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THE PROBLEM OF AN ORDERED SOCIETY *

By Roscoe Pound

If we are to begin at the beginning in any consideration of securing social interests through the criminal law, or, at any rate, if we are to begin with something fundamental, we may take for our starting point *the idea of civilization*—the idea of raising human powers to their highest possible unfolding; to the maximum of control over nature for human purposes. Through the physical and biological sciences we learn to master external nature and harness it to man's use. Through the social sciences we organize our knowledge of internal nature or human nature, and acquire an increasing mastery of it. Indeed, this mastery of internal nature or human nature makes possible the mastery of external nature by making possible division of labor and setting free of inventive genius to discover things. At bottom, it is because man has been able to a large degree to master himself that he has been able to inherit the earth and to maintain and increase the inheritance. The philosophical anarchist of the nineteenth century believed that this mastery of human nature might be achieved and maintained and should be maintained solely by voluntary individual self-restraint. But the rest of mankind has always assumed that some external agency, such as the internal discipline of a kin-group, or of a religious organization, or of a political organization is required to bring it about and maintain it.

This regime of control through political organization of society involves trusting men with wide powers of saying what their fellow men may do and may not do, with wide powers of directing and ordering the conduct of their fellow men in their every day relations, and wide powers of valuing and judging the conduct of their fellow men after the event. And here we encounter the fundamental difficulty in an ordered society. On the one hand, we must reckon with the will to power. We must recognize that men love power over their fellow men and de-

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light to exercise it for its own sake; that men "clad with a little brief authority cut such fantastic tricks before high heaven as make the angels weep." On the other hand, we must reckon with human resentment of exercise of arbitrary power over them by others and suspicion of arbitrary power even under reasonable orderings. Under the name of civil or political liberty, this freedom from arbitrary exercise of governmental authority is prized above the ordered life which alone makes liberty worth having. As the great Puritan preacher put it, we are to be "with one another, not over one another."

It is worth a moment's digression to note how men have preferred liberty to justice; how they have preferred unjust results under arbitrary rules to just results under what they feared were arbitrary men. So the rules operated equally and without distinction upon all, they preferred certain rules to just and upright men. Few things are more striking in legal history than the fondness of men for arbitrary mechanical disposition of causes, not on their merits, but on technical procedure and rigid rule. For example, the English Commons petitioned against chancery ten times between the reign of Richard II and the time of Lord Coke. The lawyer who wrote the *Replication to Doctor and Student* in the sixteenth century, considered that the practice of equity in allowing a defense to one who had paid a bond without taking a formal release was contrary to the law of God, since it introduced uncertainty as to the individual conscience of the individual chancellor where the law of God called for certainty. The Parliament of the Commonwealth sought to abolish Chancery. In the new world, Massachusetts and Pennsylvania long rejected equity. Even the enlightened Jefferson balked at *Mansfield's Innovations*—chief of which were absorptions of equity into the common law. The earliest modes of trial are mechanical—ordeal, record, compurgation, the test oath, even in its first form the jury. They were believed in at first and tolerated long afterwards because, when controversies were determined in this way, no one was subjected to the will of a fellowman as his judge.

Thus we see a quest for uniformity of action and certainty of result from the very beginning of public administration of justice. This quest has two bases. One is psychological—human distrust of our fellow men when given power over our conduct or our substance. The other is economic—the need of pre-

dictability of judicial action as assuring economic activity, long term enterprises and investments of energy and money therein.

But the end of law—the maintaining, furthering, and transmitting of civilization—involves much more than the quest for certainty and uniformity which reflects the exigencies of the economic order. They are chiefly demanded to maintain the general security, on which the economic order rests. The individual life, however, is of no less importance. There must be a balance of the two, and, as the general security calls preeminently for stability, while the essence of life is change, this means, on one side, a balance between a need of stability and a need of change. On another side, it is a balance between free spontaneous self-assertion and a general regime of regulating the relations of man with man, and governing conduct in minute detail. In law, we begin with an antithesis of men and rules which runs through every problem. In jurisprudence there is the antithesis of the individual life and the general security. In government, we start with a like antithesis of free spontaneous individual self-assertion and an ordered society. In philosophy of law and government, we start with an antithesis of personality values and community values.

These antitheses have given men trouble since the Greek philosophers of the fifth century B. C. began to think about the rational basis of law and government. Nor has the practical ordering of society escaped these difficulties. From the beginnings of legal history there has been a swinging back and forth between reliance upon a government of men, emphasis on the individual life, faith in individual free self-assertion and valuing in terms of individual personality, on the one hand, and reliance upon a government of laws, emphasis upon the general security, faith in an ordered society and weighing in terms of community values, on the other hand. In consequence, eras of what seems to be deep-seated disrespect for law, periods in which enforcement of law seems to break down and the machinery of the legal ordering of society seems inadequate to its task, are a common phenomenon.

Probably Solon is the one authentic, non-mythical lawgiver of antiquity; and we find Solon, in his reflective old age, as he came to think what had happened to his code in action, saying that laws were like spider's webs in which small flies were caught but the great break through. Again, at the other extreme

of classical Greek history, we find Demosthenes arguing almost pathetically that the Athenian people should obey the laws. As he explained to his fellow citizens, a law was a discovery of the truth and a gift of the gods, and a teaching of wise men who knew the good old customs. Also, as he explained, it was a common agreement of the state, a bargain of the citizen with his fellows, as to how every one in the state should live. Yet, as his speech indicates, the citizens would not obey these laws.

Turn to English legal history. The first monuments of our law are the dooms of the Anglo-Saxon kings, and they are filled with exhortations to keep the peace as a matter of Christian duty. Further down in the course of our legal history, Sir John Fortescue, Chief Justice under Henry VI, tells us that in his day there were more men hanged for violent crimes in England in a year than in France in ten. Two centuries later Lord Coke, in his Third Institute, bewails the large number of Englishmen who were hanged each year for violent crimes and that, despite this enormous number of hangings, crime was as rife and violence as common as ever. Indeed, this was the golden age of banditry and highwaymen in England. Finally, an Englishman, writing in 1925, has this to say: "Something has happened to the young men who served in the War. There is noticeable in them a change very marked to social conditions and social relations. In some this is manifested in a profound contempt for law and for order, for place and for privilege, for love and for human affections. In others it is manifested in a dissatisfaction no less profound." This, let us remember, is written of the land which is held up to us as an example of a people obedient to law.

Look at our own legal history. The period after the Revolution is a striking example. The books of that period are filled with references to lawlessness and disrespect for law. That was the time of Shays's Rebellion and the Whiskey Insurrection, and the Dorr War. However much disrespect for law and lawlessness there may be today, we have not yet come to rebellion, insurrection, and war. But those were the good old days of our God-fearing fathers, to which we are so often asked to compare the lawlessness of the present.

If now we look critically at each of these recurring periods of disrespect for law and failure of law enforcement, we shall find that in every case there was a period of social and economic transition. Solon wrote in the transition from a kin organized

to a politically organized society. The discipline of the past had been the internal discipline of a group of kindred, a patriarchal discipline. The discipline of the future was to the discipline of a body of citizens making law for themselves and enforcing that law through political agencies. Likewise, Demosthenes spoke in another era of transition, on the eve of the transition from the city-state of classical Greece to the Hellenistic world; the transition from the politically organized neighborhood with its local self-government, to the empire of Alexander and the great states ruled by his successors.

Again, in the period of the Anglo-Saxon kings, a people freshly converted from heathendom to Christianity was trying to learn to live a Christian life. The old religious organization, the old religious ties were broken down and new ones were formative. Sir John Fortescue wrote during the Wars of the Roses, at the breaking down of a feudal society, when the ties of lord and man were dissolving and our competitive individualistic society with its regime of economic discipline was still in the future. Lord Coke wrote in a period of transition from the local self-government of medieval England to the centralized, almost absolute, government of the Stuarts. The local agencies of discipline had decayed. The centralized government at Westminster was fighting to establish itself. Moreover, the period after the World War is too obviously one of profound readjustment to call for comment.

As to American legal history, the period after the Revolution was one of emergence from a colonial regime to a national; of economic, geographical, political expansion; of the steady acquisition of territory to the westward and successive setting up of new commonwealths; of the exploitation of natural resources on a scale such as had not been known before.

In all of these periods a condition of transition, of the breaking down of an old social order and building up of a new one, led to a temporary disturbance of the mechanism of social control, a temporary ineffectiveness of the legal order.

We are in a like condition of transition in twentieth-century America in more than one respect. A decade ago the census of 1920 told us that the center of gravity of population had shifted definitely from country to city. The census of 1930 shows the change from a rural, agricultural to an urban, industrial society intensified. But our institutions, our modes of thought, our

political maxims, our legal ideals are still those of the pioneer, rural, agricultural society of the formative era. In that pioneer society the individual man was economically self-sufficient, and was freely finding a place for himself by self-assertion and competitive acquisition. Also, each neighborhood was economically self-sufficient. The problem of an ordered society involved no more than a union of these neighborhoods for defense, and a minimum of activity of politically organized society to keep the peace.

Today the task of ordering society so as to maintain, further and transmit civilization has become more complex and more difficult. The days when the local miller ground the flour for the local community from the grain grown by the local farmer, and this flour was baked by the local baker and the local housewives, are hardly even remembered in our great urban communities, and are passing in their last rural strongholds. The days when the local butcher provided the local meat from animals sold him by the local farmers, and the hides were tanned by the local tanner and made into shoes for his local customers by the local cobbler, are utterly gone. Gone, too, are the days when the local founder provided materials for the local blacksmith, and the local carriage maker made the local vehicles. These days of local economic self-sufficiency are wholly in the past. Hence the individual can no longer do single-handed the aggregate of things demanded by the minute division of labor in a complex economic organization. The situation created by the economic order is analogous to that presented by the social order in the Middle Ages when the individual land-owner, unequal to protecting himself, entered into a relation of service and protection with a lord. For the days when the individual business man was self-sufficient are also in the past. More and more he has proved insufficient for any but the smallest businesses. He has had to commend himself by transferring his business to a corporation and taking shares in its stead.

Recall the broad lines of the feudal organization of society. A feudal society was organized about relations. It was not a competitive society of self-sufficient individuals. It was a cooperative society of men in relations. It rested on relations and duties, not on isolated individuals and rights. Every one, no matter how great or how small was in a relation to some one else—a relation involving reciprocal duties of service and of

protection. The original fundamental idea was co-operation in defense. The single individual had not proved equal to defending himself. Hence he was not thought of as self-sufficient. In the beginning he commended himself to some lord, that is, he surrendered his land to some lord who then owed him protection and to whom he owed service. If a lord acquired a new domain, he gave interests or estates in it to his retainers, and was bound to protect them therein while they were bound to do the services and perform the incidents attached to their estates. The typical man did not compete. He had his place in a co-operative organization. The several economic activities, in such division of labor as obtained in a medieval community, were conceived as services. Thus the services due the lord from the holder of an estate might be services to the feudal community in which he had his estate. He was held in his place by duty of service instead of by pressure of competition. He found his individual greatness in the greatness of his lord, not in competitive achievement. He did not own land. He had an interest in it; he owned an estate in it. Hence whoever owned anything for that very reason stood in a relation. Estate and relation, relation and reciprocal duties were inseparable. The emphasis was on duties, not on rights. Duties of service and of protection were reciprocal. The watchword was co-operation. The significant thing was relation, with duties of doing the several tasks which the community required resting on those who had interests to which those duties were attached. It was not what men undertook from interest or caprice. They were held to what their position in the relationally organized society made it their duty to do. Society was ordered through organization.

What was the society of the last century to the ideal of which our political and legal systems have been shaped? It was one in which relation was ignored and each man stood out by himself as an economically, politically, morally, and hence legally self-sufficient unit. He was to find his place by free competition. The highest good was taken to be the maximum of free self-assertion on the part of these units. The significant feature of these units was their natural rights, that is, qualities by virtue of which they ought to have certain things or be free to do certain things. The purpose of an ordered society was to give the fullest and freest rein to the competitive acquisitory activities of these units. Society was ordered through competition.

In the economic order of twentieth-century America, business and industry are the significant activities. The stand toward the social order of today where land-holding stood toward the social order of the Middle Ages. Every one in business, great or small, is in a shareholder relation in which things are due him as shareholder, not because of any special undertaking. He is not freely competing. The great bulk of the urban community are upon salaries and owe service to corporations which of late have sometimes shown consciousness of owning a reciprocal protection. The individual businesses are more and more giving up and going into corporate form. The corporations are more and more merging. Chain stores are bringing about a feudal organization of businesses which until now had been able to exist on the older basis. If a new domain of business or industry is opened, those who have conquered it distribute stock as a great feudal lord distributed estates. It is coming to be the general course that men do not own businesses or enterprises or industries. They hold shares in them. Moreover, as one who held several tracts of land might owe service to more than one lord, so one who holds investments may be a shareholder, with the reciprocal duties that relation implies, in more than one corporation.

Today the typical man (for the city dweller, not the farmer is the type for this time) finds his greatness not in himself and in what he does but in the corporation he serves. If he is great, he is published to the world not as having done this or that, but as director in this company and that. If he is small, yet he shines in the reflected glory of the corporation from which he draws a salary. Moreover, the chain of subinfeudations, of subsidiary companies, and affiliated companies, and holding companies has come to be as intricate as the chain of subinfeudations and mesne tenancies in the English land system before Edward I.

But the significant point is to contrast the feudal self-sufficient community with the individualist self-sufficient man, and then contrast the latter, as he had a real existence in the pioneer, rural, agricultural society of the past, with the employee, shareholder, investor of today, held at least in one and often in many relations, with shares or interests rather than ownership in the things which count; co-operating rather than competing; finding his satisfactions in the achievements toward which he con-

tributes rather than in what he achieves of himself.

For centuries our modes of legal and political thought have been molded to the exigencies of a competitive rather than a co-operative society. Our political tradition comes from the Reformation by way of the Puritan Revolution. It believes in private interpretation of the Scriptures and so why not of constitutions and laws? It is a Whig tradition, putting its faith in private reason as against authority, in a right of revolution as against passive obedience, in non-conformity as against an established religious organization, in consent of the governed as against a divine right of governor. We cannot expect institutions made to such patterns to conform overnight to the demands of a new economic order. Much of our problem of ordering the American society of today is one of bringing our machinery of social control into relation with its new tasks.

Talk of stubborn facts, said Dr. Crothers, they are as babes beside stubborn theories. Let us look, then, at some of the stubborn theories with which we have to contend in seeking to adjust the ordering of society to the phenomena of the society to be ordered. The theories in our way are (1) juristic, (2) political, (3) philosophical.

No problem of enforcing law was known to the legal science of the last century. To the analytical jurist the whole matter was one of executive efficiency. It was enough that a rule of law had obtained the guinea stamp of enactment by the legislature or establishment by the courts. The jurist had nothing to do with questions of enforcement. If the executive did not make some rule of law effective in action, why then the executive was at fault. To the historical jurist the whole matter was one of whether the precept did or did not correctly express human experience. If it was a formulation of what had been discovered by experience, enforcement would take care of itself. It would be rooted in habits and customs of mankind and would be secure on that basis. If not, it was a futile attempt to do what could not be done and all effort toward enforcement would in the end prove vain. To the philosophical jurist the whole matter was one of the intrinsic justice of the precept—of its appeal to the conscience of the individual citizen. If as an abstract proposition it was inherently just, its appeal to the reason and conscience of the individual would secure obedience from all but a negligible minority who would persist in going counter to their consciences

and might have to be coerced. If not, the attempt to enforce an unjust rule, contrary to the conscience of the individual citizen, ought to fail, and we ought not to feel badly if it did fail.

A second type of theory looks at the question of enforcement in terms of politics. It held that if laws were imposed on the people from without, the people would ignore or even disobey them. But if the people themselves made the laws or consented to them, they would obey the laws they made or assented to.

These simple legal and political theories of enforcement of law, each of them expressing much truth with reference to some conditions of the social and economic order, fall to the ground under the conditions of the urban society of today. We have seen that efficient and inefficient executives alike encounter certain obstacles which seem beyond the reach of efficiency. We have found that in such matters as traffic regulation, the general security requires us to make habits instead of waiting for them to develop at the expense of life and limb. We have come to see that the exigencies of the general security and of the individual life require prescribing and prohibiting of many things the reasons whereof are not upon the surface and the justice whereof, clear as it may be to the expert, will not appear at once to every reasonable and conscientious citizen. Also we have had to learn that the people will make or assent to many laws as to which the individual citizens are wholly indifferent, and that the machinery of making and consenting may be wielded by persistent minorities imposing a perfunctory consent upon easy-going majorities. The consent of the governed is no guarantee either of obedience or of enforcement.

Chiefly, however, our concern is with philosophical theories. For these go to the root of the matter. They determine whether we shall think wholly in terms of the individual life or wholly in terms of the general security, wholly in terms of free individual self-assertion or wholly in terms of an ordering of this self-assertion by the agencies of politically organized society; or shall seek to reach and maintain a balance between them.

Relativity has done a great service in setting us free from the dilemma in which we had put ourselves quite unnecessarily in the sociological and political and legal thinking of the past. We had assumed that in every connection in which we were confronted by what seemed a choice, we must inevitably and

inexorably choose one to the exclusion of the other. We could only look at things from one standpoint. We could only and must needs emphasize some one feature, which alone had real significance. At any point of divergence we must irrevocably follow out one path to the logical bitter end. Hence as between the free individual and an ordered society, as between a regime of full and free competition and one of co-operation, as between natural rights and the general security, there was of necessity one exclusive choice. We must range ourselves with the one series or with the other. We must put the whole stress on the one or on the other. We must let everything be fought out in an ordered struggle or else commit everything to an omnicompetent state. A superlative valuing of individual personality or a superlative valuing of organized society were necessary and all excluding alternatives.

This narrow mode of thought long stood in the way of an effective philosophy of law. Now that it is dissipated, now that we know that the universe can be both finite and without bounds, now that we realize that we are not held eternally to a rigid choice of an absolute personalism or absolute transpersonalism, it is possible to look on competition and co-operation as sides or phases of something which transcends both. We are not held to stress individual free self-assertion at the expense of all other aspects of human life. We are not bound to lay the whole stress upon the unique side of the individual man at the expense of control over internal nature which makes it possible for man to inherit the earth and to maintain and increase that inheritance. In civilization, in the raising of human powers to their highest possible unfolding, in the maximum of control over nature, both external and internal for human purposes, we have an idea which transcends both the individualism and the socialism of the last century. As exaggerated versions of equally valid sides of civilized life there is both truth and untruth in each.

In such a discussion we must be careful not to be deceived by conventional labels. In the last century orthodox individualism and orthodox socialism were well enough defined. But in the present century both individualism and socialism have come to be labels useful chiefly for propagandist purposes. One clinches an argument by affixing the one label or the other. This is brought out strikingly by Henry Ford's pronouncement that the trouble with the American farmer, who may well stand for the old guard of nineteenth-century individualism, is that he

is not an individualist. I suppose Mr. Ford's argument runs something like this: Individualism is good, therefore what is good is individualism. The methods whereby I was able to make a billion dollars are good, therefore they are individualism. The methods of the American farmer will not make any sum of money for anybody. Therefore they are bad. Therefore they are not individualism. Q. E. D. When the term "individualism" can be used seriously in this way it is time we began to use another term. When Mark Twain traveled in the Orient he found it difficult to pronounce the names of different places which he visited. As, after all, most of the names did not matter greatly he fell into the way of calling them by the names of towns with which he had been familiar in his own part of the world, and recorded his experiences as having taken place in Baldwinsville and Jacksonville. Often philosophers find it expedient to take a similar course. Let us, then, as philosophers do today, talk of "personalism" and "transpersonalism."

It has been usual to contrast personalism and transpersonism, or, as it is more commonly put, individualism and socialism, as exclusive alternatives. Hence many have conceived of the increasing emphasis upon civilization values, which is marked in the law of today, as a movement toward collectivism or socialism; but it has no necessary relation to the controversies between adherents of an atomistic and those of an organic conception of society. I repeat. It is not necessary to make an out and out choice, once for all, between nineteenth-century abstract individualism and nineteenth-century orthodox socialism as inevitable alternatives. It is not necessary to make a thoroughgoing choice, once for all, between looking at all things from the standpoint of the individual personality—reckoning community values and civilization values in terms of personality value—and looking at all things from the standpoint of organized society—reckoning personality values and civilization values in terms of community values or political values. Everything that is not abstract individualism is not therefore socialism in any but a propagandist sense of that term. To lump the reckoning of human claims and desires in terms of civilization values with the reckoning in terms of community values under an epithet of "socialism" is superficial. The two modes of valuing are quite as distinct from each other as each is distinct from the abstract individualism of the last century.

We must remember that individualist at the one pole and

collectivist or socialist at the other were nevertheless at one in the last century as to the highest good. Each believed in the individual free will as the starting point. Each believed in freedom as the end of social control. Each strove for political and legal institutions which would promote the greatest and freest self-assertion. The one sought it through a regime of all-embracing legal and political action. The other sought it through a regime of legal and political hands-off. For the orthodox socialism of the last century was in effect a social individualism. It sought a maximum of free individual self-assertion through a maximum of collective action, as orthodox individualism sought it through a minimum of collective action. When individual self-assertion is thought of as means rather than end, we have something which is neither "individualism" nor "socialism," as these terms got their settled application in the last century, but a distinct mode of legal and political thinking, more and more characteristic of the present century.

It would be idle to pretend that we have here an absolute and final solution for all time of the problem of an ordered society which has vexed thinkers since men became aware of the need of balance between the general security and the individual life. All solutions are relative to the problems as they are practically presented. All philosophical theories are but universal statements of such practical solutions. Hence philosophical theories are apt to be like the hero of the Freshman's theme who made himself immortal for a great many years. What we can do with assurance is to give over the extreme insistence on the individual life at the expense of the general security, which has governed the formative era of American political and legal thinking and shaped the institutions of our past, without going to the other extreme of over insistence on the general security at the expense of the individual life. A valuing in terms of civilization is more likely to lead to a just balance than the theories which obtained in the last century.

THE WORLD COURT AND THE UNITED STATES

The Relation of the Senate's Fifth Reservation to the Protocol of Accession with the Root Formula.

By CHARLES C. TRABUE

The American Bar Association and many of the State Bar Associations have indicated in successive years since 1923 their interest in the progress of the negotiations concerning the adherence of the United States to the Permanent Court of International Justice or, to use its popularized name, the "World Court"; and thus at the meeting of the Tennessee Bar Association at Jackson, in 1931, a resolution was adopted declaring that the Association—

> "respectfully petitions the Senate of the United States to consent to the ratification of these protocols at the earliest practicable time, so that the Senate's resolution of 1926 providing for the entrance of this country into the World Court may be made effective and the adherence of the United States to the Court be achieved."

The American Bar Association, through its Committee on International Law, has passed upon every important phase of this question. It will be remembered that in 1926 the Senate adopted a Resolution of Adherence to the World Court, but with certain reservations. The latest contribution (1931) of the Committee on International Law referred to above expresses its definite conclusion that the three protocols now before the United States Senate adequately meet the Senate's reservations; and the American Bar Association by adopting the report confirmed the Committee's recommendation—

> "that the government of the United States shall adhere to the Permanent Court of International Justice, upon the terms and conditions as stated in the Protocol of Adherence, to which it is a signatory; and the Association respectfully requests and earnestly urges the Senate of the United States to advise and consent to the Protocol of Signature of the Statute of the Permanent Court of International Justice, executed December 16, 1920, and to the Protocol of Accession of the United States, signed September 14, 1929, to which the government of the United States became a signatory on December 9, 1929."

The three protocols were sent through to the Senate by the Foreign Relations Committee on June 1st last. They include (1) the protocol of signature of the Court's Statute of 1920, that

is, of the Statute fixing and defining the plan of the World Court; and (2) the 1929 protocol of revision of the Court's Statute; and (3) the protocol of accession of the United States, these last two protocols having been formulated by a Committee on Revision, of which Mr. Elihu Root was an active member.

The protocol of accession is an acceptance of the five Senate reservations with a stipulated procedure for the operation of such of them as are not self-operative.

By the authority of President Hoover the signature of the United States was affixed to these treaties on December 9, 1929. A year later, on December 10, 1930, the President transmitted the three protocols to the Senate, requesting its consent to ratification. Analyzing the situation at that time the President said:

> "The protocol of accession of the United States and the protocol of revision have now been signed by practically all the nations which are members of the Court and have also already been ratified by a large majority of these nations.*
>
> "The provisions of the protocols free us from any entanglement in the diplomacy of other nations. We cannot be summoned before this Court; we can from time to time seek its services by agreement with other nations. These protocols permit our withdrawal from the Court at any time without reproach or ill-will.
>
> "The movement for the establishment of such a court originated with our country. It has been supported by Presidents Wilson, Harding and Coolidge; by Secretaries of State Hughes, Kellogg and Stimson; it springs from the earnest seeking of our people for justice in international relations and to strengthen the foundations of peace.
>
> "Through the Kellogg-Briand pact we have pledged ourselves to the use of pacific means in settlement of all controversies. Our great nation, so devoted to peace and justice, should lend its co-operation in this effort of the nations to establish a great agency for such pacific settlements."

The difficulties that have prevented the ratification of these treaties have been tactical rather than legal; for the legal difficulties that have surrounded the question of adherence have been so many times disposed of and so authoritatively dissolved that they may now be said to lack integrity. Nevertheless it is proper to consider these legal objections, as undoubtedly they will be invoked by the opponents of the World Court in the approaching Senate debates.

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*At the date of writing, November 10, 1932, the protocol of revision has been signed by 54 states and ratified by 40. The protocol of accession has been signed by 54 states and ratified by 38.

The fifth reservation of the United States has been the source of most of the difficulties. This reservation declared that the Court should not render an advisory opinion except after due notice to all states and after public hearing—

> "nor shall it, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest."

Many zealous advocates of the League and the Court in this country have contended that this reservation was unreasonable and that the United States should not have attempted to obtain a special protection that was not available to others. But this view may be questioned for the reason that the United States is not a member of the League and is, therefore, in a different position, in adhering to the Court, from that of a League member. This difference arises from the fact that it is the League alone (in practice, the Council of the League) that is privileged to request advisory opinions of the Court. It does not, therefore, seem particularly invidious for the United States as a non-member of the League to feel that its position with reference to the Court's advisory jurisdiction is in deed of definition.

The language of the fifth reservation quoted above is intended to supply that definition. It might be that the United States would refuse its consent to the submission of a case for actual judgment only to find that the League Council had requested the Court for an advisory opinion on the same question or upon a question so analogous that its determination would be applicable to and perhaps determinative of the question in which the United States was interested.

This reservation is the subject of what has come to be known as the Root Formula, which is designed to give full effect to this fifth reservation by a procedure that will respect the rights and feelings of the other signatories.

We might have entered the Court without a specific reservation with reference to advisory opinions and might have depended rather on the recognition of our power and prestige to prevent the League's asking or the Court's giving an advisory opinion upon a subject that intimately touched our interests. But since the Senate did not favor this more trustful method, but preferred to have a careful definition by legal formula of the rights of the United States in every contingency, the question of which is the better attitude for entering upon a co-operative international experiment becomes academic. It should, however,

be added that, even if we had entered the Court without reservations, and specifically without the fifth, it would have been necessary to work out some plan or method by which both the United States and the countries abroad would be reciprocally informed of each other's attitude as to the effect of a contemplated advisory opinion.

Before outlining in some detail how the protocol of accession, with Mr. Root's formula, achieves this object and makes it possible for the fifth reservation to be made operative in such way as to give us the protection we wanted and also to prevent embarrassment to the other signatories, it will be helpful to review the negotiations that followed the passage of the 1926 resolution containing this fifth reservation.

It is proper to say at the outset that the signatories had no objection to our establishing *some* form of protection with reference to the Court's advisory jurisdiction. In the 1926 Conference of the Signatory States, called to consider our reservations, the point was repeatedly made that the United States ought to have the right to prevent any advisory opinion that we did not want in a case in which we were a party; and the Final Act of this Conference makes this point and cites to us the fact that the Court in its actual practice, as demonstrated in the *Eastern Carelia Case,* had refused to give even an advisory opinion without the consent and co-operation of the parties.

The objection, therefore, to the fifth reservation was not due to any general resentment toward our attitude on this subject. No objection abroad, for instance, had been registered upon the proposed first form of the fifth reservation, which was offered by Mr. Coolidge and upon which Mr. Hughes is said to have "sounded out" the signatories, as in due course of his duties as Secretary of State he would reasonably have done. This Coolidge form of the fifth reservation merely declared that the United States would be—

> "in no manner bound by any advisory opinion of the Permanent Court of International Justice not rendered pursuant to a request in which it, the United States, shall expressly join in accordance with the Statute for the said Court . . ."

The signatories repeatedly made it clear in all the lengthy discussions that occurred that they had no objection to allowing to the United States the right to prevent an advisory opinion upon a question in which we were "interested," but that they were concerned about extending this right according to the final

form of the fifth reservation. They felt that they should have some assurance as to what the nature of our interests would be and as to how far we would be justified to go in "claiming" an interest in questions in which we were not a party and were not directly concerned. It was on this account that the 1926 Conference of Signatory States, in accepting our reservations, attached to the acceptance of the fifth the condition that if the situation did not work out satisfactorily the acceptance could be revoked at any time when two-thirds of the signatories, acting together within a year, expressed their desire to revoke it.

The United States regarded a qualified acceptance of this nature as untenable and, for over two years, made no reply to the communications of the signatories in this regard. Competent authorities, both at home and abroad, expressed the view at the time the negotiations were dropped that the differences between the point of view of the United States and that of the signatories were really not great and that further conference would lead to adjustment. The matter was delayed, however, until the spring of 1929, when the Gillette Resolution urging the President to resume negotiations was about to be definitely acted upon by the Foreign Relations Committee.

At that time Secretary Kellogg, at the instance of Mr. Coolidge, sent a note to the signatory states calling attention to the fact that their replies, as dictated by the 1926 Conference of Signatories, "would not furnish adequate protection to the United States" in their qualified acceptance of the fifth reservation, and Mr. Kellogg went on to say:

> "Possibly the interest of the United States thus attempted to be safeguarded may be fully protected in some other way or by some other formula. The Government of the United States feels that such an informal exchange of views as is contemplated by the twenty-four governments should, as herein suggested, lead to agreement upon some provision which in unobjectionable form would protect the rights and interests of the United States as an adherent of the Court Statute, and this expectation is strongly supported by the fact that there seems to be but little difference regarding the substance of these rights and interests."

The result of the receipt by the signatories of this letter was that the Committee of Jurists, which at that time was meeting in Geneva for the purpose of suggesting revisions to the Court's Statute, and upon which Mr. Root was sitting, was asked to consider also the question of adjusting the difficulties between the United States and the signatories with reference to our fifth

reservation and to see whether some method could be found which would satisfy both the signatories and the United States.

The result of the Committee's deliberations on this part of its terms of reference was a new protocol of accession, accepting the Senate's 1926 reservations and prescribing the method of procedure for such of the reservations as are not self-operative. (The first reservation, for instance, providing that the adherence of the United States to the Court "shall not be taken to involve any legal relation on the part of the United States to the League of Nations or the assumption of any obligations by the United States under the treaty of Versailles," obviously needs no *procedure* to make it operative, and is therefore not specifically mentioned in the protocol of accession, but merely included in the general acceptance of *all* the reservations in Article 1 of the protocol). Article 5 of the protocol is the famous Root Formula, providing the method of operation for the fifth reservation—a method designed to give the United States all of its "rights" under the reservation and at the same time to insure that it should not in its operation embarrass the members of the League Council.

Certainly they would be embarrassed if, not knowing what our attitude would be, they asked the Court for an advisory opinion only to have their request refused by the Court because the United States, when the request reached the Court, interposed an objection which, under the accepted fifth reservation, prevented the Court from entertaining the request. The Root Formula achieves two things: (1) the acceptance of the fifth reservation in the form and language adopted by the Senate; and (2) a working procedure for the reservation that will give us what we want—without embarrassment to the other signatories.

There has been a tendency among some people in this country —among which students of the actual text of the Root Formula can hardly be included—to regard the formula as a "substitute" for, or alternative to, the fifth reservation. The formula is, on the contrary, an express acceptance of the fifth reservation. The opening lines of the formula are:

> "**With a view to insuring** that the Court shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest . . ."

The black face are ours; they emphasize the purpose of the Root formula—to make the fifth reservation operative.

What the Root formula adds to this acceptance of the reservation is a prescribed procedure, aimed against the embarrassment that might result from operation of the fifth reservation *without* such a procedure. That possible embarrassment (already suggested earlier in this article) may be illustrated as follows: Suppose the members of the League Council had voted to request an advisory opinion from the Court upon some legal question in which the United States was not directly concerned. Suppose the United States, apprehensive as to the effect of such an opinion upon its own interests, more readily discerned by the United States than by the signatories, should interpose an objection to the Court. The Court, under the accepted fifth reservation, would be restrained from entertaining the request, for it must be borne in mind that the accepted fifth reservation is a definite restriction of the Court's jurisdiction. The result would be a flouting of the Council's request and the kind of confusion and demoralization that goes with any ineffective attempt to settle a critical international question. Quite aside from the undesirability of offending the pride of the nations in the Council, it must be clear how little such an outcome would aid international amity generally.

Mr. Root recognized that such an ontoward event could only be likely to result from a lack of mutual information. In other words, if the Council *knew* that the question upon which it contemplated making a request for an advisory opinion was a question upon which the United States would later interpose an objection to the Court, the Council would hardly be likely to make the request. The disadvantage of having the request made under such circumstances would not be to the signatories alone. The United States would hardly view with unconcern even a *request* for an advisory opinion upon a question upon which it desired to have no jurisprudence. The very making of the request would focus the attention of the world upon the situation, and it is quite conceivable that the request alone would be of almost as much embarrassment to our interests as the actual opinion.

The exchange of views, therefore, between the United States and the Council, at the time when the Council is considering whether to make the request, (and this exchange of views is the real essence of the Root formula) is in the interest of both

parties. The theory is, as Mr. Root carefully explained in January, 1931, to the Foreign Relations Committee of the Senate, that the exchange of views would so clarify the situation, both for the signatories and for the United States, that, by one route or another, agreement could hardly fail to be reached. If, for instance, the signatories were made to see that, although the question upon which they requested an advisory opinion would aid in peaceful settlement between two given countries, it might also stir up strife between the United States and some other country, they would certainly not be disposed to proceed with the request for the opinion, as a pacific objective. Or, the Council might possibly rephrase the question in such way that it would attain the desired objective and yet avoid the aspect of the question in which the United States considered itself "interested." Or, again, the United States, if convinced by the members of the Council that the proposed opinion would serve an exceedingly useful purpose and would touch our interests only remotely, might—conceivably—agree that the opinion should nevertheless be requested and given. The assumption is that an entirely frank exchange of views could hardly fail to result in agreement.

If, however, the exchange of views did *not* result in agreement: If the Council and the United States remained at odds as to whether our interest was affected, what then? There are two possible outcomes. Let us first pursue the one of the two which Mr. Root seems to consider less likely: The Council may proceed to make the request for the advisory opinion, in spite of our objection. (It is difficult to pass this assumption without reflecting how unlikely the Council *actually* would be to do so, knowing not only that the United States objected but also that the United States was likely to interpose an objection *to the Court,* under the terms of the fifth reservation.) The request reaches the Court. At this point (and not before, because the fifth reservation applies to the Court and cannot therefore become operative until the request reaches the Court) the United States interposes its objection, and since the Root formula and the protocol of accession definitely accept the fifth reservation, the Court cannot entertain the request.

And there is another course that our government can take in the event of disagreement as to the submission of a question. Mr. Root and the framers of the Root Formula evidently felt that such a disagreement, while possible, was unlikely. In his

exposition to the Foreign Relations Committee he expressed his belief, which has great force because of his long experience as an international negotiator, that if the United States and the members of the Council found themselves, in the "exchange of views," unable to agree as to whether or not an interest of the United States was affected, the United States would at that point prefer to withdraw from the Court rather than interpose its objection to the Court.

A great international experiment, as Mr. Root points out, cannot be conducted by means of lawsuits, and in pressing our point as to the existence of an "interest" against practically the whole of the civilized world, as represented by the members of the Council, the United States would be in the situation of trying to maintain its acceptance of the co-operative experiment by the lawsuit method. Mr. Root's idea was that the more appropriate and the more likely result would be for us to withdraw. Our withdrawal in such case would not be actuated by pique but by a realization of the futility of attempting to maintain a co-operative experiment with nations with whom we disagreed upon such vital matters as the existence and nature of our national interests.

The degree to which the Root Formula emphasizes the possibility of withdrawal has led in some countries to an inference that, in event of disagreement, we must withdraw. It should be said explicitly that the Root Formula contains no provision that we must withdraw, nor does it even imply such an obligation. If we prefer in such case to wait and interpose our objection to the Court we can do so and in that way exercise an absolute veto power. The Court cannot, so long as we are members, entertain a request for an advisory opinion against our objection upon the ground that it affects our interests.

The signatories have, of course, a reciprocal right. If the United States does not in such an event withdraw but chooses to interpose an objection so that the Court is restrained from giving an opinion, the signatories have a corresponding right to withdraw, that is to say, they may withdraw their acceptance of the protocol of accession and thereby of the fifth reservation. Under these quite unlikely circumstances the Court, being no longer restrained by the fifth reservation or the presence of the United States in the Court, may proceed to give the opinion. However, while the United States has an absolute right to withdraw at any time, the right of the signatories to withdraw their

acceptance of the protocol can take effect only by the concurrence of two-thirds of them acting together within a year.

Opponents of the Court in the Senate, notably Mr. Moses, have said that if the Root Formula preserves the fifth reservation and adds nothing to it except a diplomatic exchange of views, they cannot see why the Senate cannot stand upon the original fifth reservation without the Root formula; but if the Root formula gives up nothing, while at the same time it smoothes and explains the processes of operation, it will have accomplished a great benefit for us as well as the other signatories.

The Court, as Mr. Root has frequently said, is a vast cooperative experiment. It assumes on the part of those who adhere to its Statute a belief in its workability. In adhering, however, the United States affixed a reservation so all-inclusive in its provision and so peremptory in its phrasing as to seem to imply a lack of confidence. At the time that we declared these reservations in 1926 we were apparently more interested in protecting our interests to the last degree than in considering the adverse effect of our somewhat arbitrary language on the success of this experiment. We somewhat lost sight of the fact that international dealing cannot proceed—certainly cannot advance—without some mutual regard for the interests involved. The spirit of the engagement is the important thing, and in that sense Mr. Root's formula has a psychological basis. It adds to the fifth reservation a diplomatic exchange of views that cannot be harmful to us and that will tend to save the feelings of the other signatories.

The resolution for giving the Senate's consent to ratification of the three pending protocols and that will presumably reach consideration at this winter's short session, is as follows:

> "**Resolved (two-thirds of the Senators present concurring),** That the Senate advise and consent to the adherence by the United States to the said three protocols, the one of date December 16, 1920, and the other two each of date September 14, 1929 (without accepting or agreeing to the optional clause for compulsory jurisdiction), with the clear understanding of the United States that the Permanent Court of International Justice shall not, without the consent of the United States, entertain any request for an advisory opinion touching any dispute or question in which the United States has or claims an interest.
>
> "The signature of the United States to the said protocol shall not be affixed until the powers signatory to such protocol shall have indicated, through an exchange of notes, their acceptance of

the foregoing reservations and understandings as a part and a condition of adherence by the United States to the said protocol.

"**Resolved further,** as a part of this act of ratification, that the United States approve the protocol and statute hereinabove mentioned, with the understanding that recourse to the Permanent Court of International Justice for the settlement of differences between the United States and any other State or States can be had only by agreement thereto through general or special treaties concluded between the parties in dispute; and

"**Resolved further,** That adherence to the said protocol and statute hereby approved shall not be so construed as to require the United States to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State; nor shall adherence to the said protocol and statute be construed to imply a relinquishment by the United States of its traditional attitude toward purely American questions."

The second half of paragraph one of the first resolution is the "clarifying clause" which Senator Reed of Pennsylvania had inserted in order to reassure those of his colleagues who might still suspect that the Root formula marks a recession from the fifth reservation. Mr. Reed has made it very clear that he regards this clause not as a reservation, but merely as an understanding that requires no further action by the signatories.

The provisions of the third resolution were and are, word for word, the understandings incorporated in the 1926 resolution as passed by the Senate. One of these guards the Senate's initiative in the matter of submitting cases to the Court, and the other makes it clear that in entering the Court the United States does not contemplate any laying aside of its traditional attitude as to the Monroe Doctrine. These understandings will probably produce no controversy, as they did not in 1926.

The second resolution, however, introduced on motion of Mr. Moses, will meet opposition from the advocates of adherence in the Senate. This Moses proposal would obviously delay adherence indefinitely by duplicating the negotiations that have already taken place. Mr. Walsh of Montana and Mr. Fess of Ohio, who wrote the report of the Foreign Relations Committee, sent through to the Senate with the protocols on June 1st last, said of the Moses paragraph:

> "to that part of the resolution, adopted on the motion of Senator Moses, the authors of this report find themselves unable to assent."

It is probable that a move will be made early in the Senate debates on ratification to strike out the Moses Resolution on the

ground that it proposes to defer a signature which as a matter of fact was affixed three years ago.

The World Court movement has received the strong approval of the leading statesmen and lawyers of America. It accords with the traditional policies and sentiments of the American people. It is generally agreed that the fifth reservation and the Root Formula fully safeguard and protect us in giving our adherence to the Court. If the sentiments of American lawyers as expressed in their bar associations are regarded, the United States will at the ensuing Senate session join with the other countries of the world in this great pacific movement.

DO WE NEED HIGHER STANDARDS FOR ADMISSION TO THE BAR?

By Forrest Andrews

In recent years much has been said in the bar journals and bar association proceedings, pro and con, on the proposal to promulgate and enforce stricter requirements for candidates for license to practice law. In Tennessee this agitation has taken also the form of memorials by bar associations to our Supreme Court favoring the proposal. The question, very naturally, is asked: "Why should the requirements be stricter, and what are the motives of the agitators?" To many it may seem that the underlying cause of the movement is a recent over-crowding of the bar, and that the proposal for stricter requirements is put forward by the bar as a protective measure. This is true—but not for the benefit of the bar, but for the protection of society in general. A surplus of licensed practitioners we have always had, but we have always suffered from a shortage of lawyers. On the occasion of his inauguration as president of the University of Nashville, in 1826, Dr. Philip Lindsley, answering the criticism that the newly incorporated college would be handicapped in its educational work because it had neither a medical nor a law school, said that the lack of these departments would have very little effect upon the future usefulness of the school, as those professions were already so over-crowded that they offered no opportunity for advancement. There was, however, in Dr. Lindsley's day, and still is, plenty of room at the top of the profession. The real reason back of the movement is a growing consciousness within the bar of its duty to the State and a desire to serve society by eliminating, in so far as possible, the inefficient or corrupt practitioner. The bar's only plea is for regulations calculated to admit only those of intelligence, learning and honor.

The answer to the question as to why we need stricter requirements of such candidates, is simply that we need a better bar. If it is not desirable to have the bar of Tennessee as efficient as possible, then it follows as a matter of course that stricter requirements are unnecessary. On the other hand, if the State owes the duty to the people of Tennessee to provide

a capable and honest bar, the requirements for admission should be raised.

The law schools of the State are engaged in the manufacture of a highly complicated product—lawyers, and just as in any other manufacturing industry, to insure a high-class product, it is necessary first to procure the best available material from which the finished product may be fashioned. In the second place it is necessary to give to each article, as it comes from the plant, a rigid inspection. It is true that this problem of inspection, when applied to materials and fabrication, cannot by any means be carried to the point of scientific exactitude, as it is applied to material articles of manufacture; but on the other hand the importance of a rigid inspection of materials and workmanship are needed to a much greater degree, for in the ordinary product of manufacture a careful inspection of materials and workmanship will very quickly reveal the value of the product, but with the lawyer the case is far different. The client engaging an attorney usually lacks entirely the ability to judge of his efficiency, and a pompous front and sonorous voice are too often mistaken for the "hall-mark" of a genuine attorney with the result that often the client's property, liberty and sometimes his life, are sacrificed needlessly.

In respect of machinery requiring strength and stamina, it is the practice of manufacturers to make a chemical analysis of the steel and other materials of which it is fabricated to determine the fitness of these materials for the product which is to be produced, and after the article is completed the careful manufacturer gives a rigid examination to ascertain that the workmanship applied to the material has produced a satisfactory article. In the manufacture of axe handles there are certain qualities in timber which are highly desirable, it must be strong, it must be flexible, it must be tough, it must be free from knots or flaws which will weaken the strength and usefulness of the handle. It is impossible to make a good axe handle out of a piece of white pine, and if the manufacturer of such articles puts his materials into the lathe without first giving them an inspection to see that they are good materials, and free from defects, it would produce a conglomeration of useful and useless articles greatly resembling the aggregate of our present bar.

The only question that can be in doubt as to the need for an inspection of the materials and products of the law schools is in respect to *how rigid* these requirements can be made and still

supply the demand for lawyers which the legal business of the State requires. Is it possible to put a more rigid inspection upon the materials and workmanship of our law schools and still supply the demand of the State for lawyers? As to materials, the law school should select candidates endowed with good native ability, and to ascertain the fitness of the candidate, a rigid inspection should be made to determine as far as possible the candidate's reasoning powers, the fibre of his moral character, and his general education. The first of these should be determined by mental tests. The past record of the candidates would throw much light on the second, and the third should be established by the production of credits from good schools showing the successful completion of a required number of hours of study—or the passing of an examination on general information.

Both reason and experience show that a bar examination, no matter how rigid, is not in itself a sufficient criterion by which to judge of the fitness of the candidate. It reveals nothing of the candidate's moral character, very little as to his general knowledge, and too often is more a test of parrot-like memory than the capacity to think and to apply legal principles to concrete situations. The mere fact of having a mind stored with legal principles and leading cases is of all the fundamental traits of a lawyer the least valuable in actual practice, for the reason that in the poorest library there is contained more legal learning than any one mind is capable of holding. But it is the ability to apply the principles of the law as found in the books to the concrete proposition in hand and the integrity with which the business is handled that makes a lawyer valuable to society. The true function of the lawyer is to *think for the client.* To be a good lawyer he must be able to think intelligently and concretely, honestly and fearlessly. Without these qualities and capabilities the lawyer is of little use to the client in solving his legal difficulties, and more often his advice, if taken, results in a positive injury to the client's interests.

Under the present system of more or less lax requirements for admission to the bar, there is a tremendous waste of materials unsuited for that purpose but which would probably prove highly valuable in some other trade or occupation just as important to society. Many young men take a course in law school, secure a license to practice in the State, and only after the best years of their lives have been wasted in disappointment and idle

waiting for the coming of clients and a business that never comes do they realize their mistake, often too late. Therefore, for the sake of the material which presents itself to our law schools there should be a rigid examination to test as far as possible the mental capacity of the applicant for study, not with a view to barring his further progress in law school, for many take law courses simply as collateral to their business life, but to advise the applicant frankly upon the subject of taking up law as a profession. This is a matter which law schools should take to heart. It is no small crime to permit a young candidate to spend his time, his money, and his youth in preparation for a career for which he is obviously unfitted, without earnest counsel against the venture.

An applicant should further be examined rigidly with respect to his honesty and integrity to determine, as far as this is practicable, his fitness for the profession. In the third place an examination of the material should be made with respect to its general knowledge and education. *There should be in this respect as high a requirement as the general educational conditions of this State permit,* for the reason that there is no business a lawyer will be called upon to perform for his client where a knowledge of collateral subjects will not be required of him and the more thorough this knowledge the better able the lawyer will be to serve the client. With the number of schools and colleges in the State today, and the large number of graduates from these institutions, there is no reason why this requirement should not be higher than at present prescribed.

There are two objections urged against stricter requirements for the bar, neither of which has a basis of logic behind it. The first of these arguments is the fact that in pioneer days and even down to our own time there have been highly successful lawyers with very little educational background. Insofar as the early days of this community are concerned the acceptance of applicants with little or no educational background was almost a matter of necessity, and that necessity no longer exists. As to the occasional lawyer who is capable and successful, even though without educational background, it may be said that he is successful and capable in spite of his handicap rather than by reason of it, and the chances are that if he had been met with the requirement of a better educational background his ambition and energy would have obtained it and he would have been even a better lawyer than he became. It may be, of course, that occa-

sionally this requirement would bar a worthy candidate, but the public interest is at stake and this should not be sacrificed to save an occasional individual.

The second argument urged against this movement, though not so openly as the first, is that it has as its object a selfish end insofar as the present bar is concerned, and is an attempt to monopolize the practice of law into the hands of a few. It is true that a stiffening of the requirements for admittance to the bar would probably somewhat diminish in future years the number of lawyers practicing at the bar, but in the eliminated portion would probably not be those who would ultimately become a menace to the business of the present bar; but it would eliminate a great many of poorer ability who ultimately would be forced to pick up a scant living by any practice which might come their way and by means which they would not practice except by force of economic pressure.

The manufacturer of a mowing machine, as a matter of law, warrants that the machine is reasonably suitable for the purpose for which it is sold, and if, when used by the farmer, it proves to be worthless, he has his remedy in the courts. The State of Tennessee, and the Supreme Court of Tennessee, as the body in which this duty has been reposed by the State, should see that its manufactured articles, the lawyers, are reasonably fitted for the performance of their duties and this should be done with the greatest care, as experience has proven that the remedy against the incompetent lawyer is totally inadequate and that the State itself is not liable. It was for these reasons that the bar of the State of Tennessee has requested the Supreme Court to raise the requirements for admittance to practice law in the State of Tennessee, and it is for these reasons that the law schools of the State should think more of quality and less of quantity, and put into practice machinery which will ascertain as far as humanly possible the fitness of the material passing through their schools.

Nor is the mere fact that an attorney is materially successful in his practice to be taken as proof positive that the interests of the State have been served by his admission to the bar. What the citizens of the State deserve is service from the bar—service in the highest sense of that term. And only through an intelligent, learned, and honest bar can this be accomplished.

Inevitably better lawyers will eventually mean for the State more intelligent laws and a better administration of justice. It is not for the more intelligent and the opulent that the bar of

Tennessee makes this plea, for the rich and the shrewd are, as a rule, fully capable of selecting good counsel, but it is for the poor, the unfortunate, and the ignorant, who all too often lack both the intelligence and the means to distinguish between the counterfeit and the genuine. A license to practice law in Tennessee should be a badge of character and ability. By no other means can this end be accomplished than through a thorough inspection of the materials and a rigid requirement with respect to educational background.

HOW MAY THE STANDARDS OF OUR BAR BE RAISED?

By FITZGERALD HALL

What should be the requirements for admission to the bar has in recent years been very much discussed. The reason for such discussion seems to me to be due to the following facts, to-wit:

First: The number of licensed lawyers is increasing much more rapidly, in proportion, than our population as a whole, or the public needs.

Second: In many communities, especially in the large cities, there seem to be more lawyers than can make a comfortable livelihood in the proper practice of our profession.

Third: The increase of lawyers in the cities has resulted in a sharp decrease of lawyers in many rural sections.

Fourth: The old-fashioned "all-round" lawyer, a man of great character and ability, experienced in the trial of every sort of case, a real expert in pleading, a friend and adviser, seems to be passing away.

Fifth: Lawyers are becoming specialists—many seeming to be bookkeepers and accountants rather than real lawyers.

Sixth: Despite denials some corporations, such as trust companies, are really practicing law.

Seventh: Many so-called politicians and lobbyists do their work under the guise of being members of the bar.

I assume that no man could affirmatively demonstrate the cause of these conditions, but my personal belief is that the practice of law in recent years has degenerated from the noble conception of being a branch in the administration of justice to a mere money making business; and therefore has attracted greater numbers who have no real love for our profession.

The object, of course, in fixing high qualifications for admission to the bar is that there may be trained men of ability and character to perform the necessary legal work. We know for a fact that many lawyers are not competent to do anything of any importance, and that many may not be trusted. Many of them are lawyers in name only—getting results of various kinds through influence thinly camouflaged into respectability by a lawyer's license.

The question then arises whether we can give the public the character and type of lawyers it needs and at the same time clean our own house by making a certain number of years study in certain classes of institutions a condition precedent to admission to the bar.

There are many men, whose judgments are entitled to great weight, who think that no man should be permitted to even take a state bar examination unless he has an academic degree and also a degree from the school of law of a great university. This would eliminate, of course, students studying in night schools and other schools operated in great numbers in the large cities—apparently, in some instances, solely for the financial benefit of those who operate the same. The theory seems to be that a man who goes to a university and takes an academic degree and then a law degree ought to make the best lawyer. Theoretically possibly this is sound; practically it does not seem to me to work out.

I have watched with great interest—and profound regret—the standardization, on paper, of the qualifications of teachers in recent years; and I have seen instances where an experienced and competent teacher is ousted for some young, inexperienced person simply because the younger person has a degree—and little else.

The academic courses in many universities in the country since the war have, in my opinion, degenerated, and I know of my own knowledge, in certain institutions in which I take great interest, that in the place of Latin and Greek and other classics, there are courses which are designed to teach one how to make money. I know from my own knowledge of over a decade's teaching in the school of law at Vanderbilt that the average student who came into the school through the academic department was no better, if as good, than the average student who came direct from some city or county high school. My own observation and experience have led me reluctantly to conclude that the requirement of academic training as one of the many conditions to becoming a member of the legal profession, while theoretically sound, is practically useless. Until the colleges of arts and sciences have more required work of the kind requiring sustained labor and thought, preliminary academic training will, I think, continue to be only theoretically advantageous.

I do not belong to those who believe in standardizing any person or profession; nor do I belong to those who put absolute

trust or confidence in scholastic degrees—I know too many who have them.

After all, whether a man is going to make a good lawyer or a great lawyer, depends on his own personality, his own character and his willingness to work, rather than on having run a given course through certain high-sounding schools.

By what I have said I do not mean to suggest that we should make it easier for men (or women, I regret to say) to become lawyers; on the contrary I think we should make it a great deal more difficult. But I do not think that the way to do this is by fixing arbitrary scholastic standards which may or may not mean anything at all, depending upon the schools attended, personal (football for example) and family influence, and so on. The way to solve this problem, in my opinion, is to have a bar examination of such kind and of such scope that no person who is not well read in the law can pass. I know practicing lawyers who could not pass any reasonable state bar examination.

I remember very well that after I finished the first of my three year course in the school of law at Vanderbilt I took the state bar examination for Tennessee. The questions appeared to me to be perfectly easy and I passed. I do not think it should be possible for any one to study law a few months and pass a state bar examination. Therein, in my opinion, lies the root of our trouble—and its solution.

If every state had an examining board or committee, which would prescribe a rigid, thorough test, and examine the papers by number (instead of by name), I believe we would eliminate a great many of our troubles. I suggest handling through the medium of numbers because those of us familiar with the facts know the great pressure brought upon examining boards of all sorts. What effect such pressure may have is not the question. It ought to be eliminated; and could be through a plan by which the person examining the papers would have no idea whose paper he was grading.

It may be that a Harvard or Vanderbilt graduate on the average would be better equipped than students of a YMCA night school—I personally think so—but my own contact with college men of recent years has not impressed me so much as the earnestness and zeal of those, who less fortunate in money matters, must study at odd hours in such schools as their time and means afford. College for too many men and women is a

place to play and not to work—and the fault is primarily in those who run the schools.

However, if the graduate of a night school knows as much as a graduate of Harvard or Vanderbilt, what difference does it make to his future clients or to the state where and how his training was obtained. Our problem can be solved (and I think it the best way) by making it impossible for any person who is not a real student of law to get a license. Where, how and under what conditions he learned what he knows seems to me substantially immaterial.

The question of character and ethics is important, but there is practically no applicant for a bar examination who cannot get proper endorsements; and after all these are matters to be solved by bar associations dealing with active practitioners. My personal experience does not lead me to believe that a graduate of Harvard, Yale, Chicago or Vanderbilt has any better character or is more likely to observe the canon of ethics prescribed for our guidance than those who graduate from more or less unknown and local institutions. The fact seems to me to be that the test of character can, as a rule, only be made as a young lawyer actually practices law—the chief trouble from this standpoint has been the utter failure (at least in some communities) of the bench and bar to keep the bar as it should be.

I therefore more or less dissent from the views of some of my brother lawyers, not on the object to be accomplished, but simply on the means of accomplishing that object. I think there are far too many lawyers; I think there are too many poor lawyers; and I think we are too lenient with the misconduct of our own profession. But I doubt if the solution of this problem is through the medium of requiring any specific number of years work or any specific college degrees, but the real solution, as I see it, is to make the applicant's examination so difficult that the average man who is now able to pass could not possibly hope to do so; and without giving up the good work that has been done in the last several years, this is the method which I hope we will ultimately follow to accomplish our purpose of having a bar of ability and character more interested in seeing justice done than in making money.

BAR ASSOCIATION SECTION

THE AMERICAN LEGISLATORS' ASSOCIATION

One of the handicaps of efficient state government in this country is the fact that the states know so little of one another's work. The Constitution makes no provision for a joint meeting of state legislatures or for an exchange of information between one legislature and its neighbors. Yet their problems are in large measure common problems. Their responsibilities are much the same. Accurate knowledge concerning the success or failure of individual states in experimenting with this problem or with that problem would often save other states endless quantity of time and effort.

It was with this in mind that the American Legislators' Association was founded a few years ago. The organization is wholly unofficial. It merely attempts to bring members of state legislatures into touch with one another by three methods: publishing a monthly magazine, "State Government," which sums up news of the activity of different legislatures; maintaining an Interstate Reference Bureau which furnishes information concerning proposals which are being considered in other states; holding an annual convention for the discussion of matters of interest to all legislators.

The Association sponsored a meeting of newly elected Tennessee Legislators, state officials, and members of the state bar and press associations in Knoxville on November 23rd and 24th to discuss legislative problems facing the next sessions of our legislature. Round-table discussions were centered about topics of governmental functions and state revenues and expenditures. Newly elected legislators were invited to attend and take part in discussions on legislative procedure which were led by an experienced law maker.

From the membership of the new legislature councils were appointed to represent the Association as follows:

Members of the House Council:

Walter M. Haynes, Chairman, Winchester; T. L. Coleman, Lewisburg; James H. Cummings, Woodbury; Fletcher Cohn, Memphis; M. Gilbert Goodwin, Lenoir City.

Members of the Senate Council:

A. J. Graves, Chairman, Knoxville; John R. Todd, Jr., Kings-

port; R. L. Alexander, Jr., Nashville; A. B. Broadbent, Clarksville; Charles C. Crabtree, Memphis.

Chief Justice Grafton Green of the State Supreme Court presided over the meeting. The chief executive of a leading Southern state spoke on "Progress in the State Government." A noted economist led one of the open forums on matters of finance. In addition to the formal discussions and addresses, numerous opportunities were provided for the legislators to meet informally for the consideration of the problems in which they were most interested.

The following is a program of the conference:

TENNESSEE LEGISLATORS' CONFERENCE

November 23-24, 1932

Knoxville

Headquarters — Andrew Johnson Hotel

Sponsored by

American Legislators' Association

PROGRAM

Wednesday, November 23

Presiding.....Chief Justice Grafton Green, State Supreme Court.
10:00 A. M.....''The Functions and Agencies of State Government''
The round-table discussion was led by Dr. Lindsay Rogers, Professor of Public Law, Columbia University
12:00 Noon.....Conference Luncheon—Speaker, Hon. William Belknap, Kentucky, President, American Legislators' Association
2:00 P. M.....''Legislative Procedure''
Discussion was led by Honorable Edward T. Seay, Nashville, former Speaker of the Senate, State of Tennessee
6:00 P. M.—Conference Dinner
7:30 P. M.—''The Obligation of the Press and the Bar to the Development of State Government.'' Short addresses by representatives of Bar and Press.
Address: Dr. Lindsay Rogers, Columbia University.

Thursday, November 24

10:00 A. M.....''State Revenues and Expenditures.''
Professor T. L. Howard, Professor of Economics,
University of Chattanooga
Dr. Charles P. White, Professor of Finance, University of Tennessee.
12:00 Noon.....Thanksgiving Dinner—Speaker, Dr. Frank McVey, President, University of Kentucky
2:00 P. M.—Kentucky vs. Tennessee—Shields-Watkins Field

NOTES AND PERSONALS

CHATTANOOGA BAR

John H. Cantrell, one of the leading attorneys of the Chattanooga Bar, died at his home in Chattanooga on the morning of October 18, 1932.

Mr. Cantrell was actively engaged in the practice of law for over forty years. He was also very active in civic matters, being a trustee of the Chattanooga Public Library and prime mover in the Chattanooga Business League. He was president of the Chattanooga Bar Association in 1925-1926.

The death of Mr. Cantrell is mourned by his large host of friends from all parts of the state.

ELIZABETHTON BAR

J. Frank Siler of the Elizabethton Bar attended the meeting of the American Bar Association in Washington, D. C., recently.

Roy C. Nelson of the Elizabethton Bar Association was recently admitted to practice law before the Interstate Commerce Commission in Washington, D. C.

R. C. Campbell of the Elizabethton Bar Association was recently admitted to practice law before the Interstate Commerce Commission in Washington, D. C.

J. N. Edens of the Elizabethton Bar Association was recently re-elected for a period of one year as City Attorney for the City of Elizabethton, Tennessee.

Albert C. Tipton of the Elizabethton Bar Association is spending most of his time now in making campaign speeches in the furtherance of his election to Congress from the First District.

KINGSPORT BAR

The Kingsport Bar has a membership of about sixteen active lawyers. Blountville is the county seat of Sullivan County, and is between Kingsport and Bristol. We have by Statute three circuit courts and three chancery courts for Sullivan County, namely, at Bristol, Blountville, and Kingsport. All of the criminal cases are tried at the county seat.

Shelburne Ferguson, a member of the bar, is Mayor of the City of Kingsport, and Harry L. Garrett, another member of

the bar, is City Attorney. State Senator John R. Todd is also a member of the Kingsport Bar, and James R. Worley, another member of the Kingsport Bar, is chairman of the Democratic Executive Committee of Sullivan county.

Sullivan county, according to the Federal census of 1930, is the fifth largest county in the state, and there is a great deal of litigation in the courts of Sullivan County.

The Kingsport Bar is not the smallest nor the greatest, but it is one of the best bars in the state.

KNOXVILLE BAR

It has been a source of a great deal of satisfaction to the members of the Knoxville Bar to learn that Roy Beeler has been appointed Attorney-General of the State of Tennessee to succeed the late General L. D. Smith.

The annual meeting of the Knoxville Bar Association, according to the constitution, will be held on Saturday, November 26, 1932, at which time there will be held the election of officers for the ensuing year. Too much cannot be said for the unflagging energy of the president, Mr. Charles H. Smith, in his efforts to keep the standards of the local bar on a high plane. He has worked assidiously in the office for the past several years, and has devoted a great deal of his time in the interest of the local bar and the profession generally.

The Grievance Committee of the local bar association during the past year has been composed of Joel H. Anderson, Frank Montgomery, Len G. Broughton, Jr., and Thurman Ailor. They have done a tremendous amount of work, and have investigated numerous complaints, and their conscientious endeavors to do justice to all concerned have merited the appreciation of all the members of the local bar.

During the past year, under the direction of the president, the Knoxville Bar sponsored a series of weekly luncheons, which proved enjoyable, although these luncheons were later discontinued during the summer months.

Members of the Knoxville Bar are much gratified at the election of Harley Fowler to the presidency of the Tennessee State Bar Association.

The women lawyers of Knoxville and vicinity have formed an association to be known as the East Tennessee Association of Women Lawyers. The first meeting of the group was held in

October, but the formal organization did not take place until November 9th.

The officers of the organization are as follows: Amelia Corkland, president; Nellie R. Gourse, vice-president; Ida Tobe, recording secretary; Hattie Love, corresponding secretary; and Wilma Turner, treasurer.

The new association will be associated with the National Association of Women Lawyers which works in conjunction with the National Bar Association.

MARYVILLE BAR

Mr. R. R. Kramer, of the firm of Kramer & Kramer, has just returned from an extended trip to New York on legal matters. Mr. Kramer reports business conditions in the east in a bad condition but improving. Mr. Sylvan Kramer, also of this firm, is in Pennsylvania at this time on a combined business and pleasure trip and visiting with his father and brother.

Several members of the local Bar are actively engaged at this time in speaking at various places in Blount county for the state and national tickets. It is certainly to be hoped that the county will not suffer on account of lack of oratory covering political issues.

Mr. Hugh DeLozier, a graduate of University of Tennessee, class of 1932, is now actively engaged in the practice of law, having affiliated himself with the firm of Brown & Johnson, one of the oldest firms in the city.

The members of the local bar were guests of honor at a rabbit banquet given in November. Gen. Chas. C. Jackson and Homer A. Goddard, president of the local Bar, were very enthusiastic over the banquet, and each furnished several rabbits. Col. T. N. Brown, nestor of the local bar, and Judge J. C. Crawford, provided their hunting licenses. Judge Sam H. Dunn served as toastmaster. All the Judges gave their views on fur bearing animals.

Members of the local bar are very much pleased with the new arrangement that the Law Review has with the State Bar Association, and they trust the Review will continue its upward stride.

NASHVILLE BAR

Avery Handley, one of the most popular lawyers of Nashville, died a short time ago after a brief illness. He had often pre-

sided over the courts of Davidson County as special judge, and he was a member of the Nashville Bar and Library Association and the Pudingston Club, an organization within the legal profession.

His natural social instincts won Mr. Handley many friends, and it is with the deepest regret that his passing is noted.

SEVIERVILLE BAR

The following is a list of the fourteen members of the Sevierville Bar Association: W. L. Duggan, G. L. Zirkle, A. M. Paine, J. M. Lindsey, R. B. Robertson, E. E. Creswell, H. D. Bailey, D. C. Bogart, J. G. Bowers, R. S. Seaton, John O. Morrell, T. C. Paine, R. L. Ogle, and Hansell Proffit.

A. M. Paine is chairman of the association, and R. B. Robertson is secretary.

The two most unusual members of this group are W. L. Duggan and G. L. Zirkle. Mr. Duggan is more than eighty years of age, and Mr. Zirkle is past seventy, yet both are actively engaged in practice.

HEADNOTES

(Recent Tennessee Supreme Court Decisions)

PHYSICIANS MUTUAL HEALTH AND ACCIDENT INSURANCE COMPANY v. A. H. GRIGSBY

(Opinion filed October 22, 1932, by Mr. Justice Swiggart.)

1. APPEAL AND ERROR. Pleading and Practice. Statutes. Time to which appellant is entitled in order to perfect appeal.

By statutory provision an appellant has thirty days from the date of adverse judgment against him within which to file his appeal bond, if the court holds so long; but he has only until the adjournment of the court within which to file his appeal bond, if the court does not hold for thirty days. (Post, p. .....)

Code construed: Code of 1932, Section 9047.

2. APPEAL AND ERROR. Pleading and Practice. Extension of time for perfecting appeal.

The authority of the circuit court to extend the time for perfecting an appeal by filing an appeal bond may be exercised at the time the appeal is prayed, if the court deem it proper to do so. (Post, p.....)

Code construed: Code of 1932, Section 9047.

3. APPEAL AND ERROR. Pleading and Practice. Statutes. Power of court to extend time for filing of appeal bond.

If the term continue as much as thirty days from the date of the rendering of a judgment, the circuit court is authorized by statute to extend the time for the filing of an appeal bond for an additional thirty days, making a maximum period of sixty days; but if the term does not continue for as much as thirty days from the date judgment is rendered, then the power of the court to extend the time is limited to the granting of thirty days from the date the term is adjourned. (Post, p. .....)

Code construed: Section 9047.

Case approved: England v. Young, 155 Tenn. (2 Smith) 506.

4. APPEAL AND ERROR. Pleading and Practice. Record on appeal must show that appeal was perfected in accord with statute.

At the time a judgment was rendered the circuit court granted the appellant forty days within which to file his appeal bond. The appeal bond was filed within forty days from the date of the rendition of the judgment, but not within thirty days. The record on appeal did not disclose the date on which the circuit court was adjourned for the term. *Held:* Since the record did not show that the appeal was perfected in accord with statute, the appeal was properly dismissed by the Court of Appeals. (Post, p. .....)

5. COSTS. Appeal and Error. Judgment for costs when appeal is not perfected.

Where an appeal is not properly perfected, the appeal bond, being ineffective to take the case to the appellate court, is a nullity and will not support a judgment for costs against the sureties. Judgment for costs should be rendered against the appellant, but not against the sureties on the void bond. (Post, p. .....)

Code cited: Section 9110.

PAN AMERICAN PETROLEUM CORPORATION v. AMERICAN NATIONAL BANK

(Opinion filed July 23, 1932, by Mr. Justice Cook)

1. BILLS AND NOTES. Banking and Banking Check is not assignment.

While as against the depository a check does not constitute an assignment of the drawer's fund, as between the parties it operates, as of the date of presentment for payment, as an assurance of a sufficiency of the drawer's fund on deposit to pay the amount of the check. (Post, p. .....)

Case approved: Bank v. Swift, 134 Tenn. (7 Thomp.) 175.

2. BILLS AND NOTES. Time of negotiation of check as affecting character of holder.

Defendant issued to its employee a check, which was mailed to the payee in August. Upon complaint from the payee that the check had not been received defendant, after stopping payment on the check, issued a duplicate check, which was duly cashed. In the following February the payee negotiated the first check to plaintiff bank, which took it as a holder in due course unless the lapse of time affected its character. Plaintiff presented the check for payment promptly after receiving it. *Held:* Having issued the check and made possible its negotiation, defendant is in no position to avoid liability, because such loss as defendant may have suffered resulted primarily from its improvidence and not from the lapse of time in negotiation. (Post, p. .....)

Act cited: Acts 1899, ch. 94, sec. 53, 71, 185, 186.

Case cited: Anderson v. Elem (Kan.), 23 A. L. R. 1202.

CLARK HAIR v. DANA RAMSEY

(Opinion filed October 22, 1932, by Mr. Justice Chambliss.)

CONSTITUTIONAL LAW. Exemptions. Statutes. Personalty exemption is controlled by law in force when obligation was created.

The exemption laws in effect at the time of the creation of an obligation, and not the exemption laws in effect at the time of an execution, determine what personal property of the debtor is exempt.

Code cited: Code of 1932, Sections 5, 26, 770.

Case approved: Hannum v. McInturf, 65 Tenn. (6 Baxter) 225.

GEORGE R. DEMPSTER, COMMISSIONER OF FINANCE AND TAXATION, v. ROY C. WALLACE, COMPTROLLER OF THE TREASURY

(Opinion filed October 22, 1932, by Mr. Justice Cook)

1. CONSTITUTIONAL LAW. Statutes. Officers. Duties of Comptroller are not determined by statutes regulating office prior to adoption of Constitution.

Statutes which regulated the duties of the Comptroller prior to the adoption of the Constitution of 1870 cannot be read into the Constitution and into subsequently enacted taxing laws so as to confer upon the Comptroller powers and duties with respect to the administration of the taxing laws, which powers and duties, by the subsequently enacted laws, are conferred upon other officials. (Post, p. .....)

Constitution cited: Article 8, Section 3.

Act cited: Acts 1835, Chapter 12.

2. TAXATION. Statutes. Administration of gasoline taxing laws is

vested in Commissioner of Finance and Taxation.

All administrative power with respect to the gasoline taxing laws, that is, the doing of everything necessary toward fixing the amounts due from each taxpayer, is conferred upon the Commissioner of Finance and Taxation, and the Comptroller of the Treasury has no administrative power with respect to such statutes. (Post, p. .....)

Code construed: Sections 1126-1147.

Acts construed: Acts 1923, ch. 58; Acts 2nd. Extra Session, 1931, ch. 6, 14.

3. TAXATION. Statutes. Only Comptroller has authority to receive revenue derived from gasoline taxes.

The Comptroller of the Treasury, and not the Commissioner of Finance and Taxation, is authorized to receive and receipt for the revenue derived from the gasoline tax after the liability of distributor and dealer has been ascertained through the administrative methods which the Commissioner of Finance and Taxation has adopted. (Post, p. .....)

STATE OF TENNESSEE v. BOB TAYLOR

(Opinion filed July 23, 1932, by Mr. Justice Chambliss.)

1. CRIMINAL LAW. Appeal and Error. Accuracy of warrant for violation of game and fish law may not be challenged for first time on appeal.

The inaccuracy of a warrant which charges a violation of the game and fish law, but refers to the wrong statute, cannot be challenged as error on appeal, when such question was not made in the motion for a new trial. (Post, p. .....)

Acts cited: Acts 1931, ch. 51; Acts 1923, ch. 102.

2. CRIMINAL LAW. Game and Fish. Prosecution for violating game and fish law requires only warrant.

A prosecution for violation of the game and fish law is based upon the charge made in the warrant, and no additional steps are called for, either by presentment, indictment or information. (Post, p. .....)

Acts cited: Acts 1931, ch. 51; Acts 1923, ch. 102.

3. CONSTITUTIONAL LAW. Game and Fish. Criminal Law. Article 1, sec. 14 of Constitution does not include all misdemeanors.

The provision of the game and fish law authorizing prosecutions without presentment, indictment or information is not invalid as violating the requirement of the Constitution that no peron shall be put to answer any criminal charge but by presentment, indictment or impeachment, because misdemeanors punishable by fine only in amounts less than fifty dollars are not within this clause of the Constitution. (Post, p. .....)

Constitution cited: Article 1, sec. 14.

Citing: State v. Sexton, 121 Tenn. (13 Cates) 35; Henley v. State, 98 Tenn. (14 Pickle) 706; Bishop's New Criminal Procedure, Vol. 1, sec. 892.

STATE OF TENNESSEE EX REL v. R. B. GOOCH

(Opinion filed July 23, 1932, by Mr. Justice Cook)

INSURANCE. Statutes. Exemption from regulation of certain voluntary associations with death benefits.

Voluntary associations which provide through assessments against each member the sum of not more than one hundred dollars as a death benefit to each are not regulated by the statutes of Tennessee pertaining to the insurance business.

Code cited: Code of 1932, sec. 6212, 6357, 6421.

Citing: 5 C. J. 1335.

ROBERT S. GAMMON, ADMINISTRATOR, ETC. v. L. L. ROBBINS ET AL.

(Opinion filed October 14, 1932, by Mr. Justice McKinney.)

JUDGMENTS. Judgment by Default. Power of trial court to set aside judgment by default at any time during term.

In an action in which the amount of the award is uncertain and the damages must be determined by a jury impanelled for that purpose, the trial court has the power to set aside a judgment by default at any time during the term and before the damages are assessed. A judgment by default is a final judgment only if the amount of plaintiff's claim can be ascertained by simple calculation from the papers.

Code cited: Code of 1932, Sections 8804, 8805, 10456 (Shannon's Code, Sections 4678, 4679, 6185).

WM. JACKSON v. J. W. JARRATT, ET AL.

(Opinion filed July 23, 1932, by Mr. Justice Chambliss.)

1. PLEADING AND PRACTICE. Statutes. Construction of statute requiring application for rehearing at term at which judgment is rendered.

While the rendition and the entry of a judgment or decree are ordinarily different and distinct, the statute providing that a rehearing can be applied for only at the term at which the decree was rendered contemplates that the rendition will be carried into binding and effective form by entry upon the minutes. (Post, p. .....)

Code construed: Code of 1932, Sec. 8980 (Shannon's Code, Sec. 4847).

Citing: Anderson v. Mitchell, 58 Ind. 594; Gray v. Palmer, 30 Cal. 416; Feldman v. Clark, 153 Tenn. (26 Thomp.) 373; England v. Young, 155 Tenn. (2 Smith) 511; Shipley v. Barnett, 161 Tenn. (8 Smith) 437; 2 Ency. of P. & P. 249; State v. Meacham, 6 Ohio Cir. Ct. Rep. 31; Buck v. Holt, 74 Ia. 294; 3 Rawles Bouvier 2880; Fraker v. Brazelton, 80 Tenn. (12 Lea) 280; State v. True, 116 Tenn. (8 Cates) 313

2. PLEADING AND PRACTICE. Judgments. Motion for rehearing need not be made prior to entry of judgment upon minutes.

Notwithstanding the statutory requirement that a motion for a rehearing must be made at the same term at which the judgment is rendered, the party adversely affected is not compelled to move until the judgment rendered has been entered upon the minutes, even though the current term expired prior to entry of the judgment. (Post, p. .....)

Code cited: Code of 1932, Sections 8980, 9047, 9048.

3. PLEADING AND PRACTICE. Appeal and Error. Judgments. Nunc pro tunc order may not be used to cut off appeal.

An order *nunc pro tunc* may not be made at a succeeding term for the entry of a judgment rendered at a former term with the effect of cutting off the right to appeal. (Post, p. .....)

Citing: Anderson v. Mitchell, supra; Ludlow v. Johnson, 3 Ohio 553; Monson v. Kill, 144 Ill. 248; Exley v. Berryhill, 31 Minn. 121; Mitchell v. Overman, 103 U. S. 62; 3 Rawles Bouvier, 2385, 34 C. J. 71; 18 Ency. of P. & P. 458.

R. L. RUTZLER v. J. S. BOND, ET AL.

(Opinion filed October 22, 1932, by Mr. Justice Chambliss.)

PLEADING AND PRACTICE. Appeal and Error. Party cannot adopt inconsistent positions so as to put trial court in error.

Where the chancellor, over the objection of the appellant, granted an application for a jury to try the issue arising under a plea to the jurisdiction and later set aside this order, the appellant again objecting, and heard the case without a jury, the appellant will not be heard upon appeal to insist that the court was in error when he tried the case without a jury.

Case differentiated: Warren v. Gregory Co., 96 Tenn. (12 Pickle) 574.

MEMPHIS AND SHELBY COUNTY BAR ASSOCIATION v. H. D. HIMMELSTEIN

(Opinion filed July 23, 1932, by Mr. Chief Justice Green.)

1. STATUTES. Construction of conflicting provision of the Code.

When two acts which contain conflicting provisions are included in the Code, it will be held that the Code embodied the Acts as they had been previously construed. (Post, p. .....)

2. APPEAL AND ERROR. Attorney and Client. Jurisdiction of appeal in disbarment proceeding.

The Court of Appeals has the same jurisdiction of appeals in disbarment proceedings as in other civil cases, notwithstanding the conflicting provisions of the Code of 1932, Sections 9977 and 10618. (Post, p. .....)

Code cited: Code of 1932, Secs. 9977, 10618.

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GENERAL L. D. SMITH

Leonidas D'eutrecasteaux Smith, Attorney General of the State of Tennessee, and for eighteen months a member of the Supreme Court of this State, was born at Cave in White County, Tennessee, on November 25th, 1866. He died at Nashville, the place of his official residence, November 7th, 1932. He had lived and practiced law at Cookeville, Sparta, Dayton, Crossville, and Knoxville, Tennessee. He came to Knoxville in 1906 and had claimed this as his legal residence up to the date of his death. On coming to Knoxville, he formed a partnership with the late Leon Jourolman and General W. L. Welcker under the firm name of Jourolman, Welcker & Smith. This was one of the most distinguished firms of lawyers in Tennessee and enjoyed a large and lucrative practice. They were for many years Division Counsel for the Southern Railway Company and later, upon dissolution of this firm, General Smith became Division Counsel for this company, which position he held until 1922, when this relation was terminated. He was widely and favorably known and continued to enjoy a fine private practice throughout East Tennessee until his appointment as Attorney General, in 1926, by the Supreme Court, when he moved his official residence to Nashville. He served for some considerable length of time, on two different occasions, as Special Circuit Judge of the Fifth Judicial Circuit during the illness of his brother who was the regular Judge of that circuit.

When Chief Justice D. L. Lansden of the Supreme Court, a former law partner of General Smith, became ill and unable to serve, General Smith was appointed by Hon. A. A. Taylor, then Governor, to serve as member of that Court during Judge Lansden's illness which continued for about eighteen months. Gen. Smith accepted this appointment and rendered this service at a great sacrifice to his private practice, largely as a matter of loyal devotion to his disabled friend and former associate. His services on the Supreme Bench were untiring and of the highest character. An examination of the published reports for that period will show that there is one volume of those reports almost wholly made up of opinions of which he was the author.

After he was appointed Attorney General in 1926, he enlarged and reorganized the State's legal department, increasing

his staff to eight members. This staff was composed of clean, able, and loyal young men, numbering in its personnel some of the keenest and brightest legal minds that can be found anywhere and against whose integrity no word has been or can be said, even in those days of bitter political feeling through which we have passed.

Gen. Smith attended Douglas College and the University of Tennessee but never attended a Law School. He read law in the office of his brother in Sparta, Tennessee.

When he was twenty-two years of age he was married to Miss Ella Wallace of Sparta. She has been his faithful and helpful companion until his death. Two children were born of this union; a little boy, Ucue, who died as a child, and a daughter, Keilah, who survives him as Mrs. W. M. Neece. Gen. Smith also left surviving him four sisters: Mrs. Sallie Stevens of Houston, Texas; Mrs. John Eagle of Sparta; Mrs. Clay Reeves of Nashville; Mrs. I. K. Williams of Decherd; and a brother, George C. Smith of Tampa, Florida.

On Tuesday afternoon, November 8, 1932 all that was mortal of this distinguished citizen was laid to rest in the sequestered solitude of the beautiful cemetery that crowns a hill on the southeast of his old home town of Sparta. The tired actor had left the stage on which he had played so important a part and had turned back home.

It was with a feeling of overwhelming sadness that I turned away from that grave on the hill so redolent of gloom and grief's mute pageantry. The sun was going slowly down the western slope. Overhead was that cathedral sky with its infinite depth of blue and its shadow of clouds. To the east were the castellated rocks of the Cumberlands with their mural decorations of crimson and gold, their soft browns and sepias—a scene of ineffable peace and beauty; but my master feeling was one of poignant pain at the pathos of it all. I knew I had lost a friend and a benefactor.

I can not close this article without a few words of my appreciation of Casto Smith as a man and a lawyer. He was one of the most lovable characters I have ever known. He had many faults; but as Bobby Burns said in regard to his father, "even his faults leaned to virtue's side." He was delightfully human, and that attracted man to him and made him lovable.

He got his early training as a lawyer in the country with

lawyers who made the circuit. These circuit-riding lawyers were the best the State ever produced. They were men with a fine conception of the great fundamental principles of the law, artful pleaders, skillful cross-examiners, eloquent and forceful advocates with courage fired to full-fledged enterprise and to push every vantage that they had won. They mixed with men, had the common touch, and received their legal education in the school of experience. They were tried by the rough roads, the rocks, the snows, and the storms which proved their temper and gave them fiber. Above all, they knew men, their native instincts, and their motives and were enfranchised with the saving grace of common sense which made them self-possessed. Loyal and partisan, they waged bitter and uncompromising battles for their clients in the courtroom, but were the warmest and most tolerant of friends when court adjourned.

It was among such men and amid such surroundings that Casto Smith received his education and legal training. He won his spurs and stood among the best of these virile men, so that when Col. W. A. Henderson of the Southern Railway Company's legal staff, with his superb knowledge of men, saw him and heard him, he brought him to Knoxville as an associate of Division Counsel.

He was not a business man and made no pretensions along that line. He was an easy mark for the "trader" and "high-powered" salesman, whether book agent or stock broker; but he was very sympathetic and especially susceptible to the appeals of those in need.

He didn't practice law for the money.

He made plenty of money but couldn't keep it. He didn't care for it. He was generous to a fault. I have seen him write a check for a beggar when he didn't have lunch money in his pocket.

He was an idealist in his unprofessional thinking, deeply religious by nature, conscious of God's control of the universe, and deeply in love with his fellowman. He loved books and flowers and music and dogs. Beauty, truth, justice, compassion, peace with God and man were the laws and instincts of his youth. He had the heart of a boy and loved to be with and play with children. He was devoted to his family, especially to his two small grandchildren. He seemed to have somewhere sequestered in his own heart some of his boyhood days, with their

feeling of gladness of being young and their simple joys of field and flower, sunlight and song, to which he loved to return and linger.

Gen. Smith was an indefatigable worker. During his last years, although he was working under a strain and "doomed to go in company with pain"—he knew he had but a short time to live; that he was under sentence of nature's laws—he drove his overworked heart and brain and body to the limit. He hated to give up. He was ambitious to carry on, and when he saw and realized that it would soon be impossible, he grew somewhat nervous and impatient; but those who knew him, understood and loved him.

Beautiful and impressive were the eulogies spoken over his remains. The large number of floral offerings eloquently attested the esteem of his friends. Distinguished and representative citizens from all over the State gathered at his grave site to pay their tribute of respect; but off to one side sat a negro servant with tears rolling fast down his cheek. Those tears bespake his sense of loss and, to my mind, were the most eloquent and expressive commentary on the character of my departed friend.

His way had been with high hope and noble purpose and we knew, as we left the body there soon to be dissolved and taken up in "Nature's vast circulations," that this was not all; but that the end and final goal of such a felicitous life was blended with the far away sky.

L. H. Carlock.

THE COLLEGE OF LAW

The second summer session of the College of Law was held last summer for a period of twelve weeks. The enrollment during the session showed a twenty-five per cent increase over the 1931 summer session. By attendance in summer school the student is able to complete the requirements for an LL.B. degree with a saving of nine months calendar time. The work during the summer is planned so there will be courses for those who are starting the study of law as well as courses for advanced students and practitioners.

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There is no change in the Faculty this year. The personnel is as follows:

W. Raymond Blackard, A.B., University of Tennessee, LL.B., Harvard University.

S. F. Fowler, A.B., University of Tennessee, LL.B., Harvard University.

Robert M. Jones, B.S., LL.B., University of Tennessee.

R. T. Kennerly, A.B., LL.B., University of Tennessee, LL.M., University of Michigan.

J. Pike Powers, Jr., LL.B., University of Tennessee, B.L., University of Virginia.

Karl Ed. Steinmetz, LL.B., University of Wisconsin.

Harold C. Warner, A.B., J.D., University of Chicago.

Henry B. Witham, A.B., J.D., State University of Iowa.

Rules of the Supreme Court provide that after June 1, 1934, two years study of law and equity must have been completed before one is eligible to take the examination for admission to the bar in Tennessee. These two years of study must include agency, bailments, constitutional law, including the constitution of the United States and of the State of Tennessee, contracts, corporations, criminal law, domestic relations, equity, evidence, landlord and tenant, negotiable instruments, partnership, pleading and practice, professional ethics, the law of real and personal property, suretyship, torts and wills. Although the completion of the three year course in the College of Law is required before the Bachelor of Laws degree is granted it will be possible for a student to obtain instruction in the College of Law in the subjects outlined above as necessary for the bar examinations with an attendance here of two years. Therefore in the future a student may complete the requirements for admission to the bar in this College of Law in the time required by the Supreme Court rules while heretofore he has been unable to do so.

The enrollment in the College of Law in September showed an increase over last year. The results of the seventh annual legal aptitude tests which are given annually to the entering class showed this year's entering class to have a legal aptitude average rating 7% above that of the average entering classes.

RECENT CASE NOTES

BILLS AND NOTES—EXTENT OF LIABILITY OF DRAWER OF CHECK—HOLDER IN DUE COURSE OF CHECK.

The Supreme Court of Tennessee recently decided an interesting case[1] involving a check. The drawer of check No. 1 (defendant in the case) was notified by the payee that said check was never received. Whereupon the drawer had payment stopped at the drawee bank and issued check No. 2 (identical to No. 1 except as to its serial number and date). Check No. 2 was subsequently charged against the drawer's account by the drawee bank. Six months later the payee deposited check No. 1 with the plaintiff bank. In due course check No. 1 was forwarded to drawee bank which protested payment and returned same unpaid to the plaintiff bank. The payee had insufficient funds with the plaintiff bank to make good the check. The plaintiff bank then sued the drawer of the check and recovered judgment.

The layman, and doubtless the lawyer at first blush, would conclude that the decision is wrong. However, we shall see that the result reached is justified under the N. I. L., despite how harsh it may seem at first reading.

Discussion of the case will be in two parts, viz:

I. The extent of liability of the defendant as drawer of a check;

II. The rights of the plaintiff as the holder of a check.

I. THE EXTENT OF LIABILITY OF THE DEFENDANT AS DRAWER OF A CHECK. Failure to make presentment of a check within a reasonable time after its issue discharges the drawer to the "extent of the loss caused by the delay."[2] In the absence of such loss, however, the drawer continues liable on his contract indefinitely or until the action is barred by the Statute of Limitations.[3] The courts are not in accord as to when the limitation statute begins to run.[4] The "extent of the loss caused by the delay" will be due generally to the failure of the drawee bank.[5] The "reasonable time" in respect to presentment of checks[6] has been construed to mean that the check must be put in course of collection (not circulation) not later than before the close of business hours on the next business day after the issuance of the instrument.[7] Circulation of the check from hand to hand can not extend the time of presentment for payment to the detriment of the drawer,[8] whereas, despite how unreasonable the delay, the drawer suffers no loss when the check is returned for lack of funds[9] or when payment is stopped.[10] We may conclude then that the six months

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1 Pan American Petroleum Corp. v. American Nat. Bank, 165 Tenn. ....., 52 S. W. (2d) 149 (1932).

2 Sec. 186 N. I. L., or Code of Tenn. (1932), Sec. 7510.

3 Bull v. Kasson, 123 U. S. 105, 111 (1887); Hazard Bank v. Morgan, 211 Ky. 134, 277 S. W. 307 (1925).

4 Statute of Limitations begins to run: On date of the issue of the check, Bacon's Adm'r. v. Trustees, 94 Va. 696, 27 S. E. 576 (1897). When check is presented to the maker, Bull v. Kasson, *supra* note 3.

5 Ferrari v. First Nat. Bank, 127 Misc. 330, 216 N. Y. S. 280 (1926).

6 *Supra* note 2.

7 Gordon v. Levine, 194 Mass. 418, 80 N. E. 505 (1907).

8 *Ibid.*

9 Bodner v. Rotman, 95 N. J. Eq. 510, 123 Atl. 529 (1924).

10 Anderson v. Elem, 111 Kans. 713, 208 Pac. 573 (1922), where the court said stopping payment is equivalent to withdrawing the deposit.

delay in presenting the check for payment in the case at bar was not detrimental to the drawer, and therefore, he is still liable.

II. THE RIGHTS OF THE PLAINTIFF AS THE HOLDER OF A CHECK. It must be clearly distinguished that the maturity of the check, for purposes of presentment for payment in order to bind the drawer, is not identical with the maturity which will charge subsequent holders with notice of defect of title or infirmities in the instrument.

The case under discussion held that the plaintiff may recover on a check negotiated six months after its issue despite the defenses the drawer might have asserted in an action brought by the payee. A natural question may be asked, when does a check become too "stale" for purposes of negotiation so that it carries on its face notice of equities in favor of the drawer?

There is a strong policy to encourage the free circulation of negotiable instruments. For this reason, a holder in due course occupies a highly advantageous position, and is one of the most favored plaintiffs in the law. It is provided by statute as one of the requisites of a holder in due course that he must have taken the instrument in good faith.[11] It is not sufficient that the holder should have suspected, but the question is, did he suspect the equities?[12]

The presumption is that every holder is *prima facie* one in due course;[13] but if there is a negotiation of a check an unreasonable length of time after its issue, the holder is not deemed to be one in due course.[14] What is a "reasonable or unreasonable time" is defined by the N. I. L.[15] If the facts are disputed, the question of a reasonable time is one of fact for the jury, otherwise it is for the court to determine.[16] One may be a holder in due course five weeks after the issuance of the check,[17] or three months,[18] five months,[19] or even seven months;[20] but nine months[21] and fourteen months[22] have been held an unreasonable time by the jury.

W. O. G.

CORPORATIONS—OWNERSHIP OF CORPORATE PROPERTY—RELATION OF STOCKHOLDERS TO CORPORATION—NATURE OF STOCKHOLDER'S INTEREST IN CORPORATE ASSETS.

"Generally speaking, a corporation is a separate entity distinct from the stockholders, but as between itself and its stockholders this is a mere fiction, and the equitable ownership of all its property is in the stockholders, subject to the prior rights of creditors." This statement is made by the court in an appeal from an interlocutory decree to vacate the appointment of a receiver for a bankrupt corporation.[1]

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11 Sec. 52 (3) of the N. I. L., or Tenn. Code (1932), Sec. 7376 (3).

12 Swift v. Smith, 102 U. S. 442 (1880); See also, Schintz v. American Trust Bank, 152 Ill. App. 76 (1909) where the court said, "A blundering fool may therefore be found to have acted in good faith, though under like circumstances a shrewd business man might be deemed to have acted in bad faith."

13 Sec. 59 of the N. I. L., or Tenn. Code (1932), Sec. 7383.

14 Sec. 53 of the N. I. L., or Tenn. Code (1932) Sec. 7377.

15 Sec. 193 of the N. I. L., or Tenn. Code (1932), Sec. 7517.

16 Murray v. St. Louis Third Nat. Bank, 234 Fed. 481, 148 C. C. A. 247 (1916); Sheffield v. Cleland, 19 Idaho 612, 115 Pac. 20 (1911).

17 German-American Bank v. Wright, 85 Wash. 460, 148 Pac. 769 (1915).

18 Ryckman v. Fox Film Corp., 188 Cal. 271, 205 Pac. 431 (1922).

19 Bull v. Kasson, *supra* note 3.

20 Becker v. Horowitz, 114 N. Y. S. 161 (1909).

21 Pope v. Brookshire, ... Tex. Cv. App. ....., 236 S. W. 108 (1921).

22 Cowing v. Altman, 71 N. Y. 435, 440, 441 (1877). On time of negotiation of checks, see 23 A. L. R. 1202.

1 Berl et al. v. Crutcher; Doyle et al. v. Same, 60 Fed. (2d) 440 (1932).

The interest that the stockholders have in the corporate property has given rise to several different theories. It is almost unanimously agreed that until a dividend is declared or a division is made on the winding up or dissolution of a corporation, a stockholder has no legal title to the property of the corporation, or to any separate part thereof.[2] Many courts hold that the full legal and equitable title to the corporate property is in the corporation and not in the stockholders,[3] that the owner of the entire capital stock does not own the property of the corporation,[4] and even the corporate good will belongs to the corporation.[5] Other courts regard the stockholders as the equitable owners of the assets,[6] and the corporation as holding the legal title in trust for the stockholders.[7]

The legal relationship between the corporation and the stockholder gives the latter a personal right and a property right; the personal right is the power to vote in meetings, elections, etc., and the property right is a chose in action against the corporation for a share in the profits, and, upon dissolution, for a share in the assets after creditor's claims have been settled.[8] This right is represented by the stock, and exclusive of the stock, an individual stockholder has no interest in the corporate assets which is capable of being assigned.[9] Other than this right of a chose in action

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2 Union Bank v. State, 9 Yerger 490 (Tenn. 1836); State v. Mitchell, 104 Tenn. 336, 58 S. W. 365 (1899); Tubb v. Fowler, 118 Tenn. 325, 99 S. W. 988 (1906); The Collector v. Hubbard, 79 U. S. 1 (1871); Bailey v. R. R. Co., 89 U. S. 604 (1874); Distilling Co. et al. v. Nolan, 214 Fed. 189 (1914); Collector of Internal Revenue v. Turrish, 247 U. S. 221 (1917); Insurance Co. v. Montgomery County, 99 Ala. 1, 14 So. 490 (1892); Gashwiler v. Willis, 33 Calif. 11 (1867); De Nunzio v. De Nunzio, 90 Conn. 342, 97 Atl. 323 (1916); Electric Ry. Co. v. Peabody Coal Co., 230 Ill. 164, 82 N. E. 627 (1907); Ulmer et al. v. Lime Rock R. Co., 98 Me. 579, 57 Atl. 1001 (1904); Cotten v. Tyson et al., 121 Md. 597, 89 Atl. 113 (1913); Smith v. Hurd, 53 Mass. 371 (1847); Van Heusen v. Van Heusen Charles Co. et al., 131 N. Y. S. 401, 74 Misc. 292 (N. Y. 1911); Furniture Co. v. Harbour, 42 Okla. 335, 140 Pac. 956 (1914); Bidwell v. R. R. Co., 114 Pa. 535, 6 Atl. 729 (1886); 1 Fletcher, Cyclopedia Corporations (1917 ed.) Sec. 25.

3 Red Bud Realty Co. v. South et al., 96 Ark. 281, 131 S. W. 340 (1910); Sterling-Midland Coal Co. v. Chicago Williamsville Coal Co., 336 Ill. 586, 168 N. E. 655 (1929); Ins. Agency Co. v. Blossom, ... Mo. App. ....., 231 S. W. 636 (1921); Fox v. Robbins et al., ...Tex. App. ....., 70 S. W. 597 (1902).

4 Parker v. Bethel Hotel Co., 96 Tenn. 251, 34 S. W. 209 (1896); Garmany v. Lawson, 124 Ga. 876, 53 S. W. 669 (1906); Brock v. Poor, 216 N. Y. 387, 111 N. E. 229 (1915); Button v. Hoffman, 61 Wis. 20, 20 N. W. 667 (1884).

5 Dodge Stationery Co. v. Dodge et al., 145 Calif. 380, 78 Pac. 879 (1904).

6 Doherty & Co. v. Rice et al., 186 Fed. 204 (1910); Lynch v. Turrish, 236 Fed. 653 (1916); Brock v. Poor, *supra* Note 4; Korn v. Eick, 91 W. Va. 763, 114 S. E. 144 (1922).

7 Jones v. Missouri-Edison Elec. Co., 144 Fed. 765 (1906); Wheeler v. Abilene Nat. Bk. Bldg. Co., 159 Fed. 391 (1908); Boardman Co. v. Petch, 186 Calif. 476, 199 Pac. 1047 (1921); Hyams v. Old Dominion Co., 113 Me. 294, 93 Atl. 747 (1915); Hocking Valley R. R. Co. v. Toledo Terminal R. Co. et al., 99 Ohio St. 35, 122 N. E. 35 (1918); Pacific Fire Ins. Co. v. John E. Morris Co., et al., ... Tex. Com. App. ....., 12 S. W. (2d) 971 (1929); Moore v. Schoppert, 22 W. Va. 282 (1883); 14 C. J. Sec. 1320.

8 Storrow et al. v. Texas Consolidated Compress & Mfg. Assn., 87 Fed. 612 (1898); Marbury Lbr. Co. v. Hunter, 169 Ala. 503, 53 So. 1028 (1910); De Nunzio v. De Nunzio, *supra* Note 2; Field v. Pierce, 102 Mass. 253 (1869); Russell v. Temple, 3 Dane's Abrid. (Mass. 1798).

9 Pendery et al. v. Carleton, 87 Fed. 41 (1898); De La Vergne v. German Savings Inst., 175 U. S. 40 (1899); Rensselaer & S. R. Co. v. Irwin, 249 Fed. 726 (1918); Cotten v. Tyson et al., 121 Md. 579, 89 Atl. 113 (1913); Standard Distilling & Distributing Co. v. Jones & Adams Co., 239 Ill. 600, 88 N. E. 236 (1909); In re Goetz's Estate, 236 Pa. 630, 85 Atl. 65 (1912); U. S. Radiator Corp. v. State, 208 N. Y. 144, 101 N. E. 783 (1913); U. S. Trust Co. of N. Y. v. Heye et al., 224 N. Y.

and the incidents of stock ownership, it is difficult to establish any other relationship between the corporation and its stockholders in regard to the ownership of the corporate property.

An attempt to establish a principal and agent relationship between the corporation and the stockholders fails when the fundamental principles of agency and the corporate idea are considered. The liability of an ordinary principal is unlimited,[10] while that of a corporate shareholder is generally limited to the amount invested except in the case of monied corporations, such as banks, where statutes ordinarily impose double liability.[11] Other major distinctions are in the ownership of property, the corporation having title to the property,[12] while an agent has usually no title at all.[13] Additional difficulties are encountered in matters of control and operative functions when it is considered that a group of shareholders, scattered throughout a vast territory, and, for the most part, strangers to each other, could have little or no satisfactory part in the matter of carrying on their functions as principals. In the face of these major distinctions, it is impossible to consider the relationship as that of principal and agent.

The view of a trust relationship, that is, that the legal title to the property is in the corporation and the equitable title is in the stockholders disrupts the idea that a corporation is an entity, an individual being within itself. The corporate property could be attached by creditors of the individual stockholders,[14] and consent of the stockholders to a sale of the property would be required.[15] A corporation and a trust may have some methods of dissolution in common,[16] but the sale of property, which ordinarily ends a trust,[17] does not dissolve a corporation in the absence of a charter provision to that effect. If these trust characteristics were true of corporations, the fundamental advantages of corporate existence, namely, control, operative functions, and perpetual succession or definite duration, would be destroyed.[18]

While the relationship is not that of principal and agent, or cestui and trustee, neither are the stockholders joint tenants, tenants in common, or co-owners of the corporate property,[19] and they cannot acquire the property except through a corporate act.[20]

242, 120 N. E. 645 (1918); Bryan v. Fairfax Forest Min. & Mfg. Co. et al., 89 W. Va. 314, 109 S. E. 323 (1921).

10 Mechem, Outlines Agency (3d ed. 1923), Sec. 345 et seq.; 14 C. J., Sec. 1291.

11 14 C. J., Sec. 1286.

12 *Supra* Notes 2 and 7.

13 I Mechem, On Agency (2d ed. 1914), Sec. 42.

14 Bogart, On Trusts (1921 ed.), Sec. 112.

15 Burwell v. Farmers & Merchants Bank et al., 119 Ga. 633, 46 S. E. 885 (1904); Moll. v. Gardner, et al., 214 Ill. 248, 73 N. E. 442 (1905); Berner v. German State Bank, 125 Iowa 438, 101 N. W. 156 (1904); Murray et al. v. Rodman, 25 Ky. L. R. 978, 76 S. W. 854 (1903); Bremer v. Hadley et al., 196 Mass. 217, 81 N. E. 961 (1907); Garesche et al. v. Levering Inv. Co. et al., 146 Mo. 436, 48 S. W. 653 (1898); Clark v. Fleischman et al., 81 Neb. 445, 116 N. W. 290 (1908); Hattie et al. v. Gehin, 76 N. J. Eq. 340, 76 Atl. 4 (1909); Maxwell et al. v. Barringer, 110 N. C. 76, 14 S. E. 516 (1892).

16 Bogart, On Trusts (1921 ed.), Sec. 128; 5 Fletcher, Cyclopedia Corporations (1918 ed.), Sec. 5408.

17 *Supra*, Note 16.

18 I Fletcher, Cyclopedia Corporations (1918 ed.), Sec. 407.

19 Rothschild v. Memphis & C. R. Co., 113 Fed. 476 (1902); Harton v. Johnston et al., 166 Ala. 317, 51 So. 992 (1909); Gashwiler v. Willis et al., 33 Calif. 11 (1867); Morbach v. Home Mining Co., 53 Kan. 731, 37 Pac. 122 (1894); Williamson v. Smoot, 7 Martin 31 (La.); Spurlock v. Missouri Pac. Ry. Co., 90 Mo. 199, 2 S. W. 219 (1886); U. S. Radiator Co. v. State, 208 N. Y. 144, 101 N. E. 783 (1913); State v. Mudie,

Because of the inconsistencies between the principal-agent, cestui-trustee, and other relationships, and that of a corporation and its stockholders, it seems impossible to classify that relationship with any other existing at law. The rights and liabilities of the stockholders are defined and are enforcible at law.[21] As such, there is a peculiar relationship, "shareholder-corporation," which stands alone, being in its entirety anomalous to all other relationships, and yet analogous in many respects to several which are well established. C. S. B., Jr.

HUSBAND AND WIFE—THE RESPONSIBILITY OF A HUSBAND FOR THE CRIME OF HIS WIFE COMMITTED IN HIS PRESENCE.

Appellant was arrested while possessing liquor. She was the admitted owner, and directed all movements concerning it. Appellant's husband was not shown to have been present, in, or about the premises on this occasion. She assigns as error the refusal of the Court to direct a verdict for her acquittal, as she was "a married woman, living with her husband, and not responsible as a matter of law for the crime." *Held*, it is doubtful if the common law presumption that a husband is presumed to be responsible for the crime of his wife, committed in his presence, is applicable to federal law. Even if it is, the facts of this case do not bring it within the operation of the rule.[1]

The common law rule that a husband is presumed to be responsible for the crime of his wife, committed in his presence, is one of the oldest doctrines in our law. It is impossible to tell just when it had its inception. Blackstone says, "the doctrine is more than 1000 years old."[2] It was among the laws of King Ina, the West Saxon. A similar rule was found among the laws of the northern nations on the continent. The privilege of the doctrine was extended to any woman transgressing in concert with a man; "the male or freeman was punished, the female or slave dismissed."

There is some authority that this rule is not so ancient, and the greatest expansion of the rule has come rather recently in the development of our law.[3]

There are many reasons given for the development of this rule, and they vary considerably. The common law treated the husband and wife as one, and the husband as the one. Thus he was being punished for his own crime. Then, too, the law cast upon the wife the duty of obedience and affection for her husband, and the presumption was indulged that she acted under coercion.[4] Other reasons are given which are based on public policy—though not called public policy at the old common law. The doctrine is a fiction to enable judges to administer a harsh rule with mercy.[5] When a husband and wife committed a joint offense, the husband could plead the benefit of the clergy; the wife could not be in holy orders, and could not claim this privilege. Thus it would have resulted in acquitting the husband and hanging the wife unless this artificial doctrine had been created. Furthermore, no legal system

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22 S. D. 41, 115 N. W. 107 (1908); Kanawah Coal Co. v. Ballard & Welch Coal Co., 43 W. Va. 721, 29 S. E. 514 (1897).

20 Baillie v. Columbia Gold Mining Co. et al., 86 Ore. 1, 166 Pac. 965 (1917); Richardson v. Backus et al., 86 Ore. 1, 167 Pac. 1167 (1917).

21 *Supra*, Note 8.

1 Haning v. United States, 59 F. (2d) 942 (Dist. of Neb. 1932).

2 4 Bl. Comm. 28.

3 3 Holdsworth, History of the English Law 520, 530.

4 State v. Miller, 162 Mo. 253, 62 S. W. 692 (1901).

5 IV. Kidd's Note to Bl. C. 2, p. 28.

which deals merely with human rules of conduct desires to pry too closely into the relationship of husband and wife.

Treason and murder have been exceptions to this rule from its beginning.[6] As the common law developed, and as circumstances demanded, other exceptions were ingrafted into the doctrine. These exceptions are generally confined to crimes which are *mala in se,* and are such offenses as the law presumes to be generally conducted by the intrigues of the female sex. The outstanding example is the keeping of a brothel.

The decisions are not uniform, but, in general, the weight of this legal presumption has lightened as society has advanced. The earliest cases conclusively presumed the husband to be responsible for the crime of his wife committed in his presence.[7] Thereafter, the courts placed their reliance upon this presumption, coercion being treated as a fact.[8] Following this, the courts began holding that the presumption might be overcome, although with difficulty. Then the English courts held that if there was any doubt as to coercion, the wife should be acquitted.[9] Gradually the courts took the view that there was a mere presumption of coercion, and this might be rebutted by very slight circumstances.[10] This latter was the common law rule of Tennessee.[11]

The married woman's emancipation statutes in many states have done much to remove this doctrine. The contemporary statutes must be looked to in every case.[12]

This common law presumption is doomed to be stricken from our law, and the emancipation statutes will do quickly what would require a long period of time by means of judicial decisions.

The Tennessee Emancipation Act of 1919 is very broad and sweeping in its terms.[13] The Act of 1913 was not so broad, and under this Act it was held that the common law presumption did not apply: that women were completely emancipated, except where such emancipation is not permitted by proper construction of the Act, or by sound public policy to attribute such an intention to the legislature.[14] The cases indicate that the court hesitated to take the final step to complete emancipation, and was making use of the public policy argument so that if the court were ever confronted by a case in which it desired to, it might still hold the husband responsible.

Under the Act of 1919 the court has ruled that the last vestige of this common law doctrine is gone. The court has reserved no qualifications to this decision. The wife is to be regarded as a separate legal entity, and she is as capable of committing crime as if she were single.[15]

The court treats the emancipation of the wife in respect to her criminal responsibility the same as it treats her ability to contract and to own and control property. Under the present law, there can be no such holdings as that the husband

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6 *Supra* Note 2.
7 19 L. R. A. 358 note (1893).
8 Reg. v. Laughler, 2 Car. & K. 225 (1845).
9 4 A. L. R. 266 (1919); Reg. v. Smith, 2 Dears & B. C. C. (1858).
10 State v. Cleaves, 59 Me. 298 (1871).
11 State v. Morton, 141 Tenn. 357, 209 S. W. 644 (1918).
12 4 A. L. R. 266 (1919).
13 Tenn. Code (1932), Sec. 8460.
14 Gill v. McKinney, 140 Tenn. 549, 205 S. W. 416 (1918); State v. Morton, *supra* Note 11.
15 State v. Johnson, 152 Tenn. 184, 274 S. W. 12 (1925).

and wife are incapable of committing a conspiracy,[16] or that the wife cannot be guilty of stealing from her husband,[17] and other like decisions.

This common law presumption was probably right when adopted, for the state of society then existing, but it cannot be right now under our conditions of society, and it is not law. The law assumes that all persons of mature age and sound mind act upon their own volition, and are responsible for their acts. Women have the rights and privileges of men, and should have the same responsibilities. It certainly does no honor to the women of an enlightened age to apply to them the common law doctrine of disability.

Whether or not the common law liability of a husband for the crime of his wife, committed in his presence, is applicable to federal law is problematic. The writer has found no case in which the Supreme Court of the United States has settled the question.

The common law is not a part of the federal law, but, when a common law right is asserted, the federal courts look to the law of the state where the controversy arose.[18] This explains some of the conflict in federal courts.[19] In the case of *United States v. DeQuilfeldt*[20] the Court said the common law had no applicability to the federal law, yet it decided the case according to the common law. In *United States v. Hinson*[21] the court's decision was based upon a refusal to apply the common law to the federal law. Yet in the District of Columbia the court decided according to the common law.[22]

These conflicts demonstrate the inability of the federal courts to get away from the common law. It is necessary to look to the common law for the accepted definitions of crimes, unless Congress clearly defines those crimes.

S. F. D.

PRIORITY OF A VETERAN'S CLAIM AGAINST AN INSOLVENT BANK.

A World War Veteran entitled to certain compensation and disability benefits under the World War Veteran's Act of 1924 as amended[1] was found to be mentally incompetent and was committed to a hospital for the insane and a conservator appointed for his estate. From time to time payments of compensation and disability were made by the federal government to the conservator, and such funds were invested in certain industrial certificates of deposit issued by a trust company which subsequently went into receivership. The conservator claimed a priority on the theory that the money was funds of the United States. This contention was overruled and the priority denied.[2]

This case raises a question upon which there is much conflict and one of considerable interest due to the large number of bank failures throughout the United States in recent years.

The two most recent cases on this point are the principal case and the case of *State ex rel. Spillman, Atty. Gen. v. First State Bank of Pawnee et al.*[3] The latter

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16 People v. Miller, 52 Cal. 107, 22 Pac. 934 (1889).
17 Reg. v. Glassie, 7 Cox C. C. 1 (1854).
18 Wheaton & Donaldson v. Peters & Grigg, 33 U. S. 591 (1834).
19 United States v. Swierzbenski, 18 F. (2d) 685 (W. D. N. Y. 1927).
20 5 Fed. 276 (W. D. Tenn. 1881).
21 3 F. (2d) 200 (S. D. Fla. 1925).
22 United States v. Birck, Fed. Cas. No. 14,595 (Ct. of App. D. C. 1809).
1 38 U. S. C. A., Sec. 421 et seq.
2 Shippee, Bank Commissioner, v. Commercial Trust Company, In re Callery, ...Conn. ....., 161 Atl. 775 (1932).
3 121 Neb. 515, 237 N. W. 623 (1931).

case is directly contra to the main case holding that the veteran is entitled to a priority in the funds of the insolvent bank.

There would seem to be two bases for permitting a priority:

I. That the money is funds of the United States.

II. That even if title to the money has passed to the pensioner, Congress can and has impressed it with a priority.

It is not necessary to consider the second point as such legislation giving priority has not been enacted.

The court in the main case says:[4] "We do not find in the Act[5] any intention expressed or implied that the title to the moneys payable to him (the pensioner) is to remain in the United States after they have been paid over to his conservator, and until they have actually been paid into the hands of the ward or disbursed for his benefit, we find no justification in the Act for the claim that the conservator acts merely as the agent of the government through whom the funds are paid to his ward."

The same court in commenting on the cases under this Act or similar Acts allowing priority[6] says, "We do not understand such result to be required by the decision in *U. S. v. Hall.*[7] Its holding that Congress might pass laws for the protection of the pension money while in the hands of the guardian of the pensioner is far from ruling that by so doing it prevents the title of the money from passing to the pensioner when it was paid over to his guardian." Such reasoning would seem to be correct.

The Hall case concerns itself with the constitutionality of an Act[8] which provided for the punishment of a guardian who embezzles money of the pensioner in his hands. There is a section of the Veteran's Act which expresses the same provision in similar language.[9]

The cases permitting a priority[10] do so on the theory that a correct interpretation of the Hall case would indicate that title to such money is retained in the United States.

The courts have never passed on the question as to whether the pensioner or the government would bear the loss in case of misappropriation by the guardian.

A further argument that the title has passed to the pensioner is the section in the World War Veteran's Act which provides that when the money would escheat to the state in which the pensioner resides it should escheat to the United States.[11]

In the case of certain Indian tribes Congress has provided that money for the benefit of the Indians should be held and disbursed on account of the beneficiary by some agency of the United States.[12] If Congress desired that the pensioner should have a priority in such a situation as the principal case it should have so provided by enacting legislation similar to that under which the Indian agents operate. It is submitted that priority should be denied. J. R. S.

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4 Shippee etc. v. Commercial Trust Company, etc., *supra* Note 2 at 775.

5 World War Veteran's Act (Author's note).

6 Manning v. Spry, 121 Iowa 191, 96 N. W. 873, 875 (1903); Tama County v. Kepler, 187 Iowa 34, 173 N. W. 912, 913 (1913); State v. Thurston State Bank, 120 Neb. ....., 237 N. W. 293 (1932); State v. Security Bank, 120 Neb. ....., 237 N. W. 623 (1932).

7 98 U. S. 343 (1873), (Author's note).

8 Rev. St. Sec. 4783.

9 38 U. S. C. A. Sec. 556.

10 *Supra* Note 6.

11 38 U. S. C. A. Sec. 451.

12 Bramwell, Superintendent, v. United States Fidelity and Guaranty Company, 269 U. S. 483 (1925). See also 25 U. S. C. A. Sec. 151 et seq.

COMPENSATED SURETYSHIP AND GUARANTY AS DISTINGUISHED FROM INSURANCE AND INDEMNITY.

A deputy constable in attempting to make an arrest for a misdemeanor committed in his presence pursued the driver of a car and fired at the fleeing car, striking the plaintiff, a passenger therein. Suit was brought in the name of the State at the relation and to the use of the passenger against the deputy constable and the surety company on his bond. Plaintiff in his petition prayed for damages resulting from personal injuries received. The surety company's contract guaranteed that the sheriff or his deputy constables would not abuse the power with which they had been invested, and the surety demurred to the petition on the ground that the act of the deputy constable was committed without process, although under color of office, and beyond the confinements of his jurisdiction. *Held,* that the surety was liable by liberally construing the terms of the surety's contract so as to include acts committed by virtue of or under color of office. The Court attempted to justify its liberal construction on the ground that the ancient tenderness of the law for the gratuitous surety has no place in the case of the compensated surety, whose contract is one of insurance.[1]

In recent years the law of suretyship has undergone a considerable change.[2] The day of the individual gratuitous surety is almost gone, and in its stead has developed the compensated surety, usually a corporation paid for its undertaking and chartered for the conduct of such business.[3] As a result of this change of affairs the trend of all modern decisions, both federal and state, is to distinguish between the individual gratuitous surety and the corporate compensated surety in the application and construction of the law appertaining to sureties.[4] In the case of the gratuitous surety, such person is regarded as "a favorite of the law"; and liability on the contract thereof is determined by the rule of *strictissimi juris,* because the obligation of such surety is assumed voluntarily without pecuniary compensation.[5] However, in

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1 State ex rel. and to use of Kaercher v. Roth et al., ... Mo. ....., 49 S. W. (2d) 109 (1932).

2 Stearns, Suretyship (3d ed. 1922), Secs. 233-243a; 21 R. C. L. 1157-1164.

3 *Ibid.*

4 Green v. United States Fidelity & Guaranty Co., 135 Tenn. 117, 185 S. W. 726 (1915); Cambria Coal Co. v. National Surety Co., 141 Tenn. 270, 209 S. W. 641 (1918); American Surety Co. v. Pauly, 170 U. S. 133, 18 S. Ct. 552, 42 U. S. (L. ed.) 977 (1897); United States Fidelity, etc. Co. v. United States, 191 U. S. 416, 24 S. Ct. 142, 48 U. S. (L. ed.) 242 (1903); United States v. Bayly, 39 App. Cas. 105 (D. C. 1912), 41 L. R. A. (N. S.) 422 (1913); Clark County School District No. 1 v. McCurley, 92 Kan. 53, 142 Pac. 1077 (1914); Standard Asphalt, etc. Co. v. Texas Bldg. Co., 99 Kan. 567, 162 Pac. 299 (1917), L. R. A. 1917C 490; Champion Ice Mfg., etc. Co. v. American Bonding Co., 115 Ky. 863, 75 S. W. 197 (1903), 103 A. S. R. 356 (1905); Victoria Lumber Co. v. Wells, 139 La. 500, 71 So. 781 (1916), L. R. A. 1916E 1110; Tarboro Bank v. Fidelity, etc. Co., 126 N. C. 320, 35 S. E. 908 (1901), 83 A. S. R. 682 (1902).

5 United States v. Hough, 103 U. S. 71, 26 U. S. (L. ed.) 305 (1880); United States v. Ulrici, 11 U. S. 38, 4 S. Ct. 288, 28 U. S. (L. ed.) 344 (1883); United States v. Corwin, 129 U. S. 381, 9 S. Ct. 318, 32 U. S. (L. ed.) 710 (1888); Prairie State National Bank v. United States, 164 U. S. 227, 17 S. Ct. 142, 41 U. S. (L. ed.) 418 (1896); Crane v. Buckley, 203 U. S. 441, 27 S. Ct. 56, 51 U. S. (L. ed.) 260 (1906); American Bonding Co. v. Pueblo Investment Co., 150 Fed. 17, 18 C. C. A. 97 (1906), 9 L. R. A. (N. S.) 557 (1907); Anderson v. Belinger, 87 Ala. 334, 6 So. 82 (1888), 4 L. R. A. 680 and note (1889); Glenn County v. Jones, 146 Cal. 518, 80 Pac. 695 (1905); McDonald v. Bradshaw, 2 Ga. 248 (1847), 46 Am. Dec. 385 (1883); Price v. Carlton, 121 Ga. 12, 48 S. E. 721 (1904), 68 L. R. A. 736 (1905); School Trustees v. Sheik, 119 Ill. 579, 8 N. E. 189 (1886), 59 Am. Rep. 830 (1887); Salem v. McClintock, 16 Ind. App. 656, 46 N. E. 39 (1897), 59 A. S. R. 330 (1898); Ida County Sav. Bank v. Seidensticker, 128 Ia. 54, 102 N. W. 821 (1905), 111 A. S. R. 189 (1907);

the case of the compensated surety, or corporate surety, as spoken of in some cases, the rule of *strictissimi juris* is no longer applicable, because such contract of suretyship has been held to be essentially a contract of insurance or indemnity,[6] and the courts, by analogy, ordinarily apply to such contracts of compensated suretyship the rules of law appertaining to contracts of insurance and indemnity.[7] Thus, through the advent of the corporate compensated surety in modern times, the most interesting question in the law of suretyship has arisen—Whether the contract of the compensated suretyship is essentially one of insurance and indemnity?

Insurance is properly comparable with compensated suretyship in the sense that both are businesses of a quasi-public nature and character[8]; and as a general rule, surety companies for hire have been classified with insurance companies for purposes of legislative control because of the similarity in their business methods.[9] Furthermore, the compensated surety, or the so-called corporate surety, and the insurance company are similar in that both, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against a specified peril in return for premiums sufficiently high to make such business commercially profitable.[10] Another outstanding similarity is the fact that corporate sureties for hire, as do insurance companies, furnish their own forms of contracts and ordinarily act advisedly in the selection of the language and terms used therein.[11] Thus, in the final analysis, the compensated surety and the insurance company bear a strong resemblance to each

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Champion Ice Mfg., etc. Co. v. American Bonding, etc. Co., 115 Ky. 863, 75 S. W. 197 (1903), 103 A. S. R. 356 (1905); Smith v. Droue, 42 La. Ann. 1064, 8 So. 396 (1890), 21 A. S. R. 408 (1891); Strawbridge v. Baltimore, etc. R. Co., 14 Md. 360 (1880), 74 Am. Dec. 541 and note (1886); Baltimore First National Bank v. Gerke, 68 Md. 449, 13 Atl. 358 (1888), 6 A. S. R. 453 and note (1889); McShane v. Howard Bank, 73 Md. 135, 20 Atl. 776 (1890), 10 L. R. A. 552 (1890-91); Archer v. State, 74 Md. 443, 22 Atl. 8 (1891), 28 A. S. R. 261 (1893); Grasser, etc. Brewing Co. v. Rogers, 112 Mich. 112, 70 N. W. 445 (1897), 67 A. S. R. 389 (1899); Blair v. Perpetual Ins. Co., 10 Mo. 559 (1847), 47 Am. Dec. 129 (1886); State v. Conover, 28 N. J. L. 224 (1860), 78 Am. Dec. 54 (1886); Fellows v. Prentiss, 3 Denio 512 (N. Y. 1846), 45 Am. Dec. 484 (1886); Blydenburgh v. Bingham, 38 N. Y. 371 (1868), 98 Am. Dec. 49 (1888); Evansville National Bank v. Kaufmann, 93 N. Y. 273 (1883), 45 Am. Rep. 204 (1884); Smith v. Bowman, 32 Utah 33, 88 Pac. 687, 9 L. R. A. (N. S.) 889 (1907); Anthony v. Kasey, 83 Va. 338, 5 S. E. 176 (1887), 5 A. S. R. 277 (1889).

6 Supra note 4; The word indemnity is used in the sense of an agreement to indemnify against actual loss or damage as distinguished from an agreement to indemnify against liability, Weller v. Eames et al., 15 Minn. 376 (1870), 2 Am. Rep. 150 (1871).

7 Empire State Surety Co. v. Lindenmuer, 54 Colo. 497, 131 Pac. 437 (1913); American Surety Co. v. Pangburn, 182 Ind. 116, 105 N. E. 769 (1914); Van Buren County v. American Surety Co., 137 Iowa 490, 115 N. W. 24 (1908), 126 A. S. R. 290 (1909); Chicago Lumber Co. v. Douglas, 89 Kan. 308, 131 Pac. 563, 44 L. R. A. (N. S.) 843 (1913); Hormel v. American Bonding Co., 112 Minn. 288, 128 N. W. 12 (1910), 33 L. R. A. (N. S.) 513 (1911); Cowles v. United States Fidelity, etc. Co., 32 Wash. 120, 72 Pac. 1032 (1903), 98 A. S. R. 838 and note (1904).

8 Stearns, *supra* Note 2, Sec. 235.

9 American Surety Co. v. Folk, 124 Tenn. 139, 135 S. W. 778 (1910); People v. Fidelity & Casualty Co., 153 Ill. 25, 38 N. E. 732 (1894); United States Fidelity & Guaranty Co. v. First National Bank, 233 Ill. 475, 84 N. E. 670 (1908); People v. Potts, 264 Ill. 522, 106 N. E. 524 (1914).

10 Tibbetts v. Mercantile Credit Guaranty Co., 19 C. C. A. 281, 38 U. S. App. 431, 73 Fed. 95 (1896).

11 Lakeside Land Co. v. Empire State Surety Co., 105 Minn. 213, 117 N. W. 431 (1908).

other, both being enterprises chartered for the conduct of their respective businesses which they have adopted for their own commercial profit.[12]

However, the outstanding and essential facts which distinguish the compensated surety from the insurance company are embodied in the nature and elements of the respective contracts and agreements.

In the first place, the term suretyship is commonly, though not strictly accurately, used to include guaranty, which is a subdivision of suretyship but differs in some important respects from a suretyship contract.[13]

A contract of suretyship or guaranty requires three parties to make the contract: (1) the principal, the one whose debt or obligation is the essence of the transaction; (2) the creditor, the obligee in the suretyship or guaranty agreement; and (3) the promisor, the one who agrees that the debt or obligation of the principal shall be performed.[14] On the other hand, it requires only two parties to make a contract of insurance or indemnity: (1) the insured or indemnitee, the one who is assured against a specified peril or loss; and (2) the insurer or indemnitor, the one who undertakes to indemnify the insured or indemnitee against loss, damage, or liability arising from an unknown or contingent event.[15]

Again, there is an important and obvious distinction between a contract of suretyship or guaranty and a contract of insurance or indemnity. A surety undertakes to pay the debt of another, and joins in the contract of the principal, thereby becoming an original party or co-obligor with the principal.[16] The guarantor on the other hand undertakes to pay if the principal does not, and does not join in the original contract of the principal.[17] The contract of guaranty is collateral to the principal obligation and distinct from, though dependent on it.[18] Furthermore, the liability of the surety is direct and immediately fixed from the inception of the agreement; whereas the liability of the guarantor does not start with the agreement, except as a contingent liability, and is established for the first time upon default of the principal.[19] In the case of the insurer or indemnitor liability does not accrue until the insured or indemnitee has actually suffered a loss against which the covenant runs.[20] Between the contract of suretyship and the contract of guaranty, the latter more closely resembles the contract of insurance or indemnity.

Moreover, there is a strong distinction between a contract assuming the responsibility for the performance of the debt or obligation of another, and a strict undertaking to indemnify if the party indemnified or the insured is actually a loser. The latter is merely an obligation of strict indemnity, original and independent of the

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12 Bryant v. American Bonding Co., 77 Ohio St. 9, 82 N. E. 960 (1907).

13 Stearns, *supra* Note 2, Sec. 1.

14 Davis v. Wells, Fargo & Co., 104 U. S. 169, 14 Otto (S. Ct.) 159, 26 U. S. (L. ed.) 687 (1881); Singer Mfg. Co. v. Littler, 56 Ia. 601, 9 N. W. 905 (1881); Wendlandt v. Sohre, 37 Minn. 162, 33 N. W. 700 (1887); People v. Backus et al., 117 N. Y. 196, 22 N. E. 759 (1889); Welsh v. Ebersal, 75 Va. 651, 656 (1881).

15 Union Insurance Co. v. American Fire Insurance Co., 107 Cal. 327, 40 Pac. 42 (1895), 48 A. S. R. 140 (1896), 28 L. R. A. 692 (1895).

16 Stearns, *supra* Note 2, Sec. 6.

17 News-Times Pub. Co. v. Doolittle, 51 Colo. 386, 118 Pac. 974 (1911); Bedford v. Kelley, 173 Mich. 492, 139 N. W. 250 (1913).

18 Courtis v. Dennis, 7 Met. 510, 518 (Mass. 1844); Kearns v. Montgomery, 4 W. Va. 29 (1870).

19 For a collection of cases see Stearns, *supra* Note 2, Sec. 6, Note 8.

20 Wicker v. Hoppock, 73 U. S. 94, 18 U. S. (L. ed.) 752 (1867); Welso v. Stillwell, 9 Ohio St. 467 (1859), 75 Am. Dec. 477 (1886); Henderson-Achert Lithograph Co. v. John Shillito Co., 64 Ohio St. 236, 60 N. E. 295 (1901), 83 A. S. R. 946 (1902).

loss covenanted against, and not within the Statute of Frauds;[21] whereas, the former, which is a collateral undertaking, to answer for the debt, default, and miscarriage of another, is within the express provision of the Statute of Frauds, whether such undertaking is in the form of a suretyship contract or a guaranty agreement.[22] Furthermore, the surety and guarantor have a right of indemnity against the principal if the latter defaults, on an implied assumpsit,[23] which for want of privity the insurer and indemnitor are unable to enjoy. In the final analysis, the comparison between the contract of suretyship or guaranty and the contract of insurance or indemnity is precisely the same as that which exists between a suretyship contract and any other form of simple contract.

Therefore, in order to distinguish between a compensated suretyship contract and an insurance contract the question is, did the promisor agree to pay the debt or answer for the default of another, or merely to compensate the promisee in case the latter is actually a loser? The policy of the law seems to be to classify generally, as insurers, compensated sureties who engage for profit in the business of suretyship and guaranty.[24] After all, the contract of compensated suretyship is not a new kind of promise but is the same promise as that of the gratuitous surety; and the contractual relation, the rights and liabilities thereof, is unaffected by the fact that such a contract has been erroneously construed to have all the essential features of an insurance contract.[25] The courts have repeatedly submitted that the contract of compensated suretyship, entered into by a corporation for the purpose of gain, is a contract of suretyship by allowing certain defences in suretyship such as those resulting from fraudulent concealment,[26] material alteration of the contract,[27] extension of time to the principal,[28] and other equitable defenses impressed upon the contract of suretyship, and by making provision for the remedy of contribution between

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21 Anderson v. Spence, 72 Ind. 315 (1880); 1 Brandt, Suretyship and Guaranty, (3rd ed. 1905), Sec. 5.

22 Stearns, *supra* Note 2, Sec. 5.

23 In re Stout, 109 Fed. 794 (1900); Rice v. Southgate, 16 Gray 142, (Mass. 1860); Barth v. Graf, 101 Wis. 27, 76 N. W. 1100 (1898).

24 (1912) 12 Col. L. Rev. 448.

25 Stearns, *supra* Note 2, Sec. 233.

26 Mumford v. M. & C. R. Co., 2 Lea 394 (Tenn. 1879); Herbert v. Lee et al., 118 Tenn. 133, 101 S. W. 175 (1906); Benton County Bank v. Bodecker, 105 Iowa 548, 75 N. W. 632 (1898), 67 A. S. R. 310 (1899), 45 L. R. A. 321 (1899); Hier v. Harpster, 76 Kan. 1, 90 Pac. 817 (1907), 13 L. R. A. (N. S.) 204 (1908).

27 Reese v. United States, 76 U. S. 13, 19 U. S. (L. ed.) 541 (1869); State v. McConigle, 101 Mo. 353, 13 S. W. 758 (1890), 20 A. S. R. 609 (1891), 8 L. R. A. 735 (1890).

28 Hill v. Bostick, 10 Yerg. 410-14-17 (Tenn. 1837); Johnson v. Hacker, 8 Heisk. 409-430 (Tenn. 1874); Apperson v. Cross, 5 Heisk. 481 (Tenn. 1871); Way v. Mooers, 135 Minn. 339, 160 N. W. 1014 (1917), L. R. A. 1918B, 559; Philadelphia v. Fidelity & Deposit Co. of Maryland, 231 Pa. 208, 80 Atl. 62, (1911); Murray City v. Banks et al., 62 Utah 296, 219 Pac. 241 (1923); Fanning v. Murphy, 126 Wis. 538, 105 N. W. 1056, 4 L. R. A. (N. S.) 666 (1906).

29 Bobbitt v. Flowers, 1 Swan 512 (Tenn. 1852); Crowder v. Denny, 3 Head 360 (Tenn. 1859); Lover v. Bessenger, 9 Baxt. 393 (Tenn. 1876); United States Fidelity & Guaranty Co. v. Naylor et al., 237 Fed. 314 (1917); Rose v. Wollenberg, 31 Ore. 269, 44 Pac. 382 (1896), 39 L. R. A. 378 (1898); Central Bkg. & Security Co. v. United States Fidelity & Guaranty Co., 73 W. Va. 197, 80 S. E. 121 (1913), 51 L. R. A. (N. S.) 797 (1914).

30 Hall v. Hall, 10 Humph. 353 (Tenn. 1849); American Surety Co. v. Barnesville Nat. Bank, 17 Fed. (2d) 942 (1927); Colonial Trust Co. v. Fidelity, etc. Co.,

sureties,[29] and the right of indemnity[30] and subrogation,[31] without specific reference to the character and nature of the suretyship contract.

The Supreme Court of Tennessee is in accord with the general trend of modern authority as set forth by *State v. Roth*,[32] and attempts to distinguish between contracts of gratuitous suretyship and contracts of compensated suretyship. It is well settled in this State that compensated suretyship contracts are to be treated as insurance contracts with a view of ascertaining the nature and extent of the liability assumed by the surety, and also that such compensated sureties are not entitled to the favorable consideration accorded to gratuitous sureties. The reasons underlying this view seem to be identical with those adopted by the great majority of the States—that such contracts of suretyship and guaranty are executed for a money consideration by companies chartered for the carrying on of such business and with similar methods of transacting that business.[33] J. L. C., Jr.

144 Md. 117, 123 Atl. 187 (1923); Fidelity, etc. Co. v. Buckley, 75 N. H. 506, 77 Atl. 402 (1910).

31 National Surety Co. v. Berggren, 126 Minn. 188, 148 N. W. 55 (1914); Gilbertson v. Northern Trust Co., 53 N. D. 502, 207 N. W. 42 (1925); Wasco County v. Insurance Co. 88 Ore. 468, 172 Pac. 126, L. R. A. 1918D 732 (1918).

32 Cited *supra*, Note 1.

33 Railroad v. Fidelity & Guaranty Co., 125 Tenn. 658, 148 S. W. 671 (1911); Hunter v. Guaranty Co., 129 Tenn. 572, 167 S. W. 692 (1914); Green v. United States Fidelity & Guaranty Co., *supra*, Note 4; Cambria Coal Co., *supra*, Note 4.

BOOK REVIEWS

ANGLO-AMERICAN LAW. By Charles Herman Kinnane. Indianapolis: The Bobbs-Merrill Company, 1932, pp. xvi, 589.

Educators evidently are unable definitely to agree on definite subjects that shall be included in a pre-legal curriculum. There is agreement however on the point that pre-legal study should include a history of our legal system showing its development to the present. It is also agreed that a knowledge of the framework of our legal system should be had before commencing the technical study of the law.

Deane Kinnane in his A FIRST BOOK ON ANGLO-AMERICAN LAW has written a book eminently useful for the pre-legal student. Teachers of law know how much time must be taken from technical study of cases and materials to give the student the proper foundation so he may orient himself. If this time can be saved, and it should be, more knowledge can be imparted and more training had.

The book is divided into four parts. Part I deals with the nature, origin and development of the law. This part of the book is the least interesting. The thought is not clearly expressed. Some sentences are labored. Possibly, the average college freshman or sophomore will forego the necessary intensive study to master this section of the book.

Parts II and III will intrigue the attention of any thoughtful reader interested in law. These two parts give a comparison of legal systems and their origins. The subject matter is less philosophical and more concrete. The pre-legal student can learn much in the 257 pages of text in these two sections. Such words as "law and equity," "common law," "civil and criminal," "canon law" and "law merchant" will have a definite meaning for him when he begins his technical study.

Part IV is an exposition of present day legal administration. Here the reader is introduced to some of the technicalities of the law and is shown why the law is technical. The beginning law student may not comprehend this part of the book so well as parts II and III. But he should derive some benefit from its study. The law senior or graduate would do well to read part IV. It will refresh his recollection of procedure and clarify for him many cloudy conceptions gathered from his study of case materials.

By and large the author has done a good work in his endeavor to provide a short statement of so large a subject.

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HISTORY OF CODIFICATION IN TENNESSEE. By Samuel Cole Williams. Johnson City, Tennessee: The Watauga Press. 1932. pp. 51. $1.

This booklet is composed of a series of articles, which were recently published in this law review, on the History of Codification in Tennessee. The permanent historical value of this material well justifies its collection into one volume.

In this work the author has considered in chronological order the various private and official compilations of Tennessee statutes from Roulstone's Laws in 1803 to the Code of 1932. In dealing with each compilation, Judge Williams shows the cir-

cumstances leading to its publication, its contemporary value, and its effect upon subsequent statutory law. Short biographical sketches are given of the compilers of the various codes; and where a code is the joint work of two or more men, the extent of the contribution of each is indicated. One valuable feature of the work is the disclosure of the sources of new material contained in the Official Codes of 1858 and of 1932.

In addition to the historical value of this booklet, the detailed description of the methods followed by the Code Commission and the Legislature in compiling the Code of 1932 has particular current interest. This description shows the portion of the new code that was the special work of each member of the commission and also emphasizes the influence exerted by the legislative Joint Committee on Codification. It is interesting to note that the new code was compiled in two years time at a cost of only $48,000.

The difficulties besetting the enactment of official codes are mentioned, chief among which are their cost, the conservatism of legislatures, and the opposition of private compilers. The advantages of an official code in providing a unified authoritative source of statute law and in curing technical defects in the enactment of prior statutes are mentioned.

An article on the New Code by Charles C. Trabue, Past President of the Tennessee Bar Association, is included in the appendix to this booklet. This addition increases considerably the practical value of the work, since the appended article points out the most important changes in the statute law made by the new code.

Judge Williams is eminently qualified to write on the subject he has selected not only because he was Chairman of the recent Code Commission but also because he is one of the oldest and most experienced practitioners in the State, a former member of the State Supreme Court, and a noted authority on all phases of Tennessee history. This work is a distinct addition to the legal history of the State.

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Member of Knoxville Bar.

PROGRESS IN INTERNATIONAL ORGANIZATION. By Manley O. Hudson. Stanford University Press, 1932, 162 pp., published for the University of Idaho upon the occasion of the inauguration of the William Edgar Borah Foundation for the Outlawry of War.

Professor Hudson has here presented a series of lectures which constitute an excellent manual on the organization and progress of the League of Nations and the World Court, and incidentally point out the relationship of the United States to both. The lectures plead for a more definitely committal participation on the part of the United States. Americans are urged to think of "the problems of international relations as domestic problems" and to cease "to speak of relations with other people as *foreign* relations" (p. 2). The author sketches the story of the rise of modern international organization, showing the effect on international relations of the establishment of telegraphic communications, the telephone, the aeroplane, and the radio. Professor Hudson stresses the new era in international organization which dawned when the League of Nations emerged from the unfavorable atmosphere of lingering hatreds engendered by the war. In the course of twelve years the assembly of the League of Nations held twelve sessions, the Council of the League held sixty-four sessions. The feature of the League on which Professor Hudson especially beams

is the Secretariat, which prepares special studies and produces serial publications. All in all Professor Hudson rejoices in the fact "that throughout the world today when any new international action is envisaged, people's minds turn immediately toward Geneva" (p. 43). A part of the interest of the society of nations is taken up with the International Labour Organization, the chief medium of which is the International Labour Conference, a body which meets annually to adopt draft conventions or recommendations which, though they do not bind any state, yet are "a clearing house for industrial information and investigation." Special provision is made for federal states like the United States whose power "to enter into conventions or labor matters is subject to limitations." Professor Hudson is warm in his praises of the Permanent Court of International Justice, the success of which has "exceeded the expectations of the most sanguine of its founders." Within ten years the Court has held twenty-three sessions, and delivered sixteen judgments and nineteen advisory opinions. If international legislation represented a movement significant before the war it has been "phenomenal" since. "The number of multi-partite instruments concluded in ten years after 1919 was as great as the number concluded in fifty years before 1914." While conceding that in a "terrible crisis" international organization may not serve to keep the peace, that "it is not fool-proof," Professor Hudson rejoices that it does at least provide conciliation before a permanent commission, arbitration before some special tribunal, adjudication before the Permanent Court of International Justice, and consideration by the Council of the League of Nations. In spots the style waxes genial and philosophical: "Few people are ready to devote energy where quick results are not to be anticipated. Mr. Elihu Root used to remind us . . . . that 'Leg over leg the dog went to Dover' " (p. 86). The reference value of this little work is further enhanced by a good index and appendices containing reprints of the covenant of the League of Nations, a list of the members of the League, and the Statute of the Permanent Court of International Justice.

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BOOKS RECEIVED

ACCOUNTING IN LAW PRACTICE. By Willard J. Graham and Wilber G. Katz. Chicago: Callaghan & Company. 1932, pp. xiii, 444.

ANGLO-AMERICAN LAW. By Charles Herman Kinnane. Indianapolis: The Bobbs-Merrill Company. 1932, pp. xvi, 589.

ARON'S NOTES ON PROOF. By Harold G. Aron. New York: The Georgic Press. 1932, pp. xxiv, 561. Price $5.50.

CASES ON BUSINESS LAW. By William E. Britton and Ralph S. Bauer. St. Paul: West Publishing Company. 1932, pp. xxi, 1219. Price $5.00.

CASES ON CONFLICT. By Ernst G. Lorenzen. St. Paul: West Publishing Company. 1932, pp. xxx, 1118. Price $6.00.

CASES ON CONSTITUTIONAL LAW. By Walter F. Dodd. St. Paul: West Publishing Company. 1932, pp. xxii, 1509. Price $7.00.

CASES ON EQUITY. By Walter Wheeler Cook. One Volume Edition. St. Paul: West Publishing Company. 1932, pp. xxi, 1222. Price $6.50.

CASES ON EQUITY. By Walter Wheeler Cook. Three Volume Edition. St. Paul: West Publishing Company. 1932. Volume I, pp. xvi, 680. Price $6.00. Volume II, pp. xv, 662. Price $6.00.

CASES ON TRUSTS AND ESTATES. By Richard R. Powell. Volume I. St. Paul: West Publishing Company. 1932, pp. xliii, 1027. Price $6.00.

CONGRESS AS SANTA CLAUS. By Charles Warren. Charlottesville: The Michie Company. 1932, pp. vi, 151. Price $2.00.

CONVICTING THE INNOCENT. By Edwin M. Borchard. New Haven: Yale University Press. 1932, pp. xxix, 421. Price $3.75.

GOVERNMENT BY THE JUDICIARY. By Louis B. Boudin. New York: William Godwin, Inc. 1932, Volume I, pp. xiii, 583; Volume II, pp. 579. Price $10.00.

HISTORY OF CODIFICATION IN TENNESSEE. By Samuel C. Williams. Johnson City, Tennessee: The Watauga Press. 1932, pp. 51. Price $1.00.

PHILLIPS CODE PLEADING. By Percival W. Viesselman. Chicago: Callaghan & Company. 1932, pp. xci, 775.

PROGRESS IN INTERNATIONAL ORGANIZATION. By Manley O. Hudson. Palo Alto: Stanford University Press. 1932, pp. ix, 162. Price $1.50.

RESEARCH IN INTERNATIONAL LAW. By Harvard Law School. Manley O. Hudson, directing. Harvard University Press. 1932, pp. xiv, 1013.

SOME PHASES OF FAIR VALUE AND INTERSTATE RATES. By James Barclay Smith. Baton Rouge: Louisiana State University Press. 1932, pp. 101.

STORY OF THE CONSTITUTION. By Howard B. Lee. Foreword by John W. Davis. Charlottesville: The Michie Company. 1932, pp. xiii, 292. Price $4.00.

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THE FAITH OF THE LAWYER*

By JUDGE JOHN J. PARKER

I greatly appreciate the honor of being invited to address you on this occasion. I have always desired to pay a visit to the state of Thomas H. Benton, that great native son of North Carolina who won distinction in Missouri and who rendered great and lasting service to our common country as a Senator from this state; and I am glad to be in the state of my friend Judge Kimbrough Stone, with whom I have been most pleasantly associated in the work of the federal judiciary, and in the city of my friend, Mr. Marion Early, for whom I have entertained a real affection since we worked together in an important litigation some years ago. Let me add that it is a genuine pleasure also to visit the city of the distinguished president of the American Bar Association. It is a pleasure to me, as I am sure it is to his confrerees of the bar, to do honor to one who has been chosen to stand at the head of our great profession.

I shall not, this evening, enter into a discussion of any of the various phases of legal scholarship which lawyers and judges delight to discuss on such an occasion. Such scholarship as I possess is embalmed and buried in the Federal Reporter, and I shall not dig it up for the purpose of displaying it here. I shall talk rather on the fundamentals of our profession, on matters which are not written except by implication in legal opinions and treatises, but which, in my judgment, are matters of the first importance in the life of our profession and of the country which we love and serve. I wish to talk with you a while about the faith of the lawyer—his attitude towards the law, towards the philosophy of America, and towards America's system of constitutional government.

It is but uttering a truism to say that this is an age of unrest and transition. The least attention to what is going on about us is sufficient to confirm the observation. Everywhere there is

*An address delivered in May 1932, before the Bar Association of the City of St. Louis.

revolt against the accepted standards in politics, in economics, in morals, in culture. More than half of the people of Europe are in the grip of dictatorships or socialistic oligarchies. India is seething with rebellion. War rages between China and Japan. Whole continents are almost without government worthy of the name. In our own country not only has our industry been stricken by the worldwide depression, so that we suffer want in the midst of plenty, but we have witnessed the growth of crime and defiance of the laws to an extent almost unbelievable. Anarchy has here and there raised its ugly head; and everywhere there is revolt against our legal and ethical standards which challenges the very existence of organized society.

What is the cause of all this? No one seems to know. Some say it is the effect of the war. This explanation does not satisfy, however, for the social unrest was with us before the war began. Instead of the war causing the social unrest, I am inclined to think that the social unrest caused the war, or at least that both are to be attributed to the same fundamental cause. The explanation of the social unrest is to be found, I think, in something more fundamental, something which goes down to the sources of conduct. It seems to me that we have been losing our faith in the standards by which men live, in spite of, or perhaps as a result of, the most splendid physical development that the world has ever witnessed.

Just a hundred years ago the first railroad was built. We had no telephones nor telegraphs nor radios nor steamships nor automobiles nor aeroplanes. Men were living very much as they lived at the time that Caesar conquered Gaul or the blessed Saviour walked the streets of the Holy City. A century is but a short space in the life of a man; and yet, within this short period man has changed not only his physical environment but his very habits of life and his processes of thought. He has done this, however, with his mind centered upon the physical; and with his splendid achievements in the realm of science and invention has come, I am afraid, a loss of spiritual insight, of faith in the spiritual truths by which men and nations live. With all of our building of colleges we have not produced a philosopher of the rank of Kant or Hegal. With all of our law schools we have not produced another John Marshall. And it may be pertinent here to inquire what is the use of traveling 200 miles an hour, if you do nothing of importance when you arrive at your destination? What is the use of being able to talk across the ocean,

if you say nothing worth listening to when you talk? What is the use of libraries and law schools, if lawyers are unable to cope with the crime wave?

The truth of the matter is that greatness, whether of men or of nations, is not physical but spiritual. When I think of the greatness that was Greece, I think not of the splendors of the age of Pericles, but of Leonidas at Thermopylae, of Plato and Aristotle and Demosthenes. When I think of the greatness that is England, it is not of a mighty London on the Thames, or of the far flung bounds of the British Empire, but of Milton and Shakespeare and Blackstone, of the Magna Carta and the Bill of Rights. The greatness of a nation consists not in armies with banners, in glittering cities, nor in coffers filled with gold, nor yet in automobiles, or picture shows, or telephones or safety razors, but in the unseen things which belong to the reason and the spirit—individual freedom, love of country, respect for law, knowledge and understanding of the forces which shape the destinies of men and nations. The trouble with civilization is that we have been so enchanted with what science and invention have wrought in the physical world that we have been losing our grip on these things. Like the foolish people of whom we are told in the Bible, we have imagined that by building a physical tower we could mingle with the gods; and confusion has come upon us as it came upon them.

The only cure, I think, for the evils of the social unrest is a spiritual cure. Our salvation will come, not in terms of physical prosperity, nor in terms of statutes or boards or institutions, but in terms of individual character, clearer vision, stronger faith. All will agree that one of the prime needs of America is a strengthening of individual character. All will agree too that we need vision, a clearer understanding by our people of the problems which confront us. But I want to talk to you, as the leaders in the life of your community, of the need for faith—of the need of preserving the right attitude towards the things that are fundamental in America's greatness.

Faith is a much abused word. Ingersoll said faith was believing something that you know is not so; but I am not using it in that sense. Faith to me is accepting as a principle of action the fundamental spiritual truths which men are prone to forget in times of stress and disturbance. Men live not by bread, but by truth; and the truth by which they live is not the truth of fact

and accident apparent to the senses, but the truth which only the reason can apprehend. You cannot even build a building with mere stone and mortar. You must bring into play the principles of mechanics and mathematics which the reason has apprehended, and the builder must have faith in them. Likewise in building a civilization, we must have an understanding of the principles upon which a civilization is builded and have faith in those principles.

The first tenet in the faith of the lawyer is faith in the law itself. The case method of instruction has marked a great advance in the teaching of the law; but there is one great danger connected with the case system. Unless that course of instruction is supplemented by a broad study of history and jurisprudence, there is danger that the law will be presented to the student not as a great and harmonious system, not as the application of eternal principles of righteousness, but as a conglomeration of special instances—a system of chance and not a system of law. It seems to me that at this time the law is suffering from something of this sort; and this has been accentuated by a pseudo-legal scholarship which seeks notoriety by cheap criticism of the law rather than the enduring fame which can come only by the hard road of study and real understanding. I do not mean of course to disparage legitimate criticism. Criticism is necessary for the correction of errors and the promotion of healthy growth. But what I wish to emphasize, and what I would have the lawyers and particularly the young lawyers to remember, is that no civilization in the history of the world has been built by critics or cynics or doubters. Nations have been built invariably by men who believed in something; and the great legal systems of the world have been the work of men who believed in the law—who believed in it, not as a musty collection of rules and forms and precedents, but as the instrumentality of justice, as man's highest achievement in his reaching after righteousness.

What is the law? Of course, we all know the old definition that the law is a rule of conduct prescribed by the supreme power in the state commanding what is right and forbidding what is wrong. The trouble with this definition is that it is description and not definition. A true conception of law can be gained only from a true conception of society. Society is not a mere aggregation of individuals. Society is an organism; and the law is the life principle of that organism—the imperative which

determines the relationship of the individual members of society to each other and to society as a whole, and which prescribes what must be the conduct of each in the interest of the common good. Accept this definition, and a number of things become clear. One of them is that the practice of the law is not a trade or a game but a profession; and that the chief function of the lawyer is to interpret for his generation the life principle of the society in which he lives. "Of the three learned professions," says Ruskin, "it pertains to the minister to teach, to the physician to heal, and to the lawyer to give peace and order to society."

In this period of unrest, faith in the law means faith that the true solution of the problems which confront society is to be found in a true understanding of the conditions and forces of modern life and in the application of true legal principles to these forces and conditions. Legal principles are as eternal as the hills, but they must be interpreted to meet conditions as conditions arise; and one of the great duties of the lawyer is to interpret the law to meet changing conditions. At this time this duty is one of surpassing importance. The problems which confront us are peculiarly problems in human relationships and their solution, if found, will be found in terms of law. There is the problem of industrial warfare. No sensible man imagines that a situation where capital and labor fight out their differences at the expense of the public can long continue. The American lawyer must work out some more satisfactory solution. There is the agrarian problems, how we may promote agriculture and maintain the independence and beauty of our rural life without resorting to socialistic experiments which will undermine the basis of free government. There is the problem of unemployment, how we may provide means of livelihood for men thrown out of employment by changes in industry or economic depression without destroying the hardihood and independence of American labor. There is the problem of our international relationships, how we may preserve the independence and integrity of our country and yet use the power of our commanding position in world affairs for the furtherance of peace and for obtaining relief from the burden of armaments. These are economic and political problems, you say? They are; but they are vital legal problems also. They involve the fundamental relationships of modern society; and their solution must come in terms defining these relationships and laying down the

rules under which society may move forward. They will be solved not in the class room or in the study, but in the open of American life by the men who understand the great principles of the law and have faith in these principles as the only means by which justice in human affairs may be attained.

And faith in the law means something else. It means the acceptance of the law as the supreme expression of the social will; and faith in the law means that we shall give it our utmost devotion, our unstinted support. When organized crime walks forth boldly and challenges the forces of government, when the underworld menaces life and property and invades the most sacred precincts of the domestic relationship, it is time for all Americans, and particularly for the lawyers of America, to uphold the law and to give all men to understand that the law is supreme. The standard in this matter was laid down for us by that great American lawyer, the immortal Lincoln, in his address on Washington. Said he: "Let every American, every lover of liberty, every well wisher of his posterity swear by the blood of the Revolution never to violate in the least particular the laws of the country and never to tolerate their violation by others." There is no place in American civilization for the criminal organizations which have terrorized our great cities; and their power will be at an end when Lincoln's conception of the duty to obey the law is accepted by our citizenship. Our profession can render no higher public service than in leading in this all important matter. Let us do it. Let us obey the law ourselves. Let us see that other men obey it. And let us drive from the portals of the profession those who would prostitute it to ignoble purposes.

The first tenet, then, in the faith of the lawyer is faith in the law. The next, it seems to me, is faith in the people. In recent years it has become fashionable to decry the faith of the fathers. We fought the war to make the world safe for democracy; and, having won the war, we awake to find that democracy is in greater danger than ever. In the hour of democracy's triumph there have arisen, on the one hand, those who deny the capacity of the people for self government, on the other, those who, prating of the rights of man, would destroy our great system of constitutional government under which alone democracy has been made workable. There is need that Americans and the lawyers or leaders of our national life renew their faith in our fundamental philosophy.

There have been throughout human history, just two ideas of government. One is the old idea of government by the favored few, by the monarch, the noble, or the aristocrat. But for ages men have dreamed of democracy—of a civilization based upon the principle of the square deal and the open door of opportunity, in which government is the expression of the popular will and its function to provide conditions under which man may reach his highest development. The highest expression of this ideal, I think, is to be found in the teachings of the Savior. The man who ate with publicans and sinners, who chose his followers for the redemption of the world from the humble fishermen of Galilee, obtained a truer view of human life than any man who has lived before or since. He saw that institutions exist for men and not men for institutions, and that the happiness of the poor and the humble is of as much concern as the happiness of the great and the proud. America came into being proclaiming this philosophy as her confession of faith. The noble words of her declaration of independence are, "We hold these truths to be self evident, that all men are created equal, that they are endowed by their creator with certain inalienable rights, among which are life, liberty and the pursuit of happiness, that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed." And America's greatness is precisely this: that she has lived this philosophy and made it workable. She is great, not because of her army or her navy, not because of her mighty cities, her fertile fields, her mines or her factories, not because of her triumphant history or because the American dollar has become the standard of value for the world; but because she has established a civilization that stands for the open door of opportunity and a square deal for every man—a civilization in which it has been possible for a poor clerk in a country store to become, as he has become, the richest man in the world—for the orphan son of a laboring man to acquire the culture and learning of the universities and to become, as he has become, the chief executive of the nation, wielding power second to no other man on earth.

Democracy, as we conceive it in America, differs from despotism and socialism in this: Despotism is an individual controlling the social business. Socialism is society controlling the individual's business. The philosophy of America demands that society control social business and allow the individual to control

his own business. In other words, democracy in America, the American philosophy of government demands individual freedom in matters which are individual just as much as it demands social control in matters which are social. In the olden days the chief danger of democracy lay in the direction of despotism. Today it lies in the direction of socialism. As our life has developed, the social element has assumed greater and greater importance, until in the minds of the unthinking the rights of the individual have been forgotten. But these rights must not be forgotten by those upon whom rests the responsibility for the progress of civilization. Socialism is not freedom, but tyranny, tyranny by the state which cramps and starves the life of the individual just as truly as does tyranny by a monarch or an oligarchy.

The greatness of America has come, not primarily from social organizations, but from individual freedom. I spoke a little while ago of the great achievements of science and invention during the past century. Have you ever stopped to think that all of this tremendous progress has come since America has been a nation, and that the pathway along almost every line of progress has been blazed by an American? And do you think that this is mere chance? I tell you nay! It is because American civilization has stricken the shackles from the spirit of the individual and has released for the benefit of mankind his genius and his energy. And it will be a sad day for this country if the spirit of man be again shackled and the door of opportunity be closed in his face. A great civilization can be kept alive only where the individual is free and where he is guaranteed the rewards of his genius and labor; and there is no greater menace than is presented by those who, in a misguided zeal for social welfare, would strike down the freedom and rights of the individual as guaranteed by our Constitution.

I shall enter into no argument with the doubters and cynics who question the fundamental faith of my country. One hundred and forty-three years of American history is a sufficient answer to them. We are confronted by problems and dangers, but we shall meet them with the philosophy upon which the greatness of America has been built, having an abiding faith in the American people, in their inherent wisdom, their inherent justice, their inherent capacity for self sacrifice and self government.

With faith in the law and faith in our people, there is one other element that I insist upon in the fundamental faith of the

American lawyer; that is faith in our government—faith in the Constitution which has preserved individual freedom and has made democracy workable for the first time in human history. I have said that democracy has been the dream of the ages, but until the American government was founded it was little more than a dream. A fatal weakness which everywhere confronted it was the tyranny of majorities. Men feared less the power of the despot than they feared the tyranny of the mob or the injustice of the demagogue. Aristides banished from Athens because men wearied of hearing him called the just — Socrates drinking the hemlock because he taught an unpopular philosophy were but extreme examples of what was thought to be the weakness inherent in this form of government. Another weakness thought to be inherent in democracy was its inability to obtain such an expression of the popular will as would be workable over a wide territory and among a diversified people with widely different customs and ideals. Hence, the idea grew that democracy was suited only to small and sheltered communities and could never be successfully applied by a great nation. Democracy in America, however, has withstood the storms of nearly a hundred and fifty years and has been successful, not in a small and sheltered community, but in a great nation whose bounds stretch from ocean to ocean and whose flag flies over distant islands of the sea. Have you ever thought why this is—why democracy has succeeded here in the face of almost universal prophecy of failure? The answer, in my opinion, is to be found in America's peculiar system of constitutional government—a government which protects the rights of individuals against the tyranny of temporary majorities, and which by its system of dual sovereignty has preserved the spirit of freedom in local self-government while allowing the development of centralized power.

American constitutional government has embodied three conceptions—the protection of the rights of the individual against the power of the state, a division of sovereignty between the general and local governments and a judiciary to stand as a bulwark between the individual and the state and to hold the general and local governments within their proper spheres of activity. Our fathers in England had developed a conception of certain natural rights as belonging to the individual—freedom of thought, freedom of speech and freedom of action—the right of the people to be secure in their houses, persons and effects

from unreasonable searches and seizures—the right to be tried by a jury of equals in open court and to be confronted by one's accusers—to have one's imprisonment inquired into under a writ of habeas corpus—not to be deprived of life, liberty or property but by the law of the land, a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. These and others of which I need not speak in this distinguished presence, guaranteed by Magna Carta, the Petition of Rights and the Bill of Rights, had come to be regarded as the rights of the Englishman, which he could assert against the power of the Crown. In our government in America we have guaranteed these to the American citizen, not only against the executive, but against the entire power of the state, so that no powerful organization, no popular majority, not even the whole people may deny them to the humblest individual.

This I regard as the greatest contribution which we have made to the science of government; but with it has come another of almost equal importance, the principle of dual sovereignty. We have given to the various localities, the states, the right to govern themselves in matters of local concern, giving to the general government power in matters of general importance, so that it may do justice between the peoples of various localities, unify the national life and protect our people in their rightful place among the nations of the earth.

But these great conceptions of individual rights and divided sovereignty would mean nothing without an institution with power to make them effective. This institution is the American Judiciary. When the state, through the legislature or the executive, undertakes action which encroaches upon the rights of the individual, or when the states invade the province of the national government or the national government the province of the states, the duty devolves upon the judiciary, in enforcing the fundamental law, of protecting the rights of the individual and of holding the various governments to their constitutional functions. In a series of great decisions, beginning with *Marbury v. Madison, Gibbons v. Ogden, McCulloch v. Maryland* and *Cohens v. Virginia,* the judiciary of America has risen to the performance of this duty and has established for the first time in history a government which is in truth a government of law and not a government of man.

I believe that this system of constitutional government is not an outworn relic of a bygone age, but that its preservation is

just as essential to the greatness of the Republic in the future as it has been in the past—that the time has not yet come when the rights and liberties of the individual may be immolated upon the altar of social despotism, or the sturdy freedom of local self government surrendered in the interest of the supposed efficiency of centralization. If I am right in this belief, and I do not doubt for a moment that I am, then one of the greatest duties which rests upon the American lawyer is to meet the attacks of those who would destroy constitutional government in America.

I haven't the time to pay my respects to those who challenge our system of constitutional government. First, there are the socialists and near socialists who would strike down the constitution because it guarantees the rights of individuals. Then, there are the organized minorities who by propaganda and intimidation seek to control the government in the interest of particular classes. And there are the doctrinaire advocates of political nostrums, whose multiplication of elective offices has weakened the executive arm of local governments, whose initiative and referendum has weakened local legislatures, and whose political election and recall of judges has crippled local judiciaries. All of them are striking at the fundamental framework upon which the greatness of the country has been built and nothing will meet their attacks successfully except an understanding of governmental principles on the part of the American lawyer and a faith on his part that our constitutional system is founded upon the rock of eternal political truth.

I confess that to me there is something sacred about the Constitution. It is sacred to me because of its history, because of the blood and the tears that have gone into its making. It is sacred because of what it is, because I believe that it embodies the fundamental principles of political truth and, as said by Mr. Gladstone, is the greatest document ever struck off by the mind and purpose of man. It is sacred because of what it means to our race, because upon its preservation depends not alone the future of this country, but the future of the liberties of mankind. In the midst of the ruin and chaos which followed the late war, this nation was able to point the pathway to sanity and honor; and she was able to do this because, and only because, her government rested not upon the whim of the moment or the fleeting approval of majorities, but upon the eternal principles of righteousness written into her Constitution as the fundamental law of the land. Let the poor man who would destroy that Constitu-

tion remember that its guarantees are his surest protection against oppression at the hands of the rich and the powerful. Let the rich man who would violate its provisions remember that it is surest safeguard against the action of the mob. Let the reformer who chafes at its restraint remember that under it we have achieved the greatest success ever attained in all the long history of men's efforts to govern themselves.

This, then, I postulate as the essential faith of the American lawyer—faith in the law, faith in the people, faith in our form of constitutional government. This must be the fundamental faith of America; and it must be the faith of the lawyer, because in the American democracy it is the supreme function of the lawyer today, as it has been since the foundation of the Republic, to guide and direct the life of the people. It was the lawyers who led us in our struggle for independence. It was the lawyers who formulated and secured the adoption of our written constitution. It was the lawyers who breathed into that constitution the life of a national existence. And it is the lawyers today who, not only upon the bench, but in the executive and legislative departments of our state and national governments are administering the government of the Republic, and who in private station as members of the bar formulate that sound public opinion which is our real source of government. To my brethren of the bar, therefore, I make the appeal that they hold fast to the faith upon which the greatness of our country has been built.

They tell us that the creed of the church was recited by the Knights Templars of old, standing and with their swords drawn as evidence of their willingness to maintain that in which they professed belief. In the same spirit I would have the lawyers of America proclaim their faith in the fundamentals of Americanism. Let each man say for himself: "I believe in a government of law; I believe that law should be the true expression of the popular will; and I believe that the law as declared by the supreme power of the state is entitled to the unquestioning obedience and support of every citizen of the country. I believe in the rights of man and in the right and the ability of the people to govern themselves, and I believe that the future greatness of America depends upon the preservation of that freedom of the individual which has ever been the glory and the genius of our people; and I believe in the American system of constitutional government, which guarantees to every citizen of the Republic liberty under the law and which preserves the freedom

of local self government while building national strength and power."

Democracy—self government—liberty, fraternity, equality—the principle of the square deal and the open door of opportunity—these have been the dreams of the past. Through the genius of the American lawyer, as exemplified in American constitutional government, they have been given an application never before realized in the history of mankind. Their future depends upon the capacity of the lawyers of this generation to hold fast to the faith, to interpret eternal principles in the light of modern conditions and to hand on to those who shall come after the liberty under the law bequeathed to us by the great lawyers who have gone before.

EXEMPTION OF LIFE INSURANCE POLICIES UNDER TENNESSEE STATUTES AND IN BANKRUPTCY

By JOSEPH A. GRADE

It is proposed in this discussion to consider the exemption of the proceeds of a life insurance policy from claims of the insured's creditors under the Federal Bankruptcy Act and the statutes of the State of Tennessee. An adequate discussion of this subject necessarily entails an inquiry as to the extent to which such proceeds are exempt, first, under the rules of the common law, secondly, under the common law as modified and changed by the exemption statutes of the State.

(a) Exemption of Life Insurance Proceeds at Common Law.

Life insurance constitutes one of the most important savings devices invented by modern society. It "represents accumulated payments by the insured which, if he dies within a limited period, result in a payment to his estate or the beneficiary under the policy, but if he lives beyond a certain period, result in his being entitled to receive from the insurer certain cash, in addition to having his insurance continued, or, in some instances, in substitution of the latter right. When this stage has been reached the policy is said to have a cash surrender value."[1] As such an accumulation of money, the cash surrender value of the policy is property and subject, except as it may be specially exempt by law, to the claims of creditors.[2] Whether such a policy is the property or asset of the insured is determined by the form of the insurance contract.

The contract may provide that the proceeds of the policy, when any are due and payable, shall be payable to the insured, his estate, or his personal representatives, or it may provide that some third person shall be the recipient of its benefits. If payable to a third person, the insured may or may not reserve to himself the power to change the beneficiary at his pleasure.

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1 Glenn, Creditors Rights and Remedies (1915), Sec. 53, pp. 40-41.

2 "Every debtor's property, except such as may be specially exempt by law, is assets for the satisfaction of all his just debts." (Shannon's Code (1917), Sec. 3985, Code of 1932, Sec. 8197. Merchants, etc. Bank v. Boreland, 53 N. J. Eq. 282, 31 Atl. 272; Stokes v. Ammerman, 121 N. Y. 337, 24 N. E. 819. Sparkman-Thompson, Inc. v. Chandler (1931), 162 Tenn. 614, at page 618.)

By the weight of authority and in Tennessee, a policy payable to the insured, his estate, or personal representatives, is a chose in action that the insured may transfer, assign, or deal with at his will.[3] Matured or unmatured, if the policy has a cash surrender value, it is an asset of the insured and can be seized by garnishment,[4] or assigned in bankruptcy[5] for the benefit of the insured's creditors.

On the other hand, a policy payable to a person other than the insured is an asset of the insured or his estate according to whether or not the insured has reserved to himself the power to change such a beneficiary.[6]

If such a reservation of control is not provided for, the designation of a third person as a beneficiary vests that person with the absolute and indefeasible property rights to that policy thereafter. Without the consent of that beneficiary, no act of the insured can affect such vested rights as long as the policy by its terms is effective. As stated by the Tennessee Supreme Court in *Simms v. Randall.*[7]

> "It is well settled in this State, and the holding here is in accord with the great weight of authority, that when a policy is issued payable to a third person whose relationship to the assured is such as to authorize the taking out of insurance for the benefit of such party, a right is at once vested which cannot be divested without the consent of the beneficiary. . . . . In the case at bar there was no right of revocation reserved, and the assured . . . . could not deprive the beneficiary of this certificate without his consent."

The case in bar involved a benefit certificate which had been issued to a member for the benefit of his sister. The by-laws of the mutual company provided for a change of beneficiary only with the consent of the appointed beneficiary. The sister died before the brother, who subsequently died without making any change in the certificate, said certificate remaining as it had originally been issued, "payable" to his sister. The court held

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3 Mutual Protection, Inc. Co. v. Hamilton (1857), 5 Sneed 268; Scobey v. Waters (1882), 10 Lea 551, 561.

4 Caruthers' History of a Law Suit (5th Ed.), p. 369; Kratzenstein v. Lehman, 42 N. Y. Supp. 237.

5 Vance on Insurance (1915), p. 406; cases cited in 50 L. R. A. 33; 16 L. R. A. (N. S.) 316. Where the policy does not have a cash surrender value, it is not an asset so as to pass to the trustee in bankruptcy. Re. Buelow (1899), 98 Fed. 86.

6 Life Ass'n v. Winn (1895), 96 Tenn. 226, 33 S. W. 1045; Simms v. Randall (1906), 117 Tenn. 543; Lunsford v. Nashville Savings and Loan Corp. (1931), 162 Tenn. 179, 35 S. W. (2nd.) 395.

7 117 Tenn. 543, 547, 96 S. W. 971 (1906). Also see Gosling v. Caldwell (1878), 1 Lea 454, 455-6.

that the sister died the owner of a vested interest in the certificate and the fund accruing on the death of the insured passed under the statute of distribution to her distributees.

In *Scobey v. Waters,*[8] a leading case on the subject in Tennessee the insurance policy was, in effect payable to the wife and children of the insured if they survived him, if not, then to his estate. The question arose whether the insured could assign the policy to a creditor so as to divest one of the beneficiaries, without such beneficiary's consent, of his interest in the policy. Such an assignment was held void, *Justice McFarland* saying,

> "We have held that the husband cannot assign a policy taken out by himself and in terms made payable to his wife and children, though it is otherwise if the policy be payable to the assured himself or to his personal representatives . . . It rests, says Judge Cooper, upon the principle, that rights are vested when the policy is issued and cannot be divested without the consent of those for whose use the policy by its terms is payable."

Thus where there is no reservation of a power by the insured to change a beneficiary of the proceeds of a policy, the moment the policy is issued, all interest and property rights in such policy are vested by operation of law in the beneficiary. The insured, at no time, has any interest in the policy. It is the property of the beneficiary who can do with it as he sees fit.[8a]

Where such a power is reserved, the law is equally well established, that the insured is never divested of his right to the proceeds.[8b] The beneficiary's rights, if they may so be termed, do not carry with them any attributes of property. At most, they constitute a mere "expectancy of benefit to be received under the contract in case he happens to occupy the position of appointee at the time of the death of the insured."[9] This is the law of Tennessee. In *Life Ass'n v. Winn*[10] the Supreme Court of Tennessee said,

> "Under such a policy [where the right to change the beneficiary is reserved by insured] the beneficiary acquires no vested interest until the death of the assured occurs. Until this event takes place, owing to the right of revocation, which is, by the

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8 78 Tenn. 551, 554-555 (1882).

8a Southern Life Ins. Co. v. Booker (1872), 56 Tenn. 607; Scobey v. Waters (1882), 78 Tenn. 551; Ewing v. Coffman (1883), 80 Tenn. 79; D'Arcy v. Mutual Life Ins. Co. (1902), 108 Tenn. 567, 69 S. W. 768; Simms v. Randall (1906), 117 Tenn. 543, 96 S. W. 971; Elledge v. Sumpter (1917), 140 Tenn. 11, 203 S. W. 344.

8b Life Ass'n v. Winn (1895), 96 Tenn. 224, 33 S. W. 1045; Handwerker v. Diermeyer (1896), 96 Tenn. 619, 36 S. W. 869; Lunsford v. Nashville S. & L. Corp. (1930), 162 Tenn. 179, 35 S. W. (2nd) 395.

9 Vance, *supra*, p. 399.

10 96 Tenn. 224, 227, 33 S. W. 1045 (1895).

> condition, reserved to the assured, the beneficiary has a mere expectancy, depending on the will and act of the assured. . . . . As said by the Court of last resort in New York: 'Where the right of the payee has no other foundation than the bare intent of the insured, revocable at any moment, there can be no vested right in the named beneficiary any more than in the legatee of a will before it takes effect.' In such a case, 'the designation of the beneficiary is in the nature of an inchoate or unexecuted gift, revocable at any moment by the donor and remaining wholly under his control.' (Smith v. N. B. Society, 123 N. Y. 85)."

Consequently, where control of the ultimate disposition of the policy is not surrendered, the policy remains an asset of the insured, which is subject to garnishment or the claims of creditors in bankruptcy.

Summing up the general principles of the law relevant to the determination of the question of whether a specific insurance policy, which policy has a cash surrender value, is an asset of the insured and available to creditors *first,* where the proceeds of the policy are payable to a beneficiary, with no power to change that beneficiary being reserved, the insured has no property rights in such policy; *second,* where the power to change the beneficiary is reserved, the proceeds constitute an asset of the insured's estate and, *lastly,* where the policy is payable to the insured, his estate or personal representative, the policy is property of the insured. In the latter two instances, the proceeds are obviously property available for creditors.

(b) Exemption of Life Insurance Proceeds in Bankruptcy.

To the extent, then, that the proceeds of a life insurance policy, payable to the insured, his estate, or personal representatives or of a policy which names a beneficiary who can be changed at the insured's pleasure, are assets of the insured's estate, to that extent are such proceeds available to the claims of creditors, unless specially exempt by statute. This is the position taken in sections 70 (a) and section 6 of the Federal Bankruptcy Act. Section 70 (a) provides that:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification, ... shall in turn be vested by operation of the law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except insofar as it is to property which is exempt, to all . . . . (3) powers which he might have exercised for his own benefit, but not those which he might have exercised for some other person, ... (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process

against him. **Provided,** that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

Section 6 of the Bankruptcy Act provides that:

"This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or greater portion thereof immediately preceding the filing of the petition."

It is evident that section 70 (a) does nothing more than embody in its terms the common law doctrine which dedicates to the creditors for realization all property that the debtor himself could have realized on.[11] As stated by Mr. Justice McKenna in *Cohen v. Samuels*:[12]

"Regarding the section [70 a] in its entirety there would seem to be no difficulty on its interpretation, but we are admonished by the decision of the circuit court of appeals and its reasoning, and also by the arguments of counsel, that there are considerations which give particular control to the proviso and distinguish between insurance policies and other property which the bankrupt can transfer or which can be levied upon and sold under judicial process against him. (Subdivision 5.) We have given attention to those considerations and feel their strength, but they are opposed by other considerations. It might indeed be that it would better fulfill the protection of insurance by considering the proviso alone and literally, regarding the policy at the moment of adjudication, and, if it be not payable then in words to the bankrupt—no matter what rights or powers are reserved by him, no matter what its pecuniary facility and value is to him—to consider that he has no property in it. But we think such construction is untenable. The declaration of subdivision 3 is that 'powers which he might have exercised for his own benefit' 'shall in turn be vested in the trustee': and there is vested in him as well all property that the bankrupt could transfer, or which, by judicial process, could be subjected to his debts, and especially as to insurance policies which have a cash surrender value payable to himself, his estate or personal representative. It is true the policies in question here are not so payable [being payable to certain relatives of the insured bank-

11 Glenn, *supra*, Secs. 25-27, pp. 22-24.
12 245 U. S. 50, 52-53, 62, L. Ed. 143, 145 (1917).

> rupt] but they can be or could have been so payable at his own will and by simple declaration. Under such conditions to hold that there was nothing of property to vest in a trustee would be to make an insurance policy a shelter for valuable assets, and, it might be a refuge for fraud."

It follows, then, that under the terms of section 70 (a), in a common law jurisdiction, where the policy is payable to a beneficiary, with no power to change the beneficiary being reserved, such proceeds are exempt from the claims of creditors, for as we have seen, all property rights in such policy, are immediately vested in the beneficiary on its issuance.[12a] If such a power is reserved, or where the policy is payable to the estate, the insured or his legal representatives, section 70 (a) operates to vest the trustee with the right to the proceeds on the filing of the petition in bankruptcy. On the other hand, where the common law principles have been modified and varied by state exemption laws, section 70 (a) is limited by section 6 of the Bankruptcy Act so that, in order to determine whether the proceeds of a particular policy are exempt in bankruptcy, the insurance exemption laws of the state in which the petition is filed must be considered.

In Tennessee, the first statute to limit the common law rights of creditors to the insurance proceeds of their debtors was the Act of February 2, 1846,[13] the substance of which became 2294[14] and 2478[15] in the Code of 1858.

Section 2294, which was found in the chapter of the Code entitled "Of the Administration of Estates" provided that:

> "A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors."

Section 2478 provides that:

> "Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children; and the money thence arising shall be divided between them according to the law of distribution, without being in any manner subject to the debts of the husband, whether by attachment, execution, or otherwise."

These two sections, together with the Act of 1875[16] providing that:

12a See note 8a.

13 Acts 1845-6, p. 327, c. 216.

14 Shannon's Code (1917), Sec. 4030. It seems that this section is omitted from the 1932 Code.

15 Shannon's Code (1917), Sec. 4231, Code of 1932, Sec. 8456.

16 Shannon's Code (1917), Sec. 2265. This section does not appear in the Code of 1932.

> "When policies of insurance are effected by any person on his life, for the benefit of his wife, ... the creditors of the person thus insuring shall have no claim on the proceeds of the policy and the same shall inure to the persons for whose benefit the insurance was effected."

And the Act of 1925,[17] providing:

> "That the net amount payable under any policy of life insurance or under any annuity contract upon the life of any person heretofore or hereafter made for the benefit of, assigned to, the wife or children or dependent relatives of such persons, shall be exempt from all claims of creditors of such person arising out of or based upon any obligation created after the passage of this Act, whether or not the right to change the beneficiary is reserved by or permitted to such person."

have been construed as evidencing the intention of the Tennessee legislature to exempt the proceeds of all life insurance policies, before and after the death of the insured,[18] which would, in the absence of exemption statutes, pass to the creditors under section 70 (a) of the bankruptcy act.[19]

It is clearly evident from even a casual reading of sections 2294 and 2478 that by their terms and contexual positions in the Code, they are operative only after the death of the insured. The late Justice Sanford, who as district judge for the Eastern Division of Tennessee, construed these provisions in the case of *In re Moore,* (1909) 173 Federal 679, and overruled a petition to review an order of the referee adjudging that two valuable insurance policies taken out by the bankrupt on his own life, one policy payable to his estate, the other to himself, were exempt under sections 2294 and 2478, in this connection said:[20]

> "There is nothing in either of these statutes indicating that it was intended to create any exemption, even in favor of the wife and children, during the life of the husband. On the contrary, section 2478 by its terms applies only in case of death of the husband and provides for the division of the proceeds according to the law of distribution. And while section 2294 does not in terms refer to the husband's death, the fact that it was intended to apply only after his death is shown, not merely by its being found in the chapter relating to the administration of estates, but also by the provision that the 'insurance shall inure to the benefit of the widow and next of kin, to be distributed as personal property'; such provision being manifestly applicable only after the husband's death."

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17 Public Acts of 1925, Chapter 113; Code of 1932, Sec. 8458.

18 In re Stansell (1925), 8 Fed. (2nd) 363. Dawson v. National Life Ins. Co. (1927), 156 Tenn. 306, 300 S. W. 567.

19 Holden v. Stratton (1905), 198 U. S. 202, 49 L. Ed. 1018.

20 p. 681.

To support his opposite contention, the bankrupt, Moore, had apparently relied on the case of *Harvey v. Harrison*,[21] a case decided in 1891, where the Supreme Court of Tennessee made the incidental remark that:

> "If the insurance had been made payable to Harrison's estate and so continued, the creditors could not have touched it before or after death."

This case was peremptorily dismissed by Judge Sanford as not in point on its facts.[22]

The *Moore* case, consonant with well defined principles of common law, and refusing to extend the operation of sections 2294 and 2478 before the death of the insured, merely reiterated the fundamental principle already noted that whatever property the debtor can dispose of in his lifetime is property available for creditors.[23] In 1925, however, in *In re Stansell*[24] the District Court for the Western Division of Tennessee refused to follow the Moore case on the ground (1) of the dictum in the *Harrison* case and (2) that, granted sections 2294 and 2478 were operative only after the death of the insured, by the Act of 1875, all policies exempt after death were also exempt from the claims of creditors in the lifetime of the insured. In that case the court affirmed an order of the referee holding that the cash surrender value of certain life insurance policies payable to the bankrupt's wife were exempt under the laws of Tennessee.

The statement in the *Harrison* case has been shown to be unfounded in authority and utterly irrelevant,[25] and it is seriously doubted whether in the Act of 1875, the legislature intended to do anything more than declare in part the extended rule of the common law that where the policy is payable to a certain person, subject to no condition, title to the policy is vested in that person upon its issuance, even though the policy remain in

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21 89 Tenn. 469, 473, 13 S. W. 1083, 1084 (1891).

22 "It is true that in the case of Harvey v. Harrison, involving a contest between the creditors of Harrison and his widow as to the proceeds of insurance taken out by him upon his life and payable to his wife as the beneficiary, the court said, incidentally, 'If the insurance had been made payable to Harrison's estate, and had so continued, the creditors could not have touched it before or after his death. . . . . This, however, was merely an incidental reference, entirely obiter, having no reference to the question directly under consideration, and made without any statement of the reasons upon which it is based. Under these circumstances, I cannot regard this dictum as controlling the present case.' Sanford, J., in *In re Moore*, supra, at page 683. An additional consideration is the fact that as no power to change the beneficiary was reserved in the policy, the widow's rights to the proceeds vested irrespective of the exemption statute. See note 8a."

23 See note 11.

24 8 Fed. (2nd) 363 (1925).

25 See note 22.

possession of the insured.[26] This doubt is further reinforced by the construction placed on the Act of 1925, which not only embodies the Act of 1875, but is broader in its effect.

It was contended in the case of *Lunsford v. Nashville Savings and Loan Corp.* (1931) 162 Tenn. 179,[27] that under the terms of the Act of 1925 that "where a person effects insurance on his life for the benefit of his dependent relatives he cannot thereafter substitute another beneficiary, even though such right is provided in the policy, and thereby deprive them of the proceeds of the policy upon the death of the insured." Overruling such a contention, the court said:[28]

> "We think the purpose of the Act is expressed in the caption, namely: to exempt proceeds of life insurance policies from creditors. The legislature was dealing with the right of creditors to appropriate life insurance and not with the power of the insurer and insured to contract with respect thereto. **Nor was the law making body undertaking to clothe dependents with any vested interest in the policy or its proceeds.**"

Certainly if, under the Act of 1925, no vested interest in the policy or its proceeds is conferred on the dependents, it is difficult to see how the court in the *Stansell* case could have construed the Act of 1875, which is much narrower in scope than the Act of 1925, to vest such interest in the beneficiaries.

Any possible appeal from the decision in the *Stansell* case was forestalled by the ruling of the Tennessee Supreme Court in *Dawson v. National Life Insurance Company,*[29] where on the same set of facts as the *Stansell* case the same doctrine was laid down. The *Stansell* case and the Acts of 1875 and 1925 were not mentioned in the *Dawson* case, the court finding a sufficient basis for extending the insurance exemptions to the lifetime of the bankrupt in the language of sections 2294 and 2478, as construed by the dictum in the *Harrison* case. In the words of the court:[30]

> "The statute expressly provides, in conclusive language, that insurance effected by a husband on his life shall not be subject to his debts. The fact that the statute names his widow and children as distributees in no sense supports the insistence that the policy becomes exempt from creditors only upon the death of the insured. The statute does not so provide, and to give it that

26 Vance, *supra*, p. 391.
27 Same case 42 S. W. (2nd) 210.
28 At p. 181.
29 156 Tenn. 306, 300 S. W. 567 (1927).
30 Pages 310-311.

> construction would destroy the very purpose the legislature had in mind in its enactment, viz: to enable a husband and father to provide a fund in his lifetime which, upon his death, would go to his widow and children, so that they would not become public dependents. If creditors could impound and appropriate the insurance the day before the death of the insured the object of the statute would fail."

Apparently settling the law in Tennessee, it is submitted that the *Dawson* case is wrong (1) on principle and (2) public policy.

We have seen that the proceeds of all life insurance policies of which the insured has the power of ultimate disposition, by the rules of the common law, constitute assets of the insured. Sections 2294 and 2478 only operate to exempt the proceeds of such policies from the claims of the creditors after the death of the insured, as would have gone at common law to the creditors despite the death of the insured.[31] Even the court in the *Stansell* case recognizes this, for the basis of its decision in extending the exemptions set out in section 2294 and 2478 to the lifetime of the insured, is primarily the Act of 1875. The Act of 1875 could not have vested the beneficiaries with any right to the proceeds of a life insurance policy in the insured's lifetime for, even after the passage of the Act, not only could the insured dispose of such policies as he saw fit,[32] but the Act of 1925, much broader than

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31 In Rison v. Wickerson (1856), 3 Sneed 565, in construing the Act of February 2, 1846, Judge Caruthers, at pp. 568-70 said:

"It would be more difficult to meet this argument, if indeed it could be successfully met at all, if the policy had expressly provided that, in event of death, the sum secured should be paid to the widow and children. The case is to be decided upon the construction of the act alone. Its phraseology is very strong and forcible, in favor of the rights of the widow, in exclusion of creditors. But it must have given to it a sensible construction, promotive of the intention of the legislature. Without this act the insurance money would go to the personal representative of the deceased, and constitute assets in his hands, subject to the payment of debts. Before the act, creditors would have preference over the family; but since, the latter have the exclusive claim to the particular fund.

"The wisdom and humanity of the law may be admitted, but surely it was not intended to divest the insured, while he lived, of the right of disposing of his own as he pleased, so as to bind those who might come after him and stand in his shoes.

"We think that nothing more is intended by the act, and that no other operation can be given to it, than to prevent a fund of this kind from passing into the hands of the administrator with the other effects of the insured, in favor of the widow and children, or, in other words, to prefer them to creditors to that extent. But it can only apply where the claim remains undisposed of by the deceased. His power over it during his life is not at all affected by the act, but continues as ample and unrestricted as before.

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"It cannot be supposed that the legislature intended to deprive poor men of this mode of obtaining credit, and thereby getting into business and making a living for themselves and families."

32 Williams v. Carson (1876), 68 Tenn. 516; Gosling v. Caldwell (1878), 69 Tenn. 454 at pages 455-6; Tennessee Lodge v. Ladd (1879), 73 Tenn. 716; Union Trust Co. v. Cox (1901), 108 Tenn. 316, 67 S. W. 814; Nashville Trust Co. v. Bank (1910), 123

the Act of 1875, was expressly construed as not vesting the beneficiaries with any rights to the policy or its proceeds in the insured's lifetime.[33] It is anomalous to urge that the beneficiary has no vested interest in the proceeds of a life insurance policy, and yet prevent the creditors of the holder of such vested interest from availing themselves of it in satisfaction of their claims.

Granted that the established purpose of the legislature is to enable a husband and a father to provide a fund for his dependents and that public policy requires that the exemption statutes be so liberally construed that the fund created go on the insured's death to his dependents, yet, it must be confessed that a public policy which prevents a creditor from impounding and appropriating the insurance the day before the death of the insured, and, in turn, sanctions the assignment or disposition of such insurance by the insured the day before his death, is a bit inconsistent—a bit too flexible and too liberal.

It is submitted, then, that the only effect of the exemption laws of Tennessee is to limit the operative effect of section 70 (a) of the Bankruptcy Act to the lifetime of the insured—any other construction of these laws is not only illogical but impractical and conducive to fraud. Money can be invested in life insurance policies, the control of which the insured need never relinquish. A petition in bankruptcy is filed and by virtue of section 6, the doctrine of the *Dawson* case would apply to exempt the proceeds of these policies. In due course, discharged of his debts, the insured can proceed to convert the proceeds of his exempt policies into cash, or substitute an utter stranger as beneficiary instead of his wife, children or dependent kin, who conveniently were made beneficiaries pending bankruptcy.[34] Too tempting an avenue of fraud is afforded by such a state of the law.

The very purpose the insured has in mind, when he takes out a policy payable to himself, his estate, or his legal rep-

Tenn. 617; Lunsford v. Nashville Savings and Loan Corp. (1930), 162 Tenn. 179, 35 S. W. (2nd) 395; Sparkman-Thompson, Inc. v. Chandler (1931), 162 Tenn. 614.

33 Lunsford v. Nashville S. & L. Corp. (1930), 162 Tenn. 179, 35 S. W. (2nd) 395.

34 In this connection, consider the remarks of Judge Sanford, in the *Moore case*, supra, at page 682:

"It was clearly not intended by these statutes to allow a debtor to invest money equitably belonging to his creditors in policies of this character, in such a form that the beneficial interest would not be vested beyond his control for the benefit of his wife and children but would be retained in a form convertable at any time to his own uses and capable of being disposed of for his own benefit, and, at the same time, to insist that such policies were exempt in his own favor, from the claims of his creditors, at a time when his wife and children had acquired no vested interest therein."

resentatives or where such policy is made out to his dependents and he reserves the power to substitute beneficiaries at his will, is not to dedicate, irrevocably, the proceeds to his wife, children or dependent kin, but to retain such policies as his own assets, capable of being disposed of as he deems proper. And such property should, unquestionably, be available to creditors. A construction which would exempt the proceeds of such policies in the insured's lifetime affords the insured the opportunity to make investments for his own benefit free from the claims of his creditors. Such a construction could never have been the purpose of the Tennessee legislature.

THE PERSONNEL OF THE BAR

By WILL SHAFROTH,

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The general opinion of the legal profession held by laymen is not flattering to the lawyers. Carl Sandburg has put it into poetry in the following words:

> "The work of a bricklayer goes to the blue.
> The knack of a mason outlasts a moon.
> The hands of a plasterer hold a room together.
> The land of a farmer wishes him back again.
> Singers of songs and dreamers of plays
> Build a house no wind blows over.
> The lawyers—tell me why a hearse horse snickers
> hauling a lawyer's bones."

Much of the reason for this lies in the inefficient manner in which our law machinery works. Partly the opinion is due to widely advertised knaves and Lilliputians in the profession. These two causes are not as far apart as they might seem, and there is much truth in the words of Chief Justice Hughes that "The chief defects of the administration of justice lie in men rather than in method."

The question of selecting the personnel of the bar is perhaps the most vital one which we must face today. Not only do the men whom we are currently admitting to our ranks become officers of the Court charged with the task of righting wrongs and guiding the ways of our people, they will soon be sitting in our courts of justice deciding the fates alike of ordinary citizens and of gigantic financial combinations. The course of justice in the future is being determined by the men who are receiving licenses to practice law at this time. The subject of legal education may seem to be remote from a discussion of the kind of men whom we want for lawyers. As a matter of fact it is closely allied. When Elihu Root proposed the present standards of the American Bar Association he had very distinctly in mind the necessity of securing men of high character. If proof is needed for this, it can be found in his address before the Conference of Bar Association Delegates met to consider those standards in 1922. I can quote only a small fragment from that eloquent speech:

> "I do not want anybody to come to the Bar which I honor and revere, chartered by our government to aid in the administration of justice, who has not any conception of the moral qualities that underlie our free American institutions—and they are coming, today, by the hundreds.
>
> "I know of no way that has been suggested to assure to any considerable degree the achievement of such a view on the part of aspirants to the Bar except this suggestion that they should be required to go to an American college for two years and mingle with the young American boys and girls in those colleges, be a part of their life, and learn something of the community spirit of our land, at its best; learn something of the spirit of young America in its aspiration and its ambition, seeking to fit itself for greater things. That is what they will get in an American college."

The requirement of two years of college education before the study of law which those standards set forth is undoubtedly designed partly as a test of character. The experience of character committees throughout the land bears this out. The late Walter Douglas, Secretary of the Pennsylvania Board of Bar Examiners, stated that in that State while the number of college graduates who were taking the Pennsylvania bar examinations outnumbered the non-college men about four to one, that the non-college men who were refused admission by local committees on character grounds outnumbered those with college training in almost the same proportion. A somewhat similar experience in New York was one of the reasons for the addition of the two-year college rule in that State. Unquestionably there is something about the American college which tends to develop a spirit of fair play and sportsmanship at odds with unethical conduct.

There are of course other essentials which it is important to test if we are to get the right type of men for lawyers. We must test, if we can, aptitude. If we could adequately measure this and character we would almost have solved the problem, because if a man has the aptitude for understanding and interpreting the law, and the kind of character which would prevent him from deceiving his client as to how much he knew, it would seem fairly safe to trust him to acquire the essential understanding of the fundamental principles which every lawyer must have. Unfortunately, however, aptitude tests are in their infancy, and so little is known about the methods of exploring character that only when a man is guilty of some distinct overt act of an almost criminal nature do we feel justified in preventing him

from passing through the portals of admission. But if he can pass through two years of a standard college course, or if he can pass an examination showing he has the equivalent of that education, and if he can then successfully complete three years of work in a good law school, he has after all shown some aptitude for law. This will not guarantee that he will be a successful practitioner, but it is at least some assurance, which is further fortified when he passes the bar examinations. It is unnecessary to dwell on the increasing complexity of our laws. Every member of the profession and every member of the public knows it. This increasingly intricate mechanism of justice requires increased intelligence and understanding. It is not too much to ask some college education and law school training for the man who undertakes to advise his client about the law.

Lawyers are notably conservative, and changes in their traditional thinking take time. The lawyers of our fathers' day were educated principally in offices, and the number of men who went to college in those times was but a fraction of what it is today. That the tradition of learning law by the apprenticeship method is a thing of the past is shown by the fact that not over five percent of our applicants for the bar are now solely office trained. It has been a good deal more difficult to get over the idea that no college education is necessary and that any kind of a law school is sufficient properly to equip any kind of a law student. But we *are* getting over it. The standards recommended by Elihu Root's committee were adopted in 1921. Kansas was then the only State requiring any college education. Today in 19 jurisdictions where over half our lawyers and over half our population are to be found, substantially all candidates for admission must have either two years of college or an equivalent education, to be tested by examination. Leaders of our bar are almost unanimous in their belief in the wisdom of this qualification. It still remains an anachronism that in this day and time, with facilities for education so widespread, in the nine States of Arkansas, Georgia, Florida, Indiana, Nevada, North Carolina, Oregon, Utah and Virginia, a man who can pass the bar examination will be admitted to the practice of law even though he has never had even the beginnings of a high school education, much less a college training.

Chester Rowell, well known newspaper writer prominent in California politics, and eminent political scientist, makes the following remarks about the bill passed last year by the Cali-

fornia legislature giving the power to the Board of Governors of the State Bar, with the approval of the Supreme Court, to fix qualifications for admission not exceeding, as far as general education is concerned, the requirement of high school education:

> "From now on, in California, the law may gradually become a learned profession. Governor Rolph has signed the bill requiring high school graduation or its equivalent for admission to the bar examination. Thus we shall have lawyers with the minimum of education demanded of motor bus drivers, and half as well educated as the average service station attendant. They will have had a fraction of the preparation required for physicians, engineers, school-teachers, dentists, drug clerks and librarians, and about that of the printer's devil. That is progress. We long ago recognized that there is no such thing as a 'right' to practice medicine or pharmacy. The only right is that of the public not to have poisons prescribed or compounded by unskilled persons. Some day we may discover that justice is quite as important as health, and that dealing professionally with either is not the common right of ordinary men. No matter how many ordinary people there are in the world there should be no place for ordinary lawyers. Unless a lawyer has qualifications to which most of us cannot attain we should be protected against him."

When laymen speak in this way of the rules laid down for the lawyer's craft, it is time that we of the bar were giving the most serious thought to the justice of these comments. There has been a tendency among lawyers to say, "It does not matter what qualifications are required of candidates. A bar examination is given to them and if they can pass this bar examination they know enough to practice law. If they can't pass it, then the public and the bar are protected." The flaw in this argument is that it assumes the infallibility of bar examinations.

It is true that bar examinations are continually getting more strict. In 1928, 54 percent of the candidates in the United States passed; in 1929, 51 percent; and in 1930, 47 percent. During the last year we have such startling results as the failure of 80 percent of the applicants in a California examination, of 81 percent in Massachusetts, of 81 percent in Missouri, 74 percent in Utah and 75 percent in Rhode Island. With the organization of the National Conference of Bar Examiners and the exchange of mutual information between the boards, the caliber of examinations in many states is improving. But in spite of this fact, our experience thus far shows that only a comparatively small number are ultimately barred. A survey from five States demonstrates that of all the candidates who took the examina-

tions in 1922, 1923 and 1924, the following percentages eventually passed and were admitted to the bar: New York, 95 percent; Pennsylvania, 93 percent; Colorado, 89 percent; Illinois, 86 percent; California, 83 percent. In Nebraska and Ohio it was reported that 90 percent of the examinees eventually get through. This is excellent proof of the fact that we can not depend on bar examinations alone to winnow the wheat from the chaff. Preliminary qualifications are essential. In the field of character something can be accomplished by a thorough investigation of applicants from this viewpoint. Pennsylvania leads the way in the thoroughness and efficiency of its methods in this particular, but even in that State less than five percent are refused admission on character grounds. A suggestion which has met with much favorable comment is that of a conditional admission. The candidate after a certain period of practice is required to submit his record to a character committee, which on the basis of how he has conducted himself during those years of practice, decides whether or not he has shown himself fit to be a full-fledged member of the bar. If he is refused that privilege, he is not permitted to practice after his conditional license expires. Judge William Clark of the United States District Court for the District of New Jersey, has put this into effect in his Federal Court.

In Tennessee, the present requirements of a high school education followed by at least two years of law study put that State above the lowest category, but those rules still fall considerably short of the qualifications adopted by the nineteen States having the majority of our population, as far as general education is concerned, and in a lower class than 34 States which require three or more years of legal training. Of the law schools in the State, two, the University of Tennessee and Vanderbilt, are approved by the American Bar Association, are members of the Association of American Law Schools and require preliminary education of two years of college, and a full time law course of three years. Two other full time schools having a one year course will be compelled to raise this to two years when the recently promulgated rule of the Supreme Court becomes effective. In addition, the Annual Review of Legal Education published by the Carnegie Foundation for the Advancement of Teaching lists four night law schools, three of which have a three-year course but no preliminary requirements of

college education, and one of which has an afternoon and evening course of two years which may, however, be completed in one.

The following figures show the numbers taking the bar examinations and the numbers passing since 1927:

	No. Taking	No. Passing
1928	271	176 (65%)
1929	332	246 (74%)
1930	306	214 (70%)
*1931	117	55 (47%)
1932	371	175 (47%)

*1931—Results available for only one examination.

It would appear from these figures that until recently the examiners have been somewhat more lenient than in other States. Tennessee has a larger population per lawyer than the average for the United States. In 1920, with 2,040 lawyers it had 1,146 individuals for every member of the bar, while in 1930 the number of lawyers which was 444 greater, had increased faster proportionately than the population, so that according to the last census there were 1,053 persons to every member of the legal profession. The tendency of the bar to gravitate to the cities is shown by the fact that Memphis, with 440 lawyers, has a population of 575 per lawyer, as against 360 lawyers and a population per lawyer of 451 in 1920. Nashville with its 272 lawyers, shows a population-lawyer ratio of 556 in 1930, as against a ratio of 629 for its 188 lawyers in 1920. It appears that over the last five years the State has been getting an average of 214 lawyers per year, or 8.6 percent of the number shown by the 1930 census. Whether or not this is more than can be absorbed is something which the members of the State Bar are better able to judge than the author. Certainly, however, it shows the need for careful selection, including adequate preliminary qualifications, followed by a further checking by means of the bar examination and a conscientious investigation of the character of applicants.

In the biography of Aaron Burr, it is told that every barber in Washington was a staunch Federalist, and denounced the Democrats as a menace to the nation. The reason for this, it appears, was that the Federalists wore their hair in long queues, carefully powdered, which often required the barber's attention, while the Democrats wore short hair, and no powder, and got along fairly well without any barber. The story is told that one of the barbers exclaimed, "Dear me, surely this country is

doomed to disgrace and shame! What Presidents we might have, sir. Just look at Daggett of Connecticut or Stockton of New Jersey—what queues they have got, sir. But that little Jim Madison, with a queue no bigger than a pipe stem, sir, it is enough to make a man foreswear his country!"

The tendency for a man's views to be dictated by his own interests has not been confined to any one age. But in this respect the lawyers have been singularly free from blame. They have never put their own interests above those of their community or their country. The movement to restrict admissions to the bar to those who can prove themselves to be qualified is not in any way selfish. It is not done with a desire to preserve the legal business in the hands of those who already have it. It is not done with the desire to limit the numbers of the profession so that the existing scale of fees may be maintained. Its purpose is to protect the public, to insure them competent legal service, and to fortify their faith in the administration of justice. This has never been better put than by the Honorable Elihu Root at the same meeting above referred to when he said:

> "One concluding thing: What is all this for? What is the vital consideration underlying all the efforts of the American Bar? We are commissioned by the State to render a service. What we have been talking about is the way of ascertaining or of producing competency to render that service. Upon what standard of judgment shall we consider and attempt to do that? Of our rights? Of the rights of the young men who come here crowding to the gates of our Bar? Is it a privilege to be passed around, a benefit to be conferred? Is there any doubt that that standard is inadmissible? Do we not all reject it?
>
> "The standard of public service is the standard of the Bar, if the Bar is to live; the maintenance of justice, the rendering of justice to rich and poor alike; prompt, inexpensive, efficient justice."

SHOULD THE STANDARDS FOR BAR PREPARATION BE MORE EXACTING?

By JOHN H. WIGMORE

My answer is, They should.

Any one familiar with today's conditions in law and justice must find himself in accord with this conclusion, after careful reflection. The law has ceased to be static, as it was when I was admitted, forty-five years ago. It is now in a state of flux. Economic and social conditions are changing, and Law must adapt itself to the change.

This means that the law student today has a double task and burden. He must study and learn the law as it has been, and he must look ahead and prepare to shape the law as it is becoming. In all the best schools the students are being set to this double task. The law student of today will be the law reviser of tomorrow. He cannot do this without being both a master of the law as it has been and a predicter of the law as it is going to be. Three years of thorough law study are short enough for this task.

More than this, he cannot achieve his task intelligently by the law alone. The law follows social and economic conditions. He must have a working knowledge of other sciences. When one looks about and sees the innumerable new methods in transportation, banking, production, invention, medicine, social control, and engineering,—when one peruses the long lists of special college courses in all the social and economic sciences,—when one sees the business man himself going to schools of commerce,—he realizes that the lawyer, if he is to maintain his pristine position as a leader in the community, must at least know as much as these men of other occupations. He cannot guide them with his law unless he knows what they know, as well as his law. And to do this, he must prepare by going to college.

Those good citizens who recoil at requiring a college education, and deem anything more than a high school education to be undemocratic, are still living in the days of their own youth. For they forget one startling fact of change. That fact is that a college education today bears only the same relation to the total population that a high school education bore a generation ago.

In the national Census of 1910, some 200,000 youths were recorded as being in colleges; about 150,000 of these were young men. Today there are nearer 1,000,000 in college. It is, therefore, today no more undemocratic to require a college education than it was in 1910 to require a high school education. Any bar which today is content to require only a high school education is still living by the standards of 1910.

The medical man today is everywhere required to spend in preparation as much time as is required by the very highest law school standards, viz. seven years,—and that is more than is required (five years) by even the American Bar Association standard. Ten years ago the American Bar Association standard was in advance of most law schools. Today it is equalled by all the good ones, and falls short of that of the best ones. The least that any bar can do is to measure up to the American Bar Association standards.

Is our profession to be outrun by the medical profession? Where is our leadership of two generations ago? It is slipping. In the days of our near forefathers, the lawyer was the best educated man in town. Everybody looked up to him.

Is he now? And do they?

How can we hold fast to our intellectual leadership?

BAR ASSOCIATION SECTION

ESTATES BY ENTIRETY; THE EFFECT OF DIVORCE THEREON; AND ESPECIALLY MAY A TRIAL COURT OF TENNESSEE AWARD ALIMONY OUT OF REAL ESTATE HELD BY HUSBAND AND WIFE AS TENANTS BY ENTIRETY?

By P. B. MAYFIELD

The above mentioned troublesome estate has been the subject of so much excellent judicial reasoning and well drawn distinctions that we are somewhat surprised that we do not find a direct answer to the latter question, in so far as the inquiry may relate to whether out of such estate alimony may be allowed to the wife; but it has been definitely determined that there is no provision in Tennessee for allowance of alimony to the husband in any case.

Of course, the well understood legal theory behind this estate is that by an absolute divorce the unity of husband and wife, on which an estate by entirety depends, being thereby destroyed, the unity of persons, a fiction of the common law, is deemed to be resolved by the divorce into two distinct individual persons having in the future no relation to each other; and with the change in their relations a corresponding change of the tenancy dependent upon the previous relation must follow. As they cannot longer hold in joint seizen, they must hold by indivisable moieties; and so it is the prevailing rule that by divorce the estate by entireties is converted into tenancy in common.

Perhaps our most recent case is that of *Brown v. Brown*,[1] heard at Nashville at the December Term, 1929. The husband obtained divorce upon the ground of adultery, and the Knox County Court of Juvenile and Domestic Relations decreed to him certain real estate which he and the wife owned as tenants by entirety. The Court of Appeals reversed the decree of the trial court and vested title in the two as tenants in common. The Supreme Court held that under Chapter 126, Acts of 1919, a married woman holds her property as a femme sole, but that said Act preserves tenancy by entirety and the husband's right of curtesy. Section 4225 Thompson's-Shannon Code, providing

1 160 Tenn. 685.

that when a marriage is dissolved at the suit of the husband and defendant is owner in her own right of lands, his rights and interests to rents and profits and in personalty reduced to possession shall not be impaired, was also construed by the Supreme Court and in effect held to be a nullity, since the passage of Chapter 126, Acts of 1919, providing that a married woman holds and controls as a femme sole. In line with former cases it is herein also held that "An estate by the entirety is converted into an estate in common by the divorce of husband and wife owning such estate." The Court also definitely held that "There is no provision in our law for decreeing alimony to the husband upon divorce granted to him." Action of the Court of Appeals in reversing the lower court and vesting title in husband and wife as tenants in common is affirmed.

Since the aged case of *Ames v. Norman*,[2] heard in the Chancery Court at Lebanon, in 1855, the holding of our Court is uniform that a decree of divorce makes husband and wife, formerly tenants by the entirety, tenants in common, but the above mentioned case also holds that the interest of the husband in land held as a tenant by the entirety may be sold for his debts, and a purchaser of his interests will stand substantially in his position under the old statutes, giving him rights to rents, profits, etc., (since repealed) and the right of survivorship, and that the right of the purchaser to acquire by survivorship will not be affected or precluded by a subsequent decree of divorce. Likewise, in such case, her right of survivorship will continue.

The case of *Hopson v. Fowlkes*,[3] frequently quoted as a leading authority in other jurisdictions, adheres to the rule that an estate by the entirety is converted into an estate in common by a divorce of the owners. In this case the husband and wife owned a large farm as tenants by the entirety. After so acquiring the land in 1856, in 1860 they were divorced, and on attachment of judgment creditors of the husband, James Wilson, after the decree of divorce, in 1861 there was a decree confirming the sale, divesting title, etc., and the purchasers went into possession. The wife remarried and, upon the death of James Wilson in 1886, instituted an ejectment action to recover the property in her alleged right as survivor some twenty-six years after defendants had purchased and gone into possession. The court continued to adhere to the rule that the decree of divorce had

2 4 Sneed 683.
3 92 Tenn. 697.

made of husband and wife tenants in common; that such decree removed her disability as a married woman; and that the seven years statute of adverse possession having been pleaded in defense, the bar of the statute was complete.

In *Whitley v. Meador*[4] the court held that an estate by the entireties is converted to an estate in common by a divorce of the owners; but that where the husband parts with his interest in the land before the divorce, the decree does not make the wife and the husband's vendees tenants in common, the vendees standing in the same relation as the husband did before the decree; and in such case, if the wife survives the husband, she becomes the absolute owner of the whole estate by her survivorship. Further, in such case the wife does not have a separate right to the possession of the whole estate until the death of the husband, at which time she becomes the separate owner of the whole property by right of survivorship, and she could only be barred by lapse of time running from the date of the death of the husband.

In the case of *Elias Hall v. Rhoda Hall*[5] the Court of Appeals held that where real estate is held by a husband and wife as tenants by entirety and the husband procured divorce upon grounds of adultery, upon dissolution of the bonds, under the decree they become vested with the title to said property as tenants in common, and that under Section 4225 Shannon's Code the rights and interests of the husband to the rents and profits in the land were not impaired by the dissolution of the marriage relation. It will be noted, however, that since the passage of Chapter 126, Acts of 1919, as held in the case of *Brown v. Brown*,[6] hereinbefore referred to, a married woman now holds her property as a femme sole, and the rule is different.

We have many excellent cases on tenancy by the entirety, in fact too many to attempt to review all of them; but from all of our cases, as well as those of other jurisdictions, we think it may be safely asserted as established for said estate that such title may only be vested in the marriage union; but being so vested, the interest of either may by voluntary act be sold without affecting the right of the other; that it may be sold for a debt; that in such estate no right of inheritance exists, notwithstanding the practice of our State to hold such estate liable for in-

4 137 Tenn. 163.
5 6 Higgins 610.
6 *Supra*, Note 1.

heritance taxes, and the Federal Government to hold it liable for estates taxes; that it is not the subject of partition, but after decree of divorce converting it into tenancy in common partition rights do then exist.

It appears, however, that we have no Tennessee case which directly replies to the inquiry as to whether a trial court of Tennessee may award alimony to the wife out of the husband's portion of an estate in entirety converted into a tenancy in common by a decree of divorce. It has definitely been determined that the legal effect of a decree of divorce is to make of tenants by the entirety tenants in common; that is, each is to become the owner of an individual moiety. Can it be that these definite holdings mean this, just this, and nothing more, and that such interest may not be added to or taken away by the decree of the court? Such reasoning is not altogether illogical or unfounded by authority.

In the Oregon case of *Schafer v. Schafer*[7] the court held that the tenancy by the entirety is changed by a decree of divorce into a tenancy in common, and in the case the question arose whether the court, under a section of the Oregon law, could divide the estate. It was held that the statute by virtue of which the court might seize a one-third interest in any property which the unsuccessful party owned at the time of the decree did not extend the court's power so far that it could, after a decree of divorce had changed an estate in entirety into a tenancy in common, then seize on one party's share of the tenancy in common and give one-third of it to the other, for to do so would be to mutilate the legal effect of the decree. "In this case," said the court in its majority opinion, "the statute does not contemplate that the decree shall successfully dissolve the marriage, change the estate from an entirety to a tenancy in common, and then seize upon one party's share of the tenancy in common and give one-third thereof to the other party. The decree has a fixed legal effect upon the estate by the entirety, namely, to transmute it into a tenancy in common. The statute does not give the court power to seize upon the declared legal effect of its decree and mutilate and change that legal effect." To the same effect is the case of *Raulston v. Hall.*[8]

In Arkansas and Pennsylvania it is held that a decree of divorce does not sever an estate by entirety. Michigan former-

7 59 A. L. R. 707 (1927).
8 66 Ark. 305, 50 S. W. 690.

ly held to the same effect, but now, under special statute, disposition of an estate by the entirety, where the owners are divorced, is committed to the sound discretion of the court granting the divorce.

Of the estate by the entirety it has been said that neither the husband nor the wife but both are the owner; that their interests are not equal but identical; in fact, that the title rests in the marital status; and in some jurisdictions, that this marital status is analogous to a corporation, with the inaccuracy, however, that a stockholder in a corporation cannot mortgage the real property belonging to the corporation, nor is such real property subject to attachment or execution for the debts of the stockholder.

Upon contrary reasoning to that hereinbefore shown it may be mentioned that in Tennessee there is no necessary connection between divorce and alimony. Divorce may be granted without alimony, and alimony may be granted without divorce. Wide latitude is extended to the trial court in alimony allowance. Any property or interest in property owned by the husband may, in proper case, by the trial court be subjected to the payment of alimony allowance.

At the instant of granting a divorce a husband and wife are seized of an estate by the entirety; his interest therein may by him be voluntarily sold subject to her right of survivorship; he may encumber the same; or it may be subjected to the payment of his debts, subject alone to her survivorship rights, to the very instant of the decree of divorce. It is unnecessary for an express adjudication in granting divorce to change their status as tenants by the entirety to that of tenants in common, for this is the legal effect of the entry of a decree for absolute divorce; but even in the absence of any express legislative authority, it appears to us as the better reasoning that in proper case, the Tennessee court within its sound discretion, has authority to modify its decree and to subject the interest of a husband in an estate by entirety to the payment of an alimony allowance.

We know of no pending appeal involving this question. We have frequently known of the question being presented in trial courts, and we shall with interest await the logic of our splendid appellate courts in determination.

THE AMERICAN BAR ASSOCIATION GOES ON THE AIR

Arrangements have been made for a series of radio addresses by prominent members of the bar, to be given under the sponsorship of the American Bar Association over the Columbia network beginning on Lincoln's birthday, February 12. The program will be inaugurated by the Bar Association president, Mr. Clarence E. Martin of Martinsburg, West Virginia. He will be followed by three expresidents of the American Bar Association, the dean of the Harvard Law School, the president of the American Law Institute, the most recent recipient of the American Bar Association medal, the chairman of the Association's Section on Legal Education, and a number of other prominent law school men and practicing lawyers. This will be the most notable collection of representatives of the legal profession ever to appear on a broadcasting program, and it is certain to attract nationwide attention.

The purpose of the series, which will be given under the title "The Lawyer and the Public," will be to inform the individual who has little or no contact with lawyers as a group concerning what they are trying to do to improve the functioning of law in society and to render better service to the public. It will seek the cooperation of the layman in putting through measures designed to make the administration of justice more speedy, more certain and more easily available to the average citizen. It will endeavor to bring home to him that reforms in legal procedure which attempt to modify a system built up through the long experience of years are necessarily slow and difficult to bring about. It will point out the part in the work of reform which is being played by the law schools, by the American Law Institute, by such research organizations as the Institute of Law of Johns Hopkins University and particularly by bar associations. It will emphasize the necessity of high standards for admission to the bar, of efficient bar examination systems and of adequate machinery for discipline and disbarment. The success attained by the incorporated bar and the growth of the judicial council movement will be discussed as well as the necessity for improvement in our present methods of choosing our judicial officers.

The addresses will be made under the auspices of the National Advisory Council on Radio in Education. Mr. Robert

A. Millikan, the distinguished scientist, is president of that organization, Mr. Norman H. Davis is chairman of the board, and its vice-presidents include President Walter Dill Scott of Northwestern, President Livingston Farrand of Cornell and President Robert Hutchins of Chicago. This Council has been broadcasting weekly discussions this fall under the titles of "You and Your Government," "Labor and the Nation" and "The Economic World Today," and Mr. Levering Tyson, the director, estimates an average weekly radio audience of from two to two and a half million listeners.

The American Bar Association program has been arranged by its Council on Legal Education and Admissions to the Bar, the chairman of which, Mr. John Kirkland Clark who is also president of the New York State Board of Law Examiners, will be in charge of a question-and-answer period of approximately ten minutes following most of the addresses. Questions concerning any of the subjects discussed will be invited, and it is probable that the addresses will be reprinted by the University of Chicago Press and available for distribution at a small cost. These discussions, both because of the speakers who will give them and because of their subjects, will be of particular interest to members of the bar.

The broadcast will be made on Sundays, beginning the 12th of February over a national hookup, at an hour to be announced later, and will continue at the same time each week for fourteen weeks.

Some additional names may be added but the program will be substantially as follows:

THE LAWYER AND THE PUBLIC

A series of radio addresses beginning February 12, 1933, sponsored by the American Bar Association and arranged by its Council on Legal Education and Admissions to the Bar under the auspices of the National Advisory Council on Radio in Education.

CLARENCE E. MARTIN, President of the American Bar Association—"The American Bar, Its Past Leaders and Its Present Aims and Ideals."

ROSCOE POUND, Dean of the Harvard Law School—"Training for the Bar."

GEORGE W. WICKERSHAM, President, The American Law Institute—"Restating the Law."

JOHN KIRKLAND CLARK, Chairman, Section of Legal Education of the American Bar Association—"The Lawyer's Education."

JOHN H. WIGMORE, Dean Emeritus, Northwestern University Law School—"Should the Public Distrust a Lawyer?"

JAMES GRAFTON ROGERS, Assistant Secretary of State—A Young Man in Search of a Profession Interviews Mr. Rogers on the Subject "Shall I Become a Lawyer?"

SILAS STRAWN, Former President of the American Bar Association and of the United States Chamber of Commerce—"The Lawyer and Business."

GUY A. THOMPSON, Former President of the American Bar Association—"What is the Bar Doing to Improve the Administration of Justice?"

HENRY W. TOLL, Managing Director American Legislators' Association—"Reforming the Law Through Legislation."

PHILIP J. WICKSER, Secretary New York Board of Law Examiners; HON. THEODORE FRANCIS GREEN, Governor of Rhode Island; and ROBERT T. McCRACKEN, Chairman of the Philadelphia County Board of Law Examiners—"Sifting Candidates for a Lawyer's License."

NEWTON D. BAKER, President of the American Judicature Society—"When Lawyers Speak with One Voice."

PROFESSOR KARL LLEWELLYN of the Columbia University Law School, PROFESSOR WALTER WHEELER COOK of the Institute of Law of Johns Hopkins University, and MR. JEROME FRANK, Lecturer at the Yale Law School—"How the Law Functions in Society."

PROFESSOR FELIX FRANKFURTER of the Harvard Law School, on a subject to be announced later.

JUDGE LEARNED HAND of the United States Circuit Court of Appeals—"How Far is a Judge Free in Rendering a Decision?"

JOHN W. DAVIS, Former Solicitor General of the United States, Former Ambassador to Great Britain and Former President of the American Bar Association—"Selecting Judges."

NOTICE FROM TREASURER

The annual dues of $4.00 became payable January 1, 1933. A subscription to the TENNESSEE LAW REVIEW is included in the amount of annual dues, and likewise a copy of the Annual Proceedings. 1932 Proceedings are now in the hands of the printer, and should be distributed around February 1. The amount in the treasury has been entirely exhausted in payment of necessary expenditures in 1932, and to the 1933 dues must be promptly collected in order to pay for the Proceedings now in the hands of the printer. Each member is requested to mail check promptly for 1933 dues to the treasurer. Compliance with this request will save a considerable portion of the expense incident to preparing and mailing statements to our twelve hundred members.

Respectfully, W. L. OWEN,
2012 Sterick Building, Memphis, Tennessee.
Treasurer, Tennessee Bar Association.

JAMES GRAFTON ROGERS, Assistant Secretary of State—A Young Man in Search of a Profession Interviews Mr. Rogers on the Subject "Shall I Become a Lawyer?"

SILAS STRAWN, Former President of the American Bar Association and of the United States Chamber of Commerce—"The Lawyer and Business."

GUY A. THOMPSON, Former President of the American Bar Association—"What is the Bar Doing to Improve the Administration of Justice?"

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Respectfully, W. L. OWEN,
2012 Sterick Building, Memphis, Tennessee.
Treasurer, Tennessee Bar Association.

NOTES AND PERSONALS

ELIZABETHTON BAR

Lem L. Reece, of the law firm of Dugger & Reece, has recently been appointed Referee in Bankruptcy to succeed George F. Dugger.

Geo. C. Edens, of the Elizabethton Bar, was recently appointed Clerk and Master for Carter County, succeeding Mrs. R. C. Campbell.

J. N. Edens, one of the oldest members of the bar, suffered recently accidental injuries in an automobile accident near Knoxville.

The Carter County Courthouse was destroyed recently by fire, and as a result of the same, court has been held in the court room of the Municipal building of the city of Elizabethton.

Roy C. Nelson, of the Elizabethton Bar, has been granted license to practice in all the courts of the State of Virginia.

KNOXVILLE BAR

At the annual meeting of the Knoxville Bar Association on November 26, 1932, Frank Montgomery was unanimously chosen president of the local association, succeeding Charles H. Smith, who had served in that capacity for three years. Mr. Montgomery is an able and successful practitioner, and under his guidance the Knoxville Bar Association should continue as an active organization and as an aid to the legal profession and to the entire community. The other officers were re-elected and are as follows: Ray H. Jenkins, vice-president; William P. O'Neil, secretary; and James Atkins, treasurer.

Knoxville lawyers are making preparations for the entertainment of the State Bar Association which meets here in the early summer. Attendance at this meeting is expected to be large because of the program to be arranged and also because of this city's proximity to the Smoky Mountain National Park. Many lawyers throughout the state are planning to attend and afterwards to spend their vacations in the mountain retreats where the golfing is good and the fishing better.

Chancellor Robert M. Jones, who was quite ill before the Christmas holidays, is now fully recovered and is back on the bench.

MARYVILLE BAR

Criminal Court has just adjourned, and Judge John J. Blair has returned to his home at Loudon and Attorney General R. B. Witt has returned to Madisonville. The Court appears to have taken judicial knowledge of the distressed economic condition of the country, as leniency was shown to many on account of their plight, when they appeared worthy of consideration. The sessions of Criminal Court were somewhat disturbed due to illness of members of the bar.

The recent holding of our Supreme Court in the case of *State of Tennessee ex rel, Mrs. Chas. A. Waters v. S. E. Mayes* has found an echo in local legal circles in a case filed in Blount Chancery on behalf of Claude Curtis, Superintendent of County Schools elect, and against Eugene M. Williams incumbent, the theory of the complainant being that the office of County Superintendent is a constitutional office which begins on September 1, following the general election in August, and that the present incumbent cannot hold on as provided in a special act. The outcome of this controversy is awaited with interest.

Judge John C. Crawford is confined to his home with illness at the present time. Colonel T. N. Brown is out again after a short illness at his home. R. R. Kramer is again back in the office after an attack of influenza.

NASHVILLE BAR

On December 23, 1932, the Nashville Bar and Library Association held its annual meeting, having as its honor guests the bench of Davidson County and the justices of the Supreme Court and Court of Appeals of Tennessee. This meeting officially marked the termination of the successful and much-appreciated administration of Mr. Thomas G. Watkins as president of the local bar association. At this time a new board of directors was elected, and the president and other officers for the ensuing year will be chosen by this board.

The association was fortunate in procuring Solicitor General J. M. Gardenhire to address the meeting, as he, in his eloquence and wit, possesses the faculty of being highly entertaining while instructive.

In closing the program with an address by the Honorable Grafton Green, Chief Justice, the association felt fortunate in being able to continue a precedent which by now has become a delightful tradition of the meetings of the Nashville Bar and

Library Association. It is needless to say that the remarks of the Chief Justice, delivered in his inimitable manner, were enthusiastically received and are pleasantly remembered.

Though fortunate in retaining one delightful tradition of this meeting, the association was unable to continue another and most enjoyable of its social features in the manner of the past years due to the death of Mr. Avery Handley. It seems trite to say that his place at the Nashville Bar cannot be filled, but it is true, we believe. Not only was Mr. Handley a convincing advocate, appealing rather to the reason and sense of justice than to the passions and prejudices; but in his own unexcelled sense of justice, bolstered by his ready grasp of the principles of the pertinent law, his deep appreciation of human nature, and his broad understanding of the practicalities of life, he was a wise and safe counselor; and above all, his personality was of that rare type which instantly impressed all with whom he came in contact and constantly retained their friendship and devotion. Probably the highest encomium we can pay him is to say that in his life, and after his passing, he left an indelible imprint on the hearts of his fellow members of the bar—those who were best fitted to judge him.

In closing, it would be of interest to members of the Bar of the State of Tennessee to know that Mr. Chas. C. Trabue, former President of the State Bar Association, and long associated with Mr. Handley in the practice of law, will henceforth be associated with Messrs. Wm. Hume and Geo. H. Armistead, Jr., as we understand, under the firm name of Trabue, Hume & Armistead.

In the hope that certain feint signs augur the lifting of the veil of depression, the Nashville Bar and Library Association wishes to the Bar of the State a prosperous New Year.

HEADNOTES

(Recent Tennessee Supreme Court Decisions)

GEORGE L. POWERS ET AL v. ROBERT S. VINSANT ET AL

(Opinion filed December 17, 1932, by Mr. Chief Justice Green.)

1. DECLARATORY JUDGMENTS ACT. Statutes. Suit held to present proper case for declaratory judgment.

A suit by the State Board of Dental Examiners against the Trustees of the University of Tennessee and the officers of its Dental Department, to ascertain the rights of students of the Dental Department to practice dentistry under the supervision of their instructors and to charge fees for such services, presents a proper case for a declaratory judgment, the defendants having a real present interest in obtaining a declaration adverse to that sought by the bill. (Post, p. .....)

Code cited: Section 8845.

Case cited: Hodges v. Hamblen County, 152 Tenn. (25 Thomp.) 395.

2. PHYSICIANS AND SURGEONS. Dentists. Statutes. Unlicensed dental students may practice dentistry, when.

The statutes regulating the practice of dentistry in Tennessee authorize students of a recognized dental school to practice dentistry and to perform dental operations under the supervision of the competent instructors of the school. No unlicensed persons other than such students are permitted to practice dentistry or to perform dental operations. (Post, p. .....)

Code cited: Sections 6941, 6969.

3. PHYSICIANS AND SURGEONS. Dentists. Right of dental students to exact compensation for services.

The right of dental students to practice dentistry under certain circumstances without a license authorizes the charging of compensation for such services. (Post, p. .....)

Citing: Newman v. Washington, 8 Tenn. (M. & Y.) 79; 48 C. J. 1156.

LIFE AND CASUALTY INSURANCE COMPANY v. J. A. CLARK ET AL

(Opinion filed November 26, 1932, by Mr. Justice Swiggart.)

1. EQUITY. Injunctions. Judgments. Enjoining execution of judgment on ground that it was rendered without supporting evidence.

The chancery court is without jurisdiction to enjoin execution of a judgment at law on the ground that the judgment is void because rendered without evidence to support it, the question of fact which is sought to be litigated having been conclusively determined in the action at law. (Post, p. .....)

Cases approved: Thoms v. King, 95 Tenn. (11 Pickle) 60; Martin v. Porter, 51 Tenn. (4 Heisk.) 407; Greenlaw v. Kernahan, 36 Tenn. (4 Sneed) 371; Kindell v. Titus, 56 Tenn. (9 Heisk.) 727.

2. JUDGMENTS. Judgment rendered without supporting evidence is erroneous but not void.

A judgment rendered by a court having jurisdiction of the parties and of the suit is not void, but is erroneous when there is no evidence to support it. (Post, p. .....)

THOMAS LAWSON ET AL v. AMERICAN LAUNDRY MACHINERY COMPANY

(Opinion filed November 26, 1932, by Mr. Justice Swiggart.)

1. JUDGMENTS. Courts. Rendition of personal judgment against non-resident defendant without service of process.

A personal judgment may not be rendered against a non-resident defendant of whom jurisdiction is acquired only by notice by publication. (Post, p.....)

Cases approved: Perry v. Young, 133 Tenn. (6 Thomp.) 522; Paper Co. v. Shyer, 108 Tenn. (24 Pickle) 444; Fitzsimmons v. Johnson, 90 Tenn. (6 Pickle) 416.

2. SET-OFF AND COUNTERCLAIM. Pleading and Practice. Pleading matter in recoupment by cross-bill in the Chancery Court.

Where a bill seeks a judgment for unpaid purchase money and does not merely seek enforcement of the seller's lien, a cross-bill may properly be filed in which is pleaded matter in recoupment, the damage growing out of the contract which was the foundation of the original bill. (Post, p. .....)

Cases approved: Saranac Mach. Co. v. Nants & Co., 164 Tenn. 457; Mack v. Hugger Bros. Const. Co., 153 Tenn. (26 Thomp.) 260.

3. EQUITY. Pleading and Practice. Nature of cross-bill and effect of dismissal of original bill.

A cross-bill is an auxiliary suit, a dependency of the original litigation, and the dismissal of the original bill by the complainant may carry with it the cross-bill, or an answer filed as a cross-bill. (Post, p. .....)

Citing: Moore v. Tillman, 106 Tenn. (22 Pickle) 361; Gibson's Suits in Chancery (Chambliss Ed.), Sec. 726.

4. EQUITY. Pleading and Practice. When cross-bill does not fall upon dismissal of original bill.

A cross-bill or an answer filed as a cross-bill, which has been replied to and on which proof has been taken, will not fall with the dismissal of the original bill and may be prosecuted to judgment. (Post, p. .....)

Cases cited: Nichol v. Nichol, 63 Tenn. (4 Baxter) 145; Partee v. Goldberg, 101 Tenn. (17 Pickle) 664; McDowell v. Hunt Contracting Co., 133 Tenn. (6 Thomp.) 437.

5. EQUITY. Pleading and Practice. Effect of order by chancellor dismissing original bill and directing that suit continue on cross-bill.

Where in a suit an answer has been filed as a cross-bill, on which no process has issued, and which has not been replied to, an order by the chancellor directing that upon dismissal of the original bill the suit should continue on the cross-bill "alone" is proper; but such order is not equivalent to service of process upon the cross-defendant. (Post, p. .....)

6. JUDGMENTS. Words and Phrases. Effect of appearance of symbol "O. K." appearing at end of order of court signed by counsel.

The appearance of the symbol "O. K." at the end of an order of the court, signed by counsel, has no significance other than to indicate the approval by counsel of the form or draft of the written order as correctly expressing and recording the action of the court, and it does not indicate that the order was a consent order. (Post, p. .....)

Citing: 46 C. J. 1088.

7. EQUITY. Process. Necessity of process or appearance by original complainant when cross-bill is filed.

Process or an appearance having the effect of a waiver of process is necessary to make the original complainant a defendant to a cross-bill, or to an answer filed as a cross-bill. (Post, p. .....)

Cases cited: Moore v. Tillman, 106 Tenn. (22 Pickle) 361; Keele v. Cunningham, 49 Tenn. (2 Heisk.) 288; Hall v. Fowlkes, 56 Tenn. (9 Heisk.) 745; Hamilton v. Hewgley, 62 Tenn. (3 Baxter) 216; Harrell v. Harrell, 44 Tenn. (4 Cold.) 378; Essenkay Co. v. Essenkay Sales Co., 132 Tenn. (5 Thomp.) 287.

Code cited: Code 1932, Sec. 10403.

Citing: 5 Ency. Pl. & Pr. 658; 2 C. J. 353; 10 R. C. L. 490.

8. EQUITY. Process. Knowledge of counsel that cross-bill has been filed does not constitute appearance or waiver of process.

Mere knowledge by resident counsel of a non-resident complainant that a cross-bill has been filed and cost bond executed cannot have the effect of an appearance or waiver of process. (Post, p. .....).

JEFF JENNINGS v. ED JENNINGS ET AL

(Opinion filed November 26, 1932, by Mr. Chief Justice Green.)

1. MARRIAGE. Adultery. Statutes. Marriage in violation of Code, Section 8452, is void.

An attempted marriage between a person divorced for adultery and the other guilty party during the lifetime of the former husband or wife is prohibited by statute and absolutely void in Tennessee, so that no legal rights can grow out of such union and the children are illegitimate, incapable of inheriting property devised by their paternal grandfather to their father's "sons." (Post, p. .....)

Code construed: Section 8452 (Acts 1835-36, Chap. 26).

Cases approved: Owen v. Bracket, 75 Tenn. (7 Lea) 448; Pennegar v. State, 87 Tenn. (3 Pickle) 244; State v. Bell, 66 Tenn. (7 Bax.) 9; Carter v. Montgomery, 2 Cooper's Chancery 225; Newman v. Kimbrough (Ch. App.), 59 S. W. 1061, 52 L. R. A. 669.

2. WILLS. Statement of class doctrine.

Where a bequest is made to a class of persons, subject to fluctuation by increase or diminution of its number, in consequence of future births or death, and the time of payment or distribution of the fund is fixed at a subsequent period, or on the happening of a future event, the entire interest vests in such persons only as at that time, fall within the description of persons, constituting such class. (Post, p. .....)

Cases approved: Satterfield v. Mayes, 30 Tenn. (11 Humph.) 58; Sanders v. Byrom, 112 Tenn. (4 Cates) 474; Tate v. Tate, 126 Tenn. (18 Cates) 169.

3. WILLS. Case in judgment held to be within class doctrine.

A devise to testator's son for life and "at his death to his sons" is within the class doctrine above stated, so that the entire interest vests in sons of the life tenant living at his death. (Post, p. .....)

4. STATUTES. WILLS. Statute modifying class doctrine (Code, Sec. 7598) held not to be retrospective in operation.

The statute modifying the class doctrine and providing that the issue of deceased parties shall take the share of property which the party so dying would take if living,

is prospective only, applying to devises, gifts, etc., made prior to its passage. (Post, p. .....)

Code construed: Section 7598 (Acts 1927, Chap. 13).

5. STATUTES AND STATUTORY CONSTRUCTION. Construction of statute as prospective or retrospective.

A statute will be given a prospective operation only unless the legislative intent that it operate retrospectively has been manifested by the most clear and unequivocal expression. (Post, p. .....)

Cases construed: Heiskell v. Lowe, 126 Tenn. (18 Cates) 475; Dugger v. Insurance Co., 95 Tenn. (11 Pick.) 245.

6. STATUTES. Constitutional Law. Statute which by retrospective operation disturbs vested rights is void.

Where a remainder is devised to a class, to be divided among members of the class surviving at the time when division is to be made, the estate vests in the described class, as a class; hence a statute enacted after the devise has become effective would be invalid if it undertook to disturb the vested rights of the class. (Post, p. .....)

Cases approved: Satterfield v. Mayes, supra; Sanders v. Byrom, supra.

FRED BURNETT v. JOHN W. RUDD AND CITY OF KNOXVILLE

(Opinion filed November 26, 1932, by Mr. Justice McKinney.)

1. MUNICIPAL CORPORATIONS. Liability for act of fire department.

Since the extinguishing of fires is a public or governmental duty, in the performance of which the rule of *respondeat superior* has no application, a municipal corporation is not liable for injury resulting from negligent driving of its fire apparatus in responding to a call. (Post, p. .....).

Cases approved: Irvine v. Chattanooga, 101 Tenn. (17 Pickle) 291; Foster v. Water Company, 71 Tenn. (3 Lea) 42.

Citing: Aldrich v. Youngstown, 27 A. L. R. 1497; Workmen v. New York, 179 U. S. 552; Maxwell v. Miami (Fla.), 33 A. L. R. 632; Bradley v. Oskaloosa, 193 Iowa 1072; McQuillin on Municipal Corporations, Sec. 2793; Annotation, 9 A. L. R. 143; 42 C. J. 1026.

2. MUNICIPAL CORPORATIONS. Nuisances. Liability of municipality for creating nuisances in performance of governmental function.

A municipal corporation is liable, even when engaged in the performance of a governmental function, if by its acts a nuisance is created; but in order that it shall be liable for creating a nuisance in the performance of a governmental function, it must have committed some affirmative act, as distinguished from the negligence of its employes resulting in injury to a citizen. (Post, p. .....)

Cases approved: Chattanooga v. Dowling, 101 Tenn. (17 Pickle) 342; Kilb v. Knoxville, 111 Tenn. (3 Cates) 314; City of Nashville v. Mason, 137 Tenn. (10 Thomp.) 169; Williams v. City of Nashville, 145 Tenn. (18 Thomp.) 677.

Citing: 46 C. J. 663.

3. MUNICIPAL CORPORATIONS. Liability for negligent operation of street signal system.

A municipal corporation is not liable for the negligent operation of its street signal system, as a result of which the driver of an automobile fails to receive the customary warning of the approach of a fire truck. (Post, p. .....)

4. MUNICIPAL CORPORATIONS. Nuisances. Manner of operating fire apparatus held not to constitute nuisance.

The fact that a municipal corporation permits its fire truck to be operated upon a public street at a rate of from fifty to sixty miles per hour in responding to a fire, does not constitute a nuisance, when it is the custom and usage to throw on and hold the "stop" signal lights so as to warn traffic at intersecting streets of the approaching fire apparatus, and also to sound a siren. (Post, p. .....)

JOHN H. STILL v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES

(Opinion filed November 26, 1932, by Mr. Justice Swiggart.)

1. PAYMENT. Recovery of money voluntarily paid.

One cannot recover back money which he has voluntarily paid with a full knowledge of all the facts and without any fraud, duress or extortion, although no obligation to make such payment existed. (Post, p. .....)

Cases cited: Standard Oil Co. v. Petroleum Products Storage Co., 163 Tenn. (10 Smith) 565; Prescott v. City of Memphis, 154 Tenn. (1 Smith) 462.

2. INSURANCE. Payment. Recovery of insurance premium paid, notwithstanding claim of right to waiver.

Payments of premiums to maintain a life insurance contract in force pending determination of the policyholder's claim of right to waiver of premiums because of his total and permanent disability are not voluntary payments and may be recovered back upon the establishment of the fact of disability. (Post, p. .....)

Cases cited: Johnson v. Ford, 147 Tenn. (20 Thomp.) 63; Young v. Hoagland (Calif.), 298 Pac. 996; Odrico Realty Corp. v. N. Y., 250 N. Y. 29; Federal Life Insurance Co. v. Lewis (Okla.), 183 Pac. 975; Wenstrom v. Aetna Life Ins. Co. (N. D.), 215 N. W. 93.

Cases differentiated: Howard v. Mutual Reserve, etc. Ass'n., 125 N. C. 49; Jones v. Provident Sav. L. Assur. Soc., 147 N. C. 540; Rosenfeld v. Ins. Co., 222 Mass. 290; Maryland Casualty Co. v. Little Rock Railway & Elec. Co., 92 Ark. 306.

3. PAYMENT. Fraud or bad faith as element of involuntary payment.

Neither fraud nor bad faith on the part of the payee is an essential element or condition of an involuntary payment which may be recovered. (Post, p. .....)

Citing: 21 R. C. L. 146; 48 C. J. 742; Anno. 75 A. L. R. 658.

4. STIPULATIONS. Effect of stipulation of facts.

A stipulation of facts upon which a case is submitted for decision may be taken with all the admitted facts and the inferences legitimately to be drawn from them. (Post, p. .....)

Citing: Federal Trade Commission v. Pac. States, etc. Ass'n., 273 U. S. 52; Wright v. Dorman, 155 Tenn. (2 Smith) 189; Provident Loan Bank v. Parham, 137 Tenn. (10 Thomp.) 483; 20 Ency. of Pl. & Pr. 622, 25 R. C. L. 1095.

5. STIPULATIONS. Insurance. Stipulation held to justify inference that insured's disability was conceded.

In a suit to recover insurance premiums alleged to have been paid after the insured became totally and permanently disabled, a stipulation recited that the parties had settled by compromise the insured's claim for monthly disability payments, the sum paid being the amounts payable without interest. It was also stipulated that this settlement should be treated by the court as a fact upon which the question of complainant's right to a waiver of premium payments should be determined. HELD:

The stipulated facts justify the inference that the insurer conceded the fact of the insured's disability. (Post, p. .....)

H. A. WINER v. J. H. WILLIAMS ET AL

(Opinion filed November 26, 1932, by Mr. Justice McKinney.)

1. RELEASE. Necessity of consideration for oral release.

An oral release of a debt or obligation is unenforceable, if it is without consideration. (Post, p. .....)

Code construed: Shannon's Code, Sec. 5570 (Code of 1932, Sec. 9741).

Cases approved: Miller v. Fox, 111 Tenn. (3 Cates) 336; Bank v. Shook, 100 Tenn. (16 Pickle) 436; Simpson v. Moore, 55 Tenn. (8 Heisk.) 371; Richardson v. McLemore, 54 Tenn. (7 Heisk.) 586; Smith v. Harris, 35 Tenn. (3 Sneed) 553.

2. LANDLORD AND TENANT. Contracts. Verbal agreement to reduce rent without consideration is unenforceable.

A mere verbal agreement by a landlord during the term of a lease to accept a reduced rent is without consideration and unenforceable; so that, upon the expiration of the term the landlord may recover from the tenant the difference between the rent stipulated for by the lease and the reduced rent which had been paid. (Post, p. .....)

Citing: 36 C. J. 345; 43 A. L. R. 1478; McKenzie et al. v. Harrison et al., 120 N. Y. 260; Bowman v. Wright, 65 Nebr. 661.

3. LANDLORD AND TENANT. Partnership. New member of partnership is liable only for rental which landlord informed him was agreed to.

When a new member entered a partnership and was told by the landlord that the rent of property leased by the partnership was $100.00 per month, which he paid, he is not liable for any further sum, although the original lease called for $125.00 per month, which the landlord had agreed without consideration to reduce to $100.00 per month. (Post, p. .....)

MODEL GARAGE COMPANY v. DEWEY A. SANDERS

(Opinion filed November 26, 1932, by Mr. Justice Chambliss.)

SALES. Conditional Sales. Right of conditional vendor after repossession to sell property pending determination of action of replevin.

Although a conditional vendor who has regained possession of the property by replevin upon default of the purchaser is not compelled to proceed with the sale until after final judgment in the action of replevin, he may advertise and sell before the action of replevin is finally determined, especially if the property is in any sense perishable or likely to depreciate in value.

Cases cited: Mitchell v. Auto Sales Co., 161 Tenn. (8 Smith) 1; Murray v. Federal Motor Truck Sales Corp., 160 Tenn. (7 Smith) 410; Lieberman v. Puckett, 94 Tenn. (10 Pickle) 273; Jones v. Smart Motor Co., 1 Tenn. App. 297.

MRS. J. D. QUINTON v. BOARD OF CLAIMS
and
MRS. A. Q. HORTON v. BOARD OF CLAIMS

(Opinion filed November 25, 1932, by Mr. Justice Cook.)

1. STATES. Statutes. Language of statute authorizing suit against sovereign must be unambiguous.

A statute cannot subject the State to litigation at the suit of individuals unless

the words of the act are so plain, clear and unmistakable as to leave no doubt of the legislative intent that it should be done. (Post, p. .....)

Case cited: Western U. T. Co. v. Western & A. R. Co., 142 Ga. 532.

2. STATES. General statutes which would restrict sovereignty do not apply to State.

General procedural statutes in which the State is not specifically named, and which, if applied, would operate to restrict the State's sovereignty, cannot be invoked against the State. (Post, p. .....)

3. STATES. Constitutional Law. Immunity of State from suit, except as legislature otherwise provides.

The constitutional provision that suits may be brought against the State in such manner and in such courts as the legislature may by law direct, carries the positive implication that suits shall not be brought otherwise, or at all, unless the authority be affirmatively given by statute. (Post, p. .....)

Constitution cited: Article 1, Section 17.

Code cited: Code of 1932, Sec. 8634 (Acts 1873, ch. 13); and Sec. 9008.

Cases approved: Insurance Co. v. Craig, 106 Tenn. (22 Pickle) 629; State v. Odom, 93 Tenn. (9 Pickle) 446; State v. Sneed, 68 Tenn. (9 Baxter) 472; Williams v. Register, 3 Tenn. (Cooke) 214.

4. STATUTES. States. Highways. Action of Board of Claims is not reviewable by courts.

The statute creating a board of claims with power to compensate for injuries to person or property as a result of negligence in the maintenance and construction of State highways, does not authorize a review by the courts of judgments of the Board of Claims; hence a claimant may not by the writ of certiorari obtain a review in the chancery court of the action of the Board in refusing to award damages. (Post, p. .....)

Act construed: Acts 1931, ch. 75.

Code construed: Acts 1932, Sections 8634, 9008.

SWIFT & COMPANY v. STATE OF TENNESSEE ET AL

(Opinion filed November 26, 1932, by Mr. Justice Chambliss.)

1. TAXATION. Statutes. Limitation of actions. Code, Section 1792, does not limit suits for recovery of county taxes.

The statute barring suits for the recovery of taxes paid under protest unless brought within thirty days after payment is not a limitation upon suits for the recovery of county taxes, but is a limitation only upon suits for the recovery of state taxes. (Post, p. .....)

Code construed: Sec. 1792 (Acts 1872, Chap. 44, Shannon's Code, 1061).

Citing: Railroad v. State, 55 Tenn. (8 Heisk.) 803; Saunders v. Russell, 78 Tenn. (10 Lea) 299; Nashville v. Smith, 86 Tenn. (2 Pick.) 213; Railroad v. Williams, 101 Tenn. (17 Pick.) 146; Bank v. Memphis, 116 Tenn. (8 Cates) 647; Railroad v. Marion Co., 120 Tenn. (12 Cates) 353; Briscoe v. McMillin, 117 Tenn. (9 Cates) 115.

2. WORDS AND PHRASES. "Peddler" defined.

A distinctive feature of peddling is the concurrence of selling and delivering; and a peddler may be defined as an itinerant vendor of goods who sells and delivers the identical goods he carries with him. (Post, p. .....)

Citing: Ballou v. State, 87 Ala. 144; Stamford v. Fisher, 140 N. Y. 187; State v. Lee, 113 N. C. 681; Hewson v. Englewood, 5 N. J. L. 522; Ex Parte Taylor, 58 Miss. 478; Bouvier's Law Dictionary.

3. TAXATION. Privilege taxes. Statutes. Manner of doing business considered and held to be wholesale peddling.

Swift & Co., manufacturer of meats and by-products, makes delivery of goods by truck to retail stores. The refrigerator truck calls from place to place upon regular customers, to whom goods of the amount, nature and price then and there determined are sold and delivered. Orders for future delivery are taken by the driver—salesman only when the goods desired are not to be found on the truck. Only regular and previously arranged for customers are visited, and sales are in substantial quantities to merchants. HELD: Such course of business constitutes wholesale peddling within the meaning of the Revenue Act. (Post, p. .....)

Act construed: Acts of 1931, Second Extra Session, Chap. 13.

R. C. WALKER v. BLUE RIDGE GLASS CORPORATION

(Opinion filed November 26, 1932, by Mr. Justice McKinney.)

WORKMEN'S COMPENSATION. Extent of disability when injured employe can do light work of general nature.

Where a petitioner whose usual work is ordinary manual labor has been permanently disabled, so as to be incapable of doing the strenuous work which he had previously done, but has not been so disabled as to be incapable of doing light work of a general nature, compensation is properly awarded for permanent partial disability rather than for permanent total disability. In such case the burden is not upon the employer to show that petitioner can secure suitable work.

Case approved: White v. Coal Co., 162 Tenn. (9 Smith) 385.

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RECENT CASE NOTES

CRIMINAL LAW—UNCORROBORATED TESTIMONY BY ACCOMPLICE SUFFICIENT TO CONVICT IN CRIMINAL CASES.

In a recent Mississippi case,[1] evidence showed that a mill was robbed and that A did the act with B present while C waited in an automobile nearby to aid in making the getaway. D, the defendant, was not at the scene of the crime but A and C, as State's witnesses, testified that he suggested and planned the robbery and shared in the proceeds. D had been indicted jointly with A, B, and C but had been granted a severance and was tried alone. D was convicted and he appealed on the ground, among others, that the evidence was insufficient to support the conviction, which was had largely on the testimony of A and C, accomplices, which was corroborated by numerous facts and circumstances.

The court cited 1 R. C. L., par. 13, p. 166, wherein it is stated " 'that under the common law it is well settled that testimony of an accomplice, although entirely without corroboration, will support a verdict of conviction of one accused of crime, and that this is still the law in the absence of a statute to the contrary.' (The common-law rule obtains in this State.)" Numerous cases illustrate Mississippi's adherence to the common-law rule.[2]

Most jurisdictions, in the absence of statute, follow the common law rule that the uncorroborated testimony of an accomplice will support a conviction for crime.[3]

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1 Boutwell v. State, ... Miss. ....., 143 So. 479 (1932).

2 Keither v. State, 18 Miss. 192 (1848); Dick v. State, 30 Miss. 593 (1856); Strawhern v. State, 37 Miss. 422 (1859); George v. State, 39 Miss. 570 (1860); White v. State, 52 Miss. 216 (1876); Fitzcox v. State, 52 Miss. 923 (1876); Hughes v. State, 58 Miss. 355 (1880); Cheatham v. State, 67 Miss. 335, 7 So. 204, 19 Am. St. Rep. 310 (1889); Wilson v. State, 71 Miss. 880, 16 So. 304 (1894); Brown v. State, 72 Miss. 990, 18 So. 431 (1895); Matthews v. State, 148 Miss. 696, 114 So. 816 (1927); Gates v. State, 160 Miss. 479, 135 So. 189 (1931); Pruitt v. State, ... Miss. ....., 139 So. 861 (1932).

3 *Ibid.* 2; Eber v. U. S., 234 Fed. 221, 148 C. C. A. 123 (S. D. N. Y. 1916); Hollis v. U. S., 246 Fed. 832 (N. D. Ala. 1917); Freed v. U. S., 266 Fed. 1012, 49 App. D. C. 392 (Sup. Crt. D. C. 1920); Clark v. U. S., 293 Fed. 301 (N. D. Ala. 1923); Greenberg v. U. S., 297 Fed. 45 (E. D. Mo. 1924); Webb v. U. S., 8 Fed. (2d) 145 (W. D. Okla. 1925); State v. Stebbins, 29 Conn. 463 (1861); State v. Williamson, 42 Conn. 261 (1875); Jenkins v. State, 31 Fla. 196, 12 So. 677 (1893); Myers v. State, 43 Fla. 500, 31 So. 275 (1901); Caldwell v. State, 50 Fla. 4, 39 So. 188 (1905); Stone v. State, 118 Ga. 705, 45 S. E. 630 (1903); Solomon v. State, 18 Ga. App. 744, 90 S. E. 488 (1916); Dobbs v. State, ... Ga. ....., 162, S. E. 845 (1932); Rider v. People, 110 Ill. 11 (1884); Kelly v. People, 192 Ill. 119, 85 Am. St. Rep. 323, 61 N. E. 425 (1901); People v. Johnson, 314 Ill. 486, 145 N. E. 703 (1924); but see Conley v. People, 170 Ill. 587, 48 N. E. 911 (1897); Ayers v. State, 88 Ind. 275 (1882); Brewster v. State, 186 Ind. 369, 115 N. E. 54 (1917); State v. Patterson, 52 Kan. 335, 34 Pac. 784 (1893); State v. Vandeveer, 119 Kan. 674, 240 Pac. 407 (1925); Commonwealth v. Price, 76 Mass. 472, 71 Am. Dec. 668 (1858); Commonwealth v. Scott, 123 Mass. 222 (1877); Commonwealth v. Holmes, 127 Mass. 424, 34 Am. Rep. 39 (1879); People v. Gallagher, 75 Mich. 512, 42 N. W. 1063 (1889); People v. Nunn, 120 Mich. 530, 79 N. W. 800 (1899); State v. Sprague, 149 Mo. 409, 50 S. W. 901 (1899); State v. Kennedy, 154 Mo. App. 449, 55 S. W. 293 (1900); State v. Brown, 168 Mo. 449, 68 S. W. 568 (1902); State v. Wiggs, 196 Mo. 90, 93 S. W. 390 (1906); State v. Glon, ... Mo. ....., 253 S. W. 364 (1923); Lawhead v. State, 46 Neb. 607, 65 N. W. 779 (1896); Jahnke v. State, 68 Neb. 154, 104 N. W. 154 (1905); State v. Bove, 98 N. J. L. 350, 116 Atl. 766, af-

In such jurisdictions a jury should be careful in convicting upon the uncorroborated testimony of an accomplice[4] because of its unreliable nature (the accomplice may be trying to save himself, or have a promise of clemency or immunity in case of a conviction).[5] It is customary for the court to instruct the jury to use great caution in accepting the uncorroborated testimony of an accomplice, but failure to so instruct the jury is not assignable as error since most courts, following the common law rule, hold that such a charge is merely an exercise of the judicial discretion of the courts.[6] However, England and some few jurisdictions have held to the contrary and quashed convictions where the court has failed to caution the jury.[7]

Because of the inherent unreliability of the testimony of accomplices, many States have passed statutes doing away with the common law rule. These jurisdictions now require corroboration of an accomplice in order to convict in a criminal case.[8] The

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firmed 98 N. J. L. 576, 119 Atl. 926 (1923); Lindsay v. People, 63 N. Y. 143 (1875); State v. Stroud, 95 N. C. 626 (1886); Allen v. State, 10 Ohio St. 287 (1859); State v. Green, 48 S. C. 136, 26 S. E. 234 (1897); State v. Whaley, 113 S. C. 103, 101 S. E. 568 (1919); People v. Lee, 2 Utah 441 (1877); State v. Montefoire, 95 Vt. 508, 116 Atl. 77 (1922); Dove v. Commonwealth, 82 Va. 301 (1886); Woods v. Commonwealth, 86 Va. 929, 11 S. E. 798 (1890); Draper v. Commonwealth, 132 Va. 648, 111 S. E. 471 (1922); Faulkner v. Town of South Boston, 139 Va. 569, 123 S. E. 358 (1924); State v. Betsall, 11 W. Va. 703 (1877); Ingalls v. State, 48 Wis. 647, 4 N. W. 785 (1880); Means v. State, 125 Wis. 650, 104 N. W. 815 (1905); 1 R. C. L. 166; 98 A. S. R. 161, 162, and note; 5 Jones on *Evidence* (2d ed. 1926), Sec. 2217.

[4] Reagen v. U. S., 157 U. S. 301, 15 Sup. Ct. 610, 39 L. Ed. 709 (1894); People v. Bonney, 98 Cal. 278, 33 Pac. 98 (1893); State v. Stebbins, 29 Conn. 463, 73 Am. Dec. 223 (1861); Shiner v. State, 41 Fla. 630, 27 So. 36 (1899); Collins v. People, 98 Ill. 584, 38 Am. Dec. 105 (1881); People v. Schullman, 295 Ill. 560, 129 N. E. 54 (1920); Johnson v. State, 65 Ind. 269 (1879); Brewster v. State, 186 Ind. 369, 115 N. E. 54 (1917); State v. Banks, 40 La. Ann. 736, 5 So. 18 (1888); Commonwealth v. Chase, 147 Mass. 597, 18 N. E. 565 (1888); People v. Considine, 105 Mich. 149, 63 N. W. 196 (1895); Fitzcox v. State, *supra* n. 2; State v. Donnelly, 130 Mo. 642, 32 S. W. 1124 (1895); Long v. State, 35 Neb. 33, 36 N. W. 310 (1888); State v. Jones, 176 N. C. 72, 97 S. E. 32 (1918); Allen v. State, 10 Ohio St. 287 (1859); Cox v. Commonwealth, 125 Pa. 94, 17 Atl. 227 (1889); State v. Lee, 29 S. C. 113, 7 S. E. 44 (1888); State v. Dana, 59 Vt. 614, 10 Atl. 727 (1887); Faulkner v. Town of South Boston, 139 Va. 569, 123 S. E. 358 (1924); Black v. State, 59 Wis. 471, 18 N. W. 457 (1884); 1 R. C. L. 167; 16 C. J. 694; 4 Wigmore, on *Evidence* (2d ed. 1923), Sec. 2056; 5 Jones on *Evidence* (2nd ed. 1926), Sec. 2217.

[5] Gill v. State, 59 Ark. 422, 27 S. W. 598 (1894); People v. Langtree, 64 Cal. 256, 30 Pac. 813 (1883); Barr v. People, 30 Colo. 522, 71 Pac. 392 (1903); People v. McKinney, 267 Ill. 454, 108 N. E. 652 (1915); State v. Brown, 146 Iowa 113, 124 N. W. 899 (1910); State v. Shelton, 223 Mo. 118, 122 S. W. 732 (1909); State v. Kent, 4 N. D. 577, 62 N. W. 631, 27 L. R. A. 686 (1895); Allen v. State, 10 Ohio St. 287 (1859); 16 C. J. 694.

[6] State v. Wolcott, 21 Conn. 272 (1851); State v. Carey, 76 Conn. 342, 56 Atl. 632 (1904); Stone v. State, 118 Ga. 705, 45 S. E. 630 (1903); State v. DeHart, 109 La. 570, 33 So. 605 (1903); Commonwealth v. Holmes, 127 Mass. 424, 34 Am. Rep. 391 (1878); Commonwealth v. Clune, 162 Mass. 200, 38 N. E. 435 (1894); People v. Shaver, 107 Mich. 562, 65 N. W. 538 (1895); State v. Hyer, 39 N. J. L. 598 (1877); State v. Holland, 83 N. C. 624, 35 Am. Rep. 587 (1880); State v. Green, 48 S. C. 136, 26 S. E. 234 (1897); 1 R. C. L. 167; 98 A. S. R. 163 and note.

[7] Anthony v. State, 44 Fla. 1, 32 So. 818 (1902); Ray v. State, 1 Greene 316, 48 Am. Dec. 379 (Iowa 1848); State v. Meysenburg, 170 Mo. 1, 71 S. W. 229 (1902); State v. Pearson, 37 Wash. 405, 79 Pac. 985 (1905); 1 Taylor on *Evidence* (7th ed. 1920), Sec. 662.

[8] Bird v. State, 36 Ala. 279 (1860); Hudspeth v. State, 50 Ark. 534, 9 S. W. 1 (1888); People v. Hoagland, 138 Cal. 338, 71 Pac. 359 (1903); People v. Caffey, 161 Cal. 443, 119 Pac. 901 (1911); People v. McCollum, ... Cal. ....., 7 Pac. (2d) 301 (1932); State v. Homer, 1 Marv. 504, 41 Atl. 139 (Del. 1893); but see State v. Freedman, 3 Pennewill, 403, 53 Atl. 356 (Del. 1901); State v. Roake, 10 Idaho

degree of corroboration varies in different jurisdictions. Some require corroboration as to some of the material facts,[9] others, that the corroboration be such as to connect the defendant with the commission of the crime with which he is charged,[10] and in still other jurisdictions it is sufficient if the corroboration satisfies the jury that the accomplice is actually relating the circumstances of the crime.[11]

Tennessee takes a unique position and holds that corroboration is required even in the absence of statute.[12] "The rule is that to sufficiently corroborate the testimony of the accomplice there should be some fact testified to entirely independent of the accomplice's evidence, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it. The corroboration must consist in some fact or circumstance that affects the identity of the party accused."[13] But a statute has reverted to the common law rule in liquor offences and states that "the unsupported evidence of any accomplice suffices."[14]

E. F. D.

EXEMPTION STATUTES—RETROSPECTIVE OPERATION OF LAWS.

Prior to January 1, 1932, when the new Tennessee Code became effective, the plaintiff had incurred an obligation to defendant and this action was brought to replevy a horse that had been levied on under an execution based on the obligation. The debtor's property was not exempt under statutes prior to the 1932 Code, and the total value of the execution debtor's personal property was less than the exemption allowed by the new act.

The Supreme Court's holding was that Section 7701 of the Code of 1932 was inapplicable, that the plaintiff was not entitled to a lump personalty exemption of $750, as therein provided, and that the exemption laws in effect at the time the obligation was created were effective.[1]

288, 79 Pac. 82 (1904); State v. Chauvet, 111 Iowa 687, 83 N. W. 717 (1900); Little v. Commonwealth, 242 Ky. 247, 46 S. W. (2d) 97 (1932); Wolf v. State, 143 Md. 489, 122 Atl. 641 (1923); State v. Clements, 82 Minn. 434, 85 N. W. 229 (1901); State v. Gordon, 105 Minn. 217, 117 N. W. 483 (1908); State v. Douglas, 26 Nev. 196, 65 Pac. 802 (1901); People v. Berger, 254 N. Y. Supp. 136 (1931); State v. Kellar, 8 N. D. 563, 80 N. W. 476 (1899); Hill v. Territory, 150 Okla. 212, 70 Pac. 757 (1905); Davis v. State, ... Okla. Cr. ....., 237 Pac. 471 (1925); State v. Phillips, 18 S. D. 1, 98 N. W. 171 (1904); Balleu v. State, 97 Tex. Cr. R. 325, 260 S. W. 1045 (1924).

9 Spriggs v. Commonwealth, 200 Ky. 559, 255 S. W. 108 (1923); Wolf v. State, 143 Md. 489, 122 Atl. 641 (1923).

10 Moore v. State, 15 Ala. App. 152, 72 So. 569 (1916); Goodbread v. State, 29 Ga. App. 195, 115 S. E. 44 (1922); State v. Hughes, 141 La. 578, 75 So. 416 (1917); State v. Ritz, 65 Mont. 180, 211 Pac. 298 (1922); Campbell v. State, 12 Okla. Cr. 349, 157 Pac. 49 (1916).

11 State v. Achantis, 196 Iowa 223, 194 N. W. 209 (1923); State v. Smith, 51 N. D. 130, 199 N. W. 189 (1924); State v. Dana, *supra*, n. 4.

12 Fair v. State, 2 Tenn. Cas. 481 (1877); State v. Collie, 3 Tenn. Cas. 803 (1878); Hall v. State, 71 Tenn. 552 (1879); Truss v. State, 81 Tenn. 311 (1884); Robison v. State, 84 Tenn. 146 (1885); Clapp v. State, 94 Tenn. 186, 30 S. W. 214 (1895); Shelby v. State, 95 Tenn. 152, 31 S. W. 492 (1895); Hicks v. State, 126 Tenn. 359, 149 S. W. 1055 (1912); 16 C. J. 997.

13 Clapp v. State, *supra*, n. 12.

14 Pub. Acts of Tenn. 2nd. Sess., Ch. 1, Sec. 13, p. 664 (1913).

1 Hair v. Ramsey, ... Tenn. ....., 53 S. W. (2d) 381 (1932).

This decision was based on an earlier Tennessee case[2] which involved the exemption of a homestead by the Constitution of 1870,[3] the decision being that the provision against pre-existing debts was void as being obnoxious to the Federal Constitution,[4] on the ground that the legislature, under the idea of affecting the remedy, and not the right, cannot pass any law that impairs in any way the right in full force existing at the time the contract was executed.[5]

As a general rule, exemption laws are regarded as pertaining to the remedy only,[6] creating a personal privilege rather than a right,[7] and since they relate merely to the value of the remedy they do not impair the obligation of contracts by taking away all remedy for their enforcement.[8] Business men generally rely upon their ability to enforce payment of their claims by proceedings at law against their debtors and a sale of their property upon execution, and they very frequently, before giving credit, ascertain what property their debtor has liable to seizure and sale upon execution. Yet the right of the state to increase exemptions and make the same applicable to contracts previously entered into is unquestioned.[9] With few exceptions the courts have held that exemption laws are remedial in their nature and should receive a liberal construction in favor of the debtor.[10]

Blackstone defines remedial statutes to be those which are "made to supply such defects and abridge such superfluities in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever."[11] The rule that statutes are to be construed as prospective is not insistent as to remedial statutes,[12] as such statutes are favored by the courts,[13] and remedial statutes may be of retrospective nature, provided they do

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2 Hannum v. McInturf, 65 Tenn. 225 (1873).

3 2nd Session 1870, Ch. 80.

4 Const. of U. S., Art. I, Sec. 10.

5 Mann v. Rose, 53 Tenn. 93 (1871).

6 Carson v. Memphis, etc. R. Co., 88 Tenn. 646, 13 S. W. 588 (1890); East Tenn., etc. Ry. Co. v. Kennedy, 83 Ala. 462, 3 So. 852 (1888); Harvey v. Thompson, 2 Ga. App. 569, 60 S. E. 11 (1907); Wabash R. Co. v. Doughan, 142 Ill. 248, 31 N. E. 594 (1892); Newell v. Hayden, 8 Iowa 140 (1859); National Tube Co. v. Smith, 57 W. Va. 210, 50 S. E. 717 (1905).

7 Kyle v. Montgomery, 73 Ga. 337 (1884); Harvey v. Thompson, *supra* note 6.

8 Kirkman v. Bird, 22 Utah 100, 61 Pac. 338 (1900).

9 Breitung v. Lindauer et al., 37 Mich. 217, 229 (1877).

10 Webb v. Brandon, 51 Tenn. 285 (1871); Hills v. Joseph, 229 Fed. 865 (1916); Keelin v. Graves, 129 Tenn. 103, 165 S. W. 232 (1914); Hickman v. Hanover, 33 Fed. (2d) 873 (1929); Good v. Fogg, 61 Ill. 449 (1871); Montague v. Richardson, 24 Conn. 338 (1856); Astley v. Capron, 89 Ind. 167 (1883); Cowan Tent Co. No. 61 v. Treesh, 199 Ind. 24, 155 N. E. 42 (1927); Schooley v. Schooley, 184 Iowa 835, 169 N. W. 56 (1918); Breland v. Parker, 150 Miss. 476, 116 So. 879 (1928); Nelson v. Fightwater, 40 Okla. 38, 44 Pac. 213 (1896); Crites v. Bede, 86 Ore. 460, 168 Pac. 941 (1917); Rookard v. Atlantic, etc. Air Line Ry. Co., 89 S. C. 371, 71 S. E. 992 (1911); Kuntz v. Kinney et al., 33 Wis. 510 (1873); Connaughton v. Sande, 32 Wis. 387 (1873).

11 1 Blackstone Comm. 86.

12 Miller-Brent Lbr. Co. v. State, 210 Ala. 30, 97 So. 97 (1923); Aultman and Taylor Mach. Co. v. Fish, 120 Ill. App. 314 (1905); Clark v. Kansas-St. L. R. Co., 219 Mo. 524, 118 S. W. 40 (1909); Hollenbach v. Born, 238 N. Y. 34, 143 N. E. 782 (1924); Christiano v. Christiano, 197 N. Y. S. 72 (1922); Waddill v. Masten, 172 N. C. 582, 90 S. E. 694 (1916).

13 Globe Indemnity Co. v. Martin, 214 Ala. 646, 108 So. 761 (1926); Barrington v. Barrington, 200 Ala. 315, 76 So. 81 (1917).

not impair contracts, disturb vested rights, or create new obligations.[14] In the principal case[15] there is no showing of an impairment of a contract, violation of a vested right, or the creation of a new obligation. It appears that only a remedial right has been affected, whereas the Tennessee Supreme Court treats the statute as involving a substantive right.

It is easily conceivable that this decision will result in confusion in many situations. For example, in a bankruptcy case there will be the problem of allowing exemptions against a number of claims over a period of time which includes the existence of both statutes. It will be difficult to arrive at the proper division or adjustment of the exemptions.

The act was passed June 25, 1931, to take effect January 1, 1932. Additional confusion might occur as to obligations arising during this period. It might well be argued that from the time of passage all creditors are bound by notice of the change in the exemption laws and that their debtors would be entitled to the new exemption of $750. Before the time set for its going into effect no rights may be acquired under it and no one is bound to regulate his conduct according to its terms,[16] but at least an obligee has constructive notice that his remedy in enforcing an obligation is to be changed and he can govern himself according to his desires.

C. S. B., Jr.

SLANDER AND LIBEL—LIBEL BASED ON RADIO BROADCAST

An action was brought by C. A. Sorenson, who was a candidate for re-election as Attorney-General of Nebraska, against Richard F. Wood and the KFAB Broadcasting Company to recover damages arising from certain alleged false and libelous statements concerning plaintiff made by Wood in a political speech to a radio audience. The District Court rendered a judgment against the individual defendant for nominal damages and in favor of the corporate defendant. On appeal by the plaintiff, the Supreme Court reversed the judgment and remanded the cause, holding that a radio broadcasting company was liable for defamatory statements uttered by a political speaker and broadcast by the company's station facilities.[1]

The defendant corporation as a defense pleaded:

1. An order of the Radio Commission providing that in broadcasting material for candidates for public office, "such licensee shall have no power for censorship over the material."[2]

2. That it was a common carrier of intelligence by wire and wireless under the Interstate Commerce Act, duly licensed and subject to the regulations of the Federal Radio Commission.[3]

The court in the principal case in answer to the first contention of the defendant radio company, says: "We do not think Congress intended by the language in the radio act to authorize or sanction the publication of libel and thus to raise an issue with the federal constitutional provision prohibiting the taking of property without

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14 59 C. J. 1170.

15 Hair v. Ramsey, *supra* note 1.

16 Smith v. Thomas, 317 Ill. 150, 147 N. E. 788 (1925); Butters v. Des Moines, 202 Iowa 30, 209 N. W. 401 (1926); State v. No. Pac. R. Co., 53 Wash. 673, 102 Pac. 876 (1909).

1 Sorenson v. Wood et al., ... Neb. ....., 243 N. W. 82 (1932).

2 49 U. S. C. A. Sec. 1 et seq.

3 Dated May 11, 1928, also Sec. 18 of Radio Act of 1927, 44 St. at Large 1170, 47 U. S. C. A. 98.

due process or without payment of just compensation. This is particularly true where any argument for exercise of the police power and for any public benefit to be derived would seem to be against such an interpretation rather than for it. So far as we can discover, no court has adjudicated this phase of the statute and order. We reject the theory."[4] The same court continues, "We are of the opinion that the prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee from censoring the words as to their political and partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such an action. The Federal Radio Act confers no privilege to broadcasting stations to publish defamatory utterances."[5]

As to the contention of the defendant corporation that it is a common carrier of intelligence by wire and wireless within the meaning of the Interstate Commerce Act, the court says, "This has never been decided by any court. We know that licensees of broadcasting stations in their annual meetings and eminent counsel have taken the opposite view; and that in 1929 the American Bar Association adopted a resolution instructing its committee on radio law to oppose the enactment of any legislation declaring broadcasting stations to be common carriers.[6] We are of the opinion that the defense of the company that it is a common carrier is not available here."[7]

There would seem to be some doubt as to whether the broadcasting of defamatory utterances read from a written manuscript constitutes slander or libel. Tested from the standpoint of the listener who does not know that the words are being read from a printed page it would seem to be slander. The law has drawn a distinction between libel and slander[8] and has often said that words which if spoken would not constitute slander, would, if written, constitute libel. The theory back of this distinction would seem to be that the written statement makes a greater impression than the oral one. The penalty for libel is ordinarily more severe than that for a slander.[9] But should such be true as regards the radio? One author has said, "The development of the radio gives the spoken word a greater potency than the printed word. Because of this there is evidenced a tendency to reach slander by means of criminal statutes in states which, until the advent of the radio, did not punish a slander as a crime."[10]

Usually, in the case of newspapers the publisher is held absolutely liable, and if the statement is libelous *per se*, his motive is immaterial.[11]

There is a very excellent article by Stephen B. Davis[12] in which he questions the correctness of making the owner of a broadcasting station absolutely liable for

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4 Sorenson v. Wood et al., *supra* note 1.

5 *Ibid.*

6 54 Am. Bar Assn. Reports 90 (1929).

7 Sorenson v. Wood et al., *supra* note 1.

8 Harrison v. Pool, 24 Ga. App. 587, 101 S. E. 765 (1920).

9 Spence v. Johnson, 142 Ga. 267, 82 S. E. 646 (1914); Johnson v. Haldeman, 102 Ky. 163, 43 S. W. 226 (1897); Duquesne Distributing Co. v. Greenbaum, 135 Ky. 182, 121 S. W. 1026, 24 L. R. A. (N. S.) 955 (1909); Belo v. Smith, 91 Texas 221, 42 S. W. 850 (1897).

10 DAVIS, RADIO LAW (2d ed. 1930) 99.

11 American Publishing Company v. Gamble, 115 Tenn. 663, 90 S. W. 1005 (1905); Enquirer Co. v. Johnson, 72 Fed. 443 (1896); Burt v. Advertiser Newspaper Co., 154 Mass. 238, 28 N. E. 1, 13 L. R. A. 97 (1891); MacLean v. Scripps, 52 Mich. 214, 17 N. W. 815 (1883); Owen v. Dewey, 107 Mich. 67, 65 N. W. 8 (1895); Trebby v. Transcript Publishing Company, 75 Minn. 84, 76 N. W. 961 (1898).

12 34 CASE AND COMMENT 67 (1928).

defamatory utterances made over the radio. Comparing the control that a newspaper publisher has over the publication of his paper with the control the owner of the broadcasting station has over the broadcasts Mr. Davis says, "The broadcaster, on the other hand, has no such opportunity of complete inspection and protection. There is no interval between the speaking of the word into the microphone and its transmission to the listening public. The station owner has no chance to consider whether he will publish it, for speech and transmission are simultaneous. He may use the highest discretion in the selection of speakers of spotless reputation for fair speaking, and his trust may be misplaced. He may require the submission of the manuscript in advance, find it free from calumy, and so pass it, and the speaker may depart from it. He may have his monitor listen to each word spoken through the microphone; yet the defamation may come so suddenly that its escape cannot be prevented. To impose absolute liability under such circumstances is to penalize in the absence of blameworthiness—not the usual principle in the law of torts."[13]

Since the broadcasting company is being held liable in such situations as illustrated by the principal case, it would seem that some means of protection will have to be devised. Contracts of indemnity or insurance to save the radio company harmless in the event of an action on a speaker's utterances might serve the purpose.

J. R. S.

TAXATION—APPOINTMENT OF RECEIVERS IN TAX SUITS.

Pending the sale of certain property for delinquent taxes, in a proceeding by the State to collect such taxes, a petition was filed in the Chancery Court setting out the previous litigation under which the land was to be sold, averring that no taxes had been paid on the land involved for many years, and praying that a receiver be appointed to collect the rents and profits and to hold them subject to the orders of the court by virtue of a statute providing for such appointment by the court in tax suits. HELD: That in order to have a receiver appointed in such a case there must be an allegation that the property involved is being misused, wasted, or neglected, so that the value of the security is being endangered.[1] The court also held, as a matter of dictum, that upon the proper showing of fact the receiver could have been appointed without the aid of the statute.

The decision of the court in the principal case would seem to be based entirely upon the interpretation of a Tennessee statute which reads as follows: "the courts in which such bills (for the collection of delinquent taxes) may be filed are authorized to appoint receivers to take charge of the property which is the subject-matter of the litigation and collect the rents and profits thereon, to the end that the net amount of such rents and profits, after paying the receiver reasonable compensation, shall be applied to the taxes, costs, penalties, and interest involved in such suits and incident thereto."[2]

The question which first comes to mind upon reading this case is whether or not the statutory provision for the appointment of a receiver in tax suits is peculiar to Tennessee and whether or not a receiver could be appointed in the absence of such a statute in another State.

It may be stated as a general proposition that a receiver will be appointed when such appointment is necessary for the preservation of the subject of the litigation, or

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[13] *Ibid* 70.

[1] State, for Use, etc. v. Collier et al., ... Tenn. ....., 53 S. W. (2d) 982 (1932).

[2] Tenn. Code, 1932, Sec. 1602.

the rents and profits of it, from waste, spoilation, loss, destruction, or removal during the litigation, so that there may be some harvest, some fruits to gather, after the labors of the controversy are over.''[3] Should this general rule of receiverships apply to tax suits?

In answering this question it should be remembered that the levy and collection of taxes is entirely statutory. With this in mind, two new questions arise, namely: 1. If the statute provides for an action in the law courts to collect taxes, should equity take cognizance of the case where this remedy is ineffectual and grant a prayer for the appointment of a receiver? 2. If the statute provides for the collection of taxes by a suit in equity, may equity appoint a receiver for the property involved to care for it during the period of the litigation, in the absence of express statutory authority?

In answer to the first question, it is generally held that where a statute provides a remedy for the collection of taxes in given circumstances, that remedy must be pursued to the exclusion of all others based on general principles of law.[4] There is some authority, however, for saying that if this remedy is not sufficient, then a different remedy may be pursued;[5] however, in the case here cited, the method of collection was by seizure and sale, and the court held that a tax assessment amounted to a personal obligation and allowed a suit to be brought for the deficit after such sale.

The U. S. Supreme Court, in *Thompson v. Allen County*,[6] held that the power of collecting taxes was foreign to equity; that the legislature which levied the tax should provide for its collection; and that equity would not assume to grant relief merely because the appropriate legal remedy did not prove adequate. Thus, it would seem that the first question should be answered in the negative.

It has been stated before that the principal case, as dictum, held that the court could have appointed the receiver without the aid of the statute, because the State had a lien. Does this answer the second question affirmatively?

The court cites no authority for its dictum, so we must look elsewhere for authority. One of the well established rules of receiverships is that a creditor who has a lien on property may have a receiver appointed upon the proper showing that he will suffer injury by not having a receiver.[7] Conceding the fact that taxes are a lien upon property, does equity have the power to appoint a receiver in a tax suit, unless a statute provides for it or makes a tax suit the same as any other suit in equity?

It is true that the power to appoint a receiver is an inherent right of the courts of equity,[8] but it has also been shown before that the statutory method of collecting taxes is exclusive. It may now be said that a statute under which property is sold

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3 Chambliss' Gibson's Suits in Chancery (3rd ed. 1929), Sec. 895, note 2.

4 State ex rel. Hayes v. Snyder, 139 Mo. 549, 41 S. W. 216 (1897); Chamberlain v. Woolsey, 66 Neb. 144, 92 N. W. 181 (1902); Atlantic County v. Weymouth Tp., 68 N. J. L. 652, 54 Atl. 458 (1903).

5 Succession of Mercier, 42 La. Ann. 1135, 8 So. 732 (1890).

6 115 U. S. 550, 6 Sup. Ct. Rep. 140 (1885).

7 Dorathy v. Hutchins, 170 Ark. 743, 281 S. W. 353 (1926); Bromley v. McCall, 13 Ky. L. Rep. 915, 18 S. W. 1016 (1892); Kanawha Coal Co. v. Ballard and W. C. Co., 43 W. Va. 721, 29 S. E. 514 (1897).

8 Road Improvement Dist. No. 7 of Poinsett County, Ark. v. Guardian Savings and Trust Co., 298 Fed. 272 (Ark. 1925); State v. Farmers' and Merchants' Ins. Co. of Lincoln, 90 Neb. 664, 134 N. W. 284 (1912); Jones v. Jones, 187 N. C. 589, 122 S. E. 370 (1924).

for taxes must be strictly complied with.[9] Taking these last two rules together with the rule that tax statutes are ordinarily construed strictly against the State and in favor of the taxpayer,[10] it follows that in the absence of express provision, the statutes could be enlarged, by interpretation, to include the appointment of receivers, only when it has been provided that a tax suit will be tried in the same way that any other suit in equity is tried.

In Tennessee, however, the legislature, by statute, has made these suits to collect taxes to conform to the ordinary rules of procedure in the equity courts and requires that they be tried just like any other suits in the Chancery Court.[11] The court evidently had this statute in mind when it said that the receiver could have been appointed without the aid of the other statute which provides for such appointment.

From the above reasoning it is submitted that unless there is a statute making the procedure in tax suits the same as that in any other equity suit or expressly providing for the appointment of a receiver in tax suits, such receiver could not be appointed under the general laws of taxation, regardless of the statutory lien.

E. B. F.

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9 Brachey v. Peddicord, 199 Ky. 75, 250 S. W. 511 (1923); Charland v. Trustees of Home for Aged Women, 204 Mass. 563, 91 N. E. 146 (1910); Richmond Cedar Works v. Shepard, 181 N. C. 13, 105 S. E. 886 (1920).

10 H. D. Watts Co. v. Hauk, 144 Tenn. 215, 231 S. W. 903 (1921); McNally v. Field, 119 Fed. 445 (R. I. 1902); Yarbrough Bros. Hardware Co. v. Phillips, 209 Ala. 341, 96 So. 414 (1923).

11 Tenn. Code (1932), Sec. 1591.

BOOK REVIEWS

ACCOUNTING IN LAW PRACTICE. By Willard J. Graham and Wilber G. Katz. Chicago: Callaghan & Company, 1932, pp. xiii, 444.

Accountants always have recognized the necessity for a study of the law involved in business relationships. Such knowledge forms a part of the necessary background of the well trained certified public accountant. This in no sense implies that the accountant is to perform the work of a lawyer, but it does imply that he can correlate accounting principles with legal decisions and that he should be able to conform with the statutes in the conduct of his work.

More recently lawyers have recognized the value of a knowledge of the principles of accounting both in the study and in the practice of law. Law schools throughout the country have put in courses in accounting theory as a part of the curriculum. Much of the work has been experimental in nature and adequate text material has not been available. The use of standard texts on accounting would involve a more detailed and complete study than time would allow.

The principal value of an understanding of accounting principles by the lawyer is in the added facility which it gives him in the handling of his own peculiar tasks. It is not necessary that he be able to keep a set of books or that he prepare statements of condition or profit and loss. A bookkeeper can perform those tasks with less effort. A detailed knowledge of bookkeeping is not essential to an understanding of the bookkeeping process nor to the theoretical and practical considerations underlying modern accounting.

The purpose of this book is to make available to the lawyer a succinct presentation of the principles and practices of accounting with which he is most likely to be concerned in practice. With this objective, it has been possible to omit a large part of the material usually considered in elementary accounting texts and, on the other hand, to include a discussion of a number of advanced topics of particular interest to the lawyer.

The book is divided into seven parts as follows:

1. The accounting process.
2. Partnerships.
3. Corporations.
4. Valuation and determination of income.
5. Financial statements, construction and interpretation.
6. Accounting for fiduciaries.
7. Accounting and office management for law firms.

The lawyer whose practices includes any substantial amount of advisory work for business enterprises, whether corporations, partnerships, or individual proprietorships, frequently needs the ability to understand and analyze financial statements. In legal specialties such as income tax practice, utility rate regulation, and corporate mergers and consolidations, a mastery of accounting principles is indispensable. Here the accountant and the lawyer should work together. The lawyer should no more assume the functions of the accountant than should the accountant attempt the functions of the lawyer.

An analysis from an accounting point of view not only aids in the understanding and statement of rules of law, but also would probably have saved the courts from

laying down certain rules now recognized as unfortunate. Errors arising through ignorance of accounting principles abound in English and American decisions and, unfortunately, their effect is still felt. Today many old rules of law may be profitably restated and whole groups of new problems may be solved more readily and confidently if counsel are equipped with an understanding of the fundamental theories and techniques of accounting and if the courts are able and willing to follow counsel in such analyses.

While the book is designed primarily for consecutive reading rather than as a reference book the average reader delving into this science for the first time probably will encounter difficulties unless he is willing to spend considerable time in close study. The student using the book as a text will find sufficient drill in the separate manual of Problems and Exercises which accompanies the book. The preparation of solutions to a number of these problems appears indispensable to an understanding of the technique of the bookkeeping process. The general reader, however, may hurry over these sections without seriously impairing his understanding of the material which follows.

Professor Graham is well known in the field of accounting instruction. He has presented the accounting theory clearly and well, and the book is a valuable contribution to the understanding which the professions of law and accountancy are achieving to their mutual benefit.

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CONVICTING THE INNOCENT. By Edwin M. Borchard. New Haven: Yale University Press. A publication of the Institute of Human Relations. 1932, pp. xxix, 421.

While sitting at home within the happiness of your family circle you may rise to answer the knock on the door. You may be surprised to learn from the officer there that you are under arrest and must go with him. You may be astonished to hear the jury at your trial return a verdict of "guilty." You may think it can't happen. But it has. From the thousands of criminal cases decided in this country and England during a period of more than a century, Professor Borchard and his collaborator have selected sixty-five in which innocent persons were convicted. By this exposition the author hopes to awaken our legislators to the necessity of providing reimbursement for the loss and damage suffered by wrongly convicted persons. Comparatively, sixty-five is a small number. But the reader should understand that more than sixty-five such innocents have been convicted. The cases used were selected from a larger number.

These sixty-five cases illustrate admirably the various ways in which mistakes result in convicting innocents. The notes on pp. xxv-xxvii inc. classify the cases under the various errors committed. The greatest number in this classification fall under mistaken identity. Especially is this shown to have occurred when the victim of the crime identifies the accused. The other convictions were wrongly obtained by various means.

The make-up of the volume is excellent. The type is large and clear and is printed on a good quality of opaque paper. Professor Borchard presents a pleasing style which detracts from the monotony of reading sixty-five cases of somewhat similar circumstances.

The too ambitious prosecutor and over zealous policeman should learn from reading the book that securing justice does not require or even tolerate third degree methods. The public at large should learn that first conclusions as to guilt are often wrong. Public clamor for convictions may be hard to disregard but this book shows the danger of not doing so.

The author's purpose is to convince the reader that reparation should be made in cases of convicted innocents. In these times one is likely to ask how expensive that will be. It is disappointing that no specific statistics are given on this point. One may reasonably infer, though, that the cost will not be very large. The book will provoke thought about a neglected phase of our judicial system.

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CASES ON BUSINESS LAW. By William E. Britton and Ralph S. Bauer. St. Paul: West Publishing Co. Second edition, 1932, pp. xxxi, 1219.

Postulating that the case method of instruction is adapted to teaching law to non-professional students, the second edition of Messrs. Britton and Bauer's "Cases on Business Law" is a splendidly arranged work designed for use in an intensive study of the basic subjects of the professional curriculum. The cases included in the new edition have been so revised that it is abreast with current business practice. Much valuable note material has been added by the authors, and there has been a notable reduction of more than three hundred pages in the size of the present volume as compared with the 1921 edition. The work is somewhat unique among commercial law materials that have come to the attention of the reviewer in that it contains a 35-page abridgement of Black's Law Dictionary as an appendix. This feature will highly commend the book to those faced with the problem of introducing students entirely unfamiliar with legal terminology to technical law subjects.

Like all commercial law casebooks, the work under discussion is subject to the criticism that a functional perspective of the field of law can best be presented in the limited time available in the business school curriculum by means of the text method of instruction, or through a more radical adaptation of the usual case system than that of the present work.

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Knoxville Bar.

BOOKS RECEIVED

CASES ON ADMINISTRATION OF DEBTORS' ESTATES. By Wesley A. Sturges. St. Paul: West Publishing Company, 1932, pp. xiv, 1141. Price $6.50.

HANDBOOK OF THE LAW OF EVIDENCE. By John J. McKelvey. St. Paul: West Publishing Company. Fourth Edition, 1932, pp. xix, 576. Price $5.00.

LAW OF THE AIR. By Arnold D. McNair. London: Butterworth & Company, Ltd. 1932, pp. xv, 249.

RESTATEMENT OF THE LAW OF CONTRACTS. By American Law Institute. St. Paul: American Law Institute Publishers, 1932. Vol. I, pp. xli, 582; Vol. II, pp. xxxi, 583-1206. Price $12.00.

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CREDITORS' RIGHTS AGAINST TENANTS BY THE ENTIRETY

By WILL ALLEN WILKERSON

A matter of considerable importance to creditors who have claims against a person who owns real estate as a tenant by the entirety, is to what extent, if any, such a person's interest can be subjected to the satisfaction of the creditor's claim. The estate by the entirety is created when property is conveyed to a husband and wife,[1] without more. The creation of such an interest in real estate is not limited to the home, but may extend to valuable business properties held solely for purposes of investment. The estate is anomalous in that each of the tenants owns the entire estate and neither owns a part, and upon death of one tenant, the surviving tenant takes no more, but enjoys the entire fee free from claims of any one else.[2] During the lifetime of both tenants, one tenant cannot sell or convey so as to effect the rights of the other tenant,[3] nor can a judgment creditor levy upon or sell the interest of one tenant so as to affect the rights of the other tenant during the lifetime of the latter.[4] However, it seems clearly established that one tenant or a judgment creditor may sell and dispose of the tenant's rights insofar as survivorship is concerned, and that the purchaser from the tenant, or under the execution sale, will take the entire estate if the other tenant predeceases the tenant whose interest was sold.[5]

With these incidents in mind, the question arises whether a creditor can reach the rents and profits or other increment of an estate held by the entirety when the creditor has a claim against one tenant.

In these times, when resort is frequently had to the bankruptcy courts for liquidation of obligations, the question may

1 Young vs. Brown (1916), 136 Tenn. 184.
2 Beddingfield vs. Estill & Newman (1906), 118 Tenn. 39.
3 Hopson vs. Fowlkes (1893), 92 Tenn. 697.
4 Cole Manufacturing Co. vs. Collier (1895), 95 Tenn. 115.
5 Cole Manufacturing Co. vs. Collier, supra, Note 4.

well be considered as to what rights the trustee in bankruptcy, who represents creditors, takes in property held as an estate by the entirety between the bankrupt husband and his wife. May such a bankrupt have large real estate holdings and, as is common, the title to said holdings be in him and his wife and upon bankruptcy of the husband, may the wife collect all rents, profits and continue in the possession of the real estate? Such seems to be the law of Tennessee, though it is readily seen that the mere incident of the insertion of the wife's name in the deed when she is really only a nominal party, may permit the husband to acquire a fortune in real estate, file a petition in bankruptcy and let his creditors look on while he holds valuable properties and lives in luxury.

The following statutes are of importance in determining what rights would vest in the trustee in bankruptcy where property is held by the bankrupt and his wife as tenants by the entirety:

The National Bankruptcy Act, Section 70a[6] provides:

> "The trustee of the estate of a bankrupt, upon his appointment and qualification .... shall .... be vested by operation of law with the title of the bankrupt as of the date he was adjudged a bankrupt except insofar as it is to property which is exempt, to all .... (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

The Married Woman's Emancipation Act[7] provides as follows:

> "Married women are fully emancipated from all disability on account of coverture, and the common law as to the disability of married women and its effects on the rights of property of the wife, is totally abrogated, except as set out in the next following section and subsequent section; and marriage shall not impose any disability or incapacity on a woman as to the ownership, acquisition or disposition of property of any sort or as to her capacity to make contracts and to do all acts in reference to property which she could lawfully do if she were not married, but every woman now married, or hereafter to be married, shall have the same capacity to acquire, hold, manage, control, use, enjoy and dispose of, all property real and personal, in possession, and to make any contract in reference to it, and to bind herself personally, and to sue and be sued with all the rights and incidents thereof as if she were not married."

Upon the enactment of the foregoing statute, the courts held that the effect of this statute was to abolish tenancies by the

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6 U. S. C. A., Title 11, Chapt. 7, Sec. 110.

7 Chapter 26 Public Acts of Tenn. 1913; Chapt. 126 Public Acts of Tenn. 1919; Shannon's Code 1917 Supp. of 1926, Sec. 4249a4½; 1932 Code Sec. 8460 modified.

entirety, and that after the passage of said law, a conveyance to the husband and wife, created a tenancy in common.[8]

However, the legislature seemed dissatisfied with this result, and by Chapter 126, Public Acts of Tennessee of 1919,[9] amended the earlier law and provided as follows:

> "Nothing in this Act shall be construed as abolishing tenancies by the entirety and as effecting the husband's right of curtesy."

Chapter 36 of the Public Acts of Tennessee, 1849-50, Sec. 4234, Shannons Code, 1917:

> "The interest of a husband in the real estate of his wife, acquired by her, either before or after marriage, by gift, devise, descent, or in any other mode, shall not be sold or disposed of by virtue of any judgment, decree, or execution, against him; nor shall the husband and wife be ejected from or dispossessed of such real estate of the wife, by virtue of any such judgment, sentence, or decree; nor shall the husband sell his wife's real estate during her life, without her joining in the conveyance in the manner prescribed by law, in which married women shall convey lands."

Chapter 141, Public Acts of Tennessee, 1879, Shannons Code 1917, Sec. 4239:

> "The rents and profits of any property or estate of a married woman, which she owns or may become seized or possessed of, either by purchase, devise, gift, or inheritance, as a separate estate, or for years, or for life, or as a fee simple estate, shall in no manner be subject to the debts or contracts of her husband, except by her consent, obtained in writing. But this provision shall in no manner interfere with the husband's tenancy by the curtesy."

The leading case in Tennessee is that of *Cole Manufacturing Company vs. Collier*,[9a] in which the Court held that a purchaser at an execution sale, under a judgment against the husband, acquires no rights to the rents, profits or increment of the property during the life of the wife, but recognized as authority, earlier cases holding that such a purchaser would succeed to the rights of the husband insofar as ultimate survivorship is concerned. The Court says in this connection, on page 120:

> "We think it apparent that the furtherest limit to which this Court has gone, is in holding that the purchaser of the husband's interest in such an estate, stands in his shoes so far as ultimate survivorship is concerned, but that the question of the purchaser's right to the rents and profits of the property, pending the wife's life, is yet an open one in this state."

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8 Gill vs. McKinney (1918), 140 Tenn. 549.

9 Shannon's Code 1917 Supp. 1926, Sec. 4249a5; 1932 Code Sec. 8461.

9a Note 4, supra.

The Court then discussed at length the peculiar characteristics of this estate and concluded by holding that during the lifetime of the wife, creditors of the husband could not reach her right to rents and profits. Therefore, this case is authority that a trustee in bankruptcy would not be entitled to rents and profits under Sec. 70a of the National Bankruptcy Act, which vests the trustee with such property of the bankrupt which "might have been levied upon and sold under judicial process against him."

In *Hopson vs. Fowlkes*,[9b] the Supreme Court of Tennessee further held that one tenant could not sell and convey his interest in the estate in such a manner as to affect the rights of the other tenant. On page 701 the Court took occasion to quote with approval from an Illinois case, saying:

> "Judge Walker, in delivering the opinion of the Court said:
>
> 'Now this estate by the entireties is peculiar. The possession of one is the possession of both. The estate is joint for life and descends to or vests in the survivor absolutely and in fee, and by the destruction of the estate of one, it inures to the other. Neither can have partition, nor can either sell the estate so as to affect the rights of the other, and when their rights to the property are invaded, a suit for a recovery for the injury, or for the property must be joint, because the property and the right to its enjoyment are joint coverture.' "

Under the authority of this case, the trustee in bankruptcy therefore would not be vested with any present right under that portion of Sec. 70a of the National Bankruptcy Act, which gives the trustee any property which the bankrupt "could by any means have transferred."

Many Tennessee cases[10] have followed the *Cole Manufacturing Company* case and the *Hopson* case and have applied to

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9b Note 3, supra.

10 Chambers vs. Chambers (1893), 92 Tenn. 707. The wife cannot be compelled to accept homestead out of property held by the entirety.

Building & Loan Association vs. Patton (1900), 100 Tenn. 407, even though the husband may be evicted, this does not accomplish the eviction of the wife.

Walker vs. Bobbitt (1905), 114 Tenn. 700, upon the death of one tenant, the surviving tenant takes no new right but the entire estate remains in the survivor, not by inheritance but by survivorship. To the same effect is Beddingfield vs. Estill & Newman (1906), 118 Tenn. 39.

Whitley vs. Meador (1916), 137 Tenn. 163, the husband cannot convey any interest in the property so as to effect the wife's rights.

McGhee vs. Henry (1921), 144 Tenn. 548, an estate by the entirety can be ended only by the joint conveyance of husband and wife, and neither husband nor wife can separate his interest from the other except by joint action of both or by operation of law, such as absolute divorce.

Washburn & Cason vs. Moore, 3 Hig. 268, neither husband nor wife can dispose

various situations the principles laid down in those decisions, the result of which is that in Tennessee a purchaser at a sale under execution against the husband can place himself so far in the room and stead of the execution debtor, that, if unredeemed, he will ultimately come into the possession of the entire estate in the event the husband outlives the wife, but he cannot under such a sale secure any present right or interest in the estate. Nor can the husband in any manner transfer or convey without the wife joining, any present right in the estate held by the entirety. The only interest which can be reached by an execution against the husband, or which the husband can transfer or convey without the wife's consent, is the husband's hope of ultimate survivorship, in which event the purchaser or grantee would come into the entire estate, but, on the other hand, should the husband predecease his wife, the purchaser or grantee gets nothing.

The Federal Courts have generally applied the same holdings that have been developed in Tennessee. The case of *Conn. Fire Ins. Co. vs. McNeal*[11] arose in the Federal District Court for the Western District of Tennessee, and was from there appealed to the Circuit Court of Appeals for the Sixth Circuit. This case concerned property held as an estate by the entirety by husband and wife in Tennessee. The Circuit Court of Appeals, speaking through Judge Hickenlooper, in describing the rights the wife had during coverture, in lands held by her and her husband, as an estate by the entirety, says on page 678:

> "That she had an interest during coverture cannot be denied and such interest was so far independent of her husband's that he could not alienate it nor could it be taken upon execution for his debts."

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of or alienate any part of the estate without consent of the other. The Court took occasion to quote with approval from the case of Hunt vs. Blackburn, 128 U. S., 32 L. Ed. 488 as follows:

> "Undoubtedly at common law, husband and wife did not take under a conveyance of land to them jointly, as tenants in common, or as joint tenants, but each became seized of the entirety, per tout et non per my; the consequence of which was that neither could dispose of any part without the assent of the other, but the whole remained to the survivor under the original grant."

To the same effect is Taul vs. Campbell (1835), 15 Tenn. 319.

The above cases and many others are gathered in Crawford's Tenn. Digest (1929) Vol. 4, page 3296 et seq.; Michie's Tenn. Digest (1908), Vol. 6, page 773 et esq.; and in Michie's Tenn. Digest Cum. Supp. (1929), Vol. 2, page 390 et seq. and page 777.

11 35 F. (2d.) 675 (1929), C. C. A. 6.

To the same effect are *Dioguardi vs. Curran* from the Fourth Circuit[12] and *McMullen vs. Zabawski* from a District Court of Michigan.[13]

Courts of other states in the majority of jurisdictions are in accord.[14]

The Missouri case of *Dickey vs. Thompson*[14a] presented an unusual situation in which both husband and wife, who owned certain real estate as tenants by the entirety, each filed a voluntary petition in bankruptcy and were adjudged bankrupt on the same day, in the same court, and the same person was appointed trustee for both, yet the Court held that the trustee in bankruptcy took no present interest whatever in the property.[14b] This is an extreme application of the principles characteristic of an estate by the entirety.

The Courts of New York[15] and New Jersey[16] represent a minority view to the effect that upon levy of execution against one tenant, the purchaser at the execution sale, or in case of bankruptcy, the trustee in bankruptcy will take a present right to one-half of the rents and profits of the property.

Collier in his work on bankruptcy[17] states the rule as follows:

"An estate by the entirety being without possibility of sev-

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12 35 Fed. (2d.) 431 (1929).

13 283 Fed. 552 (1922).

14 Agar vs. Streeter ( ), 183 Mich. 600, 150 N. W. 160, L. R. A. 1915a 196. Re Meyer ( ), 232 Pa. 89, 81 Atl. 145, 36 L. R. A. (N. S.) 205; Frey vs. McGaw ( ), 127 Md. 23, 95 Atl. 960. These and other cases are collected in 30 C. J. 564, 567, 568, 572, 3 R. C. L. 222, 13 R. C. L. 1130, 47 A. L. R. 437, 27 A. L. R. 826, 35 A. L. R. 148, 51 A. L. R. 1106, 52 A. L. R. 893. See also Gilbert's Collier on Bankruptcy, 2nd Ed. (1931), p. 1171 et seq. The general rule is well stated and summarized in 7 C. J. 116 as follows:

> "The trustee has no present right to the possession of land owned by the bankrupt and his wife as tenants by the entirety, but is clothed with all the interest therein which the bankrupt could have conveyed to him at the date of the adjudication. . . . . Rents do not pass to a trustee in bankruptcy where it appears that at the time of bankruptcy, the same had not been collected; and were not property which could have been transferred by the bankrupt and could not have been levied on and sold under judicial process against him."

14a 323 Mo. 107, 18 S. W. (2d) 388 (1929).

14b This decision has been criticised in 43 Harv. L. Rev. 312 and in 8 Tenn. L. Rev. 60.

15 Re Mobus Estate ( ), 166 N. Y. Supp. 888; Re Carnegie Estate ( ), 191 N. Y. Supp. 753; Hiles vs. Fisher, 144 N. Y. Supp. 306, in which it was held that the husband and wife "are tenants in common or joint tenants of the use, each being entitled to half of the rents and profits so long as the question of survivorship is in abeyance." The effect of this holding is to distinguish tenancies by the entirety from tenants in common only by allowing survivorship in the former.

16 Hendrickson vs. Hendrickson ( ), 42 N. J. Eq. 657, in which it is held that "the wife is endowed with the capacity during the joint lives to hold in her possession, as a single female, half of the estate in common with her husband and that the right of survivorship still exists as at common law."

17 13th Ed. page 1672; 10th Ed. page 1007.

erance, may not be transferred by the husband without the consent of his wife, and may not be levied upon by his creditors, and does not, therefore, pass to his trustee in bankruptcy."

Remington,[18] a recognized authority on bankruptcy, agrees.

In deciding the case of *Cole Manufacturing Company vs. Collier,* supra, the Supreme Court rested to a great extent its decision upon Chapter 36 of the Public Acts of 1849-50 as carried into Shannon's 1917 Code as Sec. 4234, supra. This statute had been construed to protect estates by the entirety,[19] and was so construed in the *Cole Manufacturing Company* case.

However, Chapter 36 of the Public Acts of 1849-50 and also Chapter 141 of the Public Acts of Tennessee of 1879, supra, were omitted from the 1932 Code. The effect of this omission, however, is of little moment. At common law, the husband, during the joint lives of himself and wife, had the unlimited right to the rents and profits of an estate held by the entirety and he could lend, mortgage, or otherwise make a valid transfer of the possession of same.[20] The acts here under discussion were enacted for the purpose of giving at least partial protection to married women owning real estate against the creditors of their husbands, as well as against the husbands themselves. However, since the passage of the "Married Woman's Emancipation Acts" of 1913 and 1919, the protective features of the statutory enactments contained in the Acts of 1849-50 and 1879, are no longer necessary. The "Emancipation Act" itself now gives sufficient protection. In addition to this, the omission of the Acts of 1849-50 and 1879 from the 1932 Code, does not necessarily mean their repeal. These laws are land laws and by Sec. 3 (17) of the 1932 Code, the failure to incorporate such acts into the Code, does not affect their repeal. While the omission from the 1932 Code of the statute, which was the basis of the Court's decision in the *Cole Manufacturing Company* case, supra, is worthy of notice, it is not believed to be of determinative weight, to weaken the authority of that case.

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18 3rd Ed., 1923, Vol. 3, Sec. 1199, page 29.

19 Sec. 4234 Shannon's Code 1917 note 2 reads as follows:

"This statute applies to and protects estates held by the husband and wife by the entirety, as well as to estates held by the wife in severalty, and a purchaser of lands held as an estate by the entirety, at an execution sale made for the husband's debt, cannot obtain possession of the lands, nor is he entitled to receive the rents and profits during the joint lives of the husband and wife, nor at all if the wife survives the husband."

20 Cole Manufacturing Co. vs. Collier, supra. Note 4.

In the case of *Whitley vs. Meador*, decided in 1916,[21] the Supreme Court, in an opinion delivered by Mr. Special Justice Clark, stated by way of dictum, as follows:

> "The wife does not have a separate right to the possession of the whole estate until the death of her husband at which time, she becomes the separate owner by right of survivorship."

These words, if it should be admitted that they correctly state the law, would give considerable weight to the argument that during the joint lives of husband and wife, the wife could not claim the rents and profits from the estate to the exclusion of the husband's trustee in bankruptcy or creditors. However, the actual holding in *Whitley vs. Meador* does not lessen the weight of the decision in the *Cole Manufacturing Company* case. *Whitley vs. Meador* decided that the Statute of Limitations would not begin to run against a wife in favor of the husband's grantee until the death of the husband. The quotation above from *Whitley vs. Meador,* to be properly understood, should be qualified by the addition thereto of the words "insofar as the running of the Statute of Limitations is concerned."

The recent case of *Newson vs. Shackleford,* decided in 1931,[22] involved a dispute between the wife and the administrator of the deceased husband as to their respective rights in certain crops which had been grown upon land owned before the death of the husband as an estate by the entirety. In deciding this question, the Supreme Court used the following language:

> "But her claim to gathered crops could not exceed, in the absence of proof to the contrary, an equal moiety of the rents and profits and so could not exceed half of the hay cut from the soil before the wife succeeded to the entire estate. Half the value of the hay crop should have been awarded the wife and the other half to the husband's administrator."

These words would seem to indicate a tendancy of the Supreme Court to place Tennessee in line with the minority rule as evidenced by the New York and New Jersey cases. However, a careful reading of the *Newson* case at once dispels any such idea. The crops about which the Court was talking, were crops which had been gathered and reduced to personalty *before* the death of the husband. As to such personalty, the husband and wife were owners as tenants in common, each owning an equal moiety thereof. The "Married Woman's Emancipation Act" of 1913 and 1919 abolished estates by the entirety, as well as the right

21 Supra, Note 10.
22 163 Tenn. 358.

of survivorship as to personal property. Section 2 of the 1919 Act saved tenancies by the entirety, but not the right of survivorship.[23] Therefore, the *Newson* case may be taken as authority establishing the rule of law that such rents and profits from land as have been reduced to personalty before the death of the husband are owned in equal moieties by the husband and wife. In fact, the Supreme Court expressly stated in the *Newson* case that as to such crops which had not been converted to personalty before the death of the husband passed wholly to the wife. In this connection, the Court stated:

> "The interest of the husband terminated at his death and the estate passed as from the date of conveyance to Mrs. Newson as the survivor, and the growing crops passed as an appurtenance with the estate."

Therefore, such rents and profits which had not been converted into personalty before the death of the husband would belong wholly to the wife.

Applying the doctrine of the *Newson* case to bankruptcy, it might well be argued that such of the rents and profits that had been collected and converted into personalty before the adjudication of the husband would belong in equal moieties to the wife and the husband's trustees in bankruptcy, but such rents and profits which might arise and be collected after adjudication would belong wholly to the wife.

In conclusion, it seems safe to state that the law in Tennessee is settled that a trustee in bankruptcy of the husband, as the representative of his creditors, does take, and can sell, some interest in an estate owned by the bankrupt husband and his wife as tenants by the entirety. This interest, however, is of no substantial value. It is not a present interest, and gives the trustee no right to the possession, rents, or profits of the land during the lifetime of the wife and no interest whatever in the event the wife survive the husband. The only interest which the trustee takes, and can sell, is the hope of the husband's ultimate survivorship. This is a pig in a polk and has no value of substance. Some doubt, however, has been cast upon this conclusion by the omission from the 1932 Code of Chapter 36 of the Public Acts of 1849-50 and Chapter 141 of the Acts of 1879; by the dictum in *Whitley vs. Meador,* supra; and by a tendancy indicated in *Newson vs. Shackleford,* supra. This question, however, is a law of property and certainty above all

23 Scholze vs. Scholze (1925), 2 Tenn. A. 80.

else is desired. If the creditors of the husband can obtain no substantial rights against land held as an estate by the entirety, and this is known to them, they can protect themselves by extending credit less freely, and without reliance upon an asset so held. On the other hand, the rights which the tenants by the entirety partake should be made sufficiently definite that no doubt will arise as to the enjoyment of the very substantial properties held as estates by the entirety throughout Tennessee. It is to be hoped that an occasion soon will present itself for the Supreme Court to clear away any clouds which are hanging over this question.

As a matter of equity and justice, and aside from the actual holdings of the Supreme Court, it is difficult to justify a rule of law which would permit a man to acquire a large fortune in real estate and by the mere incident of the insertion of his wife's name in the deed to put his holdings beyond the reach of his creditors. The rule adopted in Tennessee has much to be said in its favor if it were confined to the actual home of the husband and wife. As regards valuable business properties held solely as an investment, the rule adopted in New York and New Jersey seems to reach a more equitable solution. As to such properties in those states, the incidents of the estate by the entirety is identical with the tenancy in common, except in the matter of survivorship. In these states the creditors of the husband can reach at least a substantial portion of the rents and profits. Limitation of the peculiar incidents of the estate by the entirety in either of the two respects suggested above, i. e., confined to property actually occupied as a home, or effective only as preserving the right of survivorship, seems preferable to the prevailing rule which opens wide the door of fraud and permits the unprincipled man to amass a substantial fortune in real estate, title to which is conveniently held by himself and his wife, then file a voluntary petition in bankruptcy, continue to enjoy the income from his properties while his creditors stand by without effective remedy.

WASTEFUL DUPLICATION IN APPEALS

By JULIAN C. WILSON

The State of Tennessee has furnished all the required material for a splendidly efficient appellate review by its courts. It now provides fourteen accomplished and hard working appellate judges, capable and willing to expeditiously administer the State's justice. Their number, quality and experience are ample to meet all that need be hoped for for that purpose. They sit in the three grand divisions of the State and in the capitol at Nashville, able, ready and willing to make all the effort, expend all the energy and carry out all requirement to give to the people the best available review of judicial decisions.

The State has, however, failed to take advantage of the facilities it has so fully provided and has hampered their effectiveness by requiring wasteful methods in the administration of justice in the judicial administration of appeals. There is a quite needless duplication of work and expense in getting cases to the appellate courts, in their presentation and in their determination. Papers are uselessly transcribed and checked, and briefs and arguments, as well as decisions on the facts, are just as needlessly duplicated. Time, money and work of clerks, lawyers and judges are expended in doing twice that which requires to be done but once.

Let us begin with the worse than useless transcription of the pleadings and evidence in any lawsuit. Carbon copies on paper of uniform size, weight and quality might well be required, as they often are, at the time papers are originally filed. In such event, it would be easy to send one copy to the appellate court while the other is retained in the files of the trial court. There is, however, no good reason for not sending the original papers up to the appellate court for review with provision for their return after the determination of the appeal. Either method is simple, requiring only flat filing rather than rolling up of the court papers, binding them and supplying an index. Records could then go to the appellate courts not only with but trifling expense for their preparation but without the need of checking them for errors by the already hard worked lawyer who dares not omit to do so.

So simple a saving does not even require legislation. The trial and appellate courts with slight co-operation might well provide for this economy by rules as to the original filing of papers and as to the preparation of records on appeal.

Modern methods of conduct also seem to demand that the painful formalities attending "Bills of Exception" should be discarded, at least in all cases reported by stenographers. It should be sufficient to have the trial judge approve, correct or disapprove the stenographer's transcribed notes, leaving to the stenographer the identification of exhibits and thus relieving the judge of this bit of "mummery."

Under the existing practice, the lawyer taking an appeal from a judgment at law must move for a new trial, specify exactly his complaints and in some courts only after quoting the challenged rulings. He must draw, or at least inspect, the order overruling the motion for new trial and he must then either prepare or have prepared a "Bill of Exceptions." If the testimony was noted by a stenographer, he must read it for omissions, mistakes or insertions. He must either physically insert any exhibits, or he must have them identified by the signature of the trial judge and a symbol and must be sure that the "Bill of Exceptions" so states and that the description in the bill and the symbol on the exhibit match. Having read the stenographer's report of the trial, marked the exhibits, checked them with the report of their introduction at the proper time and at the proper places in the "Bill of Exceptions," the appealing lawyer must then have the judge sign them and place his signature on each exhibit not inserted bodily in the bill and then see that the trial judge marks the "Bill of Exceptions" approved as a whole. The lawyer can not then pause to rest. This slothful advocate is next required to put an order on the minutes approving this "Bill of Exceptions" which may also grant an appeal or a writ of error, the one so like the other that their names are joined. Should any testimony be excluded in a Chancery case, the same useless formality of a "Bill of Exceptions", or something like it, is necessary to make the excluded testimony appear in the record, although it is already as much there as any other testimony. Then comes the bond. After that the clerk copies everything, and the lawyer must read the copy or take the risk of a vital mistake in transcription that may otherwise be discovered too late to save his case.

When all these things are done and the papers forwarded, the case is in the appellate court for review. The overwhelming majority of civil cases in Tennessee go first to the Court of Appeals for review. When decided there, they may be reviewed in the Supreme Court upon petition for certiorari. Such a petition is submitted in writing and, barring the useless and merely formal, is in reality a summarized statement of the case, assignment of errors, brief and argument upon the decision of the particular Court of Appeals. It is in reality only another review of the trial court's decision and is the final and determinative decision in which oral presentation and explanation may be and usually is denied. The controlling decision is thus made without personal contact between the deciding judges and the counsel and lacks the aid that face to face interrogation, answer and explanation may afford.

This lack of opportunity for oral presentation is a physical necessity under prevailing methods but might well be afforded under a more economical and better system for appellate review. The Courts of Appeals would afford the Supreme Court little or no relief if their decisions were open to the same character of presentation for appeal as those of the trial courts. For that reason, appeals from the decisions of intermediate courts have been restricted to merely written applications for redetermination that are required to show a strong case in order to obtain another hearing. These restrictions are necessary if the hearing by the Supreme Court is to be as comprehensive as the decision reviewed, but there is no justification for demanding so complete a rehearing by the Supreme Court.

The law of the State must be uniform in its nature and the judges of the Supreme Court are selected to be the expounders of that law, and so the Supreme Court must be the last arbiter on all questions of law. It need not be so as to the decisions of questions of fact. There is nothing requiring uniformity throughout the State on decisions of fact. Indeed, uniformity has no application to the subject. Each case has its own facts and no precedents are created in their decision.

The appropriate Courts of Appeals, each composed of lawyers selected for their ability, experience and character, investigate and determine the facts in each case and embrace findings thereon in a written opinion. These determinations of fact should be final and act as the basis of all future decisions in the Supreme Court. That last tribunal should only be asked to

review the controlling applications of law to those facts. Taking these findings of ultimate controlling fact as comprehensive, exclusive and correct, there would be no purpose to be served by the members of the Supreme Court reading any record under consideration. The final appeal would and should be on the facts found by the appellate court only. With the facts already determined and briefly stated and with the opinion of the Court of Appeals on the applicable law before it, the task of the Supreme Court in the rehearing should not be either onerous or time consuming.

It is now the rule in Tennessee that the findings of a trial judge, the verdict of a jury or the concurrent findings of a Master and Chancellor or of a Chancellor and the Court of Appeals are conclusive of and on the facts if, and only if, supported by any evidence. This rule may prevent but does not greatly aid in the ultimate finding of the truth. Under the existing rule just mentioned, a re-examination by the Supreme Court judges is often, not to say usually required in order to learn if there is such support in the evidence, and such new investigation is as burdensome in very many instances as if it were on original examination. The temptation to claim that the evidence does not support the verdict, decision or judgment is always there and it is usually exercised in order that the review may be as complete as it is possible to have. When there is such claim, there is no way to avoid investigating the entire record.

Under the existing practice there are often four and occasionally five arguments and trials of questions of fact in the courts of Tennessee. There may be such hearings before a Master, before the Chancellor and the Court of Appeals. After these three trials, there may be a written re-argument asking certiorari and a final argument in the Supreme Court if that writ is granted. Three and even four arguments on the same questions of fact are not at all unusual. It surely seems reasonable to require that these decisions on governing facts should stop in the Court of Appeals. If they stop there, those courts should write findings of fact appropriate to the assignments of error. If the complaint is for or against a directed verdict upon the competency of evidence or the accuracy of a judge's charge, the findings should be of what the applicable evidence tends to show. If the attack is upon a Chancellor's decision, then the

court should state its finding as to the weight of the evidence on the ultimate controlling facts.

A practice of this kind is not new in Tennessee. The Court of Chancery Appeals which preceded the Court of Appeals found the facts to which the Supreme Court of the State confined itself without review or redetermination and decided only the law applicable to the state of facts so found. The final function thus handled with success by the Court of Chancery Appeals might well be intrusted with complete confidence to the present Courts of Appeals.

With the Supreme Court's task reduced and its functions limited to reviewing opinions of the Courts of Appeals, opportunity could well be afforded for oral argument on every appeal to the Supreme Court. In fact, appeals to the Supreme Court could and should be then much simplified and the cumbersome application for certiorari abolished. An appeal to the Supreme Court should be conducted, it is submitted, by assigning errors upon the conclusions of law of the Courts of Appeals supported by brief with opportunity for oral presentation afforded to every litigant. The simple filing of assignment of errors supported by a brief should really be enough in all appeals except for cost and supersedeas bonds.

Let us visualize the sort of appeal here suggested. After a new trial has been denied in a law case or a decree entered in Chancery, an appealing party simply should give a cost or supersedeas bond as he elects, or in proper cases, take the necessary oath of poverty. He next files the stenographer's transcription of the testimony after submitting it to opposing counsel, which the judge in writing approves, corrects or which he disapproves, permitting a narrative substitution therefor. If the case is in Chancery, the depositions are already filed, and of course, the presentation of the stenographer's report is unnecessary. In either case the appellant must then have the clerk put together and bind the papers to make the record, include an index and send it to the Court of Appeals. Within not more than thirty days a statement of the case, assignment of errors and brief should be in the appellate court and reply should be made to them in like time. The case should then be placed on the appellate court's trial docket and heard with permission to illuminate it by oral argument.

After the decision of the Court of Appeals, no more than an assignment of errors based on the opinion of that Court, sup-

ported by a brief, should be required to transfer the appeal to the Supreme Court. Such transfer should be limited to not more than forty days and an answer should be required within like time and the case set for oral argument in the Supreme Court. In the Supreme Court, the conclusions and application of the law of the Court of Appeals should alone be debated. It is believed to be certain that such a simple procedure for appeals would save both time and money to the litigant, the lawyer and the people and would be a great aid to the judges.

The right of oral argument should not be denied but should be secured in such legislation. Neither lawyers nor litigants are entirely satisfied with a review of their causes which denies some sort of oral hearing. Both desire to secure the attention of and speak to all five of the Supreme Court judges. The lawyer and litigant desire to know that all five of them have heard and understood the ground of the litigant's complaint. Legislation indeed would be required in order to thus change the procedure, but such legislation should not be complex nor difficult.

The duplication of work on appeal takes time and effort, is burdensome to the lawyer and unsatisfactory to the litigant. The lawyer's time must be compensated in some fashion and so litigation is delayed, made unnecessarily expensive and causes dissatisfaction, unrest and lay criticism of the courts. It is believed that the simplification and improvement by the indicated legislation with reference to review of the Court of Appeals' decisions would render splendidly efficient the Tennessee appellate court system that has full and magnificent facilities but just misses the best results by failing to secure their full advantages.

A DEFINITE PERIOD OF TRAINING AS A REQUIREMENT FOR ADMISSION TO THE BAR

By MILLARD E. QUEENER

It is the general opinion that there is vast room for improvement in the bar. Somehow or other it is not meeting the public need. We all know that the bar is overcrowded; that ethical standards are often disregarded; that the overcrowding of the profession probably has considerable effect upon the application of ethical standards; and that far too many lawyers are practicing who have not the proper legal training. The fact that the American Bar Association maintains a section devoted to the problems of Legal Education and Admission to the Bar, the vast number of pages that have been written in recent years by outstanding members of the profession, the changes in requirements for admission that are constantly going into effect in the various states, and last but by no means least, the numerous expressions from laymen criticising the ethical standards and legal ability of the practicing lawyers are some of the indications of the general opinion that something should be done to remedy the existing conditions.

It should be understood, however, that I am not making the dogmatic assertion that the bar has reached a new "low level" as compared with the past. Whether or not that is true could not be definitely ascertained by the most complete and careful statistical survey. I am making the positive assertion that it is admitted on all sides that something should be done to improve the existing condition.

The proper approach to the problem, as I see it, is to determine (1) the true function of the bar, and (2) a method by which a bar may be developed that will carry out this purpose. If we are able to reach an agreement as to the true function of the bar, and will keep before us the definition agreed upon, discussion of a number of minor questions will be precluded, their answers then being obvious.

What is the true function and purpose of the bar? The preamble to a resolution adopted by the Knoxville Bar Association on January 30, 1932 gives an answer to the above question

in language which may be more briefly stated as follows: "The Bar of Tennessee is a *vital* and *indispensable* part of the judicial system of the state, and its members should be *well informed, upright* and *inergetic; learned in the law* and *efficient* in practice, and its interest is common *to the public at large.*" We may go a step further and say that the bar is an indispensable part of our social structure. Its members, as judges and practicing lawyers, deal with the rights and duties of man to man and the relationship of the individual to organized society. Not only do they enforce the rules of conduct under which the social order functions, but they, for most part, make the rules. Under this definition a lawyer is something more than one who goes into the courts and makes forceful and plausible arguments in behalf of his client. He is a specialized social scientist with a deep interest in most of the human relations and in the improvement of existing conditions within the field of his activities. His profession is one of dignity which requires that its members be men of ability, honor, and culture who are able to command the respect of those with whom they come into contact. There is no danger that a profession of such importance will lack for a sufficient number of members to supply the demand of the state so long as the requirements for admission are in any degree reasonable.

Having accepted a definition of the function and purpose of the bar, it follows that the most important interest to be considered is that of the public which is out of all proportion to the personal ambition of any one person to become a member of the profession when that person cannot, for some reason, meet its requirements. No one has a vested right to become a member of the legal profession any more than he has such a vested right to become a physician.

It is not a difficult matter to determine the causes of the constant criticism that is being leveled at the legal profession by laymen, some of which is unanswerable. The primary cause of this attitude on the part of the public can be traced to the fact that two particular types of men have been allowed to enter the practice of law and permitted to remain in the profession—the unscrupulous and the ones lacking in legal training and mental ability. No one can say positively which is most harmful to society. The unscrupulous lawyer, who uses the good name of the profession as a snare to bring into his clutches the ignorant and unwary, may be found out and avoided, but the

poorly prepared lawyer of low mentality is able, in many instances, to explain away his mistakes to his client and continue unchecked. In addition, a lawyer runs some slight risk of being disbarred for misconduct, while there is no method by which a member may be expelled from the profession because of incompetency.

Granting that the statements made thus far are true, and keeping in mind the welfare of the public, it is apparent that we can single out the major problems toward which our efforts should be directed; (1) the ethical standards of those who have been and will be admitted, and (2) the scholastic and legal training of the candidate. It is understood, of course, that perfection will never be reached; we are trying, merely, to find a method that will result in marked improvement.

Our legal system provides a method for the expulsion of members who have violated the ethical standards of the profession, but the method so provided is seldom invoked. A review of the reported cases shows that the highest court of our state has never failed to enunciate the highest standards of professional conduct, or to apply the high principles it has declared. Unfortunately, the Supreme Court passes only upon cases that are brought before it. So long as it falls upon the local bars, judges, and chancellors to institute proceedings for the expulsion of members, few proceedings will be brought.

It would be difficult if not impossible to remedy this situation by providing a method by which disbarment proceedings and the other problems of professional ethics would be handled by a detached, independent committee. It is suggested, however, that it would not be impossible nor impracticable to have a committee that checks carefully upon the moral standards of an applicant when he applies for membership in the profession and for a definite period after admission during which his license would be conditional. A number of sister states have adopted this method with gratifying results. It would be well for the admitting body of our state to give some time and attention to methods now in use elsewhere.

The realization on the part of a young man during the formative years of his life that a clean moral record is a prerequisite to admission to the legal profession, and that his conduct is under scrutiny, should do much toward moulding a character that will not weaken in later years. The canons of ethics, within themselves, are not sufficient guidance for the lawyer. Perhaps

nine of every ten criminals know the *Ten Commandments.* It is the moral standards of the individual as they have developed over a period of years that will determine his ethical standards as a lawyer.

A young man or woman may prepare for the practice of law in Tennessee by studying law in a reputable law school, or in the office of a practicing attorney for a minimum period of one year. (Two years after June 1, 1934.) In nearly every instance the training is obtained in a law school, however. The theory of legal training is twofold: (1) It should fit the man to handle the legal problems of the clients who come to his office, and (2) it should crowd into a definite period of concentrated study under supervision a broad legal knowledge that it would take many years for him to gain through practical experience.

How much training is necessary? From the standpoint of the one taking the training it should be so much as will enable him to reach a high grade of efficiency as a lawyer within the shortest time possible after beginning practice. If an additional amount of training will enable a person to reach a degree of efficiency within five years that would have taken ten years otherwise the time is well spent. The prospective lawyer wants to know when the point is reached at which it is no longer necessary or practical to continue the training period, since he is interested, also, in the elements of time and expense. He understands, also, that in law, as in engineering, dentistry, and other professions, an increased efficiency is gained from practical experience that cannot be gained in the training school.

If the theory of training has been stated correctly, it follows that every additional unit of training up to a given point is helpful to the man who becomes a brilliant lawyer as well as to the one who is less successful. The fact that certain men who had very little formal training have achieved greater success than others who received a more thorough training is not a reasonable argument against formal training before admission.

If the lawyers who are admitted to the Bar in Tennessee are unable, because of lack of training and mental ability, to take care of their clients' interests in an efficient manner after from three to six years of practice, I can think of no sound or convincing argument that can justify their admission. The thought I am advancing is that the theory of acquiring training, for the most part, *after admission to practice,* is unsatisfactory from the view point of the prospective lawyer with an ambition to

achieve success as quickly as possible, as well as from the view point of the public.

Bearing in mind (1) the public welfare and (2) the personal interest of the candidate himself in his own rapid advancement in his profession, what should be the length of the training period? It will be noted that I have tried, in this article, to maintain a distinction between the *length* of the training period and the *amount* of training that should be required. It is obvious that the amount of training cannot be measured accurately in "units" of time, since students vary in intelligence and in application, and no two law schools perform their tasks with equal efficiency. Even though we admit that the above statements are true, it is possible to arrive at a minimum length of time that may be required as a training period which will be a useful device in the hands of the admitting body for the improvement of the present condition. The point is this: when we have decided that a properly equipped law school, with a strong faculty, which demands the maximum amount of work from its students requires *a stated period of time* in which to give the highly intelligent student the *minimum amount* of training necessary to meet the public demand for efficiency, we know we are not making a mistake in insisting that the less efficient schools have a training period of the same length. I am unable to see how an admitting body that requires of all applicants a minimum period of training based upon the conditions set out in the preceding sentence can be charged with setting up arbitrary standards.

Both the American Bar Association and the Association of American Law Schools have set out two years of college training and three years of legal training as the minimum length of the training period. It is the sense of these organizations that no student, however intelligent he may be, and regardless of his diligence and the quality of his instruction, will have given too much time to his training by spending two years in college and three years in law school.

If we pause for a moment to contemplate the broad field that must be covered before the student has reached the required standards of efficiency, we have no difficulty in accepting the conclusion of the organizations mentioned above. The meager scholastic background of the average high school graduate is inadequate, of course. During the two year period in college he is expected to receive a thorough training in such essential

subjects as english, rhetoric, the social sciences, the political sciences, history, economics, accounting, logic, and others. Is a thorough knowledge of these subjects essential? Those who hold to the opinion that the lawyer should meet the standards declared in this paper will give an affirmative answer without hesitation, since they look upon the practice of the law as something more than a trade, a means of earning a living, and demand a broader training than that which enables the lawyer to find and present "the law" as it has been declared or enacted. The broader viewpoint expects the student during his three years of legal study to acquire something more than a sound knowledge of the principles of substantive law and procedure, and demands, in addition, the broad general viewpoint and background which is gained by careful study of the history and growth of legal systems and the theory, structure and function of the legal machinery. The law school that carries out this assignment in a satisfactory manner in three school years of nine months each is outstanding in the field of legal education.

It is not a good argument against the adoption of the aforesaid period as the minimum to point out, here and there, one or two law schools that may appear to give an amount of training in less than three years that is comparable with the training received in some of the three year schools. Mere attendance at, or graduation from, a three year law school, is no guarantee of the graduate having attained the minimum requirements set out herein, and if any law school is able to prepare its students for the legal profession as thoroughly in one or two years as another school does in three years, then it is strongly indicated that the three year law school is not, even in that time, meeting these minimum requirements of preparation, rather than that the one or two year law school is so doing.

Thus far we have proceeded upon the idea that the training of all applicants for admission should be obtained in a college or law school. If possible an alternative method might be worked out to take care of exceptional cases of young men of unusual courage, aptitude, and intelligence who are unable financially to bear the expense of college and law school. This alternative method should be considered as a separate and distinct problem and one requiring careful consideration. The path of the poor boy should be no easier than that of the boy of more means, and he should be required to demonstrate that he has qualifications equal to those of the graduate of a law school. A method

by which the boy who does not attend college and law school may be admitted, in order to be effective, would require more of the applicant than that he pass the same bar examination as the law school graduate, otherwise it would not be long until a number of commercialized organizations would come into existence purporting to give, for a consideration, a brief course of training designed to enable a young man to pass the bar examination without attending law school.

It is impossible to prepare an examination and grade the papers with sufficient accuracy to reflect the achievements of the persons examined, and this is especially true if the examination is an attempt to reflect the achievements of a long period of time. In other words, if I set myself to the sole task of preparing for a bar examination I can accomplish my purpose far more quickly than if my task is to acquire *a sufficient amount of training* to become an efficient lawyer as quickly as possible after admission. The passing of an examination should be an incident to the broad training acquired during a given period and not the *end* in view. The chief value of an examination lies in the fact that it is a device that may be used at frequent intervals during the training period to test the quality of the training and the manner in which the student is responding to the training.

The statements in the above paragraph, if true, and they are in accord with modern educational theory and opinion, should be a complete answer to the theory that the sole requirement for admission to the bar should be the ability to pass a rigid examination.

If it is conceded, as it must be, that the best training for the practice of law, under present conditions, is that which is obtained in law schools, and if we agree with the conclusions reached by the American Bar Association, the Association of Accredited Law Schools, and the leaders in the field of education generally that the two-three year period is the shortest time in which the minimum amount of training may be obtained, we should urge that this training period be required, thereby elevating the profession and protecting more fully the public interest.

BAR ASSOCIATION SECTION

CONTROL OF THE POWER COMPANIES

By L. M. G. Baker

During the Presidential Campaign of 1928, Mr. Hoover declared for private ownership and operation of the water power of the nation, under government control. Mr. Smith was not so explicit, but appeared to favor public development.

It was generally supposed when Mr. Hoover became President that a program of water power development by private enterprise at once would be inaugurated; but nothing was done.

In the Presidential Campaign of 1932 Mr. Roosevelt was emphatic in his declaration in favor of governmental development of the water power of the Tennessee River and its tributaries. Mr. Hoover adhered to his former stand.

The overwhelming victory of Mr. Roosevelt and the sympathetic Congress elected at the same time, seem to portend that a start will be made during the next four years in governmental development.

In the meantime, the Federal Trade Commission has continued its investigation of privately owned utilities. The Trade Commission's report will doubtless be ready for presentation to the next Congress.

The disclosures that will be made in this report, together with the collapse of the Insull group of utilities, will afford occasion for a thorough discussion of the entire subject, both in Congress and elsewhere.

It is now fairly certain that the Cove Creek dam will be constructed by the government. But the question of whether the Cove Creek dam when finished, and its companion, the Wilson dam, will be operated by the government or by private enterprise is still at large. There are many thoughtful men who favor construction of the Cove Creek dam by the government, but do not and would not favor its operation by the government. There are many reasons justifying construction by the government that would not, perhaps, justify government operation; such as prevention of watered stock issues, inflated capital investment accounts, and other forms of exploitation

which have been disclosed in the investigation made by the Trade Commission.

The service rendered by public utilities has become a subject of tremendous importance. Already this service affects the private life—the comfort and convenience of the private citizen in his home—every day, and almost every hour, and each succeeding year brings a large increase in its importance, as we become more accustomed to its use and more dependent upon it.

During the year 1930 there were installed in the United States hydro electric power plants with a capacity of 1,076,889 horse power, making the total installation in the United States at the close of that year 14,884,667 horse power, and the water power resources of the country are still practically untouched.

The development so far, with the exception of the Wilson dam, has been by privately owned corporations and without efficient government control. The result so far has been unsatisfactory from the standpoint of the consumer.

We are now about to have a new deal. What this will mean—whether it will be government development and operation, government development and private operation, or private development and operation—is now to be determined. That the government is going to be in it in some capacity is assured. What will it be?

To solve this question intelligently has now become of pressing importance. To do so, it is necessary to hark back to the principles of law that govern the ownership and usufruct of the waters of our rivers and to see what interest the public has therein.

Since the decision by Judge Story in *Tyler v. Wilkinson* in 1827,[1] and the publication of Chancellor Kent's Third Volume of his Commentaries in 1828, it has been settled law in the United States that the owners of the lands through which a stream runs have no title or ownership in the water of the stream, but only the right to its beneficial use the same as every other owner of land, that abuts upon the stream or through which it runs, has. In other words, the waters of the streams belong to the public, while each riparian owner has the right to a reasonable use of the water subject to the same right in every other riparian owner.

> "Though he may use the water while it runs over his land as an incident to his land, he cannot unreasonably detain it, or give

[1] 4 Mason 387, Federal Case No. 14312.

it another direction, and he must return it to its ordinary channel when it leaves his estate."[2]

It is upon this principle that the claim is made that the Federal Water Power Commission, by reason of the Federal Government's control of the navigable waters, has the right to control the development of water power along the upper reaches of the rivers far above the uppermost point of navigation. The government, it is said, has the right to have the waters of the tributaries to the navigable streams flow in their natural state down to the navigable portions of the stream. This right belongs to the public and hence the water power resources all belong to the public.

Whether or not this view will finally prevail, it is true, by the law as now established, that the water power resources upon rivers that are navigable, in any sense, belong to the public; that they are held by the state, or the federal government, as the case may be, in trust for the public.

It is necessary, therefore, to understand the relation between the corporation which enjoys a public water power site and the public from whom it acquires that site.

It is now recognized that public utility companies must be monopolies. All regulation and control of them is predicated upon this theory. It is quite as apparent that they must also be regarded as public servants; at least those which have acquired the public's water power sites must be so considered.

A portion of the public's property has been entrusted to them, primarily, of course, for the public good, and, secondarily, for the benefit of their shareholders.

The rights and privileges of public utility corporations are granted by the government and accepted by the corporations with the understanding, on the part of both parties to the transaction, that the corporation is to be without competition in its business. In each grant, the government making the grant, endows the corporation with some part of its sovereign power and with some part of its public domain. Every grant also carries with it, either expressly or impliedly, an agreement that the shareholders of the corporation may have a reasonable return on their investment. Since it is a monopoly, this means it will be allowed to charge such price for its service as will yield this reasonable return, after the payment of all expenses of operation and after setting up all reserves necessary for

2 Commentaries, 12th Ed., Vol. III, p. 439.

replacements and contingencies. Such an agreement is, in effect, a guarantee by the government of this reasonable return to the shareholders. This is so, because of the necessity of the service to the public, and the absence of any competition to limit the price. From this, it follows that there must be some power lodged somewhere to control the price in the interest of the public. It also follows, that, in order to secure the funds for development, every dollar honestly and prudently invested must receive a fixed and certain return, which will be fair and reasonable under the conditions of the investment. This means that the controlling power will allow the corporation to charge for its service a price that will yield the required return. Because of the absence of competition, and the necessity of the service to the public, the corporation will be able to collect, for its services, any price, within reasonable bounds, that the controlling power may allow.

The government's agreement that a price may be charged sufficient to give a certain return upon the investment places the investment on the same plane, for all practical purposes, as a loan to the government. The rate of return, therefore, should be fixed upon a loan basis, and not upon the basis of an investment in a business exposed to the hazard of competition and the consequent uncertainty of profits.

To illustrate, a corporation secures from the government a grant of a water power site. The shareholders of the corporation put into it fifty millions of dollars. The corporation constructs a plant, which, complete with all necessary transmission facilities ready to serve the public, costs fifty millions of dollars. The project proves successful and yields, at the prevailing rates, an annual profit of, say, five millions of dollars, net. What is it that earns this five millions of dollars? Manifestly it is not the fifty millions of investment alone that earn them. It is the combination of the fifty millions of investment required to build and equip the plant with the water power required to operate the plant, and the management required to produce the result.

It is impossible to determine with exact precision what part of this net income should be accredited to any one of the three contributing elements. The management, however, has been paid, and presumably adequately paid, out of the proceeds of the business before the net income is set up. The management, therefore, has no further equity in the net income. The shareholders, having put in their money under what amounts to a

practical guarantee by the government of a certain return, are entitled to receive this return. When they have received this return their equity will have been fully satisfied. The remainder of the net income will belong to the public and must go to satisfy the public's equity arising from the public's contribution of the water power element in the joint enterprise.

Assuming that the rate of return on the investment should be 6% per annum, the corporation should distribute its five millions of net profits—three millions to its shareholders in the way of dividends, and two millions to the public in the way of compensation for its water power. The two millions cannot be actually paid to the public, but the same result can be achieved by deducting the public's part of the net profits from the public's power bill—that is by reducing the rate to the public until the public gets the benefit of its part of the net profits as effectively as if the money were paid to it as dividends.

From this analysis the following propositions are made very plainly to appear. The investor must receive 6% per annum upon the money which he has invested. He has no just claim to anything more. The management must receive just and fair compensation for its services according to its efficiency. Its efficiency must be measured by the price at which it furnishes efficient service to the public. And the public must enjoy the service at precisely that price which under efficient management will yield a net return sufficient to pay the shareholders 6% per annum after providing a reserve fund sufficient to make all renewals and replacements and to meet all emergencies of the operation.

If this kind of control shall be ordained and perfected, a fair price to the public will result automatically. The return to the investor will be as certain as human affairs can be made, and, for that reason, abundant capital will seek investment in the capital shares of the power companies.

There will remain, however, the question of efficient management. The price at which the public will receive the service will depend upon the efficiency of the management, and, therefore, this, to the public, will be the most vital problem of the enterprise. Just here is the weak spot in the present system of public control, and here will lurk the greatest danger in any system that may be devised, because just here is the point of surest approach for the grafter and boodler. This has already been

proved by the evidence adduced in the Trade Commission's investigation.

Whether the future rate control is going to be by the State Governments or by the Federal Government, the first essential is that this sham control that has heretofore existed be entirely discarded. There must be a real price control so exercised as to encourage economy in capital investment and in operating cost. The only sure method to accomplish this is to make it to the interest of the corporations to practice economy. For illustration, let the corporation receive in addition to its 6% per annum on capital investment, an amount for dividends dependent upon the price at which it furnishes efficient service, but not to exceed say, 2% per annum. Whether the shareholders will receive 6%, or 8%, or some rate between these figures, will then depend upon the corporation's success in furnishing cheap power. The measure of a management's success will be guaged by the low cost of its product and the consequent high rate of its dividend. There will be no watered stock and no bond issues. Each share of stock will represent so many dollars invested and will be entitled to its dividends at the rate between 6% and 8% which its management warrants. The management problem will be to make each dollar of invested capital earn eight cents net per annum on a price of service low enough to win the 2% extra. With this substantial inducement there will be real effort to produce and deliver power at the lowest possible cost.

The next difficulty will be to ascertain what rate will be low enough to win the 2% premium. Outside of the utilities and their engineers there is very little knowledge in this country as to what it costs to make and distribute hydro electricity. Widely differing claims are made, but upon insufficient evidence for the public to judge between them. The matter will have to be determined by a Government Commission appointed for that purpose. The duty of this Commission will be to supervise the expenditures in the construction of the dams and transmission facilities and their operations, for a sufficient length of time, to make an accurate report to be used as a basis. Whenever the public service corporation is brought to realize that the public intends to have the service at a reasonable and fair rate, upon some such basis as that outlined here, or else the public service business will be done by the government itself, there will be no further contention.

There is no sound reason why the utility corporations may not be privately operated with success for the corporation and satisfaction for the public. The basic requirements are absolute honesty, candor, and fairness, both on the part of the utility management and on the part of the governing authority. By this course government operation will be avoided, and at the same time the public will receive the service at a price that should be satisfactory to everyone.

The most important thing, however, is that the government will proceed now, before the power sites are granted, to establish a supervision and control that will keep an accurate check upon expenditures and not permit padded accounts, fictitious values, or watered securities, to get into the capital account upon which dividends are to be paid, as occurred in the case of the railroads.

It is high time that the public should realize the importance of this subject.

LIABILITY OF THE SURETY ON A PERSONAL REPRESENTATIVE'S BOND

By R. W. SANFORD

When is the surety on a personal representative's bond liable to others than creditors, legatees, or distributees where the personal representative takes into his possession personalty not belonging to the estate or in which the estate owns only an interest?

As a matter of course, the surety is not liable where the personal representative takes possession of and converts to his own use property to which he has no right of possession. But it has been held that where the personal representative has the right to take possession of personalty, as personal representative, and does so, the surety on his bond is liable in case he converts it. In *Fidelity, Etc. Co. vs. Texas Land Co.*,[1] the court, quoting from another case, expressed the rule thus: "Whatever an administratrix lawfully receives in her official capacity, her sureties become responsible for."[2] Otherwise, the law would clothe the personal representative with the right to take possession without any protection to the owner of the property in case of insolvency of the personal representative. The surety cannot complain, because his signing the bond was a voluntary act on his part, and by so doing he put it within the power of the personal representative to take possession.

In most of the cases seeming to hold contrary to this rule, upon a careful examination of the opinions, it will be found either that the claim of the person suing was a claim against the decedent's estate and stood on the same footing as other claims against the estate, or that for some reason the personal representative did not have the right to take possession as personal representative. For instance, in the New York case of *Wells vs. Wallace*,[3] the intestate had himself collected a trust fund, used it in his business and mingled it with his own property so that it could not be identified at the time of his death. Of course, under such circumstances the claim was just an ordinary claim

1 40 Tex. Civ. App. 498, 9 S. W. 197.

2 See also Perkins vs. Perkins, 46 N. H. 110; State ex rel vs. Young, 34 S. E. 444; 11 A. & E. Encl. Law, 2 Ed., p. 888.

3 2 Redfield 58.

against the decedent's estate. In the Florida case of *Bradford vs. Watson,*[4] it was held that when the administrator collected insurance on the life of his intestate which was payable to his estate and converted it to his own use, the surety was not liable. Upon examination of the case it will be found that the court based its opinion upon the fact that under Florida law not only does such insurance, even though payable to the estate, go to the widow and next of kin free from the debts of the estate, but the personal representative has no right to take possession of, nor to collect, nor to have anything to do with such insurance. In the Tennessee cases of *Morris vs. Morris,*[5] and *Hardison vs. Billington,*[6] in one of which the personal representative took possession of and converted to his own use personalty exempt to the widow, and in the other of which the widow allowed the personal representative to remain in possession of personalty set off to her as year's support after it was so set off, and he converted it to his own use, upon suit by the widow the surety on the personal representative's bond was held not liable. The widow does not take exempt property or her year's support by succession to her husband, but takes adversely to the estate. The title vests in her, to the exempt property, immediately upon the death of her husband, to the property set off as year's support, immediately upon its being so set off. Hence, in neither case did the personal representative as such have any right to possession. In the recent case of *Sykes vs. White,*[7] although the choses in action and certificates of time deposit in a bank were in the name of the decedent, he in his life-time not only owned no interest, legal or equitable, in them, but had never had possession and had no right to possession nor to collect, and of course, his personal representative could have no higher right than he had. These five cases are mentioned merely by way of illustration. Of course, a discussion of the many like cases is not possible within the limits of this article.

In case the personalty in question is a chose in action the fact that some other person has a right, and a superior right, to take possession and collect which is not exercised can not affect the liability of the surety on the personal representative's bond, where the personal representative exercises his subordinate

4 65 Fla. 461.
5 55 Tenn. 814.
6 82 Tenn. 346.
7 14 Tenn. App. 327.

right and takes possession and collects. This rule is announced and approved in the Tennessee case of *Clark vs. Pence,*[8] and is further illustrated in Tennessee by the fact that where the personal representative collects damages for the death of the decedent and converts the collection to his own use, the surety is liable, even if the decedent left his widow surviving, who, under the Tennessee statute, has the right, and a superior right, to take possession and collect.

What is the law in Tennessee on this subject of the liability of the surety?

The case of *Jackson Insurance Co. vs. Partee,*[9] decided in 1872, at first blush would seem to be authority on this question. It is not, however. In that case a cotton broker had sold in his own name cotton of his customers. He died, and his administrator collected for the cotton, took out the broker's commission, and paid over the balance to those to whom the cotton originally belonged. They were satisfied and raised no question. Hence, anything said in the opinion in that case bearing on the question now under discussion was mere dictum.

In *Sanders vs. Forgasson,*[10] decided in 1873, where the intestate, at his death, had in his possession notes payable to him personally but given for funds in his hands as guardian, and the administrator collected the notes and converted the funds to his own use, it was held that the surety was not liable. But in the Tennessee case of *Clark vs. Pence,*[11] decided in 1903, where the decedent, at her death, had in her possession a note payable to her as executrix, and her administrator took possession of the note, collected it, and converted the proceeds to his own use, the surety on his bond was held liable. Without stopping to discuss the question as to whether in the former case the personal representative had the right to sue at law in his own name as personal representative on the choses in action, it is sufficient to say that if in the former case the personal representative had the right to take possession of and collect the choses in action, then the latter case clearly overrules the former.

In all the Tennessee cases upholding the rule of liability of a surety on a personal representative's bond where the property

8 111 Tenn. 20.
9 56 Tenn. 296.
10 62 Tenn. 249.
11 *Supra,* note 8.

was not a part of the estate for payment of debts and distribution, the property in question consisted of choses in action, and the personal representative had the right, not only to possession, but to sue at law in his own name as personal representative.[12]

While this right to sue is stressed in these cases, especially in that of *Clark vs. Pence,* is not this right mentioned only as showing the right to possession? Doesn't the right to sue at law on a chose in action in one's own name necessarily import the right to possession? However, the right to possession by no means always imports the right to sue at law in one's own name nor necessarily the right to collect.

In each of these Tennessee cases the personal representative had the right not only to take possession but to collect. Where the property consists of choses in action is the principle of the liability of the surety confined in Tennessee to cases where the personal representative has the right to collect, and does it not apply where he has the right to take possession without the right to collect? For instance, would the surety be liable where the personal representative has the right to take possession only temporarily for some particular or specific purpose, and, while so in possession, he converts the chose in action to his own use? We need not stop to inquire whether in such case payment of a note under these circumstances is a good payment, extinguishes the debt, and releases the debtor, because unauthorized collection of a note, delivery to the maker, and use of the proceeds constitute a conversion, and the fact that the true owner of the note may have a right of action against the maker in no manner affects his right of action against the person guilty of the conversion.

In *Commercial Nursery Co. vs. Ivey,*[13] as alleged in the complainant's bill and not disputed, an agent whose principals' place of business was in a county distant from his place of residence died at his home having in his hands for collection notes payable to the principals aggregating about $1300.00. By services already rendered in securing orders for merchandise the agent had earned, under the terms of his contract and course of dealing with the principals, the right to pay to the principals about $750.00 and own the notes, or, upon collection of the notes,

12 Glass vs. Howell, 7 Tenn. 50; The State for use, etc. vs. Anderson, 84 Tenn. 321; Clark vs. Pence, *supra,* note 8; Patterson vs. Tate, 141 Tenn. 607.

13 164 Tenn. 504.

whether he collected them or whether they were collected by the principals or some other agent of theirs, to have the surplus over and above the $750.00. But, under the terms of the contract, the title to all the notes was to remain in the principals, and the notes were to remain exclusively their property until the $750.00 was paid. The agent's administratrix took possession of the notes, immediately collected them as administratrix, and converted the whole $1300.00 to her own use. The estate and the administratrix were both wholly insolvent. The principals sued the administratrix personally and the surety on her bond in the Chancery Court for the $750.00.

It will be perceived at once that there is no analogy between this case and one where a note is sent for collection to an attorney or other agent upon commission in case of collection and the agent dies before collection made, because in this case the agent at his death had by services rendered already earned, under the contract, the right to any surplus of collections over the principals' account, regardless of whether this agent or the principals or some other agent of theirs should collect.

Of course the general rule is that an agency terminates with the death of the agent, yet where the agent owns the legal title to an interest in personalty in his possession as agent, not only does his power as agent with respect to that personalty survive the termination of the agency and survive to his personal representative in case the agency is terminated by his death, but the right to possession survives, and he or his personal representative can not be dispossessed even by the principal, as a possessory action does not lie between owners of interests in personalty. But in this case the agent at his death owned no legal title to any interest in the notes, the principals' account not having been paid in full, and accordingly the principles of law on which rest the survival of the agent's power and the right to possession where the agent owns the legal title to an interest in the property have no application to the case under discussion.

This case raises two questions as follows: First, was the right of the agent, with respect to these notes, such that his administratrix owed the duty to the estate to see that the notes were collected and had the right, subordinate to the superior right of the principals, to take possession and collect, although the agent at his death owned no legal title to any interest in the

notes? It has already been seen that if she had this right, the fact that the principals had also a right, and a superior right which was not exercised, could not affect the liability of the surety on her bond. Second, if the agent had no right to collect the notes; yet, in view of the right of the agent's estate, with respect to the notes, he had a right to have the surplus, was there imposed upon the administratrix the duty to the estate; and therefore, since there can not be a duty without a right, the right as administratrix to take possession of the notes and preserve and safeguard them for the purpose of delivering them to the principals for collection? In other words, did she have the right to take temporary possession as administratrix for a particular and specific purpose, and, if so, did that render the surety liable, she having converted the proceeds to her own use while rightfully in her possession as administratrix?

The court held that, as the notes were payable to the principals, and the title to the notes was in them at the agent's death, and the agent owned no interest in them, but merely had the right to any surplus over the principals' account after collection, the administratrix had neither the right to sue thereon nor the right to collect, and therefore, the surety was not liable. This seems to settle the law in Tennessee to be that where the property consists of choses in action not belonging to the estate, the test of the liability of the surety is not the right of the personal representative to take possession, temporary or otherwise, but the right to collect.

ON AMENDING THE CONSTITUTION OF TENNESSEE

By HENRY B. WITHAM

Many citizens of Tennessee have in mind the problem of providing means for carrying on the necessary governmental institutions of the state so as not to curtail their efficiency in any degree detrimental either to the present or future generations. Many believe our taxation system is archaic. Arguments are made that real property carries too much of the tax burden. Sales taxes and consumers taxes of various kinds have been proposed to relieve the burden on real estate. The problem is not new. Our legislature in 1931 provided an income tax,[1] but this tax was held unconstitutional by the Supreme Court.[2] Present conditions have aggravated the situation so that today everyone is tax conscious and many relief programs have been proposed.

This article does not mean to propose a panacea for the tax burden. The writer holds no brief for the relief of real estate, for the consumers tax, for the sales tax, nor for a general income tax. Real estate taxes we have. A sales tax and a consumers tax appear to be constitutional. But a general income tax may not be had except by constitutional amendment.[3] If the state desires a general income tax, the writer desires to suggest a possible method of amendment which may permit the enactment of an income tax without a two years delay.

Article XI, Section 3 of the 1870 Constitution provides:

> "The legislature shall have the right, at any time, by law to submit to the people the question of calling a convention to alter, reform or abolish this Constitution; and when, upon such submission, a majority of all the votes cast shall be in favor of such proposition, then delegates shall be chosen and the convention shall assemble in such mode and manner as shall be prescribed."

Acting under this article and section our legislature has several times submitted to the people the question of calling a convention to alter, reform or abolish the Constitution. Each time the vote has been negative. One explanation of this negative vote is that we are afraid to place in the hands of the dele-

1 Public Chapter 21, First and Second Extraordinary Session; Public and Private Acts of Tennessee, 1931.

2 Evans vs. McCabe, Com., 164 Tenn. 672, 52 S. W. (2d) 159 and 617 (1932).

3 *Supra* note 2.

gates the responsibility of framing a new constitution. We have thought it better to proceed under the constitution we now have than to provide the means for another with the assumption of risk which it entails. Another explanation of the negative vote is that certain political interests have such a hold upon the electorate that we have been hoodwinked into casting a negative vote. Whether either of these reasons is true, the fact remains that many believe changes should be made in the 1870 Constitution, and many indicate that the most urgently needed change is in our system of taxation.

Before the 1870 Constitution was adopted the Constitution of 1834 was in effect. This Constitution provided in Article XI Section 3 as follows:

> "Any amendment or amendments to this Constitution may be proposed in the senate or house of representatives; and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays thereon, and referred to the general assembly then next to be chosen, and shall be published six months previous to the time of making such choice; and if, in the general assembly then next chosen as aforesaid such proposed amendment or amendments shall be agreed to by two thirds of all the members elected to each house, then it shall be the duty of the general assembly to submit such proposed amendment or amendments to the people in such manner and at such times as the general assembly shall prescribe. And if the people shall approve and ratify such amendment or amendments by a majority of all the citizens of the state voting for representatives voting in their favor such amendment or amendments shall become a part of this Constitution. When any amendment or amendments to the Constitution shall be proposed in pursuance to the foregoing provisions, the same shall at each of said sessions be read three times on three several days in each house. The legislature shall not propose amendments to the Constitution oftener than once in six years."

It should be particularly noted that this provided method of amendment or change was not used when the Constitution of 1870 was adopted. Instead of proceeding under Article XI Section 3 of the 1834 Constitution the legislature acted under Article I Section 1 of the 1834 Constitution which was as follows:

> "That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have, at all times, an unalienable and undefeasible right to alter, reform, or abolish the government in such manner as they may think proper."

In accordance with this article and section the following excerpt was passed by the legislature on November 15, 1869.[4]

"An Act **to authorize the people to call a Convention, and for other purposes.**

"WHEREAS, According to Section 1, Article 1, of the Declaration of Rights, All power is inherent in the people, and all free governments are founded on their authority and instituted for their peace, safety and happiness; and,

"WHEREAS, It is declared that, for the advancement of these ends, the people have, at all times, an inalienable and indefeasible right to alter, reform or abolish the Government in such manner as they may think proper; and,

"WHEREAS, In the opinion of this General Assembly, the public exigencies do now demand the exercise of these inherent and reserved powers on the part of the people of the State; Therefore,

"Section 1. **Be it enacted by the General Assembly of the State of Tennessee,** That every male person not convicted and rendered infamous for crime, of the age of 21 years, being a citizen of the United States and a citizen of the county where he may offer his vote, six months next preceding the day of election, is hereby authorized to assemble on the third Saturday of December, 1869, at the several places of holding elections in the several counties, and vote for or against calling a convention to amend, revise, or form and make a new Constitution for the State; and no certificate or other qualification than the foregoing shall be required by the Judges holding said election.

"Section 2. **Be it further enacted,** That in submitting the question of a Convention to the people, they shall have written or printed on their ballots the words 'Convention', or 'No Convention', and if the number of votes cast for a Convention be greater than the votes cast against a Convention, then there shall be a Convention.

"Section 3. **Be it further enacted,** That an election for delegates to a Convention of the people of the State shall be held in the several counties thereof at the same time and places, and that said election shall be held at all the precincts and voting places established by law, and shall be managed and conducted by the Commissioners of Registration and other proper officers of the counties respectively, in the same manner and under the same rules and regulations that members of the General Assembly are now elected. And it is hereby declared to be the duty of the Governor to issue his proclamation to the several Commissioners of Registration of the State immediately after the passage of this act, requiring them to hold and conduct the same as herein provided. The said Commissioners of Registration shall advertise the time and places of said election as in cases of members of the General Assembly.

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4 Chapter 105 Laws of 1869-70.

"Section 4. **Be it further enacted,** That the whole number of delegates elected to said Convention shall be seventy-five.

"Section 14. **Be it further enacted,** That the Constitution or form of government which said Convention may adopt, shall not be of any binding force or efficacy until the same has been submitted to and ratified by the people of the State, in such manner and at such time as the Convention shall provide."

It is pointed out that the authority for calling the convention of 1870 was found in Article I Section 1 of the Constitution of 1834 and specifically in the statement that all power is inherent in the people who have at all times an unalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper. No convention method was provided in the Constitution of 1834, yet Section 1 of Chapter 105 Laws of 1869-70 provided for a convention, and section 14 of the same chapter provided for a vote by the people on the adoption or rejection of the constitution adopted by the convention. It cannot be said that the legislature followed in any particular way the specific methods set out in the 1834 Constitution for its amendment or change. Neither may it be said that the legislature acted without authority from the 1834 Constitution. Article I Section 1 gave full authority to the legislature to provide the ways and means which the legislature provided for securing a new constitution. "It is the settled rule in Tennessee and in the United States generally, that the legislature has unlimited power to act in its sphere of legislation except so far as restrained by the Constitution of the United States and the Constitution of the State"[5]

It appears reasonable that our legislature could submit to the people the question of calling a convention for the specific purpose of amending the Constitution in one respect, namely, an income tax. This would be in accord with the constitutional provision that the legislature shall have the right to submit to the people the question of calling a convention to alter, reform or abolish this Constitution.[6] Such a convention would not have the full authority to provide a new Constitution, for it would be limited by the act of the legislature to the consideration of an income tax amendment. This procedure is not prohibited by the 1870 Constitution, but is in accord with it. It is a procedure

5 Bell vs. Bank, 7 Tenn. 269 (1821); Hope vs. Dea[illegible]erick, 27 Tenn. 1 (1847); Davis v. State, 71 Tenn. 377 (1879); Evans vs. McCabe, Comr., 164 Tenn. 672, 52 S. W. (2nd) 159 and 617 (1932).

6 Art. XI, Sec. 3, Constitution of 1870.

that does not go so far as the Constitution of 1870 permits, but so far as it does go, it is entirely within the amendment section of the Constitution.[7] No restraint may be found in the 1870 Constitution upon this method, and the writer knows of no such restraint in the Constitution of the United States. If more constitutional authority for the suggested procedure of amendment is needed, it is submitted that the first section of the first article provides it.[8] Since, in the amendment of the 1834 Constitution, the legislature found its authority in the broad general power of the people, it follows that the legislature may find the same authority in Article I Section 1 of the Constitution of 1870 which is precisely the same as Article I Section 1 of the Constitution of 1834.

Under this section the whole Constitution of 1870 was established. *A fortiori,* under the same provision, a small change could be made. "The rule of *stare decisis* is probably applicable to the construction of written constitutions.—A cardinal rule in dealing with written constitutions is that they are to receive an unvarying interpretation, and that their practical construction is to be uniform."[9]

It may be thought that the delegates to this convention would not be bound legally to limit their deliberations and actions to the income tax matter. But the legislature's action in providing for the convention may limit it in any way it sees fit. Action by the convention outside of or beyond the authorized action would be unconstitutional. The legislature receives its authority for calling a convention from the Constitution. If the legislature desires to use only a part of that authority it may do so.[10] The authority for any action by the convention must be found, through the legislature, in the Constitution. Any limitation at the source or along the line must *ipso facto* limit the result. A stream can rise no higher than its source. Neither may the convention do anything without authority from the source, the present Constitution. However, if some future action is necessary so as to check on the action of the delegates at the con-

7 Art. XI, Sec. 3, Constitution of 1870.

8 "Article I, Section 1. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness; for the advancement of those ends they have, at all times, an unalienable and indefeasible right to alter, reform, or abolish the government in such manner as they may think proper."

9 The Judges Cases, 102 Tenn. 509 at p. 532, 53 S. W. 134 (1899); Camden Fire Insurance Association vs. Haston, 153 Tenn. 675 at p. 683, 284 S. W. 905 (1925).

10 *Supra* note 4.

vention, the legislature in submitting the question for the convention, could provide that no action of the convention should be binding except by vote of the people. This would, however, entail the expense of a general election.

If the legislature feels that an income tax or any other specific change or changes in the Constitution are necessary, it is opined that the legislature could submit the question of calling a convention to alter the Constitution so as to provide an income tax or any specific change; have this convention voted on at an election within thirty days and the delegates chosen so as to put the amendment into effect within a possible time of three months from the time of submission by the legislature.

NOTICE FROM TREASURER

Several weeks ago I released the 1933 statements, and while a number of our members have remitted their dues, the amount so far received lacks considerable of paying our obligations. We owe at the present time $125.00 balance on printing the 1931 Proceedings, the entire bill for printing the 1932 Proceedings, several hundred dollars to the Tennessee Law Review, and the semi-annual salaries of the secretary and treasurer. If our members will respond to the statements recently sent them, these obligations can be met.

Won't you send a check now for your dues?

Respectfully, W. L. OWEN, Treasurer,
2012 Sterrick Building, Memphis, Tenn.

NOTICE

For the Bar Association of Tennessee meeting to be held in Knoxville on June 9th and June 10th, the following committee on Hotels and Reservations has been appointed:

Mr. James M. Meek, Chairman
Mr. Wayne B. Parkey
Mr. James E. Atkins, Jr.

The Headquarters will be at the Hotel Andrew Johnson. Any member of the Association desiring information or reservations in the city for the Association meeting should write to Mr. Meek, Chairman, care Lee, Cox, Meek & Heir, East Tennessee National Bank Building, Knoxville, Tennessee.

FRANK MONTGOMERY, President
Knoxville Bar Association.

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Won't you send a check now for your dues?

Respectfully, W. L. OWEN, Treasurer,
2012 Sterrick Building, Memphis, Tenn.

NOTICE

For the Bar Association of Tennessee meeting to be held in Knoxville on June 9th and June 10th, the following committee on Hotels and Reservations has been appointed:

Mr. James M. Meek, Chairman
Mr. Wayne B. Parkey
Mr. James E. Atkins, Jr.

The Headquarters will be at the Hotel Andrew Johnson. Any member of the Association desiring information or reservations in the city for the Association meeting should write to Mr. Meek, Chairman, care Lee, Cox, Meek & Heir, East Tennessee National Bank Building, Knoxville, Tennessee.

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NOTES AND PERSONALS

ELIZABETHTON BAR

Raymond M. Fleshman, who was formerly associated with Seiler & Hunter, is now practicing law by himself with offices located in the Dungan Arcade Building.

Guy Ferguson of Bluefield, West Virginia, is now practicing law in Elizabethton, Tennessee, with offices in the Bonnie Kate Theatre Building.

W. H. Clark is now associated with R. C. Campbell in the practice of the law with offices in the First National Bank Building.

M. W. Snell is now associated with Mack Evans in the practice of the law with offices in the First National Bank Building.

Messrs. Edens & Edens have removed their office from the old U. S. Post Office Building into the Nave Funeral Co. building on Elk Avenue, where they will continue the practice of the law.

Raymond C. Campbell of the Elizabethton Bar has recently been elected County Attorney for Carter County, Tennessee.

Albert C. Tipton has recently moved his offices to the Dungan Arcade Building, Elizabethton, Tennessee where he continues to practice law.

Sherman Grindstaff has recently been attending to Criminal Practice in the United States District Court at Greeneville, Tennessee.

J. Frank Seiler of the law firm of Seiler & Hunter was in Washington for the inauguration on March 4th.

Roy C. Nelson of the Elizabethton bar has recently made application for admission to the Supreme Court of the United States.

C. Lee Richardson is now attorney for the Receiver for the closed First National Bank of Elizabethton, Tennessee and is devoting much of his time to that work.

MARYVILLE BAR

Many of the members of the Bar are able to be back at work after recent illness. Circuit Court has just closed; a rather light docket due possibly to a distressed economic condition of the country. Judge M. H. Gamble, R. R. Kramer and Will A.

McTeer have been appointed to make recommendations to the State Board of Law Examiners as to the character and standing of applicants in this section for admission to the Bar.

The local Bar is very much pleased with the appointment of Judge Nathan Bachman of Chattanooga, Tennessee as U. S. Senator from Tennessee. Judge Bachman is an able counselor and without doubt will uphold the prestige of the Volunteer State in the halls of the U. S. Senate.

MEMPHIS AND SHELBY COUNTY BAR ASSOCIATION

The Memphis and Shelby County Bar Association has an unusually outstanding and capable corps of officers for the current year. Walter P. Armstrong, president, is a member of the Executive Committee of the American Bar Association and Commissioner for the State of Tennessee on Uniform Laws. First Vice-President is William M. Stanton, former Speaker of the State House of Representatives, and an official of the local Bar Association for many years. Lois D. Bejach, present County Attorney and former member of the State Legislature, holds the office of second vice-president. The offices of Secretary and Treasurer are ably filled by J. P. M. Hamner and Harry M. Adams respectively.

A strong Grievance Committee under the chairmanship of Floyd M. Henderson has been appointed and is actively functioning.

At a recent general meeting several new bills covering legislative matters of vital interest were considered and recommended to the legislature for passage.

Plans for the establishment of closer relations between members of the Bar and the public at large have been discussed. To that end, a series of radio addresses have been planned and a committee appointed to disseminate news of the activities of the Bar Association through the Press.

The annual dinner of the Memphis and Shelby County Bar Association was held at the Memphis Country Club on the evening of February 14th. Attended by more than three hundred attorneys and their wives, the dinner and dance was featured by the fact that it was the first held by the local Association to be addressed by the President of the American Bar Association, Clarence E. Martin; the first to be attended by women; and it marked the first Memphis appearance of Judge Hu C. Anderson since his appointment to the Court of Appeals.

Silas M. Strawn, a past president of the American Bar Association, also attended.

The State Board of Law Examiners met at the Hotel Peabody on February 17th and 18th and announced results of the recent examinations. The meeting was attended by President A. B. Broadbent, of Clarksville; Judge R. A. Davis, vice-president, of Athens; and R. I. Moore, secretary-treasurer, of Memphis. Of the fifty-four successful candidates, eight of them were Memphians. While in session here the Board resolved to request the presidents of the local Bar Associations throughout the state to appoint a committee to inquire into the character of the applicants from the respective districts and advise the Board relative to their moral fitness.

J. GRANVILLE FARRAR, Correspondent.

SAVANNAH BAR

The Savannah bar has lost one of its most genial and active members through the appointment of Maj. J. H. Ballew as State Adjutant General. General Ballew was county manager for McAlister and very active in his support. He has removed with his family to Nashville.

E. W. Ross, Jr., recently graduated from Cumberland Law School and successfully passed the State bar exam and is expected to join his father and brother in the practice here.

R. D. DeFord is being favorably mentioned by the bar of West Tennessee and others as likely to land one of the Assistant U. S. Attorneys places for the Western District.

A. M. Patterson is serving by appointment of the United States District Court as Receiver for the New Southern Hotel in Jackson, Tenn.

HEADNOTES *

(Recent Tennessee Supreme Court Decisions)

STATE OF TENN. EX REL. v. BANK OF BRISTOL

(Opinion filed January 10, 1933, by Mr. Chief Justice Green.)

1. BANKS AND BANKING. Guardian and Ward. Relation of bank and guardian who deposits ward's funds.

The relation between a bank and a guardian who deposits his ward's funds in the bank is the ordinary relation of banker and general depositor,—of debtor and creditor.

Cases cited: Conquest v. Broadway National Bank, 134 Tenn. (7 Thomp.), 17; Marine Bank of Chicago v. Fulton County Bank, 2 Wall. 252.

2. GUARDIAN AND WARD. Insane persons. Statutes. Principal and Agent. Guardian of insane veteran as agent.

Although a guardian who receives funds under the World War Veterans Acts for an insane veteran is an agent of the government in the sense that he has certain statutory duties to the government, he is also the veteran's agent and acts as the veteran's agent in depositing the money in bank.

3. GUARDIAN AND WARD. Limitation of Actions. Title to property of ward held by guardian.

In the relation of guardian and ward the title to the property is in the ward and the possession of the guardian is the possession of the ward and will inure to the ward's benefit under statutes of limitations.

Citing: United States v. Hall, 98 U. S. 343; Williams v. Walton, 16 Tenn. (8 Yerg.) 387; Davis v. Mitchell, 13 Tenn. (5 Yerg.) 281; 28 C. J. 1128; 12 R. C. L. 1123.

4. BANKS AND BANKING. Insane Persons. Statutes. Construction of World War Veteran Acts respecting title of fund paid guardian of incompetent veteran.

A fund received under the World War Veteran Acts by the guardian of an insane veteran and deposited in bank is not "a debt due to the United States" and is not entitled to priority of payment upon the insolvency of the bank. Such fund belongs to the veteran and not to the government.

Citing: U. S. C., Title 31, sec. 191; U. S. C., Title 38, sec. 421, 450, 451, 514, 556; Shippee Bank Commissioner v. Commercial Trust Co. (Conn.), 161 Atl. 775; State ex rel. v. First State Bank, 121 Neb. 515; State ex rel. v. Security Bank, 121 Neb. 521; Butler v. Cantley (Mo.), 47 S. W. (2d) 258; Brownwell v. U. S. F. & G. Co., 269 U. S. 483; Payne v. Jordan, 152 Ga. 367; Watkins v. Hall, 107 W. Va. 202; Wilson v. Sawyers (Ark.), 6 S. W. (2d) 825; Perrydore v. Hester, 215 Ala. 268; Tax Commission v. Rife (Ohio), 162 N. E. 390; In Re Geier, 155 La. 167.

5. BANKS AND BANKING. War Risk Insurance. Title to fund received by beneficiary of war risk insurance.

Money received by a beneficiary in settlement of war risk insurance, entrusted by the beneficiary to her personal agent, and deposited in bank by such agent as

* Note: These headnotes furnished by the courtesy of the Attorney General's Office at Nashville.

trustee is not money of the government and is not entitled to priority of payment upon the insolvency of the bank.

6. GUARDIAN AND WARD. Banks and Banking. Duty of guardian to keep trust funds separate.

It is a breach of trust for a bank which is a guardian to mingle the funds of its ward with its general deposits. Such money should be kept separate.

7. TRUSTS. Banks and Banking. Following trust funds in mixed bank account of trustee.

Where a trustee blends in a bank account his own money with the beneficiary's, from which account the trustee subsequently withdraws funds, the withdrawals will be presumed to be the trustee's own funds, which he had a right to withdraw and the balance will be presumed to include the beneficiary's funds, which the trustee had no right to use.

Citing: Knatchbull v. Hallett, L. R. 13 Ch. Div. 968; Central Nat. Bank v. Conn. Mut. Life Ins. Co., 104 U. S. 54; Bragg v. Osborne, 147 Tenn. (20 Thomp.) 382; Brocchus v. Morgan, 3 Shan. Cas. 761; Notes, 26 A. L. R. 11; 55 A. L. R. 1275; 39 Cyc. 640.

8. BANKS AND BANKING. Trusts. Guardian and Ward. Preferential payment of funds held by insolvent bank as guardian.

Where a bank which is a guardian mingled the funds of its wards with its general deposits and the general deposits at no time fell below the total amount of trust funds held by the bank, upon the insolvency of the bank its wards are entitled to payment in preference to the claims of general depositors.

TOM OVERTON v. THE STATE

(Opinion filed February 11, 1933, by Mr. Chief Justice Green.)

1. CRIMINAL LAW. Homicide. Insane Persons. Insane delusion as defense.

Defendant, with intent to kill, made an assault upon another. At that time defendant, otherwise sane, possessed an insane delusion that his victim was maintaining illicit relations with defendant's former wife and that his victim had previously attempted to kill him. HELD: Conviction of assault with intent to commit manslaughter was authorized, because the defendant would have been guilty of such offense if his insane delusion had been true.

Case approved: Davis v. State, 161 Tenn. (8 Smith) 23.

2. APPEAL AND ERROR. Pleading and Practice. Failure of trial judge to give requested charge must appear from bill of exceptions.

Failure of the trial judge to give in charge certain requests said to have been offered cannot be challenged as error upon appeal when the bill of exceptions does not show that any such requests were tendered, although the motion for a new trial represents that such requests were offered.

3. NEW TRIAL. Pleading and Practice. Motion for new trial is pleading.

The motion for a new trial is nothing but a pleading and cannot be looked to as establishing facts that it alleges.

Case approved: Sherman v. State, 125 Tenn. (17 Cates) 19.

EFFIE T. LINGNER v. W. H. LINGNER

(Opinion filed February 11, 1933, by Mr. Chief Justice Green.)

1. COURTS. Pleading and Practice. Certiorari. Significance of denial by Supreme Court of writ of certiorari to Court of Appeals.

The denial of the writ of certiorari by the Supreme Court without a written opinion or some explanatory memorandum does not invariably show approval by the Supreme Court of the reasoning of the Court of Appeals in the case, but the Supreme Court in some instances denies the writ without a memorandum, although it concurs only in the result reached.

Case cited: Beard v. Beard, 158 Tenn. (5 Smith) 437.

2. PLEADING AND PRACTICE. Certiorari. Review by Supreme Court of matter of practice involved in opinion of Court of Appeals.

The Supreme Court will no more hesitate to investigate again a question of practice decided by the Court of Appeals in a case in which the writ of certiorari was denied than it would hesitate so to do in a case disposed of on direct appeal.

3. MARRIAGE. Nature of.

Marriage is a status regulated by law, created only by prescribed formalities and dissolved only by prescribed procedure.

4. DIVORCE. Suit for divorce is sui generis.

Although a divorce suit is in the nature of a suit in equity, nevertheless it is a suit sui generis, in which the procedure, controlled by statute, differs in many particulars from the procedure in equity cases generally.

Cases cited: Broch v. Broch, 164 Tenn. (11 Smith) 219; Hackney v. Hackney, 28 Tenn. (9 Humph.) 459.

5. DIVORCE. Statutes. Decree authorized is divorce suit.

The statute regulating the procedure in divorce suits (Code, Sec. 8445) authorizes (1) a decree according to the prayer of the bill, by annulling the marriage or by ordering a special, perpetual or temporary, or (2) such other decree as the nature and circumstances of the case require.

Code cited: Sec. 8427, 8444, 8445.

6. DIVORCE. Right of court to grant absolute divorce when only limited divorce is prayed for.

Although the only specific relief prayed for in a bill for divorce is a divorce from bed and board, nevertheless the court may grant an absolute divorce if the circumstances of the case require it.

Case approved: Hackney v. Hackney, supra.

Cases cited: Rutledge v. Rutledge, 37 Tenn. (5 Sneed), 555; Burlage v. Burlage, 65 Mich. 624.

Case disapproved: Merritt v. Merritt, 10 Tenn. App. 369.

7. DIVORCE. Attorney and Client. Allowance of counsel fees in divorce proceeding.

Upon application made in the Supreme Court for additional counsel fees in a divorce proceeding, the court may refer the application to the chancellor on remand.

8. DIVORCE. Attorney and Client. Amount of counsel fees in divorce proceeding.

In a divorce proceeding the amount of fees allowed counsel of the wife will naturally be governed to some extent by the amount of the alimony allowed.

JESSE ANDERSON v. STATE OF TENNESSEE

(Opinion filed February 23, 1933, by Mr. Justice McKinney.)

1. EVIDENCE. Criminal Law. Testimony of bad reputation of accused whose character is not in issue is incompetent.

In a criminal prosecution in which the defendant did not testify and did not put his character in issue, evidence that he had the reputation of being a bootlegger is incompetent for any purpose and may not be admitted to be considered by the jury in determining the punishment to be imposed.

Citing: Ware v. State, 71 Ark. 555; State v. Lapage, 57 N. H. 245; 33 C. J. 781; Chamberlayne's Modern Law of Evidence, Vol. 4, p. 4524.

2. EVIDENCE. Criminal Law. Court may hear evidence to be considered in aggravation or mitigation of punishment.

Where it devolves on the court to determine the amount of punishment, either on a verdict by a jury or on a plea of guilty, evidence may be received in aggravation or mitigation of the punishment.

Case cited: Cason v. State, 160 Tenn. (7 Smith) 271.

3. CRIMINAL LAW. Evidence. Admission of incompetent testimony of defendant's reputation held not prejudicial under facts of case.

In a criminal prosecution for violation of the prohibition statute the admission of incompetent evidence that the defendant had the reputation of being a bootlegger is not prejudicial error when the uncontroverted facts establish defendant's guilt and when the jury imposed the minimum fine authorized by statute.

4. CRIMINAL LAW. Evidence. Appeal and Error. No reversal by Supreme Court for harmless admission of incompetent evidence.

The Supreme Court is prohibited by statute from reversing a criminal case for error committed in the admission of testimony unless the accused was prejudiced thereby.

BROWN HEIRS v. CANNON COUNTY ET AL

(Opinion filed February 11, 1933, by Mr. Justice Swiggart.)

1. HIGHWAYS. Eminent domain. Statutes. Construction of Chapter 57, Acts of 1931.

Chapter 57 of the Acts of 1931 transfers from the county to the State liability for the cost of all rights-of-way for State highways not paid for or settled prior to its enactment, even though there was no pending litigation or dispute between the State and a county as to their respective liability.

Act construed: Acts 1931, ch. 57.

Case approved: Baker v. Donegan, 164 Tenn. (11 Smith) 625.

Case differentiated: Shelby County v. J. H. Adams (Court of Appeals, 1932).

2. EMINENT DOMAIN. Highways. Liability of State where condemnation suit was pending between property owner and county at time of passage of chapter 57, Acts 1931.

Where at the time of the enactment of chapter 57, Acts of 1931 an action was pending between one whose land had been taken for a State highway and a county, the Commissioner of Highways was properly made a party thereto and the State held primarily liable for the value of the land.

3. HIGHWAYS. Constitutional Law. Eminent domain. Liability of county for land appropriated prior to Act of 1931.

One whose land was taken by condemnation for a right-of-way under a statute making the county liable for land is entitled to a judgment against the county, notwithstanding the enactment of a statute fixing liability upon the State.

Case cited: Baker v. Rose, 165 Tenn. (1 Beeler) .....

J. W. RAINES v. PAULINE MERCER

(Opinion filed December 24, 1932, by Mr. Justice Cook.)

1. HUSBAND AND WIFE. Statutes. Effect of Married Woman's Act upon rule that husband and wife are one.

The rule of the common law declaring husband and wife to be one person, so that neither can maintain an action in tort against the other and rights of action for antenuptial wrongs, are extinguished by marriage, has not been changed by the Married Woman's Act of Tennessee.

Citing: Lillienkamp v. Rippetoe, 133 Tenn. (6 Thomp.) 62; Wilson v. Barton, 153 Tenn. (26 Thomp.) 250; Tobin v. Gelrich, 162 Tenn. (9 Smith) 96; Hennegar v. Lomas, 32 L. R. A. 848; Schouler's Husband and Wife, Sec. 81; 30 C. J. 714.

2. PRINCIPAL AND AGENT. Master and Servant. Liability of principal or master depends upon liability of agent or servant.

Because the doctrine of *respondeat superior* rests upon the doctrine that the wrong of the agent is the act of his principal, any rule of law which extinguishes the liability of the agent, the immediate actor, operates to relieve the principal, the remote actor, from liability for tort.

Citing: Goodman v. Wilson, 129 Tenn. (2 Thomp.) 464; Loveman Co. v. Bayless, 128 Tenn. (1 Thomp.) 317; 18 R. C. L. 786.

3. PRINCIPAL AND AGENT. Automobiles. Basis of "Family Purpose Doctrine."

The ''Family Purpose Doctrine'' rests upon the doctrine of agency.

Citing: King v. Smythe, 140 Tenn. (13 Thomp.) 217; Keller v. Truck Co., 151 Tenn. (24 Thomp.) 427.

4. HUSBAND AND WIFE. Automobiles. Principal and Agent. Right of injured person to sue principal after marriage to agent.

Where a woman injured by the negligent operation of an automobile subsequently married the driver of the automobile, thereby extinguishing her right of action against her husband, she cannot maintain an action against the owner of the automobile whose liability was predicated upon the Family Purpose Doctrine. Such action cannot be maintained although it was begun prior to marriage.

Citing: Riser v. Riser, 240 Mich. 202; Emerson v. Western Seed Co. (Neb.), 216 N. W. 297; Newton v. Webber, 96 N. Y. Supp. 113; Maine v. Maine, 37 A. L. R. 161; Harvey v. Harvey, 239 Mich. 142; Phillips v. Barnett, 1 Q. B. D. 436; Abbott v. Abbott, 67 Maine 304; Hobbs v. Illinois Central R. Co., 171 Iowa 624.

5. PLEADING AND PRACTICE. Plea of "Not Guilty" admits proof of plaintiff's marriage.

Under a plea of ''Not Guilty'' to a declaration seeking a recovery for personal injuries, every material averment, including the right to maintain the action, is denied; and such a plea, offered after plaintiff amended her declaration by changing

her name, admits proof of a subsequent marriage which would extinguish defendant's liability.

Citing: Plowman v. Foster, 46 Tenn. (6 Cold.) 52.

6. NEGLIGENCE. Automobiles. Guest in car held guilty of contributory negligence.

A woman who permits a man to drive an automobile with one hand, the other being around her, is guilty of such contributory negligence as precludes a recovery by her of damages from him for an injury received as a result of his negligent driving.

INDEPENDENT LIFE INS. CO. v. C. E. RODGERS

(Opinion filed January 10, 1933, by Mr. Chief Justice Green.)

1. LIBEL AND SLANDER. Absolute privilege of statements in judicial proceeding.

The pertinent expressions of parties and witnesses uttered by them in judicial proceedings are absolutely privileged, so that no action for libel or slander can be based upon such expression.

Cases cited: Lea v. White, 36 Tenn. (4 Sneed) 111; Cooley v. Galyon, 109 Tenn. (1 Cates) 1; Crockett v. McLanahan, 109 Tenn. (1 Cates) 517; Roberts v. Parker, 156 Tenn. (3 Smith) 82; Wells v. Carter, 164 Tenn. (11 Smith) 400.

Case disapproved: Buohs v. Backer, 53 Tenn. (6 Heisk.) 395.

Case differentiated: McKee v. Hughes, 133 Tenn. (6 Thomp.) 455.

2. STATUTES. Insurance. Nature of hearing in proceeding for revocation of insurance agent's license.

The statute which authorizes the Insurance Commissioner to revoke an insurance agent's license "after a hearing for good cause shown" necessarily implies a legal hearing, with notice to the defendant, because a hearing without notice would be without due process of law.

Act construed: Acts 1925, ch. 46.

3. CONSTITUTIONAL LAW. Due process of law. Right of insurance agent to pursue vocation is property right.

The right of an insurance agent to pursue his vocation is a property right, similar to the right of a physician to pursue his profession, of which one may not be deprived without due process of law.

Case cited: State Board of Medical Examiners v. Friedman, 150 Tenn. (23 Thomp.) 152.

4. STATUTES. Insurance. Insurance Commissioner Acts as court in hearing upon revocation of agent's license.

The statute which authorizes the Insurance Commissioner to revoke an insurance agent's license, after complaint, notice and hearing, makes the Commissioner a court to determine this matter of rovocation.

Act construed: Acts 1925, ch. 46.

5. LIBEL AND SLANDER. Proceedings to which doctrine of absolute privilege extends.

The doctrine of absolute privilege does not extend to the proceedings of every official, board, committee, or the like, authorized by law to conduct an investigation,

but extends only to the proceedings of courts of justice and tribunals having attributes similar to those of courts.

Citing: Dawkins v. Rokeby, 45 L. J. Q. B. 8; Jekyll v. Moore, 2 Bos. & P. N. S. 341; Brown v. Globe P. Co., 213 Mo. 611; Duncan v. Atchison, etc. R. Co., 72 Fed. 808; Stone v. Hutchinson Daily News, 125 Kan. 715; Vausse v. Lee, 19 S. C. L. (1 Hill) 197; Watson v. McEwan (1905) A. C. 480; Connellee v. Blanton (Tex. Civ. Ap.) 163 S. W. 404; Keenan v. McMurray, 34 Pitsb. L. J. N. S. (Pa.) 223; Andrews v. Gardiner, 224 N. Y. 440; Royal Aquarium v. Parkinson (1892) 1 Q. B. 431.

6. LIBEL AND SLANDER. Basis of absolute privilege.

The basis of absolute privilege is public policy.

7. LIBEL AND SLANDER. Statutes. Insurance. Investigation by insurance commissioner respecting revocation of agent's license is absolutely privileged proceeding.

A communication by an insurance company to the Insurance Commissioner, containing charges against a former agent of the company, cannot be made the basis of an action for libel brought by the former agent against the company, public policy requiring that the immunity of absolute privilege extend to statements of parties and witnesses in an investigation by the Insurance Commissioner with respect to the revocation of an agent's license.

Act construed: Acts 1925, ch. 46.

Case cited: Dawkins v. Rokeby, 45 L. J. Q. B. 8, 9 Eng. Rul. Cas. 39.

LOUISE PATTEN v. STANDARD OIL COMPANY OF LOUISIANA AND A. N. HAYNES

(Opinion filed January 7, 1933, by Mr. Justice McKinney.)

1. LIMITATION OF ACTIONS. Fraud and deceit. Doctrine of fraudulent concealment.

Since the equitable doctrine of fraudulent concealment is based upon the principle of fair dealing, there can be no concealment where there is no dealing between the parties.

Citing: 37 C. J. 973.

2. LIMITATION OF ACTIONS. Fraud and deceit. Silence as fraudulent concealment.

Mere silence does not constitute fraudulent concealment, but in addition to a failure to disclose known facts, there must be some trick or contrivance intended to exclude suspicion and prevent inquiry, or else there must be a duty resting upon the party knowing such facts to disclose them.

Citing: 12 R. C. L. 306.

3. LIMITATION OF ACTIONS. Fraud and deceit. Declaration held not to state case of fraudulent concealment.

A declaration alleged that plaintiff's intestate was a passenger in the airplane of a transportation company and was killed because of unfit gasoline furnished by the defendant oil company to the transportation company, that the defendant knew such gasoline was unfit, that after the accident defendant instructed its employes to conceal such fact and that as a result of the concealment plaintiff did not learn the cause of the accident until after the expiration of the statutory period of limita-

tion. HELD: The declaration does not state a case in which under the doctrine of fraudulent concealment the statute of limitations should be postponed.

Citing: Smith v. Bishop (Vt.), 31 Am. Dec. 607.

4. LIMITATION OF ACTIONS. Statute of limitations is favored.

The statute of limitations is looked upon with favor as a statute of repose.

Citing: Wood v. Carpenter, 101 U. S. 135; Cocke v. Hoffman, 73 Tenn. (5 Lea) 105; Coleson v. Blanton, 4 Tenn. (3 Hayw.) 152; Shelby's Heirs v. Shelby, 3 Tenn. (2 Hayw.) 179.

DONALD SMITH v. MODERN BAKERY

(Opinion filed January 21, 1933, by Mr. Chief Justice Green.)

1. PARTIES. Process. Effect of amending process with respect to parties upon rights of sureties.

The sureties on an appeal bond and on a delivery bond executed by defendant in an action instituted before a justice of the peace by partners under their trade name are released by amendment of the warrant and the attachment writ in the circuit court so as to sue in the name of the individuals who compose the partnership.

Cases approved: Irwin v. Sanders, 13 Tenn. (5 Yerg.) 287; Phillips v. Wells, 34 Tenn. (2 Sneed) 154; Smith v. Roby, 53 Tenn. (6 Heisk.) 546; Thomas v. Cole, 57 Tenn. (10 Heisk.) 411.

2. PARTIES. Prosecution of suit under trade name.

Question reserved: Whether a person or a partnership can maintain a suit in a trade name.

Citing: Cain v. Kersey, 9 Tenn. (1 Yerg.) 443; Irwin v. Sanders, supra; 47 C. J. 173.

3. APPEAL AND ERROR. Principal and surety. Appeal by principal party as preserving rights of surety.

Upon appeal by a party, the rights of sureties on a bond executed by such party are before the court, the bonds being part of the record, and the appellate court renders such judgment with respect to the sureties as the court below should have rendered.

Case approved: Moore v. Lassiter, 84 Tenn. (16 Lea) 630.

LEILA CORNETT v. CITY OF CHATTANOOGA

(Opinion filed February 11, 1933, by Mr. Justice Swiggart.)

1. WORKMEN'S COMPENSATION. Contracts. Action for compensation is suit upon contract.

The benefits accruing under the Compensation Act and the obligations arising therefrom are incidents of a contract of employment; therefore, an action for an award of compensation is a suit upon a contract.

Cases approved: Tidwell v. Chattanooga Boiler & Tank Co., 163 Tenn. (10 Smith) 420; Vantrease v. Smith, 143 Tenn. (16 Thomp.) 254.

2. MUNICIPAL CORPORATIONS. Officers. City policemen are officers.

City policemen are civil officers, primarily of the municipality and secondarily of the State.

Citing: Code Sec. 11419; Acts 1901, ch. 432, Sec. 58.

Case approved: Porterfield v. State, 92 Tenn. (8 Pickle) 289.

3. MUNICIPAL CORPORATIONS. Officers. Charter provision held not to change status of policemen as officers.

The status of policemen as civil officers is not changed to that of employes by a provision in the city charter authorizing the municipality "to employ policemen."

Act cited: Private Acts 1927, ch. 692.

4. OFFICERS. Rights and obligations of officers are not contractual.

A civil officer does not hold his office by contract with the government. His rights and obligations are not contractual but are created and imposed by law.

Cases approved: Haynes v. State, 22 Tenn. (3 Humph.) 480; Hunter v. Conner, 152 Tenn. (25 Thomp.) 258; Roberts v. Roane County, 160 Tenn. (7 Smith) 109.

5. WORKMEN'S COMPENSATION. Municipal corporations. Police officers are not within Compensation Act.

Police officers in the service of a city which has accepted the provisions of the Workmen's Compensation Act are not included within the provisions of that law.

Citing: McDonald v. New Haven (Conn.), 109 Atl. 176; 10 A. L. R. 193, and Note.

Code cited: Sec. 6852, 6856 (e).

6. MUNICIPAL CORPORATIONS. Workmen's Compensation. Estoppel City held not estopped to deny liability for compensation to policemen.

A city which accepted the provisions of the Compensation Act and in its notice of acceptance referred to members of the police force as within the provisions of the Act is not estopped to deny liability on account of the death of a policeman, when it is not shown that such policeman, or the petitioner, had knowledge of the fact prior to the accident.

7. WORKMEN'S COMPENSATION. Statutes. Construction of Compensation Act.

The rule that the Compensation Act will be construed liberally as a remedial statute cannot be resorted to for the purpose of extending the statute to persons not included or embraced by its terms.

Code cited: Sec. 6901.

Cases approved: Baxter v. Jordan, 158 Tenn. (5 Smith) 471; Pillow v. Kelly, 155 Tenn. (2 Smith) 597.

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JUDGE W. A. OWEN

(Died February 4, 1933.)*

The Bench and Bar of Memphis share the severe loss which people throughout the State have sustained in the passing of Judge William A. Owen of the Court of Appeals of Tennessee. He was a Christian gentleman, an able jurist, and a faithful public servant.

Eldest child of Richard B. and Sarah Walton Owen, William Alexander Owen was born on the sixth day of March, 1869, in Tipton County, Tennessee. There he was reared and educated, and for a full, useful life. Finishing a law course at Vanderbilt University, he was admitted to the practice of his profession at Covington in 1891, and promptly gained a prominent place in the life of the people of that fine community.

Although not an aspirant for honors, they were bestowed as rewards of loyal, untiring service in the fields in which he labored. In his Church, Judge Owen was chosen presiding officer of the Tennessee Baptist Convention; in fraternal orders to which he was devoted, he became Grand Chancellor of the Knights of Pythias, and a Mason of high degree; and in the realms of education, Judge Owen was a Trustee of Union University at Jackson. But it was in the domain of law that he achieved his most conspicuous success.

Judge Owen was one of the leading attorneys of the West Tennessee Bar for twenty-seven years, and when elevated to the Bench in 1918, took with him the ripe experience of a lawyer who had earned promotion in the field of active practice. He was skillful in the handling of complicated causes and persuasive before a jury. Although courageous in the representation of his clients, Judge Owen's deep love of his fellowman made him essentially a man of peace. Industrious to a marked degree and direct in the power of reasoning, he held the wholesome respect of his opponents; and, surcharged with the ethical standards and ideals of his profession, he was an ornament to the Bar.

These high qualities remained with Mr. Justice Owen throughout his judicial career. He rarely missed being in his

*Resolutions adopted by Memphis and Shelby County Bar Association at a Memorial Meeting held February 27, 1933.

accustomed place on the bench, and never failed to give an attentive ear to the arguments presented. As he was never known to be behind in his work on the Court, he could not have been indecisive. Avoiding any display of erudition, Judge Owen's opinions evinced a thorough knowledge of the cases he was called on to decide, and woven in them all could be found that indispensable fabric of a real judge, unfailing common sense, and the determination to reach the merits of the cause regardless of the effort involved and the personal consequences to follow.

The younger members of the bar will long remember Judge Owen's friendly interest in their progress. He was never petulant or impatient, and his kindly words of encouragement often helped many a faltering beginner to complete his presentation. For the older lawyers, there was always present that spirit of comradeship which solidifies our profession and marks the true lawyer.

Possessing an uncanny gift for remembering names and faces, Judge Owen enjoyed as wide an acquaintance and as large a circle of friends as any citizen of Tennessee; and his capacious memory enabled him to retain a vast store of general information.

By birth, education, and association, Judge Owen was a gentleman, and throughout his life, whether in ordinary social or business relationships or before the bar as an advocate or on the bench as a judge, he never failed to measure up to every requirement of that honorable title. Above all, he had what Judge Parker, in a recent address before the St. Louis Bar, has called "the faith of the lawyer," a confidence in the nobility of his profession and an appreciation of its responsibilities. He realized always that the happiness of the citizen, whether from the humbler walks of life or from those stations where wealth and power prevail, should be the ultimate aim, and that, upon the lawyers more than upon any other class of men rest the duty and the power to see that such happiness is accomplished. That faith in the law permeated the course of his whole life.

In spite of his absorbing labors on the bench, Judge Owen found time to write entertainingly of people and occurrences, and a number of his contributions to newspapers and magazines have a lasting value. Indeed, shortly before his death, he completed a composition containing family history, poetry and gems of thought for his children; and, at its close, like the premonition

of an approaching change, is a message of faith and hope that only a man of upright character could have penned:

> "May there be no loss in our ranks for years to come; but when the summon comes, it shall not be our right to reason why but ours to answer 'here', and to obey without falter or fear. When the sun goes down, sunset is followed by twilight; after twilight, dusk; after dusk, darkness. But after darkness comes the dawn and a new sunrise, a new day, a brighter and a more glorious life."

And so we leave our friend and brother as he enters the King's highway on the bright morning of the new day and begins the blessed journey of that more glorious life. We give thanks for the privilege of having known him and served with him. We are grateful for the fine lessons of his earthly life; and we rejoice that, having fought the good fight and finished his course here, he has gone up higher where the spirits of just men made perfect enjoy perpetual peace.

THEREFORE, BE IT RESOLVED, That the Bench and Bar of Shelby County record this tribute to the memory of Associate Justice William A. Owen in our memorial book; that copies be sent to the members of Judge Owen's family; and that this resolution be presented to the Courts of record in this County, to the Court of Appeals, and to the Supreme Court of Tennessee.

Respectfully submitted,

WALTER CHANDLER, Chairman,
JUDGE F. H. HEISKELL,
H. D. MINOR,
J. E. HOLMES,
HILLSMAN TAYLOR,
Committee.

RECENT CASE NOTES

AUTOMOBILES—DISTINGUISHING "PASSENGER FOR HIRE" FROM "GUEST".

The defendant is a corporation in Sioux City in the business of selling and exchanging automobiles. One Leap, a servant of the defendant corporation, called at the residence of the plaintiff and began negotiations with him relative to the exchange of cars. Everything was practically arranged on the condition of the car being suitable, whereupon Leap asked the plaintiff to get into the car, explaining that they would take a little drive and see what the car worked like. The plaintiff got in the seat beside the driver and during this journey, taken for the purpose of demonstrating the car, an accident occurred in which the plaintiff was injured. No deal was finally consumated. The court held that the plaintiff was not a guest but a "passenger for hire" and not required to prove recklessness to recover against the owner of the automobile for injuries.[1]

Iowa has,[2] as do some other states,[3] a guest statute which provides that the owner or operator of an automobile shall not be liable to an invited guest unless damage is caused as a result of the driver of the said vehicle being under the influence of intoxicating liquor or because of the reckless operation by the driver. The states which have such a statute have held that for the purpose of determining whether a passenger is a "passenger for hire" or a guest, not merely the act of transportation must be considered but also any contract or relationship between the parties to which it is an incident,[4] and that automobile dealers and salesmen are not only willing but anxious to exchange their time and use of a car for the time and attention of the person who is in the market for such a car. In actual business one is regarded as an equivalent or recompense for the other.[5]

In Massachusetts there is no similar guest statute, but the rule has been established that where an invited guest is riding in a machine with the owner, he cannot recover for injuries sustained unless the owner and driver of the car was guilty of gross negligence.[6] This is the rule in a number of jurisdictions.[7] But in applying

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1 Bookhart vs. Greenlease-Lied Motor Co., ... Iowa ...., 244 N. W. 721 (1932).

2 Iowa Code (1931) Sec. 5026.

3 California Codes and Gen. Laws (Deering, Supp. 1929), p. 1580; Conn. Pub. Acts (1927).

4 Champagne vs. Hamburger, 169 Calif. 683, 147 Pac. 954 (1915); Kruy vs. Smith, 108 Conn. 628, 144 Atl. 304 (1929).

5 Crawford vs. Foster, 110 Calif. App. 81, 293 Pac. 841 (1930).

6 West vs. Poor, 196 Mass. 183, 81 N. E. 960 (1907); Massaletti vs. Fitzroy, 228 Mass. 487, 118 N. E. 168 (1917); O'Leary vs. Fash, 245 Mass. 123, 140 N. E. 282 (1923).

7 Tenn. Cent. Ry. Co. v. Vanhoy, 143 Tenn. 312, 226 S. W. 225 (1920); Epps vs. Parrish, 26 Ga. App. 399, 106 S. E. 297 (1921); Harris vs. Reid, 30 Ga. App. 187, 117 S. E. 256 (1923); Munson vs. Rupher, 148 N. E. 169 (Ind. 1925); Beard vs. Klusmeier, 158 Ky. 153, 164 S. W. 319 (1914); Fitzjarrel vs. Boyd, 123 Md. 497, 91 Atl. 547 (1914); Massaletti vs. Fitzroy, *supra* note 6; Flynn vs. Lewis, 231 Mass. 550, 121 N. E. 493 (1919); Lyttle vs. Monto, 248 Mass. 304, 142 N. E. 795 (1924); Liston vs. Reynolds, 69 Mont. 497, 223 Pac. 507 (1924); Paiewonsky vs. Joffe, 101 N. J. L. 521, 129 Atl. 142 (1925); Patnode vs. Foote, 138 N. Y. S. 221 (1912); Atwell vs. Winkler, 188 N. Y. S. 158 (1921); Bolton vs. Madsen, 199 N. Y. S. 353 (1923); Clark vs. Traver, 200 N. Y. S. 52, 143 N. E. 353 (1923); Glick vs. Baer, 186 Wis. 268, 201 N. W. 752 (1925).

the rule, the courts have distinguished between the case where one is a mere guest of another and has been permitted to ride gratuitously and cases where one, in riding, is conferring some benefit upon the driver of the car.[8]

It then remains to be determined what constitutes a "passenger for hire" and a guest under such a statute and a rule. The California statute[9] defines a guest "as being a person who accepts a ride in any vehicle without giving compensation therefor." The court of that state further extends the definition of the statute by saying that a guest "within the meaning of the statute respecting a motorist's liability, is one who accepts the driver's hospitality and takes the ride for his pleasure or business without making any return or conferring any benefit upon the driver."[10] Thereby the court indicates the intention not to limit compensation to payment for transportation in cash or its equivalent. Wharton says the confidence accepted is sufficient consideration.[11] It is upon such an assumption that the Iowa court goes when it declares that the prospective purchaser here was riding for the mutual benefit of both the salesmen and himself rather than as a guest.

Where the meaning of the language in the statute is free from ambiguity, the court cannot depart from the meaning,[12] but in construing a statute, the law as it previously stood, the matter to be remedied and the nature and spirit of the law should be considered.[13] The court here in making this decision looked at the intent of the legislature and the purpose of the statute. The court reasoned that as the use of the automobile became more universal, the proverbial ingratitude of the dog that bit the hand that fed him, found a counterpart in the many cases that arose where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close cases of negligence. Undoubtedly, the legislature in adopting this act reflected a certain natural feeling as to the injustice of the situation. Neither this feeling nor the reasons therefor apply to a situation arising out of an ordinary business transaction, such as the efforts of a dealer to sell an automobile to a customer.

V. A.

BASTARDS—THE ISSUE OF A VOID MARRIAGE IS ILLEGITIMATE.

The will of Anderson Jennings devised the land in litigation to Royal S. Jennings for life, and then to the sons of Royal S. Jennings. Royal S. Jennings was married in 1864; Ed Jennings was born to this marriage. In 1891, one Holland divorced his wife for committing adultery with Royal S. Jennings. The two adulterers went through a marriage ceremony in 1892. Jeff Jennings was born to this union. Holland, the innocent spouse, was still living at the time of this litigation. HELD:

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8 Loftus vs. Pelletier, 223 Mass. 63, 111 N. E. 712 (1916); Lyttle vs. Monto, *supra* note 7; Jackson vs. Queen, 257 Mass. 515, 154 N. E. 78 (1926); Labatte vs. Lavallee, 258 Mass. 527, 155 N. E. 433 (1927).

9 Calif. Codes and Gen. Laws, *supra* note 3.

10 Crawford vs. Foster, *supra* note 5.

11 Wharton, Negligence (2nd ed. 1878), Sec. 482-510.

12 City of Eureka vs. Diaz, 89 Calif. 467, 26 Pac. 961 (1891); Smith vs. State, 66 Md. 217, 7 Atl. 49 (1886); Rex vs. Barham, 8 B. & C. 99 (1828).

13 Evans vs. Selma Union High School Dist. of Frenso County, 193 Calif. 54, 222 Pac. 801 (1924); State vs. Claiborne, 185 Iowa 170, 170 N. W. 417 (1919); Sennatt vs. Dist. Court in and for Clarke County, 201 Iowa 292, 207 N. W. 129 (1926); Latta vs. Utterback, 202 Iowa 1116, 211 N. W. 503 (1926).

The marriage is a nullity, and Jeff Jennings is illegitimate and incapable of taking under his grandfather's will.[1]

This decision is based upon a Tennessee statute[2] which provides that one "who has been guilty of adultery shall not marry the person with whom the crime or act was committed, during the life of the former husband or wife." But no provision is made for the status of children born to these prohibited unions.

The foregoing has been the law since 1835. It accords with a sound "public policy, is predicated upon common sense, and tends to assure the decent propagation of the human race."[3] The decided public policy of this state demands that the sensibilities "of the innocent and injured husband or wife shall not be wounded, nor the public decency affronted by being forced to witness the continued cohabitation of the adulterous pair."[4]

At common law a bastard could not inherit as he was *nullius filius*, the son of nobody. Being the son of nobody, he had no ancestor; having no ancestor, his blood lacked inheritable quality. He did not even have a name until one was acquired by use and reputation.[5] He had no heirs or next of kin except those arising from his own contract of marriage—his wife, children or descendants.[6] Another objection to permitting a bastard to inherit is more practical than theoretical—it is usually difficult to establish his paternity.[7] Though the maternity is easily established, this is of little benefit due to the lack of property rights in women at common law.

In this state of the law, when a court was called upon to determine who should take under a will, it of necessity construed heirs, sons, children, etc., to be only those that the law recognized as such.[8] Consequently, a bastard was an unhappy species of being, deprived of the majority of the vital rights and privileges of society.[9]

The harsh rules of the common law have been greatly modified in the United States. It is generally considered that relief can be obtained only by legislative enactment,[10] but in some instances the alterations have been made by judicial decisions establishing a local common law.[11]

Statutes in many of the United States make the issue of void marriages legitimate. A Virginia statute to this effect dates back to 1785. Kentucky followed the example of Virginia with a statute to the same effect in 1797.[12] These statutes are in keeping with our advance in civilization. From the earliest times, children of void marriages have been stigmatized with the shame and reproach, and made to suffer throughout their lives, for that which should rightfully be placed on those who were responsible for bringing them into being.[13] The children have not been

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1 Jennings vs. Jennings, ... Tenn. ...., 54 S. W. (2d) 961 (1932).
2 Tenn. Code (1932), Sec. 8452.
3 Owen vs. Bracket, 75 Tenn. 448 (1881).
4 Pennegar vs. State, 87 Tenn. 244, 10 S. W. 305 (1889).
5 McGunnigle vs. McKee, 77 Pa. 81 (1874); Peck, *Domestic Relations* (2d ed. 1920), Sec. 141.
6 Bennett vs. Toler, 56 Va. 588 (1860).
7 *Ibid.*
8 *Ibid.*
9 Rogers, Domestic Relations (1899), Sec. 579.
10 Bell vs. Terry & Trench Co., 163 N. Y. S. 733 (1917); Tiffany, *Domestic Relations* (3rd ed. 1921), Sec. 114.
11 Peck, *Domestic Relations* (2d ed. 1920), Sec. 41.
12 Leonard vs. Barswell, 99 Ky. 528, 36 S. W. 684 (1896); Bennett vs. Tolor, *supra* note 6.
13 1 Schouler, *Marriage, Divorce, Separation, and Domestic Relations* (6 ed. 1921), Sec. 704.

asked if they should be brought into the world, and should not be made to suffer for the iniquities of their parents. There is no reason why these children should be pictured as social Ishmaelites and treated as untouchables.

The court decided the principal case[14] according to twelfth-century ideas because Tennessee has no statute making the issue of void marriages legitimate. Thus, a child was reared by his father and mother, living together as husband and wife; and on becoming thirty-eight years of age he was adjudicated a bastard and incapable of inheriting under the will of his grandfather. The court realized the injustice of this, but felt powerless to remedy it.

The policy of the law in prohibiting such marriages as the one between Royal S. Jennings and the divorced wife of Holland is sound and above reproach. But is it not more important to legitimize children than to make such marriages null? Is it not true that the public policy favoring the legitimizing of children is stronger than the public policy prohibiting such marriages? It is submitted that a statute making the children of void marriage legitimate is much needed and would be a wholesome reform.

S. F. D.

CARRIERS—LIMITATION OF LIABILITY—EFFECT OF NOTICE FILED WITH PUBLIC SERVICE COMMISSION.

The *D* Bus Co., engaged in interstate commerce, filed its tariff schedules, as required, with the Tennessee Railroads and Public Utilities Commission, such tariff schedules becoming effective in the early part of 1931, and providing in part as follows:

"Baggage:

(C) Liability: Liability for loss or damage to baggage due to any cause is limited to twenty-five dollars ($25.00) unless greater value is declared and excess charges paid accordingly when baggage is checked.

(D) Excess Valuation: Charges for excess valuation will be levied at a rate of twenty-five cents (25c) per additional fifty dollars ($50.00) or fraction thereof valuation above twenty-five dollars ($25.00), total valuation not to exceed two hundred dollars ($200.00). Charges for excess valuation must be prepaid."

In the fall of 1931, *P* purchased a ticket from the *D* Bus Co. for transportation from Abingdon, Va., to Knoxville, Tenn. The ticket issued to *P* contained on its face the following stipulation:

"This ticket is sold subject to conditions of the lawfully published tariffs of the issuing carrier, and to the lawfully published rules and regulations of participating carriers.

BAGGAGE LIABILITY LIMITED TO $25.00."

P boarded one of the *D* Company's busses for the journey to Knoxville, and, as she entered, the driver relieved her of her hand bag, and, as he testifies and as she believes, placed it in a rack in the bus above the heads of the passengers. The particular bus was crowded, and many people entered the bus and left it between Abingdon and Knoxville. When the terminal in Knoxville was reached, all the passengers left the bus and the baggage was brought outside for the passengers to claim. *P* testified that her bag was not among the ones which were brought out

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14 Jennings vs. Jennings, *supra* note 1.

from the bus, and that she has never seen her bag since she was relieved of it by the driver in Abingdon. *P* sues the *D* Bus Co. for the value of the bag and its contents which she proved to total $58.75. The *D* Bus Co., it having been established that there was liability, contends that such liability cannot exceed $25.00 due to the fact that such provision was made in the tariff schedules filed with the Tennessee Railroads and Public Utilities Commission, and that thereby *P* had notice of it when she purchased said ticket. The court gave judgment for *P* for the full value of the hand bag and its contents. Quoting from the opinion of the court, "We think under the holding of *Railroad vs. Lillie*, 112 Tenn. 331, and *Railway vs. North*, 6 Higgins 25, that there is liability on the part of the carrier herein on account of the negligent acts of its servants in handling the baggage. . . . . It is well established at common law and in Tennessee that common carriers will not be permitted, under any circumstances or in any manner, to protect themselves against the consequences of their own negligence in carriage of either goods or passengers. See *Coward and Wife vs. Railroad Co.*, 84 Tenn. 228. However, it is held that a common carrier may relieve himself from the strict liability imposed upon himself by the common law by special contract, but he cannot contract for exemptions from consequences of his own or his agents' negligence. *Idem.* 229.

"In order to limit the liability to $25.00, or at all, as stated in the ticket, it must be shown that knowledge of this fact has been called to the plaintiff's attention. *Wiegant vs. Central Railroad Co.*, 75 Fed. 372. This was not done. . . . . There is no presumption that the passenger had read the notice limiting the company's liability for baggage from the fact that such notice was printed on the back of the check delivered to the passenger. *Malone vs. Boston, etc., R. R.*, 74 Am. Dec. 598."[1]

There seems to be two distinct lines of decisions in this country as to the ability of the carrier to limit its liability for loss of passenger's baggage due to its own negligence, by making such provision in its schedule of tariffs filed with the utilities commission of the state or with the Interstate Commerce Commission, and referring to such by a printed notice on its tickets. The majority of state courts have followed what would seem to be the common law rule in the matter,[2] as expounded by the above Tennessee case. A clear statement of the rule is found in *Rawson vs. Pa. Ry. Co.*:[3] "The words thus printed do not purport to embody the contract between the parties. They are a mere notice as to the terms upon which a passenger's baggage will be carried, and are entitled to no more force because they are printed upon the face of the ticket than if they had been printed on the back of the ticket, or on a separate piece of paper posted up at the ticket office; and hence, this case is clearly within the rule that a carrier cannot limit his liability by notice, but can do so only by express contract. It must, however, be admitted that if the railroad agent had called plaintiff's attention to this language when he sold the ticket and took her money, or if it had been shown that she knew of this language when she paid her money and took the ticket, the law would presume, in the absence of objection on her part, that she assented to the terms therein expressed." It is not doubted that

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1 Atlantic Greyhound Lines v. Ida Rose, decided by the Tennessee Court of Appeals, October, 1932.

2 Williams v. Pickwick-Greyhound Lines, Inc., 15 La. App. 344, 131 So. 860 (1931); Rawson v. Penn. Ry. Co., 48 N. Y. 212 (1872); Dazey v. New York Central & H. R. R. Co., 150 N. Y. S. 58 (1914); Franklin v. Southern Pacific Co., 265 Pac. 936 (1928). But cf. Kopetzky et al v. Cunard S. S. Co. Ltd., 227 N. Y. S. 539 (1928). Contra: Payne, Agent v. McConnell, 234 S. W. 942 (Tex. 1921).

3 48 N. Y. 212 (1872).

a carrier may by special contract limit its liability for loss or injury to the baggage of passengers, but such limitation of liability, except in Federal Courts as will be later pointed out, must be worked out by an estoppel against the passenger.[4] There can be no question that a special contract limiting the carrier's liability for loss of baggage through its fault can be spelled out only from the acceptor's assent, notice, or understanding of the special provision, or of the fact that special provisions are sought to be made effectual against him through his acceptance and retention of the receipt or check.[5] Our conclusion, therefore, must be that in the state court the fact that the carrier has filed its schedule of tariffs which limit its liability for baggage lost or injured due to its negligence to a specified amount unless the passenger declares the excess valuation and pays the higher charges, is unavailing unless it can be shown that the passenger actually was informed of such regulation, or knew of it, and assented to be bound thereby.

However, as is before indicated, a very different result has been reached in the Federal Courts. The provisions of the Interstate Commerce Act[6] and the Carmack Amendment[7] have been decisively adjudicated in the *Hooker* cases[8] to make effectual the limitation of the carriers liability. "The effect of the regulations, filed as required, giving notice of rates based upon value when the baggage to be transported was of a higher value than $100.00, and the delivery and acceptance of the baggage without declaration of value or notice to the carrier of such higher value, charges the carrier with liability to the extent of $100.00 only. . . . . While such regulations were in force they were equally binding upon the railroad company and all passengers whose baggage was transported in interstate commerce. This being the fact, we think the limitation of liability to $100.00 fixed the amount which the plaintiff could recover in this case, and there was error in affirming the recovery for the full amount of the baggage, in the absence of a declaration of such value and payment of the additional amount required to secure liability in the greater sum."[9] The rule of the Federal Courts seems to be that while a common carrier can not exempt itself from negligence, it may by a fair and reasonable exemption, limit the amount recoverable by a shipper to an agreed value made for the purpose of obtaining the lower of two or more rates proportioned to the amount of risk.[10] Accordingly it is held, under the rule announced by the Federal Courts, that when a carrier has filed a schedule of its rates with the Interstate Commerce Commission in the manner provided by the statute, the shipper is charged with notice, and when the rates filed are graduated according to the declared value, and limit the carrier's liability accordingly, they are conclusive as to the rights of the parties. A regulation contained in the published tariffs of an interstate railway carrier on file with the Interstate Commerce Commission, limiting its liability to $100.00 unless a greater value is de-

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4 Hart v. Penn. R. R. Co., 112 U. S. 331, 340, 5 S. Ct. 151, 28 L. Ed. 717 (1884); Kansas Southern Ry. v. Carl, 227 U. S. 639, 33 S. Ct. 391, 57 L. Ed. 683 (1913); Cincinnati etc., Co. v. Rankin, 241 U. S. 319, 327, 36 S. Ct. 555, 558, 60 L. Ed. 1022 (1916).

5 Dazey v. New York Central & H. R. R. Co., *supra* Note 2.

6 49 U. S. C. A. Sec. 1. et seq; Comp. St. Sec. 8563 et seq. (1906).

7 49 U. S. C. A. Sec. 20 (1906).

8 Boston & Maine Ry. v. Hooker, 233 U. S. 97 (1913).

9 *Ibid.*

10 Atchison, T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. Rep. 556 (1914); Chicago, R. I. & P. R. Co. v. Cramer, 233 U. S. 490, 58 L. Ed. ...., 34 Sup. Ct. Rep. 383 (1914); Kansas City Southern R. Co. v. Mixon-McClintock Co., 107 Ark. 48, 154 S. W. 205 (1913).

cared and stipulated by the owner and the excess charges paid, is binding upon the passenger in case of loss by the carrier's negligence, regardless of the carrier's failure to inquire as to the value of the baggage, or of its outward appearance indicating a greater value, any state law or policy to the contrary having been superceded by the act of Congress which made interstate railway transportation a Federal question.[11]

This doctrine is, of course, not applicable to the case of a carrier by motor bus because the supervision and control of such carrier is not given to the Interstate Commerce Commission.[12] However, due to the recent advance of motor busses and trucks into the field of the common carrier, it is very easy to see how the definition of carriers that are subject to be controlled by the Interstate Commerce Commission may be enlarged to include motor busses and trucks.

It is submitted that the rule of the Federal Courts, as made possible by Congressional legislation, is a sound, just, and reasonable rule. A carrier should not be compelled to carry baggage of a very valuable nature without just compensation for the risk it assumes and the liability it may incur. On the other hand the passenger and shipper should not be forced to ship valuable baggage by common carrier without having the liability of the carrier for the full value of the said baggage in case of its loss or injury due to the negligence of the carrier or its servants or agents. By the rule adopted both of the above results may be reached, or if the shipper does not wish to pay the excess charges, he is taken to have admitted that his baggage is not worth more than the specified amount, and is thereafter estopped to assert a greater value.

It is the opinion of the writer that the state courts might do well to adopt the Federal rule in this regard. In the last analysis the Interstate Commerce Commission and the individual state utilities commissions are very similar, and state commissions require, as does the Interstate Commerce Commission, the utility or carrier to file a schedule of its rates, and tariffs including baggage rates and excess baggage rates. The major contention of the state courts seems to be that such a provision in regard to a "limitation" of liability must be expressly called to the attention of the passenger or shipper and the contract expressly agreed to; whereas it is the rule of the Federal Courts that the mere fact that such provision is on file with the Interstate Commerce Commission will serve as constructive notice to the passenger or shipper, and being presumed to know it, he cannot be excused from its effects just because it was not expressly called to his attenton. Herein lies the inconsistency of the state courts. They hold that both shipper, or passenger, and carrier are chargeable with notice of the rates and charges to be made for a particular service as provided in the tariff schedules of said carrier which are on file with the state utilities commission. Why should the passenger or shipper be chargeable with notice of the rates and charges for carriage, and not be charged with notice of the carrier's provision, which is also filed, as regards his liability for baggage, the value of which is not declared? No basis for such distinction is ascertainable. The Federal rule could be invoked in the state courts by the enactment of a very little legislation, and the result would apparently be of benefit to both the carrier and the shipper or passenger.

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11 Boston & Maine R. Co. v. Hooker, *supra* note 8; Ford v. Chicago R. I. & P. R. Co., 123 Minn. 87, 143 N. W. 249 (1913).

12 49 U. S. C. A. Sec. 1 (1906).

It may be contended that the Federal rule does not apply even in the Federal courts in such a case as the principal one when the baggage was hand baggage and not really ever out of the possession of the passenger,[13] but it must be assumed for the purposes of the above note that first of all the liability of the carrier is clearly established.

O. M. T., Jr.

LIENS—PRIORITY BETWEEN HOLDER OF MECHANIC'S LIEN AND JUDGMENT CREDITOR.

In a contest between an automobile repair man and a judgment creditor of the owner, both asserted a prior lien on the car. The mechanic, who had made certain repairs including the furnishing of materials, claimed the benefit of statutes[1] imposing a lien on motor vehicles for such repairs furnished at the request of the owner. The judgment was rendered against the owner by a justice of the peace in the sum of $50.00. Execution was issued thereon and levied on the car. The car was taken by the defendant, the levying officer, to be retained pending advertising and sale. Before sale under the execution, the plaintiff asserted his mechanic's lien within the authorized period in an attachment suit before a magistrate. The attachment was levied on the car and taken by the sheriff under the attachment. At the trial of this suit the attachment was sustained and judgment given against the owner. On appeal by the defendant the Circuit Court held the judgment lien superior to the mechanic's lien. In reviewing the judgment of the Circuit Court the Supreme Court HELD that the lien of the mechanic for repairs, though unrecorded, was superior to the subsequent judgment lien where before sale under the execution on judgment, the mechanic attached the car for repairs.[2]

At common law, a workman, who by his skill and labor has enhanced the value of a chattel, has a lien upon it for his reasonable charges, provided the employment is with the express or implied consent of the owner.[3] It is a specific lien which secures the payment of his services in respect to property upon which the lien is claimed. It exists in favor of every bailee who takes property in the way of his trade and occupation and by his labor and skill imparts additional value to it.[4] Possession of the chattel by the lien-claimant, at common law, is essential to its existence,[5] and, if voluntarily relinquished to the bailor, the lien is destroyed.[6]

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[13] Murphy v. Eastern Greyhound Lines, Inc., of New York, 256 N. Y. S. 114 at 115 (1932).

[1] Tenn. Code (1932), Sec. 7960. This section makes the lien inferior to the right and title acquired by a purchaser without notice. Tenn. Code (1932), Sec. 7961. This section requires the lien to be asserted within twelve months after completion of the work or until final decision of any suit brought within that time for the debt, provided the vehicle has not been transferred in good faith to a purchaser without notice.

[2] Gilson vs. Lacey et al., ... Tenn. ...., 55 S. W. (2d) 766 (1932).

[3] McFarland v. Wheeler, 26 Wend. 467 (N. Y. 1841); Gross vs. Eiden, 53 Wis. 543, 11 N. W. 9 (1881).

[4] Hanna vs. Phelps, 7 Ind. 21 (1855); White v. Smith, 44 N. J. L. 105 (1882); Grinnel vs. Cook, 3 Hill 485 (N. Y. 1842); 2 Kent Com. 536, 627, 635; Schouler, *Bailments* (3rd ed. 1897), Sec. 123.

[5] Shaw v. Webb, 131 Tenn. 173, 174 S. W. 273 (1914); Peck vs. Jennes, 48 U. S. 612 (1849); Lathrop Lumber Co. vs. Titts, 208 Ala. 334, 94 So. 354 (1922); Dooley vs. Dwight, 132 N. Y. 59, 30 N. E. 258 (1892); McCombie vs. Davies, 7 East 5 (1805); 2 Kent Com. 638.

[6] Robinson Bros. Motor Co. vs. Knoght, 154 Tenn. 631, 288 S. W. 725 (1926); Vane v. Newcombe, 132 U. S. 220, 10 Sup. Ct. 60 (1889); Tucker vs. Taylor, 53 Ind. 93 (1876); Kitteridge vs. Freeman, 48 Vt. 60 (1875).

Statutes affecting the problem of workmen's liens on personalty are in most respects declaratory of the common law in so far as the necessity of retaining possession is concerned.[7] Their purpose, in general, has been to extend the common law lien in respect of the persons who can acquire such lien, and to provide remedies for their enforcement, either by sale after notice or by attachment and sale under execution.[8]

The Tennessee statute[9] relied on in the principle case is an extension of the common law in that it enables the claimant to assert it, notwithstanding lack of possession. The right asserted is, therefore, purely statutory. His lien became inchoate upon the making of the improvements and perfected in the attachment suit. It was defeasible upon his failure to perfect it within the prescribed statutory period or the passage of the vehicle into the hands of a purchaser without notice. The lien thus imposed is not within the recording acts of Tennessee.[10] "All of said instruments" mean the instruments named in the statute.[11]

In the absence of statutes otherwise providing, there is nothing to except a judgment lien from the general rule which ranks liens and other interests in the order in which they are created. Hence a prior mortgage,[12] trust deed,[13] attachment,[14] vendor's lien,[15] mechanic's lien[16] or a lease ranks a subsequent lien. This is because the lien attaches only to the title which the debtor has. The judgment creditor, by virtue of the levy, does not acquire any title to the property, but only an inchoate right to payment out of its avails by legal proceedings.[17] In any event the interest of the creditor is limited to the actual interest of the debtor at the time the lien attaches.[18]

The solution to the problem raised in the principle case appears, therefore, to be unaffected by the recording acts, and found by merely giving effect to the liens in the order of their occurrence.[19] This would reach the same result reached by the court.

However, in justifying the decision the court resorts to analogies not altogether perfect or in accord with the legislative policy of the state regarding creditors. The

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7 McDonald vs. Foster, 14 Ore. 417, 12 Pac. 813 (1887).

8 1 Jones, *Liens* (2d ed. 1894), Sec. 749.

9 Tenn. Code, *supra* note 1.

10 Tenn. Code (1932), Sec. 7621.

11 Cox vs. Keathley, 99 Tenn. 527, 42 S. W. 200 (1897).

12 Jeffrey vs. Morgan, 101 U. S. 285, 25 L. Ed. 785 (1879); Morris-Glendon Supply Co. vs. McColden, 100 Md. 479, 60 Atl. 608 (1905).

13 McClure vs. Smith, 115 Ga. 709, 42 S. E. 53 (1902).

14 Burnham vs. Dickson, 5 Okla. 112, 47 Pac. 1059 (1897).

15 Vaughn vs. Vaughn, 59 Tenn. 472 (1873).

16 Pace vs. Moorman, 99 Va. 246, 37 S. E. 911 (1901).

17 French vs. DeBow, 38 Mich. 708 (1878).

18 Jones vs. Chenault, 124 Ala. 610, 27 So. 515 (1899).

19 Parker-Harris Co. vs. Tate, 135 Tenn. 509, 88 S. W. 54 (1916); Rankin vs. Scott, 25 U. S. 177, 6 L. Ed. 529 (1827); Kirksey vs. Means, 42 Ala. 426 (1868); Smitton v. McCullough, 182 Cal. 530, 189 Pac. 606 (1920); Des Moines Brick Co. vs. Smith, 108 Iowa 307, 79 N. W. 77 (1899); MaGuire vs. Spalding, 194 Mass. 601, 80 N. E. 587 (1907); Peter Barrett Mfg. Co. vs. Wheeler, 212 N. Y. 90, 105 N. E. 811 (1914).

court quotes with approval the case of *Harris vs. Gaines*,[20] "the weight of authority and reason is, we think, that the mere levy of an execution without sale fixes a lien attaching to the legal title, and this is subject to any *equity* (italics supplied) against the debtor, relating to a period of time prior to the levy." In the light of the recording acts[21] of Tennessee, this statement is rather broad, for the equity against the debtor may be such as to come within the recording acts and be unprotected without registration "against existing or subsequent creditors of, or bona fide purchasers from the makers without notice." The quoted case held that the right of a grantor to rescind for fraud or duress was superior to the lien of the execution. The holding was correct and in point for the right asserted by the grantor was an equity created by law, not by conveyance or writing, and therefore not within the recording acts. The liens of the vendor and the levying creditor being unaffected by statutes providing otherwise, their priority of occurrence was controling.

The court further states, "It is quite usually held that the recording acts which avoid unregistered instruments only as against purchasers do not avoid them as against creditors and the lien of the judgment is inferior to an unrecorded mortgage." This no doubt is the general rule in those states whose statutes avoid unregistered instruments as against purchasers only.[22] The statutes of the various states must be consulted. In some states the recording acts are framed so as to extend their protection only to bona fide purchasers. In others the rights of creditors generally, or of judgment creditors only are protected. The recording acts of Tennessee extend their protection to creditors and purchasers against the effects of unregistered instruments required to be recorded.[23] Mortgages[24] are included among those which must be properly executed and registered, or noted for registration, to be effectual against creditors. Creditors include judgment creditors.[25]

The registry laws of many states so modify the effect of conveyances and other instruments as to give a judgment lien precedence over a prior unrecorded instrument of which the judgment creditor had no knowledge at the time of the judgment lien attached.[26]

It thus appears that the analogies drawn were unnecessary and misleading. The holding, nevertheless, was proper and administered under a wise and beneficient statute securing to a deserving class of citizens the reward of their labors.

E. H. S.

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20 Harris vs. Gaines, 70 Tenn. 12 (1878).

21 Tenn. Code (1932), Sec. 7668. This section avoids certain unregistered instruments, required to be registered, both as to creditors and as to purchasers.

22 16 L. R. A. 668n (1892).

23 Bryant vs. Bank of Charleston, 107 Tenn. 560, 64 S. W. 895 (1901) Snyder vs. Yates, 112 Tenn. 309, 79 S. W. 796 (1903); Wilkins vs. McCorcle, 112 Tenn. 688, 80 S. W. 834 (1904).

24 Tenn. Code (1932), Sec. 7621; Barfield vs. Cole, 36 Tenn. 465 (1857); Cates vs. Baxter, 97 Tenn. 443, 37 S. W. 219 (1896).

25 Atlas Portland Cement Co. vs. Fox, 265 Fed. 444 (App. D. C. 1920).

26 Hawkins vs. Files, 51 Ark. 417, 11 S. W. 781 (1888); McFadden vs. Worthington, 45 Ill. 362 (1867); Guiteau vs. Wiseley, 47 Ill. 433 (1868); Wilcox v. Leominster National Bank, 43 Minn. 541, 45 N. W. 1136 (1890); Mississippi Valley Co. vs. Chicago, etc. R. R. Co., 58 Miss. 846 (1881); White vs. Morris, 36 N. J. Eq. 324 (1882); 23 C. J. 509.

STATUTORY INTERPRETATION—CONFLICTS IN THE CODE.

As the result of a recent disbarment proceeding an attorney was suspended from the practice of law.[1] . . . . Said attorney appealed to the Supreme Court and the plaintiff moved that the case be transferred to the Court of Appeals, which motion was granted.

The attorney in appealing his case direct to the Supreme Court relied on a section of the new Tennessee Code which provides that, "In all proceedings (disbarment) either party may prosecute an appeal to the Supreme Court."[2] This section of the Code was taken from the statute law of Tennessee without change.[3]

The plaintiff bar association relied on another section of the above mentioned Code as authority for the motion to transfer the case from the Supreme Court to the Court of Appeals.[4] This section was likewise taken verbatim from the statute law of Tennessee.[5]

The Court in the principal case in construing these apparently conflicting sections of the Code said, "Prior to the adoption of the Code of 1932, jurisdiction of appeals in such cases was clearly in the Court of Appeals as we have often decided . . . . the Code includes these two acts without material change and accordingly it must be held that the Code embodied these acts as they had been previously construed."[6] This same interpretation of the Acts of 1919 and the Acts of 1925 was made in a recent case in an opinion rendered by Mr. Justice McKinney.[7] The cases interpreting Chapter 100, Section 10, Acts of 1925 have construed it to mean that the Court of Appeals is the proper forum for an appeal in a disbarment proceeding.[8]

Tennessee, like many states, has collected all of its statute law and arranged it in a "Code."[9] One of the purposes of the making of a code is to incorporate the statute law in a readily accessible and convenient record. But a code should be more than a mere restatement of the statute law in briefer form. It should be the

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1 Memphis and Shelby County Bar Ass'n. vs. Himmelstein, ... Tenn. ...., 53 S. W. (2d) 378 (1932).

2 Tenn. Code (1932), Sec. 9977.

3 Tenn. Public Acts 1919, Chapter 42, Sec. 4.

4 Tenn. Code (1932), Sec. 10618.

5 Tenn. Public Acts 1925, Chapter 100, Sec. 10.

6 Memphis and Shelby County Bar Ass'n. vs. Himmelstein, *supra* note 1.

7 Thompson vs. Denman, 164 Tenn. 428, 50 S. W. (2d) 222 (1932).

8 State of Georgia vs. City of Chattanooga, 153 Tenn. 349, 284 S. W. 359 (1925); Craesy vs. Comargo Coal Co. et al., 154 Tenn. 373, 289 S. W. 524 (1926); Gormany, et al. vs. Ryan, Admr., etc. et al., 154 Tenn. 432, 289 S. W. 497 (1926); State ex rel. Groce vs. Clyde Martin, County Judge, 155 Tenn. 322, 292 S. W. 451 (1926); Cockrill vs. Peoples Saving Bank et al., 155 Tenn. 342, 293 S. W. 996 (1926); Johnson vs. Stuart et al., 155 Tenn. 618, 299 S. W. 729 (1926); Chattanooga, Dayton Bus Line, F. S. Wingate, Maryland Casualty Co. vs. Burney, 160 Tenn. 294, 23 S. W. (2d) 669 (1929); Collier vs. City of Memphis, 160 Tenn. 500, 26 S. W. (2d) 152 (1929); Cumberland Trust Co. vs. Bart, 163 Tenn. 272, 43 S. W. (2d) 379 (1931); King vs. King, 164 Tenn. 666, 51 S. W. (2d) 488 (1932); Swing vs. Harnaday, 1 Tenn. App. 568 (1926); Northwestern Mutual Life Ins. Co., 2 Tenn. App. 70 (1926); Howard and Herrin vs. N. C. and St. L. Ry Co., 3 Tenn. App. 174 (1926); Hyde vs. Dunlap, 3 Tenn. App. 368 (1926); Mattei vs. Clark Hardware Co., 3 Tenn. App. 379 (1926); Blanton vs. Tenn. Central Ry. Co., 4 Tenn. App. 335 (1927); Sharpe vs. Sharpe, 8 Tenn. App. 392 (1928).

9 Tenn. Code (1932).

result of careful consideration and re-examination of the existing statute law with a view to a restatement of the law in a better form. This is evidently the attitude with which the eminent Code Commissioners undertook their momentous task.[10]

The intent of the legislature must be determined before that intent can be given effect to, and as a result of this many rules of construction and interpretation have developed. It is well to keep in mind that the primary purpose of all rules of construction is to determine the true intent of the legislature.

In the principal case[11] we have two apparently conflicting acts. We are interested primarily in whether or not either of these two acts repealed or modified the other prior to the adoption of the new code, because the inclusion of a repealed statute in a subsequently adopted code or compilation does not maintain that statute in effect.[12]

In the principal case we may term one of the acts a special act[13] and the other a general act.[14] If we apply the rule of construction that a statute which deals with a subject specifically and particularly will prevail over a statute that deals with the same subject in a general manner, we will be constrained to say that Section 4, Chapter 42, Acts of 1919 is still in force.[15] But we must bear in mind that this rule of construction is only one of our aids to determine the legislative intent and is by no means conclusive. In dealing with this particular problem we are confronted with still another rule of construction, namely: if the legislature intends to make the general act controlling it will prevail over the special act. This rule, if applicable here, is the solution to our problem.

In looking at the general act we note that the title is, "An act to reorganize the Appellate Court system, and to change the practice and procedure with reference to *all* cases taken up for review . . . ."[16] This would seem to be a clean expression of the legislative intent as to the jurisdiction of the Appellate Court. The cases[17] bear out the assumption that the old Court of Chancery Appeals was increased in numbers and its jurisdiction extended so that the burden on the Supreme Court might be lessened. This being true the appeal from disbarment proceedings is to the Appellate Court.

It is submitted that the Supreme Court's interpretation of the two acts in the principal case is the correct one.

J. R. S.

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10 Tenn. Code (1932), Preface, p. III.

11 Memphis and Shelby County Bar Ass'n. vs. Himmelstein, *supra* note 1.

12 59 C. J. 893.

13 Tenn. Public Acts 1919, Chapter 42, Sec. 4.

14 Tenn. Public Acts 1925, Chapter 100, Sec. 10.

15 Ex parte Perry, 71 Fla. 250, 71 So. 174 (1916); State vs. City of Avon Park, 96 Fla. 494, 118 So. 228 (1928); Daviess County Board of Education vs. Daviess County Fiscal Court, 221 Ky. 106, 298 S. W. 185 (1927); Young vs. Davis, 182 N. C. 200, 108 S. E. 630 (1921); Smith vs. South Carolina Highway Comm., 138 S. C. 374, 136 S. E. 487 (1927).

16 Tenn. Public Acts 1925, Chapter 100, Sec. 10. Italics ours.

17 *Supra* note 8.

PRIORITY OF A VETERAN'S CLAIM AGAINST INSOLVENT BANK.

In a recent Tennessee case[1] the facts are: A guardian of an incompetent world war veteran deposited money paid by the federal government for the benefit of the veteran in a bank which subsequently became insolvent. The guardian sought to have the money impressed with a priority. The Supreme Court of Tennessee denied such priority.

This case is identical in almost every respect with the case discussed in the TENNESSEE LAW REVIEW, Vol. XI, page 59. Attention is called herewith to that note.

[1] State ex rel. Robertson, Superintendent of Banks, vs. Bank of Bristol, ... Tenn. ...., 55 S. W. (2d) 771 (1933).

BOOK REVIEWS

CONGRESS AS SANTA CLAUS. By Charles Warren. Charlottesville, Virginia: The Michie Company, Publishers, 1932, pp. vi, 151.

This little volume, which is a study of congressional appropriations for individual relief and for aid to states, is the outgrowth of a series of lectures delivered at the University of Virginia in January, 1932. The author, formerly Assistant Attorney General of the United States, is a well known authority on constitutional history, having been awarded the Pulitzer prize in history in 1922 for his three-volume work entitled *The Supreme Court in the United States History*. In the present volume he maintains the high standard of scholarship already established, and by use of historical method, forces attention upon an important but neglected problem in federal and state finance.

The general conclusions may be stated as follows:

(1) Congress has violated the spirit, if not the letter, of the Constitution by means of (a) relief acts for individuals, both in the form of donations and loans, and (b) federal aid laws for the support of state activities over which Congress has no direct control.

(2) There is no known way of bringing these Acts before the Supreme Court for final adjudication, hence responsibility for checking the movement rests directly upon Congress and the President, and indirectly upon the public.

(3) The whole theory of federal aid to states, and gifts or loans to individuals is vicious, since it leads to an indefinite expansion of federal expenditures and breaks down the dividing line between powers of the state and federal governments.

The method of treatment is historical. Debates in Congress as early as 1792 are cited to show the sharp conflict of opinion over the interpretation of the General Welfare clause, and the conclusion is reached that certain acts appropriating money to individuals were not based on this clause, and cannot therefore be considered as precedents for the deluge of flood, grasshopper, and drought relief bills that began in 1874, to say nothing of the more recent system of "loans" to farmers. Early attempts to broaden the scope of federal powers by means of appropriations for internal improvements are traced in detail. The point is made that when the vetoes of Jackson and Van Buren checked this line of attack, the battle was renewed over the power of Congress to dispose of the public lands. The evolution was gradual and long-continued, but the conclusion has been a complete triumph for those favoring the expansion of federal powers. First, lands given only for a "consideration", then as outright gifts; at first, gifts to states for education and railroads, then directly to railroads; at first, lands only, then the proceeds of land sales, and finally money from any source.

The modern system has reached its culmination in the so-called "50-50" laws, which require states to match federal appropriations, the best examples being the Smith-Lever Act, for agricultural and home demonstration work, the Smith-Hughes Act, for training teachers in agricultural and industrial subjects and home economics, and the various federal aid highway acts.

These developments have been contested vigorously at every stage, as the author shows by liberal quotations from the debates in Congress, but opponents have been powerless to stem the tide except in rare instances, such as the defeat of the Sterling Towner Bill for education in 1918, 1924, and 1929.

Opposition to these measures may be based on Constitutional arguments, or sectional interests, or merely on expediency. Should appropriations for the benefit of farmers in certain counties in a few states, be considered for private or general welfare? Should the people of Massachusetts and New York be taxed to build roads, or support education in Nevada and North Dakota? Should government services be equalized throughout the country, regardless of the ability of certain sections to support them? Is it desirable to have people look to the federal government for support in all emergencies? Should the dividing line between state and federal powers be broken down, and if so, will the federal government perform the tasks "as economically, as carefully, and as intelligently at long range" as the local communities might?

Senator LaFollette, Senator Costigan, and the Peoples Lobby would have Congress go much further along the lines it has already taken; Mr. Warren would call a halt, asserting that "What we, each of us, need today is a good stiff dose of robust, local, self-reliance. Self-help breeds self-respect." Logic may be on the side of Mr. Warren, but those who favor continuance of the system have the political strength. So long as we have the present disparity between wealth of a state or section and its representation in Congress, so long will the present system continue to grow.

CHARLES P. WHITE.

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RESEARCH IN INTERNATIONAL LAW. By the Harvard Law School. Cambridge, Massachusetts, 1932, pp. 1013.

There is a widespread feeling among international jurists that international law should be expanded to meet the needs of a world daily becoming more interdependent. *Research in International Law*, by the Harvard Law School, grew out of the efforts of the League of Nations to satisfy this need by the progressive codification of international law.

On September 22, 1925, the Fifth Assembly of the League of Nations adopted a resolution asking the Council of the League to prepare a provisional list of subjects in international law, the regulation of which by international agreement would be most desirable and realizable at that time. Further, the resolution provided these lists were to be submitted to the Governments of the States of the world for comments and suggestions and finally a convention should be called to prepare conventions on these subjects for adoption by the nations of the world.

As a result of the above action, there was held in 1930 the First Conference for the Progressive Codification of International Law. This conference called the attention of the League to the need for adequate preparation of the subject matter to be considered by the next conference for the codification of international law. The conference suggested that an appropriate body be assigned the task of drawing up drafts of conventions which should be submitted to the nations of the world for their consideration and these drafts with the suggestions and comments of the nations would form the basis for the program of the next conference.

In general, the League adopted the suggestions of the First Conference for the Progressive Codification of International Law and added the opinion that legal institutes of the nations should collaborate with the League in its efforts to secure the codification of international law. The work of national and international legal organizations should be in the form of the draft conventions.

As a result of the proposal of the League, the faculty of the Harvard Law School established a research in international law. Judges of the Supreme Court of the United States, judges of the highest state courts, writers and teachers of international law were invited to participate in the work. The group thus secured includes the names of the most learned and prominent men in American legal and political life.

An Advisory Committee was created in February, 1929. This committee decided on the lines to be followed in developing the work and appointed other committees to execute the project. *Research in International Law,* published in 1932, is the result of this undertaking. This work consists of four draft conventions on subjects of international law that these experts considered now ready for codification. Pages 15-187 deal with the subject of Diplomatic Privileges and Immunities, pages 189-449 with the Legal Position and Functions of Consuls, pages 451-738 the Competence of Courts with Regard to Foreign States, and pages 739-885 with Piracy. In addition to these draft conventions, pages 887-1013 contain a collection of the piracy laws of the different states.

The materials used to prepare these drafts were the theories of the great writers on international law and the practices of the states as shown in their treaties and diplomatic policies. The material examined was voluminous. The preparation of the drafts were undertaken with the object of stating the collective views of a group of representative American thinkers in the field of legal theory and practice. The work is the result of exhaustive research and thorough consultation of a group of America's most representative legal minds.

In addition to the four drafts, the expression of what these experts think the law should be on the designated subjects, each article of each draft is followed by valuable comments and explanatory notes. Exhaustive bibliographies are given which would be of great value to the student of these subjects.

The work is wholly unofficial and must not be taken as representing the views of the government of the United States.

Research in International Law can be used to great advantage by the advanced student of international law who is interested in the codification of international law and who desires to find the modern trends in this subject.

RUTH STEPHENS.

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SOME PHASES OF FAIR VALUE AND INTERSTATE RATES. By James Barclay Smith, J. S. D., Professor of Law in Louisiana State University. Baton Rouge: Louisiana State University Press, 1932, pp. 101.

This volume constitutes the sixth of a series of "Studies" published by the Louisiana State University upon legal, economic and political subjects.

To a practitioner who is handling rate adjustment cases before the Interstate Commerce Commission, one of the most serious and perplexing problems is involved

in the phrase "just or reasonable return to the carrier." Shall this be calculated upon the original cost of the transportation system, no matter how wasteful or conservative that investment may have been; or upon the replacement value as of the time when the question arises, without regard to the conditions of inflation or depression which then prevail; or upon an appraised value? Or shall the freight charges be based upon the service, or on encouragement of an infant industry, or upon what the traffic will bear; or shall the basis be that of competition, or of comparison with the rates upon other commodities or from other localities? In experience it is found that no matter how meritorious a complaint seems to be, or indeed how well founded the Commission shall find it to be, one defense which is almost universally interposed is, that to inflict such a loss of revenue will cause irreparable and unwarranted loss and will reduce the revenue of the carrier below that of a "reasonable" return. This seems to be a "plea of last resort" or it might be termed a "plea to sympathy."

To the average practitioner, this field of enquiry as to what is or may be a "reasonable return," with its corollary, what is a "fair valuation," is an unexplored wilderness, with no paths laid out, and with few if any guides available to aid the occasional traveler. The transportation companies may have clear ideas upon this subject, but seemingly, judging by their handling of rate cases, they do not care to communicate such ideas and thoughts to the protesting shippers who are attacking the prevailing freight rates. They place their defenses to claims for rate adjustment, in part at least, upon the all embracing plea of poverty and failure to "yield a reasonable return."

This "Study" by Professor Smith does not endeavor so much to state conclusions, as to present the different theories and basic facts from which proper conclusions may be drawn. The author points out that even the Courts have not been entirely consistent in their consideration of these questions.

Many of the modern works on subjects of law, while extremely valuable in themselves, in the last analysis are little more than collections and digests of the decisions of our Courts. While Professor Smith has supported his presentation of the questions covered by this Study by pertinent references to controlling authorities, his work is not a digest but on the contrary is a scientific analysis of the subject under consideration. He approaches the subject more from the point of view of an explorer and with the skill and experience of one accustomed to travel little known paths. His logic is sound, and his analysis is thorough and deep.

A careful study of this work would enable the general practitioner before the Interstate Commerce Commission to more successfully meet the blanket arguments of the representatives of the transportation companies that the rates contended for do not yield "reasonable returns"; and upon the other hand, should enable the carriers themselves to so present their defenses as to entitle them to greater consideration. The work evidences great care in its preparation, and a thorough acquaintance with both the reason of the matter and the pertinent authorities. The style is clear and non-technical.

This "Study" is entitled to a permanent place in legal literature far out of proportion to the brevity of the treatise.

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THE LAW OF THE AIR (The Tagore Law Lectures of 1931). By Arnold D. McNair. London: Butterworth & Co., Ltd., 1932, pp. xv, 249. 12s. 6d. net.

This concise text admirably succeeds in accomplishing the professed aim of the author, namely, "to state the aeronautical law of England." The author has steadfastly confined his remarks to British Aeronautical Law, but this by no means implies that the book is only of academic interest to American readers. Dr. McNair is thoroughly conversant with our air law problems and makes numerous well selected references to United States cases and legal periodical writings. In fact, as stated in the preface, the book has its inception in a series of lectures given in Chicago at the Summer Session of the Air Law Institute in 1930. This was followed the next year by an invitation to give a similar and fuller series for the Tagore Law Lectures at the University of Calcutta, which lectureship necessitated the publication of this book.

Much has been added to the worth and interest of the book by the fact that the author has not hesitated to freely advance his opinion on all phases of the subject although, of necessity, many are controversial and others lacking in precedent. Unfortunately Dr. McNair's treatment occasionally suffers at the very place his analysis becomes most crucial. For example, one ground advanced for maintaining that trespass will not lie at common law without contact with the surface is that "the common law is not committed to the view that abstract space can be the subject of ownership apart from its contents." (p. 33.) No reason, other than the author's assertion of the "gravest doubts," appears to be advanced for this plausible although controversial position—for a contrary view see, *Kocourek,* Jural Relations (2d Ed. 1928), pp. 323-38. By way of introduction the International aspects of aeronautical law and the general scope of English legislation are summarized. This occupies the first chapter.

Every American judge who is presented with an aviation trespass-nuisance complaint, such as found in *Swetland vs. Curtis Airport Corp.* (55 F. (2d) 201) and *Smith vs. New England Aircraft Co.* (270 Mass. 511, 170 N. E. 385), would do well to read Dr. McNair's clear analysis of the common law authorities which are found in the second and third chapters. These chapters are valuable, notwithstanding the criticism advanced in the preceding paragraph, and irrespective of the fact that the author's conclusions are favorable to aviation and in accord with the last report of the Aviation Committee of the American Bar Association (A. B. A. Advance Program, 1932). The "obscure" and "misunderstood" maxim, *cujus est solum, ejus est usque ad coelum et ad inferos,* is examined historically. This is followed by a scholarly review of the English text books and twelve "principal" English cases dealing with the maxim and the use of the action of trespass q. c. f. in situations analogous to aerial invasions. The author summarizes his conclusion: "The passage of an aircraft over my land at a height and in such circumstances as to cause interference with the reasonable use and enjoyment of it and structures upon it affords me an action of nuisance, but probably not an action of trespass unless the aircraft comes into contact with the land or something attached to it." (p. 66.) Along with this problem the application to aircraft of the *res ipsa loquitur* rule and the doctrine of dangerous instrumentalities are discussed, and the former accepted and the latter rejected.

The common law right to bring an action of trespass and nuisance against an aviator is not entirely a moot question in England today under Section 9 of the British Air Navigation Act of 1920 as has frequently been thought. This is discussed

in Chapter 4 under the heading "Statutory Liability of Owners of Aircraft for Damage." Section 9 of the statute affected a compromise between the rights of the landowner and aviator, but for reasons not shown the immunity clause of Section 9 (that which removes the common law action of trespass and nuisance) is limited by several conditions: compliance with the Act of 1920, the Orders in Council made thereunder (administrative regulations), and the Convention of 1919; the section does not apply to aircraft "in the service of His Majesty," to aircraft of a nationality not a signitory to the Convention of 1919, nor to a special treaty with Great Britain of a specified type; and lastly, the immunity does not apply unless the fight takes place "at a height above the ground, which, having regard to wind, weather, and other circumstances of the case, is reasonable." If any of these conditions are not complied with, the author contends, the common law rights become applicable in addition to the new statutory liabilities for actual damage irrespective of fault.

The novel problem of the jurisdiction of events happening on board an aircraft such as crimes, torts, contracts, births, deaths, marriages, and wills is discussed in the fifth chapter on "Jurisdiction." In this field there are admittedly no precedents and argument must be based on analogies. The attractive analogy between the ship and the aircraft, "except where it has been specifically adopted by statute," is rejected along with the assumption that events taking place on board an aircraft have a peculiar association with the state of the flag carried by the aircraft. In this respect the analogy of the motor bus is found more satisfactory, but its acceptance complicates the question of the jurisdiction of events happening on an aircraft while over the high seas.

The British contract of carriage for goods and passengers is next discussed and the manner by which the Imperial Airways, Limited, has contracted away by "unambiguous language" their *prima facie* status as common carrier and liability for their own negligence and misconduct. This is followed in the next chapter by a discussion maintaining that the "common law possessory lien" is applicable to aircraft, but that the "statutory claim for necessaries" is not. "Aircraft Charterparties," "Insurance," and "Miscellaneous and Technical Matters" are discussed in the remaining chapters. The current practice of British underwriters and the extent of coverage furnished by the standard form of British aircaft policy are explained. Several insurance cases, none of which are officially reported, are mentioned which deal with the technical construction of such phrases as "racing" and "in flight."

The volume concludes with five appendices. The first gives the text of the Convention of 1919, and the second that of the British Air Navigation Act of 1920. The third sets forth the General Transport Conditions of the International Air Transport Association (in force at the time of publication). To this appendix the author has added valuable observations. The fourth appendix gives the French text of the Warsaw Convention of October 12, 1919, "pour le Unification de Certaines Régles Relatives au Transport Aérien International," and the last gives the General Transport Conditions that will come into effect with the final ratification of Warsaw Convention.

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THE STORY OF THE CONSTITUTION. By Howard B. Lee, Attorney General of West Virginia. Charlottesville, Va.: The Michie Company, 1932, pp. 292. Foreword by John W. Davis, former Solicitor General of the United States.

The subject matter of this book including the author's introduction covers 233 pages divided into fourteen chapters. The title is very appropriate. It accurately indicates what the book is, namely, "The Story of the Constitution," meaning, of course, the Constitution of the United States. This story is presented in an attractive and most interesting way. It is written for the layman in language devoid of legal phraseology. It is neither too long nor too short. From first to last the interest never lags.

This book comes to the public at a time when it is greatly needed. Nothing is more vital to the citizen than the Constitution which is the great instrument on which the life of this nation depends.

With consummate skill the author shows the necessity for a constitution and portrays admirably the tremendous struggle for its construction, adoption and ratification. He then relates the story of the difficulties of the new government and the history of the Amendments. The four chapters devoted to guaranties are illuminating and fascinating. These chapters deal with general guaranties in criminal and civil cases, and political guaranties. The last two chapters of the main story are devoted to the early judicial growth of the Constitution and the Supreme Court and Congress.

Through the crumbling centuries mankind has struggled incessantly for civil equality. The story of the Constitution of the United States shows the consummation that was devoutly wished. No story is more fascinating. This great document was not at the time of its formation a creation. It grew out of the past. "The fabric of human institutions is a texture which can be woven only in the loom of time." The development of this Constitution is equally as interesting and instructive as the struggle for its formation. General Lee has succeeded in giving to the public a new and indeed refreshing opportunity to delve into this story and gain a more thorough understanding of the Constitution, its origin, meaning, and importance.

With this book before him, the reader's admiration for this government will grow and his loyalty and devotion as a citizen will be intensified. It is delightful reading and is a book worth having in one's library.

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DECLARATION OF RIGHTS WITHOUT CONSEQUENTIAL RELIEF

By WILLIAM H. WICKER

Responsible clients ordinarily will perform their legal obligations and will limit their claims to their legal rights when they know exactly what their legal rights and obligations are. But predicting a court's reaction to a given cluster of facts is sometimes a hazardous task. There may be no local decision or statutory rule on the question, and the authorities in other jurisdictions may be in sharp conflict; or the local statutes or court decisions may be couched, either intentionally or inadvertently, in ambiguous expressions. The parties themselves or their draftsmen often inject the uncertain element into the problem of stating the law applicable to their case by inartistically drafting their deeds, will or contracts. Such instruments may contain ambiguous expressions susceptible of two or more interpretations each of which is equally objectively reasonable; or it may be necessary to interpret particular instruments in the light of changed social or economic conditions which were not even contemplated by their draftsmen. The common law afforded no remedy of general application for the situation where a competent lawyer felt that no amount of study on his part would enable him to make a safe prediction as to what a judge at a later stage would decide. There is an obvious need for a procedure which will lead to an authoritative declaration of law as applied to an existing dispute, even though no other or further relief can be claimed.

The declaratory judgment is the procedural reform that adequately supplies this need by authorizing the courts to make binding declarations of the respective rights and duties of the parties, even though no consequential relief can be claimed. On the occasion of the passage by the House of Representatives of the Federal Declaratory Judgment Act (it has not yet passed the Senate) the function of the declaratory judgment was picturesquely described as follows: "Under the present law

you take a step in the dark and then turn on the light to see if you have stepped in a hole. Under the declaratory judgment law you turn on the light and then take the step."[1] The primary advantage of a declaratory judgment over the usual executory judgment lies in the fact that one may be entered at an earlier stage in the controversy than the other, and the parties may thus obtain an authoritative declaration of their rights and duties before either party has taken any irretrievable action.

Declaratory relief has long been a familiar and much used portion of the law of judgments in most of the countries of continental Europe and has been employed extensively for several centuries in Scotland.[2] But except in a few equity cases of limited scope[3] the common law proceeded on the assumption that it was necessary for one party to commit or threaten to commit a wrongful act before the other party could get a court to decide the controversy. In 1852 the English Parliament adopted the Scottish declaratory relief practice by amending the act[4] governing the High Court of Chancery so as to provide:

> No suit in said court shall be open to objection on the ground that a mere declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of rights without granting consequential relief.

But with characteristic conservatism the courts narrowly construed this section as authorizing declaratory relief only in cases where the plaintiff was entitled to consequential equitable relief but had elected to ask merely for a declaration of his rights.[5] In 1883 a Supreme Court Rule[6] adopted under the Judicature Act of 1873 broadened the basis of declaratory relief by making it applicable to both equity and law courts and mak-

1 Quoted in Borchard, *Declaratory Judgment*, 7 Tulane Law Review 412 (1933) from 69 Cong. Rec. 2108 (1928).

2 The two pioneer American essays showing the extent to which declaratory relief is employed in the various countries of the world are Sunderland, *A Modern Evolution in Remedial Rights*, 16 Mich. L. Rev. 69 (1917) and Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 Yale L. J. 1, 105 (1918).

3 Equitable decrees in bills *quia timet*, bills of the peace, bills to remove a cloud on title and bills for the cancellation of written instruments are purely declaratory decrees in so far as they merely declare the complainant's rights, but if, as is usual in such cases, the decree goes further and orders a surrender and cancellation of a written instrument, the decree is, of course, executory to that extent. Chancery decrees declaring marriages valid or void or parties legitimate or illegitimate and chancery decrees construing wills and trust deeds, are other examples of cases where equity since ancient times has taken jurisdiction for the purpose of granting pure declaratory relief.

4 15 and 16 Vict. C. Sec. 50.

5 Rooke v. Lord Kensington, 2 K. & J. 753, 69 Eng. Rep. R. 986 (1856); Lady Langdale v. Briggs, 8 De G. M. & G. 391, 44 Eng. Rep. R. 441 (1856).

6 Order XXV, Rule 5, of the Supreme Court Rules of 1883.

ing it clear that a plaintiff seeking declaratory relief need not have a cause of action entitling him to affirmative relief. It provided:

> No action or proceeding shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

Apparently New Jersey was the first American state to pass an effective declaratory judgment act and New Jersey did not act until 1915. The New Jersey Act[7] is limited to equitable rights arising out of written instruments. It provides:

> Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will or other written instrument, may apply for the determination thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested.

Since 1915 there has been a strong movement in the United States by students of judicial administration and bar associations for adoption of declaratory judgment acts. In 1922 the National Conference of Commissioners on Uniform State Laws approved a draft of a Uniform State Act. By the end of the year 1932 thirty-two American jurisdictions had adopted declaratory judgment legislation. Seventeen of these jurisdictions[8] adopted the Uniform Act and the remaining fifteen other legislation.[9] The Uniform Act contains seventeen sections, but all of the sections except the first are mainly concerned with rules of construction, procedure and practice. The effective part of the Uniform Act is contained in section one, which reads as follows:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

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7 N. J. Laws 1915, Chap. 116, Sec. 7. This is the original New Jersey Act. New Jersey has since adopted the Uniform Declaratory Judgment Act.

8 Arizona, 1927; Colorado, 1923; Indiana, 1927; Nebraska, 1929; Nevada, 1929; New Jersey, 1924; North Carolina, 1931; North Dakota, 1923; Oregon, 1927; Pennsylvania, 1923; Porto Rico, 1931; South Dakota, 1925; Tennessee, 1923; Utah, 1925; Vermont, 1931; Wisconsin, 1927; Wyoming, 1923.

9 California, 1921; Connecticut, 1921; Florida, 1919; Hawaii, 1925; Kansas, 1921; Kentucky, 1922; Massachusetts, 1929; Michigan, 1919, amended in 1929; New Hampshire, 1929; New York, 1921; Ohio, 1931; Rhode Island, 1923; Philippines, 1930; South Carolina, 1922; Virginia, 1922.

It will be noted that the Uniform Act is very broad in its scope. Several of the other American declaratory judgment acts, for example the acts in Florida and South Carolina, expressly limit declaratory relief to actions based on written instruments. But most of the non-uniform American acts are as broad in scope as the Uniform Act; that is, they contain no substantial limitation as to subject matter.

It is easy to distinguish declaratory judgments from decisions in moot cases and advisory opinions. A moot case is one in which the issues are fictitious, dead, hypothetical or academic. A decision in such a case differs from a declaratory judgment in that it involves no actual live controversy affecting the rights and duties of the parties to the action. Of course, no court having full knowledge of all the facts will decide a moot question, and it is immaterial whether such a question is presented under the guise of a request for a declaratory judgment or an executory judgment. Thus in a Tennessee[10] case it was held that a declaratory judgment to determine the rights of ten of eighteen magistrates to hold a session of the Quarterly Court to transact county business, when the remaining eight magistrates refused to attend, will not be rendered, where the recalcitrant magistrates decided to co-operate before the question was presented to the court and no official action had been attempted by the complaining ten magistrates.

An advisory opinion is an opinion rendered by judges, not in the decision of a case between parties whose rights are involved, but in response to a request from the legislative branch or the executive branch of the government for information on a question of law. Such questions are usually submitted without reference to any specific facts, and judges, in giving advisory opinions, are acting as individuals and not in their judicial capacity. In the absence of constitutional or statutory provisions[11] requiring them to do so, judges cannot be compelled

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10 Hodges v. Hamblen County, 152 Tenn. 395, 277 S. W. 901 (1925). Moot cases are not within the purview of declaratory judgment acts. Nashville Trust Co. v. Drake, 162 Tenn. 356, 36 S. W. (2d) 905 (1931); Poore v. Poore, 201 N. C. 791, 161 S. E. 532 (1931); Ladner v. Siegel, 294 Pa. St. 368, 144 Atl. 274 (1928); Hogan v. Dungannon Lumber Co., 145 Va. 568, 134 S. E. 570.

11 The constitutions of seven states, Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota provide for the rendering of advisory opinions by the Justices of the Supreme Court. Five other states, Alabama, Delaware, Minnesota, Oklahoma and Vermont have similar statutory provisions. Clovis and Updegraff, *Advisory Opinions*, 13 Iowa Law Review 188 (1928).

to render advisory opinions.[12] Advisory opinion statutes have been held invalid under some of the American constitutions requiring a strict separation of the departments of government, as attempting to confer non-judicial power upon the judiciary.[13] Declaratory judgment acts do not purport to impose the duty of rendering advisory opinions upon the courts.[14] An advisory opinion binds no one, not even the judges. The doctrine of *stare decisis*[15] does not apply, and the doctrine of *res adjudicata* cannot apply, because the real party aggrieved is not before the judges. An action for a declaratory judgment requires a real controversy between real parties in interest, and the decision of the court is binding on the parties and also serves as a precedent for future cases.[16] The only difference between a declaratory judgment and an executory judgment lies in the fact that the former gives a successful plaintiff no right to an execution or other process to carry the judgment into effect. It does, however, make a final binding declaration of the rights and duties of the parties to the controversy. If one party does not subsequently act in conformity with this declaration the other party may bring an action for damages, and in that action the question decided in the declaratory judgment action is *res adjudicata.*

In America we have elaborate written constitutions, and usually as soon as legal innovations attempting a better adjustment of human differences are inaugurated, the cry of unconstitutionality is raised. *Anway v. Grand Rapids Railway*[17] was the first American case to consider the constitutionality of a declaratory judgment act. This case invovelved a question as to how a Michigan statute forbidding a seven day working week should be interpreted. Both the plaintiff employee and the defendant employer desired the court to hold that the

12 *In re Opinion of Justices,* 126 Mass. 557 (1878); Rice v. Austin, 19 Minn. 103, 18 Am. R. 330 (1872); *In re Opinion of Justices,* 62 N. H. 706 (1883).

13 Muskrat v. United States, 219 U. S. 346, 31 Sup. Ct. 250 (1910); In re State Senate, 10 Minn. 78 (1865); State v. Baughman, 38 Ohio St. 455 (1882).

14 Mulcahy v. Johnson, 80 Colo. 499, 252 Pac. 816 (1927); Reese v. Adamson, 297 Pa. 13, 146 Atl. 262 (1929). In Crawford v. Favour, 34 Ariz. 13, 267 Pac. 412 (1928) it was held that there was nothing in the Declaratory Judgment Act which would authorize an action by the Speaker of the Arizona House of Representatives against the Code Committee to determine whether a proposed bill for codification of laws complied with the constitutional requirements.

15 *In re Opinion of Justices,* 214 Mass. 599, 102 N. E. 464 (1913); *In re Opinion of Justices,* 3 Okla. Cr. 315, 105 Pac. 684 (1909).

16 McCrory's Stores Corp. v. S. M. Braunstein, 102 N. J. L. 590, 134 Atl. 752 (1926).

17 211 Mich. 292, 179 N. W. 350 (1920).

plaintiff had a right to work more than six days a week if he wanted to do so. The court would have been entirely justified in refusing to make a declaration on the ground that there was no real controversy between the parties. But instead of doing that, the court improperly assumed that the Declaratory Judgment Act required the court to give advice and to decide moot cases. Acting on this erroneous assumption, the court held that the Declaratory Judgment Act was unconstitutional, as attempting to impose upon the courts non-judicial functions. But fortunately all the other state courts refused to follow the Michigan Supreme Court in this erroneous interpretation of the scope of declaratory judgment acts. In 1929 the Michigan legislature amended its Declaratory Judgment Act by providing expressly that it applied only to "cases of actual controversies" and added a provision specifically giving to declarations of rights the effect of a final judgment. In 1930 in the case of *Washington Detroit Theater Company v. Moore,*[18] the Michigan Supreme Court in effect overruled the unfortunate decision in the *Anway* case by holding that the Declaratory Judgment Act as amended in 1929 was constitutional. Since the decision in the *Anway* case, the highest courts in at least sixteen states have considered arguments to the effect that declaratory judgment acts attempt to impose non-judicial powers upon the judiciary. All of these courts reached the ultimate unanimous conclusion that these arguments are without merit and that declaratory judgments are constitutional in every respect.[19]

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18 249 Mich. 673, 229 N. W. 618 (1930).

19 Arizona: Morton v. Pacific Constr. Co., 36 Ariz. 97, 283 Pac. 281 (1929); California: Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495 (1923); Connecticut: Braman v. Babcock, 98 Conn. 549, 120 Atl. 150 (1923); Florida: Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930); Indiana: Zoercher v. Agler, 172 N. E. 186 (Ind. 1930); Kansas: State *ex rel.* Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1922); Kentucky: Black v. Elkhorn Coal Corp. 233 Ky. 588, 26 S. W. (2d) 481 (1930); Michigan: Washington-Detroit Theater Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930); Nebraska: Lynn v. Kearney County, 236 N. W. 192 (Neb. 1931); New Jersey: McCrory Stores Corp. v. S. M. Braunstein Inc., 102 N. J. L. 590, 134 Atl. 752 (1926); New York: Board of Education v. Van Zandt, 119 Misc. 124, 195 N. Y. Supp. 297 (Sup. Ct. 1922), Aff'd. 234 N. Y. 644, 138 N. E. 481 (1923); Pennsylvania: In re Kariher's Petition, 284 Pa. St. 455, 131 Atl. 265 (1925); Tennessee: Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1924); Virginia: Patterson's Ex'rs. v. Patterson, 144 Va. 113, 131 S. E. 217 (1926); Wisconsin: City of Milwaukee v. Chicago & N. W. Ry., 230 N. W. 626 (Wis. 1930); Wyoming: Holly Sugar Corporation v. Fritzler, 296 Pac. 206 (Wyo. 1931). The courts in the following nine other states have assumed the constitutionality of declaratory judgments: Colorado, Massachusetts, Nevada, North Dakota, Oregon Rhode Island, South Carolina, South Dakota and Utah. Borchard, *The Constitutionality of Declaratory Judgments,* 31 Col. L. Rev. 561 (1931).

In several cases[20] the United States Supreme Court has intimated by way of *dicta* that an action for a declaratory judgment was not a "case" or "controversy" within the meaning of the Federal Constitution, Article III, Sec. 2, limiting the judicial power of the United States to certain designated "cases" or "controversies". But in the recent case of *Nashville, Chattanooga & St. Louis Railway v. Wallace*[21] that court was faced for the first time with the necessity of deciding that question, and it came to the conclusion opposite to that expressed in these *dicta*. This case was brought under the Tennessee Declaratory Judgment Act by a railway against the state officials charged with the duty of collecting a gasoline storage tax imposed by a Tennessee statute. The defendants demanded payment of the tax in a specified amount on gasoline which the plaintiff used in its business as an interstate rail carrier, and the defendants were determined to enforce their demand. The plaintiff asked for a declaration that the gasoline storage tax statute, as applied to gasoline so used, is invalid under the commerce clause and the Fourteenth Amendment to the Federal Constitution. The Tennessee Supreme Court decided against the plaintiff's contentions. On the plaintiff's appeal to the Supreme Court of the United States, that Court unanimously held that, as the case was an adversary proceeding involving a real controversy

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20 Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282 (1927) Willing v. Chicago Auditorium Ass'n., 277 U. S. 274, 48 Sup. Ct. 507 (1928).

Liberty Warehouse Company v. Grannis was an action against a Kentucky prosecuting attorney to obtain a declaration that a certain Kentucky statute was unconstitutional. There was no proof that the plaintiff had violated the statute or that he contemplated doing so or that the defendant threatened to enforce the statute. The majority opinion, after pointing out the absence of adverse parties, said that there was no "case or controversy" and that a federal court "had no jurisdiction to entertain the petition for the declaratory judgment." In view of the fact that a declaratory judgment presupposes real adverse parties and a live controversy this statement is pure dictum.

Willing v. Chicago Auditorium Association was an action to remove a cloud on title brought in a state court. The case was removed to a federal court on the grounds of diverstiy of citizenship. The question was whether a certain 99-year old lease required the lessee to obtain the lessor's consent before tearing down an old building and erecting a new one. After stating that the doubt appeared on the face of the lease itself and that this was not a cloud on title within the federal rule the majority opinion went further and said: "The plaintiff seeks simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary." It will be noted that this quotation was not only unnecessary to the decision but it violates the rule that a constitutional question will not be decided unless necessary to a decision of the case.

Similar *dicta* regarding declaratory judgments appear in Liberty Warehouse Company v. Burley Tobacco Growers' Co-operation Marketing Association, 276 U. S. 71, 48 Sup. Ct. 291 (1928) and in Piedmont and Northern Ry. v. United States, 280 U. S. 469, 50 Sup Ct. 192 (1930).

21 53 Sup. Ct. 345 (1933).

finally determined by the court below, it was a "case or controversy" within the meaning of the Federal Constitution, even though the judgment contained no award of process or execution to carry it into effect.

Of course, the actual decision in the *Nashville Railway* case is limited to the holding that a declaratory judgment is a "case or controversy" in the constitutional sense, and that the Supreme Court of the United States will review declaratory judgments rendered in state courts, if the other pre-requisites to its appellate jurisdiction are present. All questions relative to the original jurisdiction of federal courts over actions for declaratory judgments are still undecided. But the opinion in the *Nashville Railway* case emphasized the purely procedural aspects of the declaratory judgment. The Supreme Court of the United States already possesses statutory power[22] to promulgate uniform procedural rules in equity cases for all federal courts. It would seem to follow that no congressional action is necessary to give federal district courts jurisdiction over suits in equity for declaratory judgments.[23] Whether an action for a declaratory judgment brought on the law side of a federal district court can be maintained would seem to depend upon the state in which the federal district court is located. The federal Conformity Act[24] requires proceedings in law actions to comply "as near as may be" to "the practice, pleadings and forms and modes of proceeding" of the courts of the state within which the federal court is held. It would seem to follow that declaratory judgment actions at law can be maintained in federal district courts in states having declaratory relief statutes, but a federal Declaratory Judgment Act is necessary to authorize such an action at law in a federal district court located in a state having no such state procedure.

Professor Edwin M. Borchard of Yale University has estimated that since 1919 American state courts have rendered seven hundred declaratory judgments and the courts of England and elsewhere thousands of such decisions.[25] The wide range of the controversies that have been settled by these decisions precludes any accurate statement in this short paper as to their

22 28 U. S. C. A. Sec. 723.

23 See Comment, 31 Mich. L. R. 707 (1933).

24 28 U. S. C. A. Sec. 724.

25 Borchard, *Declaratory Judgments*, 7 Tulane Law Review 388, 413 (1933). Professor Borchard's various monographic articles cn the subject of this paper have been of considerable assistance to the writer.

factual scope. Some illustrative Tennessee cases are stated in the note.[26] Our social and economic relations are undoubtedly becoming more and more complicated, and this fact increases the need for judicial relief against peril and insecurity. The need for developing preventative machinery on the civil side of the law is as great as the corresponding need in the criminal law field. The declaratory judgment, if properly used, is an efficient instrument of preventative justice. It removes the necessity of postponing an application for an authoritative determination of a controverted question until damage has resulted.

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26 A declaration was made that the comptroller of the state should pay the temporary judge appointed by the governor during the pendency of an election contest and not the judge whose term had expired and who claimed the right to hold over during the contest of an election resulting in his defeat. Graham v. England, 154 Tenn. 435, 288 S. W. 728 (1926). A bill by a public service corporation, challenging the jurisdiction of the public utilities commission to require the corporation to apply for certificates of necessity and convenience before making certain developments and seeking to have the rights of the parties defined, was held to present a proper case for a declaratory judgment. Tennessee Eastern Electric Co. v. Hannah, 157 Tenn. 582, 12 S. W. (2d) 372 (1928). Where the parties did not comply with Declaratory Judgment Acts Sec. 11 providing that the Attorney General of the State shall be served with a copy of the proceedings and shall be entitled to be heard in every case involving the constitutionality of a statute, the court has no jurisdiction to make a declaration as to the validity of a statute. Cummins v. Shipp, 156 Tenn. 595, 3 S. W. (2d) 1062 (1928). The constitutionality of a statute will be passed on in a declaratory judgment action only so far as the parties before the court have a real interest in the question. Goetz v. Smith, 152 Tenn. 451, 278 S. W. 417 (1925). A taxpayers' bill for a declaration as to the constitutionality of an act amending a city charter is insufficient as not showing that the complainant had a real interest in the subject of the action, in the absence of an averment that the act would result in additional taxation. Perry v. City of Elizabethton, 160 Tenn. 102, 22 S. W. (2d) 357 (1929). The plaintiffs' request for a declaration that they were not "general contractors" within the meaning of a statute imposing privilege tax on persons engaged in general contracting business was granted. Parmer v. Lindsey, 157 Tenn. 29, 3 S. W. (2d) 657 (1928). A claim that the law imposing an assessment on property owners for improvements had been repealed, was denied. Frazier v. City of Chattanooga, 156 Tenn. 346, 1 S. W. (2d) 786 (1928). A will was construed and a declaration was made that the executrix who was also the widow had the power to sell real estate for the support of herself and her children. Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1924). Where a life tenant executed a trust deed in fee, the remaindermen's action against a foreclosure purchaser for a declaration of the future rights and status of the parties was maintainable. Guy v. Culberson, 164 Tenn. 509, 51 S. W. (2d) 500. The trustee holding title to the property and the pledgee of notes secured by a mortgage are necessary parties to a declaration as to the validity of the mortgage. Harrill v. American Home Mortgage Co., 161 Tenn. 646, 32 S. W. (2d) 1023 (1930.)

THE BENEFIT THEORY OF TAXATION

By D. T. Krauss

The field of substantive law has a very close relationship to every aspect of human society. The principles and theories enunciated by courts concerning the aspects of human society, as expressed in judicial decisions, are not by any means insignificant in their import on the destiny of mankind. In adjudicating conflicting claims courts frequently reveal the legal concepts of the structure of the basic institutions of our society, which concepts have probably had as great a formative influence on our social institutions as that exerted by the non-legal specialists in the fields involved. Legal lore is rich in concepts concerning all aspects of our society. Such concepts, however, when involved in court decisions, may find their justification not in the social or economic realities of a given situation, but in the principles of the narrower field of jurisprudence.

Governments must secure money for their maintenance. The power to make compulsory levies on its citizens for its support is inherent in the sovereignty of governments. Such power is said to be legislative and not judicial in nature and is said to be limited only by constitutional prohibitions. Legislatures pass tax laws which, in effect, allocate the costs of government to the constituent elements of the population in whose welfare the government is concerned. Probably one of the earliest principles followed in the levying of taxes was that a tax was a payment for services received by the tax payer from his government or overlord. The payments and services made by a vassal to his overlord for protection in the feudal society of the middle ages can be explained on such a theory. This system broke down with feudal society, although it has somewhat of a counterpart today in the system of fees charged by governmental agencies for special services.

Constitutions, statutes, and courts in their decisions and dicta give expression to certain concepts and theories of taxation. It is the purpose of this article to examine one such theory of taxation, namely, that of taxation according to the benefits or advantages received by the taxpayer and to set forth the credence that has been given to this theory of taxation by the courts.

The maxim that taxes should be proportioned to the taxpayer according to benefits derived has made an appeal to American courts. This legal benefit theory of taxation seems to include two classes of recipients of benefits, namely, some territorial division or district or else, individuals. With reference to the first it is said a state cannot tax where it has jurisdiction over neither the owner nor the property.[1]

This article is concerned with the second type of recipient of the benefits. Indicative of the appeal to legal authorities of the benefit doctrine are numerous statements in the courts' decisions and in text books. Illustrative of the latter is the following statement from Cooley:[2]

> "If it were practicable to do, taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the government affords him, but this is manifestly impossible. The values of life and liberty and of the social and family rights and privileges cannot be measured by any pecuniary standard; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated."

A distinction can also be made between "general" benefits and "special" benefits. General benefits fall upon all as a result of general governmental expenditure; while special benefits fall on those peculiarly and directly benefited by a governmental expenditure. Whatever validity might have been given, historically, to the doctrine of taxation according to special benefit or advantage accruing to a particular individual or his property, cases in which this doctrine has been in recent times supported by considerable authority can be classified into two groups. The one group of cases is a broad, general one, in which the benefit theory of taxation is stated arguendo as a justification for a particular scheme of taxation the validity of which is challenged, usually on constitutional grounds. The other group of cases can be broadly termed the special assessment or taxation for local improvement cases, in which the legality of a particular assessment upon certain property in order to finance a sidewalk, sewer, paving, or some other appurtenance is based upon the special benefit which the owner of the property receives from the improvement. A levy for a

1 Dewey v. Des Moines, 173 U. S. 193, 43 L. Ed. 665.

2 Cooley, *Taxation*, 4th Ed. 1929, Collaghan & Co., Chicago, page 213, Illinois Central R. R. Co. v. Decatur, 147 U. S. 190.

local improvement is sometimes designated as "special assessment" and is differentiated from a "tax" which is presumably for general purposes. The complexities of modern economic life would seem to eradicate such a distinction, although this distinction is made the basis of freeing special assessments from certain constitutional limitations, such as the uniformity rule.

Cases which can be grouped in the first classification will be examined first. The concept of benefit to the taxpayer is found in the doctrine running through inheritance tax cases, that a state can tax whenever its help is needed to enforce a right to property, and that to the property or person there flows some benefit for which the state can demand a quid pro qou in the form of a tax.

A case which has been used as a precedent for this group of cases is that of *Blackstone vs. Miller*.[3] Timothy B. Blackstone died, domiciled in Illinois, leaving a deposit of a considerable sum in New York. Justice Holmes held that this sum was subject to the transfer tax of the state of New York under its inheritance law even though New York State at that time recognized the law of the domicile as the taxing jurisdiction. The law of the State of New York permitted the creditor to collect the debt from the debtor in New York and without that law the right of the creditor would be gone. Such a tax did not violate the 14th Amendment to the Federal Constitution.

In a later case, decided by Justice Holmes, it was held that the State of Kentucky could levy an annual tax on a bank account in St. Louis held by one domiciled in Kentucky. The court said, "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed."[4]

In 1929 another case came before the United States Supreme Court. A Virginian, the beneficiary of a trust estate held by the trustee in Baltimore, Maryland, was assessed on the securities held by the trustee in Maryland. The majority opinion of the court held that such taxation was in violation of the 14th Amendment to the Constitution of the United States. Tangible personal property permanently located beyond the domicile of the owner was not taxable at such domicile and this case applied this

[3] 188 U. S. 189, 47 L. Ed. 439.
[4] Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54; 62 L. Ed. 145.

principle to intangibles.[5] Justice Holmes, in his minority opinion held to his previously expressed doctrine that "taxes generally are imposed upon persons for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed on grounds not of fiction but of fact."

Justice Holmes again dissented in another case decided in the same year. The imposition of an inheritance tax by the State of Minnesota on bonds held by a resident of New York was held to be violative of the 14th Amendment. The case of *Blackstone vs. Miller* was expressly overruled.[6] In his dissenting opinion, Justice Holmes holds to the doctrine of *Blackstone vs. Miller*. The bonds in dispute are taxable in the State of New York, but they should also be taxable in the State of Minnesota. The right of Minnesota to tax is based on the need of the creditor to require the help of Minnesota and for such help the State of Minnesota can demand a quid pro qou in return. The right of the creditor has a theoretical dependence upon the existence and benefits derived from the law of the domicile of the debtor.

Under the common law doctrine of "mobilia sequvntur personam" the state of the domicile of the decedent could exact a succession or inheritance tax on the tangible and intangible personal property of the decedent wherever such property might be located. In the case of *Frick vs. Pennsylvania,*[7] tangible personal property permanently located in the State of New York was not subject to a succession tax in the State of Pennsylvania. This was a denial of the common law doctrine previously followed. Apparently, some of the authorities desire to follow the rule of the *Frick case* making it applicable to a testamentary tax on intangibles, taxing them at their domicile on the theory of the benefits or privileges which the intangible property enjoys at its domicile.[8] In the California case of *Chambers vs. Mumford* the interest of a non-resident in a note held in California and a mortgage on California property, also held in California, was held to be not subject to the inheritance law in that state.[9] The court followed the common law doctrine that

5 Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; 50 L. Ed. 150.
6 Farmers Loan & Trust Co. v. State of Minnesota, 280 U. S. 204, 74 L. Ed. 377.
7 Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058.
8 People v. Griffith, 24 Ill. 532; 92 N. E. 313, Re Handayer, 150 N. Y. 37, 34 L. R. A. 235.
9 Chambers v. Mumford, 187 Cal. 228, 201 Pac. 588, 42 A. L. R. 342.

such intangibles are subject to testamentary taxation at the domicile of the decedent owner, but it recognized the contrary rule in the following language: "The rule supported by these authorities, as applying to those in action against non-residents of the state where the inheritance tax is claimed, is that if the owner must invoke the laws of that state to reduce his claims to possession, or secure the beneficial enjoyment thereof, and if the security and evidences of indebtedness are in that state, the property interest is one within the state and subject to the local tax."

Stock issued by a domestic corporation and held by a non-resident at the time of his death is not subject to a succession tax according to the decision in the case of the *First National Bank vs. Maine.*[10] The minority opinion in that case again followed the argument developed in previous cases that a tax on the "transfer by death" of such stock is justifiable on the grounds of control and benefit. The validity of such a tax is denied under the due process clause of the constitution.

The benefit doctrine of taxation is also given some validity in an income tax, however, this time by the majority opinion of the Supreme Court. The State of Mississippi levied an income tax on the income received by a person domiciled in the State but earned outside the State of Mississippi.[11] Such a tax does not violate the 14th Amendment to the Constitution of the United States. Justice Stone stated in dictum, "The obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expense of government and to distribute its burdens equally among those who enjoy its benefits. Hence, domicile in itself establishes a basis of taxation. Enjoyment of the privileges of residence within the State, and the attendant right to invoke the protection of its laws are inseparable from the responsibility for sharing the costs of government."

The situs of real and personal property and the domicile of the owner, in the case of intangibles and income, seem to give to a particular state jurisdiction to tax, the latter doctrine assuming that the situs of intangibles is the domicile of the owner. If taxation according to benefit received is a "just" theory of taxation, then it seems that on the basis of logic the

10 First National Bank v. Maine, 52 S. Ct. 174, 77 A. L. R. 1401.
11 Lawrence vs. State of Mississippi, 286 U. S. 276.

testamentary taxation of intangibles at their situs rather than at the domicile of the owner can commend itself to a considerable degree. The expenditures of a state may go in part to protect and benefit property evidenced by intangibles owned by a person domiciled in another state.

The group of cases known as special assessment or local improvement illustrate substantially the doctrine of taxation according to benefit. Property which is the chief beneficiary of local improvements is made to bear the costs of such improvements in proportion to the benefit derived. In the statutes and cases involving levies for local improvement, the legal benefit doctrine of taxation emerges in its best form. Courts have distinguished between general taxes and special assessment. The latter is sometimes said not to be a tax at all, and consequently, constitutional provisions pertaining to uniformity of assessment and equality of valuation of the property are said not to apply to special assessments.[12] The theory is that the cost of a local improvement is laid on abutting property because it is a payment for the benefit received by the property owner from the local improvement, which benefit is presumed to be a special benefit apart from that which the community at large receives from the improvement. The assessment of property for a local improvement is statutory, and in quite a few states the theory of benefit is strictly followed and no special levy, either for general purposes or special improvements, can be made on property unless the owner of the property receives an equivalent benefit.

The distinction between general taxes and special assessments rests on supposedly various differentiating characteristics. One court expresses this difference as follows: "A 'tax' is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration plan, and to execute the various functions the sovereign is called to perform. A special assessment is like a tax in that it is an enforced contribution from the property; it may possess other points of similarity to a tax but it is inherently different and covered by entirely different principles."[13] Such a statement is not very convincing. It is said that special assessments are imposed on selected properties benefited and not on all the

12 Mayor, etc. of Birmingham v. Klein and note, 8 L. R. A. 369.

13 Klemm v. Davenport, 129 So. 904; 70 A. L. R. 156. See Cooley on Taxation, 3rd Ed., page 1152, and McQuillan on Municipal Corporations, Second Ed., Sec. 2166.

taxable property in a general taxing district. Courts are not clear in what ways a special assessment is "inherently different" from general taxation. That there is a difference in law between the two forms of taxation cannot be denied.

In a few jurisdictions some of the earlier statutes and cases made a distinction between the grounds on which the power to levy a special assessment rested and the grounds for the power of general taxation. Apparently, under the constitution of 1848 of the State of Illinois, the power to levy special assessments was sustained under the power of eminent domain. There had to be an equality of benefit and burden to sustain the constitutionality of a special assessment in Illinois, and any residue of cost above the benefit was payable under the constitutional rule of equality and uniformity of taxation.[14] Later a new constitution placed the power to levy special assessments under the general taxing power.

Another distinction that has been made between special assessments and general taxes is that while the latter rests on the general legislative power of taxation, the former is sustainable on the ground that it is an exercise of police power, on the theory that if several persons cannot enjoy their properties under certain conditions, the state can, under its police power, compel property owners to take such measures as will mutually benefit certain local properties.[15] Something can be said for this view in the case of certain types of local improvements which involve the abatement of nuisances resulting from the construction of sanitary sewers or the drainage of a swamp. This theory has been denied by most jurisdictions but it has had some validity in a few states.[16]

Such distinctions between special assessments and general taxes based on the sources of the power to levy the particular tax apparently have at the present time only a historical significance. Most jurisdictions place the power to impose a tax under the general tax power of the legislature. The most weighty distinction between a special assessment and the general tax seems to be that in the case of general taxation the money is spent in so many ways that no direct connection can be traced between the payment of the tax and the benefit, while

14 Chicago v. Larned, 34 Ill. 203.
15 26 R. C. L., page 24.
16 See Doughter v. Cowden, 72 N. J. L. 451; 11 Am. Ct. Rep. 680; Pueblo v. Crosby, 12 Colo. 593, 21 Pac. 899.

in the case of special assessment there is a direct connection traceable between the expenditure for the local improvement and the benefit.[17] The assumption is that there is a casual relation between the expenditure and benefit.

Apparently Tennessee was one jurisdiction which refused to make a distinction between local assessments, based on special benefit, and general taxation. Assessing the cost of street improvements on abutting lots was declared unconstitutional in the case of *McBean vs. Chandler.*[18] This case was followed for thirty years until the levy of special assessments for municipal local improvements was declared not unconstitutional because of the deprivation of the property owners taxed under the due process clause. This was in the case of *Arnold vs. Knoxville.*[19]

The benefit doctrine of taxation has been applied in statutes and judicial decisions to the effect that the financing of local improvements may be accomplished by a special assessment against such property as is benefited and to the extent of the benefit to the property. In theory the benefit to the property is equivalent to the amount of the assessment. No definite rule has been established as to what constitutes benefit. Apparently, the property assessed may be some distance from the improvement, the benefit to the property consisting of additional traffic facilities for the taxpayer.[20] Another rule is that the benefit is measured by the enhancement in the value of the property as a result of the improvement.[21] The court said in the case of *Elmwood vs. Rochester,* "The excess of the value with the improvement over the value without it, is the amount of the benefit. And in estimating the value of each lot regard must be had to the buildings and other improvements upon it." In a Massachusetts case it was said that the benefit "must be understood to be a pecuniary benefit resulting from the increased market value of its land and which cannot be predicated of land which has and can have no market value.[22] The right to use the improvement increases the market value of the property assessed." In a later decision, a Massachusetts court asserted that the rules

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17 25 R. C. L. 86.

18 McBean v. Chandler, 24 American Reports 308.

19 115 Tenn. 195, 90 S. W. 469. See also Reasonover et al. v. City of Memphis, 39 S. W. (2d) 1029.

20 Chicago v. Farwell, 284 Ill. 491; 120 N. E. 520. But see also in re. Taylor Avenue Improvement, 370 Pacific 827.

21 Elwood v. Rochester, 43 Hun. 102.

22 Mt. Auburn Cemetery v. City of Cambridge, 150 Mass. 12, 22 N. E. 66.

for ascertaining the amount of benefit are the same as those by which land values are dtermined in any other connection, and stated further:—"the inquiry is, how much has the particular improvement added to the fair market value of the property as between a willing seller and a willing buyer with reference to all the uses to which it is reasonably adapted and for which it is plainly available, prospective as well as present, by strangers as well as by the owner."[23]

This method of ascertaining the amount of benefit suggests the question whether or not the cost of the local improvement needs to be proportional to, and in no case exceeding, the amount of the benefit. Conceivably, a paved street or a sewer may not enhance the value of the property at all in the eyes of the prospective buyer. There seems to be evidence in certain cities that a special assessment against certain properties may actually decrease the value of the property.

Some statutes proportion the cost of improvement against abutting properties on the basis of some arbitrary rule, such as the front foot rule. Suppose such a method of allocating the cost of the improvement results in levies in excess of the benefit, is it unconstitutional under the due process clauses? The cases are filled with statements to the effect that a special assessment can only be made to the extent of the value of the special benefit. In the case of *Norwood vs. Baker* the United States Supreme Court said, "the exactions from the owner of private property of the cost of a public improvement in substantial excess—the special benefits accruing to him, is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."[24]

Apparently, however, a legislative body has the power to determine what district will be specially benefited by an improvement and then assess the cost of that improvement against the property in the district on the basis of some arbitrary rule such as the frontage rule, and such an assessment is not violative of the 14th Amendment to the United States Constitution, even though the levy does exceed the special benefits accrued. Such a levy probably is only unconstitutional if the excess above the amount of the special benefit amounts to confiscation. Such a view casts some suspicion on the validity of the doctrine of

23 Driscoll v. Inhabitants of Northbridge; 210 Mass. 151, 96 N. E. 59.
24 172 U. S. 269; Savannah v. Knight, 157 S. E. 309, 73 A. L. R. 1289.

taxation according to special benefit even in the case of local improvements.[25] If a legislature can improve a particular district and assess the cost against the property in the district, disregarding special benefits, the validity of the doctrine is considerably imperilled.

SUMMARY

Legislatures and courts in matters touching taxation base their decisions on certain assumptions. One assumption frequently made, in the establishment of equality and justice in taxation, is that people are taxed because of benefits accruing to them from government. Such benefits may be general or special. The benefit doctrine of taxation has been used to justify certain conclusions in inheritance tax, income tax, and personal property tax cases, but it has been the most used in the levying of special assessments. Benefits accruing to property have been said to be the basis for special assessment, but some doubt is cast on this application of the doctrine because of the legality of assessments of all costs of local improvements in certain districts determined by a legislative body.

25 French v. Baker Asphalt Paving Co., 181 U. S. 324; Swayne v. City of Hattiesburg, 147 Miss. 244, 111 So. 818; Collins vs. Phoenix, 54 Fed. 2nd S. 770.

A UNIFIED AND SELF-GOVERNING BAR

By EDSON R. SUNDERLAND[1]

The administration of justice involves two equally important elements, namely, the machinery and methods by which judicial proceedings are carried on, and the personnel which directs and controls the process.

The first of these elements has received by far the greater measure of attention from both the public and the profession. The intricacy and technicality of common law pleading was the primary cause of the great revolt, which produced the reformed American system known as code pleading. Even in those states where the so-called "Code" has not been adopted, legislation has in most instances abolished the worst abuses of the old system, and has provided methods better suited to the needs and the temper of our time. Similar problems have been encountered throughout the entire fields of trial and appellate practice, and an immense amount of effort has been devoted to the development of new devices and to the improvement of old ones for the purpose of increasing the efficiency of judicial procedure.

The results, nevertheless, are still unsatisfactory, and there has been a widespread movement to substitute procedure by rule of court for the more rigid plan of legislative regulation, in the belief that expert control of procedural processes would facilitate the employment of better methods.

But the problems of procedure present only one side of the picture. While, of course, efforts to provide more effective ways of conducting the business of the courts ought not to be relaxed, the vital question of maintaining an able and reliable personnel in control of the processes of litigation imperatively demands attention. The best machinery is useless without competent and responsible operators. If the public is to enjoy satisfactory service from the legal profession, the ability and character of its membership must be kept at a high level.

There are two ways of dealing with the problem of personnel in any social group, namely, by internal and by external supervision and control. If the first is to be employed the members

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of the group must be closely associated, strongly organized, and all must be held collectively responsible for the professional conduct of each. In dealing with individual violations of standards of behavior, the self interest of the group will furnish a strong inducement to maintain effective discipline within the organization. Only in that way can it hope to enjoy satisfactory relations with the public whose good will is necessary to its own success.

On the other hand, if the group is to be regulated and controlled from without, a strong organization within the group is undesirable. The public, acting through various governmental agencies, is less likely to meet successful resistence to its demands if it deals with individuals rather than with an organized association.

The latter method has been almost exclusively employed in this country in dealing with the legal profession as a social group. Organization among lawyers has been feared rather than encouraged. The profession has never been given disciplinary power over its own members. On the contrary, professional misconduct has been considered a wrong which the state itself, acting through the regular courts, should prosecute by direct proceedings against the offending individual. The bar as a group has had substantially nothing to do with the matter.

This method of controlling the conduct of lawyers has never proved satisfactory. Its fundamental weakness is its essentially criminal character.

It is quite true that the courts have repeatedly held that a proceeding to suspend, disbar or reprimand an attorney for misconduct is civil, not criminal, in its nature, since its purpose is to purify the bar, not to punish the respondent.[2] But this is a technical, not a realistic, view of the matter. The fact is that the public looks upon disciplinary proceedings against lawyers as substantially equivalent to accusations of crime, and their consequences are frequently no less serious. In this the public is right, for, as pointed out by the Supreme Court of Kansas:

> "The proceeding to disbar is often entitled in the name of the state, or the people, or the commonwealth. . . . Such a prosecution is for the public. It is always for misconduct on the part of the attorney. It is not for money or other property, and not

2 2 Thornton on Attorneys at Law, Sec. 867.

> to recover for any pecuniary loss sustained by the public, and it always involves disgrace to the defendant. . . . It takes away his business and his means of gaining a livelihood. And it does this, not for the purpose of giving the same to some other persons, or to the state, but simply to deprive the defendant of the same. The whole thing is in the nature of a criminal forfeiture. . . .''[3]

As a proceeding essentially criminal, it is too drastic to be effective. The mere public accusation alone may be sufficient to destroy a lawyer's professional career, irrespective of the outcome. This is so well understood that such proceedings are brought only as a last resort and in extreme cases.

Furthermore, when discipline is attempted, the publicity involved results in serious damage to the bar as a whole, for the public is likely to assume that the misconduct so widely advertised is typical of the profession.

It follows that the disciplinary methods by which we seek to create and maintain high standards of conduct at the bar are of little use in those cases where guidance, advice and warning are needed as deterrents against the formation of loose habits. Our system of discipline is completely lacking in flexibility, and cannot be adjusted to the infinitely varying degrees and conditions of dereliction, actual or potential, which arise out of the complexities of professional life.

Efforts are frequently made by the bar associations of our larger cities to provide unofficial tribunals, usually known as grievance committees, for the investigation of complaints against lawyers, without the undesirable feature of publicity. But their usefulness is seriously restricted by two conditions, namely, their lack of power to compel the attendance and testimony of witnesses and their want of authority to make or enforce disciplinary orders. Their influence upon the younger members of the bar is often valuable, but as general agencies for preserving high standards of professional conduct they leave much to be desired.

Conceding that the method of external control of professional conduct has largely failed of its purpose, is there any reason to expect greater success from a system of internal control exercised by the profession itself upon its own members?

England furnishes us with an excellent example of complete self-discipline on the part of the bar.

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[3] Peyton's Appeal (1874), 12 Kan. 398, 405.

The four Inns of Court, namely, Lincoln's Inn, the Inner Temple, the Middle Temple and Gray's Inn, have entire control of the bar of England. They are voluntary unincorporated societies, of very ancient origin, all of equal rank, all independent of the state, all outside the jurisdiction of the courts, and all subject only to the visitorial jurisdiction of the judges.

The Inns of Court were organized largely for the purpose of giving instruction to their members in the common law, and when they were deemed properly qualified the members were called to the bar by the particular Inn to which they were attached. This has been recognized as a necessary qualification for practicing before the bar of any of the superior courts of England, and the governing body of the Inn was the sole authority by which the position of advocate in the courts could be conferred or taken away. The benchers, as governors of the Inn, can refuse to admit a person as a student or to call a student to the bar, and they can expel any member or disbar a barrister already admitted. In so doing they are entirely outside the jurisdiction of the courts. Disbarment is a punishment inflicted by the benchers on a barrister who is guilty of any conduct unbecoming his profession, and there is no judicial review of their action by the English courts, although there is a right to appeal to the judges in their capacity as visitors of the Inns. There is no instance in modern times of any attempt by the courts to exercise the power of disbarment, though they have often inflicted punishment, by fine or imprisonment, for contempt of court committed in either the private or professional capacity of the barrister.[4]

This system of internal regulation and control of the profession has proved eminently satisfactory. The bar of England maintains the highest ethical standards and enjoys the complete confidence of the English public. The mere power on the part of the Inns to disbar their members for unprofessional conduct seems to render its exercise unnecessary, for there is no evidence that disciplinary action is of frequent occurrence in any of the Inns. In comparison with the multitude of disbarment cases which fill American law reports, and which have developed so large a body of law that almost 200 pages are required for their discussion in Thornton on Attorneys,[5] professional discipline in England appears to raise no problems for public concern. If

4 See 2 Halsburg's Laws of England, 358-366.
5 Vol. 2, pp. 1165-1339.

a system of control is to be judged by its results, the self government of the English bar must be considered entirely successful.

The same general plan of professional responsibility, power and control is employed in Canada. The Law Society of Upper Canada is a body corporate, of which every member of the Ontario bar is necessarily a member. The Society is governed by 30 benchers chosen by the members each year, who have power not only to make rules regarding legal education and admission to the bar but have the power to suspend and disbar. The statute provides:

> "When a barrister, solicitor or student-at-law is found by the benchers, after due inquiry by a committee of their number or otherwise, guilty of professional misconduct, or of conduct unbecoming a barrister, or solicitor or student-at-law, the benchers may disbar any such barrister, or suspend him from practicing as a barrister for such time as they may deem proper; may resolve that any such solicitor is unworthy to practice as a solicitor or that he should be suspended from practicing for a period to be named in the resolution; may expel from the Society, and the membership thereof, such student and strike his name from the books of the Society; or may refuse either absolutely or for a limited period to admit such student to the usual examinations, or to grant him the certificate of fitness necessary for him to be admitted to practice."[6]

After a barrister has been disbarred or suspended, and after a solicitor has been found unworthy to practice or has been suspended from practicing, a copy of the order of the benchers must be communicated to the senior registrar of the Supreme Court, and any such order may be set aside or varied at any time by the court.[7]

In France the bar, which includes every practicing advocate, is entirely under the regulation and control of its own members.

In every locality where there are six or more lawyers there is an organized bar, having a governing council elected by the members.[8] The membership of the council varies from five to fifteen, depending on the size of the bar, that in Paris, however, consisting of twenty-four.[9] Council members are elected by the direct votes of the registered lawyers belonging to the bar, but only those lawyers are eligible who have been registered for a certain number of years.[10]

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6 Rev. Stat. Ontario (1927), Ch. 192, Sec. 45.
7 Id., Secs. 46, 47, 48.
8 Appleton, Traite de la Profession d'Avocat, p. 123.
9 Id., p. 149.
10 Id., p. 150.

All disciplinary power over members of the bar ordinarily rests in the council,[11] but if it is for special reasons unable to function matters of discipline go to the court of appeal.[12]

The council may impose penalties consisting of warning, reprimand, suspension or disbarment.[13] Where the warning or reprimand carries with it loss of eligibility for membership in the council, and in every case of suspension or disbarment, an appeal lies to the court of appeal.[14]

The details of French disciplinary procedure differ among the various bars. Generally the president, when presented with a complaint, names an examiner to make a preliminary investigation. Quite commonly this part of the proceeding is kept secret even from the lawyer against whom it is directed, and he is informed of it only when the council decides to pursue the matter. If the case continues, the examiner hears what the accused has to say after he has been informed of the facts presented against him. The examiner may call witnesses, seek information from magistrates, and require the production of records. Every protection provided by the criminal law must be accorded to the accused. He must be confronted by the witnesses and informed of the evidence against him.[15]

Eight days after the examiner has made a report to the council, the accused appears before that body, and is accorded the assistance of one of his brethren. The session of the council is secret. Its decision is rendered by majority vote, and is entered on a special register. The accused is then notified of the result by the president of the bar.[16]

In case of an appeal the hearing takes place in chambers and is not public.[17]

That the standards of conduct of French lawyers are of the highest and most exacting character is universally recognized, and even slight infractions bring the prompt and vigorous censure of the bar.[18] Self-government, if not the only cause of the enviable position of the bars of France, has at least made

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11 Id., p. 441.
12 Id., p. 447.
13 Id., p. 464.
14 Id., p. 473.
15 Id., pp. 470, 471.
16 Id., pp. 472, 473.
17 Id., p. 483.
18 The French Bar, by Paul Fuller, 23 Yale Law Jour. 113 (Dec. 1913); The French Advocate, by John M. Zane, 14 Ill. Law Rev. 562 (March, 1920).

possible the development of the best professional traditions and practice.

In view of the unsatisfactory results obtained from our system of external control of the bar, which contrasts so strikingly with the highly effective systems of professional self-government found in other countries, it is not surprising that a strong movement has arisen in the United States for the establishment of a responsible self-governing bar to which every lawyer must belong.

Already an imposing array of favorable data has been obtained as a result of American experience with this method of professional control.

The first state to create an inclusive organized bar with power of discipline over its members was Idaho, in 1923; but two years of litigation and legislative amendment because of constitutional objections, postponed its effective operation until 1925. Alabama created a self-governing bar in 1923, New Mexico in 1925, California in 1927, Nevada in 1928, Oklahoma in 1929, Utah and South Dakota in 1931, and Washington and Arizona in 1933.

All of these states follow the same general plan regarding discipline of members. Power to disbar, suspend or reprimand is lodged in the bar itself, and all lawyers engaged in the practice of law are necessarily members of the organization and subject to its jurisdiction. Public accusation proceedings in the courts against lawyers charged with professional misconduct are entirely supplanted by the more flexible, direct and effective methods employed within the organization itself.

In size, activity and successful accomplishments, the California State Bar is the outstanding institution of its kind in this country, and a description of its organization and procedure may be taken as typical.[19]

The Board of Governors of the California State Bar is given power to disbar members, to discipline them by reproval, public or private, or by suspension from practice, and to pass upon petitions for reinstatement. The Board has power to create local administrative committees and to delegate to them such powers and duties as it may deem desirable, and to divide such

19 The California State Bar Act is Chap. 34, p. 38, of the Statutes of 1927, amended by Chap. 708, p. 1256, and Chap. 884, p. 1965, of the Statutes of 1929.

All the state bar acts then in force were collected and published as a booklet entitled State Bar Acts, Annotated, by the Conference of Bar Association Delegates, Feb. 2, 1931.

committees into units or sections with concurrent powers to handle the work more expeditiously. The local committees have power to receive and investigate complaints as to the conduct of members, to compel the attendance of witnesses and the production of books and documents, and to make findings and recommendations to the Board of Governors. The Board may, by rules, provide the mode of procedure in all cases of complaints against members, and the Supreme Court has the power of review over the decisions of the Board of Governors. The person complained against has the right to reasonable notice, to be represented by counsel, and is entitled to compel the attendance of witnesses and examine and cross-examine them.

When objection was made that members of the bar were subjected to an investigation by an informal and unsworn complaint, the Supreme Court, in sustaining the practice, said:

> "What innocent man would not prefer this method of handling a complaint to a public proceeding against him resting alone on the affidavit of a partisan, if not a prejudiced, client?"[20]

The effectiveness of this method of preventing improper practices by members of the bar has been amazing. During the first three and one-half years of the State Bar's activity, 2,943 complaints were filed, and 2,425 of them were dismissed after an investigation without the necessity of a formal hearing. Every one of these complaints represented a grievance by some client which was probably shared by his family and friends, and the records show that as a result of the informal investigation the great majority of the complainants were satisfied that the grievance was not justified. The value to the bar of such a method of removing grounds of dissatisfaction and hostility on the part of the public, is immeasurable.

The remainder of the complaints, 518 in number, went on to formal hearings before the Board of Governors, and of these 143 resulted in disciplinary action. There were 64 cases in which reprimands were administered, 43 in which suspensions were recommended, and 36 cases of disbarment. These 79 disbarments and suspensions in three and a half years were three times as many as took place during the entire 77 years of state history prior to the creation of the State Bar.[21]

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20 Herron v. State Bar of California (1931), 212 Cal. 196, 298 Pac. 474.

21 These figures, furnished by the secretary of the California Bar, are published in 11 Mich. State Bar Jour. 47 (Sept., 1931).

All investigations are conducted in private, the file is not open to public inspection, the formal hearing is also in private, and there is no public notice of the proceedings unless and until the Board of Governors recommends disbarment, suspension or a public reprimand.

Although foreign systems of bar organization were not followed as models, it is surprising how closely the American plan corresponds in essential features with the English and Canadian systems and particularly with the French.

This plan of organizing the entire practicing profession into a body politic and corporate with regulatory and disciplinary powers over the conduct of its members, has been subjected to every possible attack on constitutional grounds. The California act was held not to be unconstitutional as a local or special law,[22] nor as creating a corporation by special act,[23] nor as an intrusion by the legislature upon the judicial department.[24] It was declared to be a regulatory measure under the police power.[25] In Nevada the act was upheld against the contentions that it created a corporation by special act, that it was an unreasonable exercise of the police power, that it did not provide for due process of law and that it made for an improper distribution of governmental powers.[26]

The advantages of internal discipline over public prosecutions in the courts as a means for securing proper professional conduct and of ridding the bar of undesirable members, has strongly appealed to the lay public where general interest has been aroused in behalf of legislation creating bar autonomy.

During the 1933 session of the Missouri legislature a bill for the incorporation of a self-governing Missouri bar has been introduced, and it has been warmly supported by the St. Louis Post-Dispatch. In the course of a series of editorials urging the need for this reform, the paper said:

> "The legislature shows an indisposition to pass the bill. . . . We feel that this is because the legislators, particularly those out in the state, do not understand the perilous plight of society in the big cities. . . . It is in the city that rats in the law, like all other rats, are most numerous and fattest.

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22 State Bar v. Superior Court (1929), 207 Cal. 323, 278 Pac. 432.
23 Id.
24 Id.
25 Carpenter v. State Bar (1931), 81 Cal. Dec. 143.
26 In re Scott (1930), 53 Nev. 24, 292 Pac. 291.

"Let us consider the difference between disbarment proceedings as they are now practiced and as they would be under the proposed State bar act. . . .

"Under the present procedure someone would first need to volunteer the information to the Grievance Committee of the St. Louis Bar Association. Reference to the membership records would probably show that the offending lawyer is not a member of the Bar Association. . . . If the lawyer is not a member . . . he cannot be reproved or suspended. All the Grievance Committee can do is to hold a hearing.

"The date of the hearing arrives, but since the committee has no power to compel witnesses to attend, the lawyer . . . does not appear. It is a play without Hamlet. Or perhaps the offending lawyer attends but refuses to testify or produce papers. . . . Thus the agency of the Bar Association . . . is frequently defeated at the outset.

"But, we will say, the Grievance Committee decides to go ahead. Suit for disbarment is then filed. . . . The court then appoints a commissioner and makes an order on the Bar Association for funds to cover the taking of testimony and incidental expenses. In contested proceedings the costs are sure to reach $1000.

"If there were no other drawback to the present procedure, this item of expense would still constitute an almost prohibitory handicap. . . . One or two attempts at disbarment would constitute a yearly limit.

"All this would be changed by the proposed State bar act. . . . Every licensed attorney would automatically become a member of the organization whose authorized machinery calls for a board of governors, with power to formulate and enforce rules of professional conduct for all the lawyers of the state. Every lawyer therefore would become a part of a state-wide movement to purify his profession. . . .

"Under the proposed bar act it would be made the duty of local administrative committees . . . to watch for violations of the rules of conduct, . . . to receive and investigate complaints as to the conduct of members, to make findings and to report recommendations to the State Bar's Board of Governors. . . .

"What the proposed state bar act would do, then, in regard to the purification of this great profession would be to establish an orderly channel for accomplishing the work now performed only with great difficulty. The bar and the people both stand to benefit—the people through the elevation of legal standards, the bar through the higher popular esteem which would naturally result. There is no conjecture about it. It has been tried in several of the states and it works."[27]

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27 St. Louis Post-Dispatch, Thurs., Feb. 23, 1933, p. 23, under the title, Some Facts for the Legislature.

The legal profession in the United States has been put in the absolutely unsound position of having to carry responsibility for the misconduct of its undesirable members without having any power either to control their actions or to get rid of them. The responsibility cannot be avoided, for lawyers constitute so definite, distinctive and important a class, and exercise privileges so clearly monopolistic in their character, that the public has always assigned them a degree of unity far beyond what they actually possessed, and has looked upon the bad conduct of one as more or less typical of the attitude of all. Since this seems to be inevitable, the only reasonable and fair course is for the people to give the profession the power to carry that responsibility and then insist upon a high ethical standard of professional performance. All political experience indicates that it is futile to expect services of a public nature to be satisfactorily performed otherwise than by vesting adequate power in those chargeable with the character of the results. The movement for an integrated self-governing bar is in accord with that experience.

FEDERAL REGULATION OF HOURS OF LABOR IN INDUSTRY

By CLARENCE A. MILLER

The attention of students of constitutional law has been arrested by the proposals in the Seventy-Second Congress for the Federal regulation of hours of labor in industry.[1] The last-minute legislative jam prevented action on these proposals.[2] Similar legislation has been introduced in the present Congress,[3] and will, doubtless, be enacted into law. The purpose of this legislation is to bring about a thirty-hour work week in industry, in order that millions of industrial workers may be provided with opportunities for employment.[4] The high purpose of this legislation is appealing to all.[5] Its enactment, however, has been opposed on constitutional grounds.[6] The regulation of the hours of labor in industry is sought to be brought about by excluding from interstate and foreign commerce commodities mined, manufactured or produced by persons employed more than five days per week or six hours per day.[7] The sponsors of the

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1 The Black Bill, S. 5267, 72d Cong., 2d Sess.; The Connery Bill, H. R. 14518, 72d Cong., 2d Sess.

2 H. R. 14518 was reported to the House on February 10, 1933. See Cong. Rec., February 17, 1933 (Vol. 76, No. 60), pp. 4417-4426, for statement of Senator Black with reference to S. 5267.

3 S. 158, 73rd Cong., 1st Sess., was favorably reported to the Senate on March 30, 1933. See Senate Rep. No. 14. This bill was passed by the Senate on April 6, 1933, and a motion to reconsider was defeated on April 17, 1933.

H. R. 4557, 73rd Cong., 1st Sess., was favorably reported to the House on April 4, 1933. See House Rep. No. 24. No action has been taken on this bill.

4 See House Rep. No. 1999, on H. R. 14158, 72d Cong., 2d Sess., (1933); Senate Rep. No. 14, on S. 158, 73rd Cong., 1st Sess. (1933); House Rep. No. 24, on H. R. 4557, 73d Cong., 1st Sess. (1933).

"In a word, the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions and from the action of economic forces and their consequences, give it immunity from the pitilessness of life."—McKenna, J., dissenting, in Arizona Copper Co. v. Hammer, 250 U. S. 400, 438, 39 Sup. Ct. 553, 63 L. ed. 1058 (1919).

5 "The ethical right of every worker, man or woman, to a living wage, may be conceded."—Sutherland, J., in Adkins v. Children's Hospital, 261 U. S. 525, 558, 43 Sup. Ct. 394, 67 L. ed. 785, 24 A. L. R. 1238 (1923). Employment is a condition precedent to a living wage.

6 See House Report 1999, note 4 *supra*, p. 2; Hearings on S. 5267, before a subcommittee of the Committee on the Judiciary of the Senate, pp. 189-216, 253-257, 311-322 (1933); Hearings on H. R. 14105 (predecessor of H. R. 14518) before the Committee on Labor, H. of R., pp. 43-52, 87-103, 127-151 (1933).

7 These bills provide: "That no article or commodity shall be shipped, transported, or delivered in interestate or foreign commerce which was produced or manufactured in any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment situated in the United States or in any foreign country in which any

legislation predicate it upon the "commerce clause" of the Constitution.[8] Those opposing it, upon constitutional grounds, assert that it invades the police power of the States,[9] specifically reserved to them by the Tenth Amendment, and that mining, manufacturing and production of commodities are not interstate commerce, and, therefore, beyond the power of Congress to regulate.[10]

With the exception of the so-called Child Labor Law,[11] which was held unconstitutional, [12] it is concededly a new departure for Congress to attempt to regulate the conditions under which commodities may be mined, manufactured or produced, as a condition precedent to their transportation in interstate commerce. So far, such regulation has been directed either to the instrumentalities[13] or actual subjects[14] of interstate commerce. The power of Congress to exclude articles from foreign commerce is absolute, and is not confined, as in the case of interstate commerce, to articles of an objectionable character.[15] Under its power to regulate foreign commerce, Congress has prohibited the importation of tea below standard.[16] It has also prohibited the importation of opium.[17] This power has been

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person was employed or permitted to work in the production of such article or commodity more than five days in any week or more than six hours in any day."

8 See Reports referred to in note 4 *supra.*

9 See hearings referred to in note 6 *supra.*

" * * * if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."—Day, J., in Hammer v. Dagenhart, note 12 *infra,* at page 276.

10 See hearings referred to in note 6 *supra.*

11 39 Stat. L. 675 (1916).

12 Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724 (1918).

13 The Interstate Commerce Act, as amended, (24 Stat. L. 379, c. 104, 49 U. S. C., 1-27) has been sustained in numerous cases, as a valid regulation of instrumentalities of interstate commerce. See Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024 (1917), sustaining the Adamson Law, 39 Stat. L. 721 (1916), 45 U. S. C., 65, 66, as a reasonable regulation of the hours of labor and wages of employees of railroads.

14 Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364 (1911); McDermott v. Wisconsin, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39 (1913); Seven Cases v. United States, 239 U. S. 510, 36 Sup. Ct. 190, 60 L. ed. 411 (1916).

15 The Abby Dodge, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. ed. 390 (1912); U. S. v. Brig William, 2 Hall, L. J. 255, Fed. Cas. No. 16,700 (1808); U. S. v. Marigold, 9 How. 560, 13 L. ed. 257 (1850).

16 Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 525 (1904).

17 Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. ed. 544 (1915); Yee Hem v. United States, 268 U. S. 178, 45 Sup. Ct. 470, 69 L. ed. 904 (1925).

held valid for the exclusion of aliens,[18] as well as to impose a duty tax on each alien passenger brought into the United States from a foreign country.[19]

Concededly, Congress has the power to regulate the instrumentalities of commerce, such as the railroads,[20] but there are limits to that power so far as fixing the hours of labor or wages may be concerned.[21]

In all those cases in which Congress has been sustained in the interdiction of the carriage from one State to another of certain commodities,[22] the basis of the regulation has been some inherent quality in the character of the thing regulated.[23] The

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18 Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. ed. 1013 (1909).

19 Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. ed. 798 (1884).

20 See note 13 *supra*. See S. 1181 and H. R. 4597, 73rd Cong., 1st Sess., establishing a six-hour day for employees of carriers engaged in interstate commerce. No action has yet been taken on these bills.

21 "It is not too much to say that the ruling in Wilson v. New went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster." Taft, C. J., in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 544, 43 Sup. Ct. 630, 67 L. ed. 1103, 27 A. L. R. 1280 (1923).

22 Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. ed. 108 (1902) sustained the exclusion from interstate commerce of diseased stock. The Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. ed. 492 (1903) sustained the power of Congress to punish the transmission of lottery tickets from one State to another. Its power to punish the transportation in interstate commerce of adulterated articles has been sustained. Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364 (1911). Upon the same theory it has been sustained in its punishment of the transportation of women from one State to another for immoral purposes, commercial or otherwise. Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905 (1913); Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168 (1917). Likewise, it has forbidden the introduction of intoxicating liquors into any State in which their use was prohibited. Clark Distilling Co. v. Western Md. R. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845 (1917). It has prohibited the transportation in interstate commerce of prize fight films. Weber v. Freed, 239 U. S. 325, 36 Sup. Ct. 131, 60 L. ed. 308, Ann. Cas. 1916C, 317 (1916). It has punished the transportation in interstate commerce of stolen automobiles by those with knowledge of the theft. Brooks v. United States, 267 U. S. 432, 45 Sup. Ct. 345, 69 L. ed. 699, 37 A. L. R. 1407 (1925). Similarly, it has punished the interstate transportation of any kidnaped person. Act of June 22, 1932, U. S. Stat. 72d Cong., 1st Sess., p. 326 (1932). The constitutionality of this statute has not yet been presented to the courts for adjudication.

These cases may all be distinguished from Hammer v. Dagenhart, note 12, *supra*, on the ground that articles made by child labor "could be properly transported without injuring any person who either bought or used them."—Taft, C. J., in Brooks v. United States, 267 U. S. 432, 438, 45 Sup. Ct. 345, 69 L. ed. 699, 37 A. L. R. 1407 (1924).

23 "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." Taft, C. J., in Brooks v. United States, 267 U. S. 432, 436, 45 Sup. Ct. 345, 69 L. ed. 699, 37 A. L. R.

Supreme Court has made it plain, however, that such regulation of the vast body of commodities can not be sustained.[24]

The authority of Congress to prohibit the transportation of commodities because of some previous condition of manufacture, and not because of any inherent quality of the goods themselves, has been expressly denied.[25] Where the same result has been sought in the name of a tax it has likewise been denied.[26] The power of regulation has been held to be wholly with the States.[27] Even the power of the States is limited.[28]

1407 (1925). Where, as in Hammer v. Dagenhart, note 12 *supra*, Congress has attempted to exercise a police power over a subject not committed to it, it has not been sustained. "The distinction to be observed is between the exercise of the power of Congress over a subject committed to it and its attempt to establish a regulation over a subject not committed to it."—Hughes, The Supreme Court of the United States, pp. 155-156 (1928).

24 "It is shown by the settled doctrine sustaining the right by regulation to absolutely prohibit lottery tickets and by the obvious consideration that such right to prohibit could not be applied to pig iron, steel rails or most of the vast body of commodities."—Wilson v. New, note 13 *supra*, at page 347.

25 Hammer v. Dagenhart, note 12 *supra*.

26 Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 499, 66 L. ed. 817, 21 A. L. R. 1437 (1922). See, Powell, Child Labor, Congress and the Constitution, 1 North Car. L. Rev. 61 (1922). Also, Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822 (1922) holding invalid the Future Trading Act, 42 Stat. L. 187 (1921) which imposed a heavy penalty, in the name of a tax, on sales of grain for future delivery. Cf., Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470, 67 L. ed. 839 (1923) holding the Grain Futures Act, 1922, 42 Stat. L. 998, 7 U. S. C., 1-17, valid as a regulation of interstate commerce.

27 "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States—a purely State authority."—Day, J., Hammer v. Dagenhart, note 12 *supra*, at page 276.

The power of the States to control child labor, either by prohibiting employment, limiting the hours of labor, or regulating the minimum wage, has uniformly been upheld. See cases collected in annotation in 12 A. L. R. 1216 (1921).

Minimum wage laws have been sustained in a number of States, as being within the police power. See cases collected in annotation in 24 A. L. R. 1259 (1924). These statutes, however, have been confined to the establishment of a minimum wage for women or minors. Where the statute has provided for the fixing of wages of all employees (including men) in certain specified industries, it has been stricken down. Wolff Packing Co. v. Court of Industrial Relations, note 16 *supra*. Cf., Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435, 61 L. ed. 830, Ann. Cas. 1918A, 1043 (1918).

28 "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State."—Peckham, J., in Lochner v. New York, 198 U. S. 45, 56, 25 Sup. Ct. 539, 49 L. ed. 937 (1905). The power of the States to regulate the hours of labor in industry, other than of women and minors, is limited to businesses "affected with a public interest." "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."—Taft, C. J., in Wolff Packing Co. v. Court of Industrial Relations, note 16 *supra*, at pages 536, 537. See Brown, Police Power—Legislation for Health and Safety, 42 Harv. L. Rev. 866, 867-868 (1929).

The authority of Congress over interstate commerce can not be extended to the mining, manufacturing or production of commodities simply because they are later to be used or transported in interstate commerce.[29] Even if within its legislative domain, Congress may not, by its mere fiat, make these businesses "so affected with a public interest" as to enable it to control the hours of labor of the employees engaged therein.[30] The decisions of the Supreme Court make it clear that Congress has no power to control, either directly[31] or indirectly,[32] the

29 "Commerce succeeds to manufacture, and is not a part of it. * * * The fact that an article is manufactured for export to another State does not of itself make it an article of inter-state commerce. * * * If the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for State control."—Fuller, C. J., in United States v. E. C. Knight Co., 156 U. S. 1, 12, 15 Sup. Ct. 249, 39 L. ed. 325 (1895).

"If the possibility, or, indeed, certainty of exportation of a product or articles from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from State jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other States, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to States other than those of their production." McKenna, J., in Heisler v. Thomas Colliery Co., 260 U. S. 245, 259, 43 Sup. Ct. 83, 67 L. ed. 237 (1922).

"Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation. * * * Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."—Van Devanter, J., in Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 178, 43 Sup Ct. 526, 67 L. ed. 929 (1923).

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacturers and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. * * * If it be held that the term 'commerce' includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?"—Lamar, J., in Kidd v. Pearson, 128 U. S. 1, 20-21, 9 Sup. Ct. 6, 32 L. ed. 346 (1888).

See Utah Power and Light Co. v. Pfost, 286 U. S. 165, 52 Sup. Ct. 548, 76 L. ed. 1038 (1932) for a case indicating that the Supreme Court is still of the opinions above expressed.

30 Wolff Packing Co. v. Court of Industrial Relations, note 21 *supra*, and cases therein cited.

31 See cases cited in notes 27, 28 and 29 *supra*.

32 See notes 12 and 26 *supra*.

mining, manufacturing or production of commodities within a State.

The proponents of the legislation believe that the reasons advanced for its enactment will so appeal to the present members of the Supreme Court that it will overrule *Hammer v. Dagenhart*[33] and the other precedents,[34] sustaining the validity of the law.[35] It does not seem likely, however, that the majority

33 See note 12 *supra*.

34 See note 29 *supra*.

35 "We are not hesitant to leave the question of constitutionality to the members of the Supreme Court, believing that the reasons advanced for the enactment of this legislation will appeal to the members of that body and further believing that the constitutional power given to the Congress to regulate interstate commerce permits the enactment of this legislation within the powers of the Congress."—House Rep. No. 1999, note 4 *supra*, p. 2; House Rep. No. 24, on H. R. 4557, 73rd Cong., 1st Sess., p. 2.

"There are those who express the opinion that, because of the decision of the United States Supreme Court in the child labor case such a law as you propose would be declared unconstitutional. I am unable to express an opinion on that, because I am not an attorney; but it is reasonable to conclude that there has been some change in the judicial attitude of the Supreme Court toward social and economic problems since the child labor case was decided; and the committee will probably remember that that decision was a 5-4 decision, and, owing to certain developments which had taken place, labor at least is of the opinion that if the same issue were presented to the court as the court is now constituted the court would take a far more liberal progressive, and broader view of the question than it did when that decision was rendered. So that is one reason we hope and believe that if the legislation is favorably acted upon, as proposed in this bill, we have reasonable grounds for hope that the court would sustain it."—From statement of Hon. William Green, President of the American Federation of Labor, Hearings on H. R. 14105, note 6 *supra*, p. 3.

"I think the committee will agree with you that the majority decision of the Supreme Court covers a case that is in line with this bill. In other words, the language of the bill is similar to the bill declared unconstitutional, but nevertheless I personally feel that times have changed and the court would change its previous decision, because we are facing a real crisis in the United States today."—Statement by Chairman, Committee on Labor, H. of R., Hearings on H. R. 14105, note 6 *supra*, p. 51.

"This measure, unlike the child labor bill, does not merely affect a small percentage of American workmen, in order to prevent working practices within their State, thought by Congress to be detrimental to those individual children working within the States. This bill has a broader base and a broader object. It is directed toward interstate commerce in its larger aspect. It affects not a small number of children, but millions of those engaged in interstate commerce. Interstate and foreign commerce have today reached such national proportions that the national economic soundness and prosperity depends upon its life and vitality. In our trading country if interstate and foreign commerce languish, the Nation languishes, and there must necessarily result national problems of want, destitution, misery, illness, and undernourishment.

"This bill, therefore, it is believed comes within the constitutional interpretation both of the majority and the minority of the Supreme Court in the child labor case."

Attention is called to the fact, however, that the child labor case was decided by a divided court of 5 to 4. Conditions today are different to conditions that existed when that case was decided. Laws must be interpreted to meet conditions that existed when that case was decided. Laws must be interpreted to meet conditions existing when the law is interpreted.

Our Constitution has been interpreted from time to time to meet new situations and conditions that could not have been foreseen by the writers of that great document. Its interpretation has made it possible to adjust laws written under its terms

of the Court as now constituted will overrule a long line of decisions in order to uphold the constitutionality of legislation that clearly invades the rights of the States.[36] The *Utah Power & Light Company Case*[37] reaffirms the principles announced in a long line of decisions heretofore referred to.[38] The views of the majority of the Court were not swayed by the able dissenting opinion of Mr. Justice Brandeis in the *Oklahoma Ice Case,*[39] where he discusses at length present economic conditions.[40] There are no cases of record in which the Court has been persuaded to permit changed economic conditions to override constitutional limitations, even though the Court has overruled its earlier decisions in thirty-five cases, and qualified and limited them many times.[41] Many of these earlier decisions were tax cases, and considered by the Court to be not well grounded. Others were overruled by reason of subsequent enactments of Congress. In one case[42] the Court based its decision upon

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to fit alike the oxcart and the aeroplane; the hand loom and the swift spinning of modern factories.—Senate Rep. No. 14, on S. 158, 73rd Cong., 1st Sess., p. 2.

In an attempt to bring the legislation within constitutional limitations, as "emergency" legislation, there has been inserted in S. 158, as passed by the Senate, a provision that it shall be effective for only two years. Cf., Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. d. 865, 16 A. L. R. 165 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. ed. 877 (1921); Chastleton Corporation v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405, 68 L. ed. 841 (1924).

36 "In dealing with the child labor cases, from the standpoint of the power of Congress, the Court manifestly was not considering child labor from an economic or humanitarian point of view. Every member of the court might be opposed to child labor although unable to sustain the particular act as being within the power of Congress."—Hughes, The Supreme Court of the United States, pp. 38-39 (1928).

"No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress."—Brandeis, J., in Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 161, 40 Sup. Ct. 106, 64 L. ed. 194 (1919).

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."—Holmes, J., in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416, 43 Sup. Ct. 158, 67 L. ed. 322, 28 A. L. R. 1321 (1922).

37 See note 29 *supra.*

38 See note 29 *supra.*

39 285 U. S. 262, 52 Sup. Ct. 371, 76 L. ed. 747 (1932).

40 Pages 305-311.

41 Many of these cases are collected in the dissenting opinion of Mr. Justice Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 Sup. Ct. 443, 76 L. ed. 815 (1932), at pages 406-408. Sharp: Movement in Supreme Court Adjudication—A Study in Modified and Overruled Decisions, 46 Harv. L. Rev. 361-403 (1933), contains a critical discussion of these cases.

42 Farmers Loan Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371, 65 A. L. R. 1000 (1929), overruling Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1902). The fact that business is now conducted upon a national scale, making double taxation of securities an evil, was the principle reason assigned for the change of views of the court.

changed conditions, but this was a change in the way in which business is conducted.

Conceding the economic need for the proposed legislation, it was suggested to the committees of Congress, during the course of the hearings, that the proper procedure would be the proposal to the States of an amendment to the Constitution giving to the Federal Government the power to regulate hours of labor in industry.[43]

It is well settled that the courts will not declare a law unconstitutional unless in their judgment it is plainly so beyond rational doubt.[44] The courts take this position by reason of the fact that the laws are passed by a coordinate branch of the government, which is entitled to great respect,[45] presupposing that the members of Congress adhere to their oath of office obligating them to support the Constitution of the United States. Every member of Congress, therefore, has the duty of considering with care whether a bill violates the Constitution before voting upon it. This is recognized by all the leading authorities.[46] If the legislation be enacted into law, the country will await with interest the decision of the Supreme Court as to its constitutionality.[47].

The question presented to Congress, and, possibly, to the Supreme Court, is: Shall we continue to have a government of

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43 See Hearings on S. 5267, note 6 *supra*, pp. 311-322; Hearings on H. R. 14105, note 6 *supra*, pp. 87-103.

44 Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287 (1871); Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496 (1870); Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606 (1827); Fletcher v. Peck, 6 Cranch 87, 3 L. ed. 162 (1810); Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550 (1879).

45 "The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity; and that determination must be given great weight."—Sutherland, J., in Adkins v. Children's Hospital, note 5 *supra*, at page 544.

46 See Remarks by Hon. Henry St. George Tucker, M. C., Congressional Record, August 17, 1922, p. 1255.

"The oath that we take to uphold and support the Constitution of this country is not limited to times when no emergencies exist. It applies at all times."—Senator Reed (Pa.), Cong. Rec. April 13, 1933, p. 1632.

47 "We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution."—Day, J., in Hammer v. Dagenhart, note 12 *supra*, at page 276.

laws, with certainty of law, or a government of men, with uncertainty of law?[48]

48 "The Government of the United States has been emphatically termed a government of laws, and not of men."—Chief Justice Marshall.

"In Marbury v. Madison he (Marshall) established that fundamental principle of liberty that a permanent written constitution controls a temporary Congress."—4 Beveridge, Life of John Marshall, 430 (1919).

FORMS OF ACTIONS IN TENNESSEE

By Joseph Higgins

A word respecting the forms of action may well precede the treatment of the original writ or summons in a law action. It is true that under the modern statutes a summons may be in the most general terms and void of any suggestion as to the nature or form of action which the defendant is notified to meet and defend, yet it may be so drawn as to forecast the cause and form of action that is prompting the plaintiff to sue. In such case the declaration must assume that form which was impressed upon the action by the original process.

In the early history of the common law the original process in personal actions was in the nature of a bill and contained the essential elements of plaintiff's cause of action. This writ was changed by 2 Westminister 4, from a paper possessing the features of a pleading to a mere notice wherein the defendant is informed that he must appear at a certain court upon a certain day and answer a complaint at that time lodged with the clerk of the court. But notwithstanding this statutory reduction of that writ to the function of a mere notice, the worshippers of the common law formulism wrote into the statute a provision that the writ must bear on its face the stamp of forms of the action which defendant was to meet, such as trespass, *vi et armis,* or *assumpsit* or debt or covenant. A failure so to do rendered the writ void.

On the surface of things forms of action are virtually unknown in Tennessee courts. The real nature of an action is determined by the allegations of the initial pleading regardless of form.[1] Rare is the occasion when the action of assumpsit, debt, covenant, or trespass upon the case is mentioned. And yet the very principles of those actions are operating underneath at this time, and it is a healthy exercise and digression to dig them up from the past and give them consideration. These contrivances of the builders of the common law were not the work of a year or of a century. They were constructed amid an atmosphere of public good and sound public policy, and a departure from these frames brought a shock that is hard to

1 Union Canning Co. v. Lowe, 148 Tenn. 407.

realize at this time. It may be said that for a long time these forms were the framework of the entire system of jurisprudence prevailing in England and America, and that no branch of it was untouched thereby and probably no part of it uninfluenced by them. Notwithstanding the legislative declaration that forms of action at law were abolished, they in great measure dominate and shape the well-drawn pleadings in our courts. In view of the effort in Tennessee to destroy the common law forms of action, it may seem strange that such a declaration, that is, framed with all the meticulous care of a common law pleader, will pass muster at this time.[2] When the question of interposing general or special pleas is up for solution, a pondering of these common law forms of action seems to the well grounded lawyer to be necessary or at least extremely advisable.

The several forms of action developed as a part of the common law system prevailed in North Carolina in the year 1775, and they persisted and were a part of the jurisprudence of that state at the time of the separation of the territory of Tennessee therefrom and the erection of the latter into a state in 1796. There was no substantial enactment by the state of North Carolina prior to that year which wrought any material change in court procedure. Therefore, Tennessee lawyers began their career at the birth of the state with this system of pleading as a heritage. Needless to say, they cherished it with almost as much veneration as did Coke and Plowden and Kenyon who repeatedly declared their conviction that the preservation of these forms of action was necessary to the perpetuation of the British people.

And these forms, thus sacredly looked upon, were retained with virtually no modification for half of the first century of the state's existence. So late as 1836 our Supreme Court gave the stamp of its approval to the common law forms and referred to them as a most valued heritage and stated that it was the policy of the court and the state that they be observed. This was so declared in *Tappan vs. Campbell.*[3] It was further said that good pleading is honorable and excellent and that many a good cause is clearly lost for want of good and orderly pleading; and that it should be cultivated by all and is the foundation of every action and contains within itself the soundest logic.[4]

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2 Oliver v. Greenwood, 4 Higgins 535.

3 6 Yerger 463.

4 Roberts v. Stewart, 1 Yerg. 390; Cherry v. Hardin, 4 Heisk. 203.

At that time we had the action of assumpsit which had been created for the purpose of enabling a plaintiff to recover for the breach of any contract, express or implied, other than contracts under seal and of record. It was specifically adapted to the recovery of damages for the failure to perform an oral or simple undertaking. It had the general and again the special characteristics, the former taking the name of common counts of very general expression to be supplemented later by a bill of particulars. Special assumpsit was a form of pleading resorted to when the action was upon a definite written instrument.

Next in order was the action of debt upon a contract, express or implied, by express promise or by declaration of law for a specific sum of money due and payable at a certain time or upon demand. The great difference between debt and assumpsit is that the latter was broad enough and was designed to embrace damages of an uncertain amount which had to be arrived at by computation of the court or jury. The action of debt was devised for the recovery of a fixed sum which had been promised. It was an action of more simplicity than the former. But after a time there was an encroachment of assumpsit upon the field of debt, and even at the common law it was permissible to use assumpsit wherever debt would lie. But this rule did not work both ways; there could be no action in the nature of debt for recovery the amount of which had to abide the contingencies of a trial.

Covenant was a form of remedy contrived to meet contracts under seal. This action was quite narrow in its operation and restrictive in its defenses. It had its vogue during the time when seals imported certainty and sanctity to a written instrument. It had its origin in the days when few men could read and when written contracts were the exception and were generally executed under great solemnity.

The three foregoing remedies, long venerated as the most efficient methods of redressing wrongs or protecting rights of a contractual nature, were in time discovered to have the common root of an agreement or promise, express or implied. As public policy had for ages given them an unusual rigidity, this same public policy broadening with the stream of time found vent in a legislative declaration that all three of these remedies might be asked for in one and the same form of action. These com-

missioners, compiling Tennessee's first code, so declared in Section 2746, published in the year 1858 and carried into the Code of 1932 in Section 8563.

We think it significant that the legislators declared that all contracts might be sued upon in one and the same *form of action.* It will be difficult to read this word out of that Tennessee statute. Form is still emphasized to some degree. This position is strengthened by the provisions of the first statute in Tennessee providing for liberal amendments. This was the act of 1851-2, chapter 156, which with very little variation is reproduced as Section 8713 of the Code of 1932. Those parts having direct bearing upon the subject of this immediate writing are as follows: "No civil suit shall be dismissed . . . on account of the form of action . . . but the court shall have the power to change the form of action, and allow proper averments to be supplied."

The conception of some form of action persisted. Until the time of the passage of this act the parties could not by amendment or consent change the form of action. By this act such a change might be made, but some form had to be retained by the declaration. The very implication of a statute allowing amendments is that there is a standard or ideal which has been originally missed and which can be reached or approximated by a second effort.

It was through the Code of 1858, when considered as a whole, that forms of action such as we have been treating of were declared to be abolished in Tennessee, either expressly or by necessary implication in so far as actions upon contracts were concerned. There had been an effort in 1849 to introduce an action known as one upon the facts of the case, but strange to say, this was not deemed by the bench and bar of the state as affecting a radical change in common law procedure. The phraseology of this act which is in substance, Section 8564 of the Code of 1932, is quite suggestive of the principles and motivations behind the invention of the action of trespass upon the case. This is evidently the reason that this statute did not bring about a pronounced innovation.

It will be recalled by those familiar with the history of common law procedure that, in response to the clamor for an enlarged remedy for wrongs, parliament commanded the chancellors to devise and issue a new kind of writ which subsequently took the name of case or trespass upon the case. The direction

was to issue the writ which fitted the plaintiff's case, or if there was no known writ fitting plaintiff's situation, the draftsmen were ordered to feign a case similar to that presented by the plaintiff and frame a writ accordingly. It would seem at first view that the parliamentary mandate was that a new writ issue regardless of the nature of plaintiff's trouble. It is quaintly said by a liberal minded jurist that the chancellor should frame a writ such as will suit the plaintiff's individual situation. But the ever present conservatism of the common law judges constrained them in the end to discourage the issuance of novel processes, and they worked to this end by deciding that the chancellors must not improvise any writ unless it find somewhat of a counterpart in the old forms of action. The result was that the action of trespass on the case became as inflexible as any other.

But the oft repeated miscarriage of justice brought about by a slight error in the language of a declaration had its effect both in England and America, but always with a struggle with those who venerated form. Soon after the adoption of the Code of 1858 the conviction obtained in Tennessee that forms of actions such as were known to the common law had been thrown into the scrapheap. (A misconception as was shown by the provisions of an Act passed in February, 1860.) This Act was to the effect that the parties were not required to pursue the methods prescribed in the Code of 1858, but might plead in accordance with the common law. This was but an assertion that these old forms persisted and that they could be looked upon as still in existence although somewhat in a state of suspension. The result was that the common law with a few strictures upon phraseology in the declaration, was restored with almost all of its vigor and rigor. And this view, we repeat, became the accepted one and was consistently acted upon as shown in several decisions between 1861 and 1932.

And yet there remained on the statute books the very wording of Sections 2913-2917 of the first Code, which fact begat an uncertainty in the minds of students and beginners, especially as to what system of pleading prevailed in our state. We find that for some fifteen years after the passage of the Act of 1860 defendants followed the directions of the above enumerated Code sections, and a few of the judges looked upon the innovation with much favor. The substance of these sections was that if

the defendant interposed general denial of plaintiff's cause of action he was constrained to give simultaneous notice of all the defenses upon which he expected to rely at the hearing. If this had been the settled mode with respect to pleading, we would have had a system of special pleading, such as is implicit in code systems and such as now prevails in law cases in England.

We resume a consideration of the common law forms of action prevailing at the adoption of the Code of 1858 and which persisted beyond dispute at the time of the adoption of the Code of 1932, although not to the exclusion of the liberalizing provisions respecting declarations. We pass to actions ex delicto.

The first or primitive action was that of trespass. Naturally, this was the simplest and gave less room for dispute as to its framework and its operation. It was the form to be used in all delict actions where the wrong was directly inflicted and with force. It embraced personal injuries, damages to personal property, and wrongful entries upon real property. Its distinctive feature was that the wrong complained of was a direct and immediate result of force or power, or as it was anciently expressed, vi et armis.

This action was adapted to an age of violence. While not always essential, the elements of malice and willfulness afforded almost conclusive evidence of a direct infliction of wrong. It was not possible, under a declaration framed in trespass, to sustain a recovery where the consequence was indirect and where the mind went to the consequences instead of the means and methods. Hence, there was no form of pleading by means of which there could be a recovery for damages sustained by inadvertance. The primitive law makers did not undertake to cultivate attention and circumspection in the every day affairs of life. It was only when society reached a stage of composure and where there was a separation of activities and an impulse to material and commercial activity that a conviction was reached that men should be made to answer for the consequences of their indifference. After a long fight this duty of watchfulness became a rule of law.

More than four hundred years ago the English judges declared that there would always be provided or sanctioned by them a remedy for the breach of any duty imposed by law. Now when the obligation of due care was accepted as a part of the common law, the judges, the commons, and the crown

were impressed that a writ should be framed by means of which the sufferer from an infraction might obtain redress. The consequence was the adoption of the action of trespass on the case. This writ has a curious and interesting history which might be pursued with profit. This study cannot fail in benefit.

This action was the product of the times and of the needs of the times. No action is more pregnant with meaning when its implications are all considered. It demonstrates that it is wise to adhere to old forms and traditions, but to extend them to the needs of any age in which the old framework does not meet all situations. It is also most fruitful in juridical enlightenment in that it had its birth in a spirit of equity and long became known as a child of the chancellors' bosoms, and therefore, entitled to the utmost amplitude of operation. It is because of this origin that the simple plea of not guilty was the only one that was really needed by way of denial.

But even this helpful writ tended toward formalism, as seems inevitable with the jurisprudence whose developers and preservers strive always for a settled text of law and method of procedure. The principles that gave birth to this form of action are those that form the basis of our code provision to the effect that in all cases of injuries to the person or property redress may be had upon the facts of the case. This is really the old command of the sovereign that his chancellor shall issue to a plaintiff such writs as will suit the facts of his case.

The third common law delict action was that of trover. Its creation and its uses from the earliest times to the inauguration of the code system of pleading are quite interesting. For in none other is there a revelation of the long disputed attribute of flexibility in common law forms. It was designed first to meet the case of one who had found a chattel and had refused to deliver it up to the owner. Through a fiction often resorted to in primitive times in the juridical process, every wrongful appropriation of personal property was construed as a finding. The methods of transmuting language in a pleading were changed so as to make it appear that every chattel for which plaintiff sought to recover had been lost and subsequently found and appropriated by the finder.

Another peculiar turn in the action of trover was its extension to all sorts of conversion of personal property to another's use, thus diverting the mind of the court from the find-

ing, or detention, and concentrating it upon the advantages accruing to the alleged finder. In such instances the courts began early to sanction the waiving of the original trespass and entertaining the action as if the finder had promised to reimburse the owner. This transition was easy, for the action of assumpsit was approved in many cases where trespass on the case might have been sustained.

The distinction between trover and the action in the nature of an assumpsit should still be borne in mind for the reason that they called for different pleadings, and the recovery might vary in amount.

The actions of ejectment, detinue, and replevin were also surrounded by peculiarities which the modern statutes have in great measure taken away and helpfully so. The great distinction between the old forms and the later is that there may be a recovery not only for the property demanded, but likewise, damages for the provision of use, thus converting them into mixed actions.

Without discounting all attempts at simplification or procedure, we reiterate that a discriminating study of common law forms would be worthwhile. In fact, as was said by the Supreme Court in *Cherry v. Hardin*,[5] every innovation in pleading should be pondered in the light of the principles of the common law. It is further said that it was an erroneous assumption that the most liberal system of pleading to be found in codes affected an abolition or destruction of the fundamentals of the common law system.

It were a happy turn of events if the great principles of the common law system were blended with the practical purposes of the code method. This attempt has been made in Tennessee, and the bench and the bar can, by co-operation, bring forth a very satisfactory form and manner of pleading. They should unite in discouraging loosness, incoherence, and disorderly arrangement of parts in pleading. This can be done without importing into any particular form the immutability which characterized the common law.

The greatest innovation, with respect to the form of pleading, and particularly defensive pleading, was introduced by the Code of 1932. Its effect was to reverse the position of the parties who might give color or character to the pleading. It

[5] *Supra*, note 4.

will be remembered that under the Act of 1860 defendant had it in his power to convert the simplest kind of action into that common law form recognized or adapted to the kind of cases covered by the simplified declaration. This right is now taken away from a defendant and placed in effect in the hands of the plaintiff. Section 8767 of the Code of 1932 is as follows:

> "Or he may on motion of plaintiff, entered of record be ordered to plead specially his defenses, in which case he shall state the facts relied on truly and as briefly as may be, and no matter of defense not pleaded shall be shown in the evidence; and to such special plea the plaintiff shall reply, and the pleadings shall proceed to issue."

In the immediately preceding sections from 8757 to 8766 the defendant was and is given permission to plead generally or specially. There is every indication that the compilers of the old and the new Codes contemplated that all general and special pleas filed under the sections immediately above given should approximate the general and special pleas which the common law had adapted to general or special defenses.

The fact that the language of the Code of 1932 is a reproduction of corresponding sections of the Code of 1858, with the exception of a modification of pleas in abatement, we express the opinion that if the parties go to trial in the law court under the present system under pleas of the general issue, the case will have to be proceeded with in accordance with the common law procedure and its principles as formerly and as now understood. So that if the declaration be one in debt, a plea that the defendant is not indebted will admit of all the defenses known to the common law. And so on with respect to the seven or eight other forms or divisions of action which may be said to veil every ordinary action at law today.

We also are of the opinion that if a defendant puts in a plea of general denial and likewise numerous special pleas without any objection or question upon the part of the plaintiff, the case will be heard just as were actions of similar kind in Tennessee until the adoption of the Code of 1932. So that it is the plaintiff who is vested with the power to constrain the defendant to the position of a special pleader.

Another unsettled question is as to what becomes of a general denial after the plaintiff has moved to require the defendant to plead specially. We submit the following: If the defendant refuses to comply, plaintiff should be given judgment final or

interlocutory according as the court may be able or not to compute the amount of plaintiff's demand. For it must be remembered that the code provision is that no matter of defense unpleaded shall be available to the defendant after the plaintiff has called upon him to specify his defenses.

Another unsolved question is as to the elaborateness of those special pleas. This will arise when it is urged that certain pleas should be construed as denying the whole cause of action and putting the burden on the plaintiff to make out his case. Under most of the code systems the entering of special pleas does not deprive defendant of his right to insist that plaintiff make out his right to a recovery. But when the purpose of our modified code sections is brought into view, and we avail ourselves of the aid to be derived from the procedural amendments of England, we are of the opinion that the defendant must challenge, by appropriate plea, every element of plaintiff's cause of action. For instance, if the action be for damage to a horse, the special plea would be that plaintiff did not own the horse, or that he was not damaged, or that defendant did not inflict the injury, or that he wounded the horse in self defense, or that plaintiff was guilty of contributory negligence, or had been paid; and so on ad infinitum. A further example would be an action for a breach of contract. This special plea would be that defendant never promised, or that he never breached, or that plaintiff breached first, or that the contract had been rescinded.

This method of pleading is quite novel, but we unhesitatingly approve it, convinced that it will tend very much to the clarifying of issues and the expediting of hearings. It may be said that we shall be constrained to make special pleading a peculiar study. If so, it will turn out that we become the devotees of a science and an art much commended by the learned judges during the middle period of a common law development. We shall indeed arrive at the stage where pleadings will be the means and the implements for the administration of justice.

BAR ASSOCIATION SECTION

Tentative

Program of the Fifty-second Annual Session

of the

Bar Association of Tennessee,

Knoxville, Tennessee,

June 9 and 10, 1933.

Headquarters: Hotel Andrew Johnson.

Meetings:

Hotel Andrew Johnson

Cherokee Country Club

Friday, June 9, 1933—Hotel Andrew Johnson

10:00 A. M.

(Daylight Saving Time)

Invocation.....Rev. Walter A. Smith

Official Welcome.....Hon. John T. O'Connor
Mayor of Knoxville

Address of Welcome.....Frank Montgomery
President, Knoxville Bar Association

Response.....Mr. J. E. Holmes, Memphis

President's Address.....Mr. Harley G. Fowler, Knoxville

Announcements.....A. L. Heiskell, Secretary

Report of Treasurer.....Mr. W. L. Owen, Memphis

Report of Central Council.....Mr. T. G. McConnell, Knoxville

Report of Committee on New Members.....Mr. Harry T. Poore, Knoxville

Report of Committee on Constitutional
Amendments.....Mr. D. W. Harper, Martin

Report of Committee on Unification of the Bar.....Mr. J. B. Sizer, Chattanooga

Report of Committee on Municipal Law.....Mr. Chas. M. Bryan, Memphis

Report of Committee on Legal Education and Admission to the Bar.....Mr. Edward T. Seay, Nashville

Report of Committee on Publication.....Mr. Chas. S. Coffey, Nashville

Miscellaneous Business

12:30 P. M.—Recess

12:45 P. M.

Luncheon at Hotel Andrew Johnson, Courtesy of the Knoxville Bar

1:00 P. M.

Luncheon for Visiting Ladies.....Hotel Andrew Johnson
Courtesy of the Knoxville Bar

Friday, June 9, 1933—Cherokee Country Club

3:00 P. M.

Address.....Hon. James M. Beck

Member of Congress and former Solicitor General of the United States.
Subject: The Future of the Constitution.

Reception by President and Mrs. Fowler.....Cherokee Country Club

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7:30 P. M.

Annual Dinner at Hotel Andrew Johnson

Mr. William Baxter Lee, Toastmaster

Speakers:

The Honorable Edwin P. Morrow, Ex-Governor of the State of Kentucky. Subject: "Kentucky Tales of the Bench, Bar, and Stump."

Mr. Clarence Templeton, of the Jellico Bar. Subject: "Mules".

Dinner tendered by the Knoxville Bar Association. Ladies invited.

Dancing.

Saturday, June 10, 1933—Hotel Andrew Johnson

8:30 A. M.

University of Tennessee Alumni Breakfast
Vanderbilt University Alumni Breakfast

10.00 A. M.

Report of Committee on Jurisprudence and Law Reform.....Mr. J. E. Holmes, Memphis

Report of Committee on Judicial Administration and Remedial Procedure.....Mr. J. A. Susong, Greeneville

Report of Committee on Uniform Laws.....Mr. Albert Akers, Nashville

Report of Committee on Legislation.....Mr. T. W. Schlater, Jr., Nashville

Report of Committee on Grievance.....Mr. D. Sullins Stuart, Cleveland

Report of Committee on Obituaries.....Mr. Bennett Eslick, Pulaski

New and Unfinished Business

Election of Officers

11:30 A. M.

Adjournment

12:00 Noon

Automobile Trip to the Great Smoky Mountains National Park and Luncheon there.

Courtesy of the Knoxville Bar.
Ladies invited.

Automobiles will be provided for transportation to and from the Cherokee Country Club and the Great Smoky Mountains National Park.

Courtesies of Cherokee Country Club and Holston Hills Country Club are extended to all visitors.

The following Committee on Arrangements and Entertainment has been appointed by Mr. Frank Montgomery, President of the Knoxville Bar Association: Mr. C. Raleigh Harrison, Chairman; Mr. Charles E. Donaghy; Mr. Thomas G. McConnell; Mr. William Baxter Lee; Mr. Ray H. Jenkins; Mr. John M. Kelly; Mr. Clyde W. Key; Mr. Joel H. Anderson; Mr. Sam E. Young.

STATEMENT FROM TREASURER

Several years ago it was the custom for the treasurer to send a membership card to each member who paid his dues, which card attested to the fact that he was a member in good standing of the Bar Association of Tennessee for the current year. It was ascertained that some of the members retained this card, while others did not; and consequently, the utmost economy being necessary in order to meet the expenses of the Association out of the dues, the membership cards were discontinued. The increase of postage from two cents to three cents augmented the expenses of the office considerably, it being necessary to mail out between five and six thousand statements, letters and circulars during the year. To save the expense of sending receipts, the remitter's check serving for that purpose, receipts are not mailed except when especially requested.

However, as some of the members have lately expressly requested the membership cards, the treasurer will send same when requested by notation at time of remittance, but believing that the number so desired will be small, the treasurer will follow the same plan as in case of receipts, and avoid the expense of sending such cards to those who do not especially desire same.

NOTICE TO LAWYERS

The Tennessee Bar Association meets in Knoxville June 9th and 10th. All members should immediately pay their dues, and those lawyers who are not members should join without further delay.

The lawyers at Knoxville plan to make the coming meeting the greatest in the history of the Association. Speakers of national reputation have been obtained and interesting forms of entertainment are being planned. No lawyer can afford not to be an active member of the State Association.

—Committee on New Members.

HEADNOTES*

(Recent Tennessee Supreme Court Decisions)

THE ATLANTIC LIFE INSURANCE CO. v. J. M. CARTER ET AL

(Opinion filed February 25, 1933, by Mr. Justice McKinney)

1. BILLS AND NOTES. Effect of extension of time upon liability of one signing negotiable instrument as maker.

The maker of a negotiable instrument secured by a mortgage on real estate is not released by an extension of time given without his consent to a grantee of the mortgaged land who, with knowledge of the holder of the note, had assumed and agreed to pay the note.

Act construed: Acts 1899, Ch. 94 (Code Sections 7325-7519).

Cases approved: Peter v. Finzer, 116 Neb. 380, 65 A. L. R. 1419; Continental Mut. Sav. Bank v. Elliott, 166 Wash. 283, 81 A. L. R. 1005.

2. BILLS AND NOTES. One signing as maker is primarily liable.

Under the Negotible Instruments Law, one who signs a negotiable instrument as maker is "primarily" liable thereon and may be discharged only in the ways provided by statute.

Case approved: Union Trust Co. v. McGinty, 212 Mass. 205.

3. STATUTES. Bills and Notes. Construction of Negotiable Instruments Law.

In order to effectuate the purpose of the Negotiable Instruments Law, which was to make uniform throughout the country the law with respect to negotiable instruments, its provisions will be given their natural and common meaning without unnecessary resort to that which had been the law of this State prior to its adoption.

Case approved: Union Trust Co. v. McGinty, 212 Mass. 205.

4. BILLS AND NOTES. Payee as holder in due course.

The payee of a negotiable instrument may be a holder in due course.

Case approved: Snyder v. McEwen, 148 Tenn. (21 Thomp.) 423.

5. BILLS AND NOTES. Effect of extension of time upon liability of accommodation maker or surety.

An accommodation maker or surety upon a negotiable instrument is not, under the Negotiable Instruments Law, discharged by an extension of time granted to the principal, such as would have discharged the accommodation maker or surety prior to the adoption of the Act.

Citing: Annotation in 48 A. L. R. 716; Long v. Mason, 273 Mo. 266; Smith v. Blackford (S. Dak.), 228 N. W. 469.

W. W. CHUMBLEY ET AL v. PEOPLES BANK & TRUST COMPANY

(Opinion filed March 18, 1933, by Mr. Justice Cook.)

1. CONSTITUTIONAL LAW. Judges. Disqualification of Judges.

The purpose of the constitutional provision which forbids a judge to preside in any cause in which he is interested, or in which he may have been counsel, is to insure for every litigant the cold neutrality of an impartial court.

Constitution cited: Article 6, Sec. 11.

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*NOTE: These Headnotes furnished by courtesy of the Attorney General's office at Nashville.

Cases cited: Waterhouse v. Martin, 7 Tenn. (Peck) 373; Harrison v. Wisdom, 54 Tenn. (7 Heisk.) 110; Reams v. Kearns, 45 Tenn. (5 Cold.) 218; In Re Cameron, 126 Tenn. (18 Cates) 658.

2. JUDGES. Attorney and client. Constitutional Law. Disqualification of attorney to act as judge in client's litigation.

One who has represented a litigant as attorney in a cause is conclusively presumed to have a pecuniary interest in the result and therefore is disqualified by constitutional provision to preside in the cause as judge, even after severance of the relation of attorney and client.

Constitution cited: Article 6, Sec. 11.

Citing: State v. Hocker, 25 L. R. A. 115; 33 C. J. 1003; 15 R. C. L. 535.

3. JUDGES. Attorney and client. Constitutional Law. Disqualification of judge because of having been counsel.

In order to disqualify a judge on the ground of having been a counsel in a case, the relation of attorney and client must have existed at some time.

4. JUDGES. Constitutional Law. Justices of Supreme Court held not disqualified to determine validity of Code.

The fact that a suit involves the constitutionality of the Code of Tennessee, and that the Supreme Court, in accordance with statute, appointed the Code Commission which drafted the Code and publicly commended the industry and ability of members of the Commission, does not disqualify from hearing the cause the Justices of the Supreme Court, either as counsel or as interested in the litigation.

Code cited: Section 10500.

Act cited: Acts 1929, Chapter 48.

5. JUDGES. Interest which disqualifies judge.

The interest which disqualifies a judge is a direct pecuniary or property interest, or one which involves some individual right in the subject matter of the litigation, whereby a liability or pecuniary gain must accrue on the event of suit.

Citing: Ex Parte Alabama State Bar Association, 12 L. R. A. 136; 33 C. J. 992, 994.

6. JUDGES. Interest which does not disqualify judge.

Interest in a public question merely as a citizen of the State or the member of a civic body is not such interest as disqualifies a judge.

Citing: Harrison v. Wisdom, *supra;* Meyer v. San Diego, 41 L. R. A. 765; 33 C. J. 995; 15 R. C. L. 537.

MRS. E. P. TIPTON v. SPARTA WATER COMPANY

(Opinion filed March 18, 1933, by Mr. Chief Justice Green.)

1. CONTRACTS. Municipal Corporations. Waters. Action by individual for breach of contract between municipality and water company.

Where a contract between a municipality and a water company for the supply of water contains no provision that it shall inure to the benefit of any citizen aggrieved, one whose property has been damaged by fire because of the failure of the water company to fulfill its contract cannot maintain an action on the contract against the water company to recover damages for the injury thus caused.

Cases approved: Foster v. Water Company, 71 Tenn. (3 Lea) 42; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24; Irvine v. Chattanooga, 101 Tenn. (17 Pickle) 291.

Citing: Annotation in 38 A. L. R. 505; Woodbury v. Tampa Waterworks Co., 57 Fla. 243; Paducah Lbr. Co. v. Paducah Water Supply Co., 89 Ky. 340; Gorrell v. Greensboro Water Supply Co., 124 N. C. 328.

2. TORTS. Municipal Corporations. Waters. Action in tort by individual injured by failure of water company to fulfill contract with municipality.

An action in tort cannot be maintained against a water company by one whose property has been damaged by fire because of the failure of the water company to fulfill its contract with a municipality to furnish water for fire protection.

Cases approved: Foster v. Water Company, *supra;* Longmeid v. Holliday, 6 L. & Eq. Rep. (Eng.) 562; Davidson v. Nichols, 11 Allen (Mass.) 514; Coughtry v. Glove Woolen Co., 56 N. Y. 127; Houck v. Cape Girardeau Waterworks & Electric Light Co. (Mo. App.) 114 S. W. 1099; Fowler v. Athens City Waterworks Co., 83 Ga. 219; German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220; and other cases collected in note, 38 A. L. R. 527.

3. COURTS. Doctrine of stare decisis.

A question of law settled by a decision which has stood for many years without legislative action and upon the faith of which contracts have been based will not be approached as if it were an open question.

MRS. REGINA COHEN v. OSCAR F. NOEL AND JOHN H. NOEL, TRUSTEES, ET AL

(Opinion filed February 11, 1933, by Mr. Chief Justice Green.)

1. CONTRIBUTION. Torts. Rule as to contribution among joint tort feasors.

The general rule is that where two parties participate in the commission of a tort and one party suffers damage thereby, he is not entitled to indemnity or contribution from the other party.

Cases cited: Anderson v. Saylors, 40 Tenn. (3 Head) 551; Rhea v. White, 40 Tenn. (3 Head) 121; Maxwell & Co. v. L. & N. R. Co., 1 Cooper's Chy. 8; Merryweather v. Nixon, 8 T. R. 186.

2. CONTRIBUTION. Equity. Exception to general rule respecting contribution among joint tort feasors.

Where several are jointly responsible for an act not necessarily nor ordinarily unlawful, one who acted without moral guilt or wrongful intent in the commission of the act, and who has paid the damages caused thereby, may recover contribution from the other wrongdoers.

Case approved: Central Bank & Trust Co. v. Cohn, 150 Tenn. (23 Thomp.) 375; Ford v. Brown, 114 Tenn. (6 Cates) 467.

Citing: Pomeroy's Equitable Remedies, Vol. 2, Sec. 916.

3. TORTS. Contribution. Negligence. Exception to general rule respecting contribution among joint tort feasors.

An exception to the rule that there can be no contribution or indemnification between tort feasors is found in cases where one of them made the condition that caused the damage and the other merely failed to detect or remedy that condition.

Citing: Washington Gas Light Co. v. Dist. of Col., 161 U. S. 316; Lowell v. Boston & L. R. Corp., 23 Pick. 24, 34 Am. Dec. 33; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 144 N. Y. 663; Gray v. Boston Gas Light Co., 114 Mass. 149; Union Stock Yards Co. v.

Chicago, etc. R. Co., 196 U. S. 217; Notes in 2 Anno. Cas. 528, Anno. Cas. 1913B, 938; 36 L. R. A. (N. S.) 583, 16 Am. St. Rep. 254.

Case overruled: Holland v. Ry. & Lt. Co., 6 Hig. 68.

4. CONTRIBUTION. Torts. Negligence. Facts considered and held to be exception to general rule against contribution among tort feasors.

A declaration alleged that defendants operated a public garage and that plaintiff was the customer who sent her car in charge of a servant to defendant's garage; that defendants were painting the garage and had placed a ladder in one of the run-ways, upon which an employee was standing; that defendants gave no notice to drivers of cars of the obstruction in the run-way; that plaintiff's car entered the dimly lighted garage and plaintiff's servant failed to see the ladder and the painter, as a result of which the employee was injured; that such employee in an action had recovered from the plaintiff for the injuries; and that plaintiff sues defendant for indemnity. HELD: This declaration is not demurrable, but states a cause of action under the exception to the general rule above cited.

THE FEDERAL LAND BANK OF LOUISVILLE ET AL. v. MONROE COUNTY

(Opinion filed February 25, 1933, by Mr. Chief Justice Green.)

1. EMINENT DOMAIN. Remedy of landowner.

The taking of land, even though wrongful, by a condemnor authorized to expropriate for public purposes, leaves the landowner no redress except to sue for his damages under the statute.

Cases approved: Colcough v. Nashville & N. W. R. Co., 39 Tenn. (2 Head) 172; Sanders v. Railroad, 101 Tenn. (17 Pick.) 206; Doty v. Telephone & Telegraph Co., 123 Tenn. (15 Cates) 329; Lea v. Louisville & N. R. Co., 135 Tenn. (8 Thomp.) 560; Armstrong v. Illinois Central R. Co., 153 Tenn. (26 Thomp.) 283; Campbell v. Lewisburg & N. R. Co., 160 Tenn. (7 Smith) 477.

2. EMINENT DOMAIN. Mortgages. Deeds. Right of action for land expropriated does not pass under deed or mortgage, when.

After the actual taking of land, the claim of the landowner becomes a personal claim for damages which will not pass to a subsequent vendee or mortgagee of the land unless such claim is especially assigned. This is true whether the condemnation suit be filed prior to or subsequent to the execution of the deed or mortgage.

Case approved: County of Obion v. Edwards, 159 Tenn. (6 Smith) 491.

LIFE AND CASUALTY INSURANCE CO. v. MRS. EUNICE CANTRELL

(Opinion filed March 18, 1933, by Mr. Justice Cook.)

1. INSURANCE. Construction of contract favorable to insured.

Ambiguities in contracts of insurance are construed most favorably to the insured, with the intention of the parties prevailing.

2. INSURANCE. Accident Insurance. Policy covering accident to "motor-driven automobile" held to cover accident to truck.

An insurance policy which insures against death by accident to a "private motor-driven automobile in which the insured is riding or driving" protects a policy holder killed by accident to a motor truck in which he was driving.

Cases approved: Moore v. Life and Accident Ins. Co., 162 Tenn. (9 Smith) 382; Inman v. Life and Casualty Ins. Co., 164 Tenn. (11 Smith) 12; Metcalf v.

Life and Casualty Ins. Co. (Ky.) 42 S. W. (2d) 909; Brame v. Life and Casualty Ins. Co. (Ky.), 22 S. W. (2d) 439.

Cases differentiated: State v. Freels, 136 Tenn. (9 Thomp.) 483; Hemlock Tire Co. v. McLemore, 151 Tenn. (24 Thomp.) 99.

3. WORDS AND PHRASES. "Automobile" defined.

The word "automobile" indicates a motor-driven, fast-moving vehicle mounted on four wheels, and such a vehicle is an automobile whether called a runabout, a coupe, a coach, a sedan, a town car, a speed wagon, a delivery wagon or a truck.

LEON SILVERMAN v. CITY OF CHATTANOOGA

(Opinion filed March 8, 1933, by Mr. Justice Chambliss.)

1. MUNICIPAL CORPORATIONS. Aeroplanes. Power of municipality to maintain airport beyond corporate limits.

For corporate purposes, including the maintenance of a municipal airport, municipal corporations may own property lying outside the corporate boundaries and may exercise the usual powers incident to ownership.

Code cited: Section 3334 (Shannon's Code, Section 1922).

Cases cited: City of Nashville v. Vaughn, 158 Tenn. (5 Smith) 498; Reams v. Board of Aldermen of McMinnville, 155 Tenn. (2 Smith) 222.

2. MUNICIPAL CORPORATIONS. Aeroplanes. Statutes. Charter held to confer power to pass ordinance applicable to municipal airport beyond corporate limits.

A charter act conferring upon the city power to regulate public grounds "belonging to the city in or out of the corporate limits" and to pass ordinances to carry out the intent of the act authorizes the enactment and enforcement of ordinances regulating the operation of aircraft at a municipal airport lying outside of the corporate limits.

Act construed: Private Acts of 1929, Chapter 2.

Case differentiated: Malone v. Williams, 118 Tenn. (10 Cates) 390.

Citing: In Re Blois, 179 Calif. 291.

3. WORDS AND PHRASES. "Regulate" defined.

The word "regulate" means "to adjust or control by rule, method or governing principle or laws" or "to subject to governing principles or laws."—Bouvier's Law Dictionary.

GRANT HUNT v. STOCKELL MOTOR CAR COMPANY, ET AL.

(Opinion filed February 25, 1933, by Mr. Justice Swiggart.)

SALES. Conditional sales. Replevin. Consent of purchaser to repossession by seller held inferable under facts of case, notwithstanding irregularity in replevin suit.

A mere irregularity in an action of replevin by which a conditional seller recovered possession of property after default will not render the seller liable for conversion when the purchaser had actual knowledge of the default, repossession, advertisement and sale and did not dispute the default, reclaim the property or protest the sale.

Cases approved: Mitchell v. Automobile Sales Company, 161 Tenn. (8 Smith) 1; Murray v. Federal Motor Truck Sales Corp., 160 Tenn. (7 Smith) 140.

STATE OF TENNESSEE v. SOUTHERN LUMBER MANUFACTURING CO. ET AL.

(Opinion filed February 25, 1933, by Mr. Chief Justice Green.)

1. TAXATION. Statutes. Collection of delinquent taxes. Suit to collect delinquent State and County taxes when municipality refuses to join therein.

A suit to collect delinquent State and County taxes upon property located in a city is proper without undertaking to collect municipal taxes when the municipality has refused to certify to the county trustee or to the tax attorney lists of delinquent taxes.

Code cited: Section 1591.

2. TAXATION. Statutes. Collection of delinquent taxes. Suit to collect delinquent State and County taxes when municipality refuses to join therein.

The statute which requires tax suits to be brought "in the name of the State, in its own behalf and for the use and benefit of the county, and of any municipality certifying the lists of delinquent taxes" does not permit a city to defeat the right of the State and County to collect delinquent taxes by refusing to join therein.

Code cited: Section 1591.

3. TAXATION. Equity. Collection of delinquent taxes. Reference to ascertain other taxes due.

The reference which the Chancellor should order in a tax suit to determine the amount of taxes due on the property, other than those sued for, need not be made before the sale but may be made after the sale before confirmation or even after confirmation before distribution of the proceeds of the sale.

Cases cited: State v. Collier, 160 Tenn. (7 Smith) 403; Williams v. Whitmore, 77 Tenn. (9 Lea) 262.

Code cited: Sections 1601, 1678.

HERBERT L. REDMAN v. DuPONT RAYON COMPANY

(Opinion filed February 11, 1933, by Mr. Chief Justice Green.)

1. WORKMEN'S COMPENSATION. Action for compensation is transitory.

An action based on the Workmen's Compensation Act is transitory.

Case approved: Chambers v. Sanford & Treadway, 154 Tenn. (1 Smith) 134; Harr v. Booher, 146 Tenn. (19 Thomp.) 694; Hall v. Southall Bros., 146 Tenn. (19 Thomp.) 129.

2. VENUE. Corporations. Statutes. Venue of suits against corporations.

The venue of suits against corporations, except such suits as may be instituted by original attachment, is limited to counties where the corporation has an office, agency or resident director.

Code cited: Sections 8643, 8669 (Shannon's Code, 4516, 4542).

Case cited: Brewer v. Glass Casket Co., 139 Tenn. (12 Thomp.) 97.

3. WORKMEN'S COMPENSATION. Venue. Corporations. Venue of action for compensation against corporation.

The venue of suits against corporations under the Compensation Act is limited to counties where the corporation has an office, agency or resident director, the provisions of the Compensation Act respecting venue (Code, Sec. 6885) not being exclusive.

Code cited: Sections 6885, 8640.

Case cited: Chambers v. Sanford & Treadway, *supra.*

H. G. DAVIS ET AL v. D. D. ROBERTSON, RECEIVER, ET AL.

(Opinion filed February 11, 1933, by Mr. Chief Justice Green.)

1. WRIT OF ERROR CORAM NOBIS. Pleading and Practice. Writ may issue at instance of party in interest.

The writ of error coram nobis will lie at the instance of a party in interest, although such person is not a party in name.

Case approved: McLemore v. Durivage, 92 Tenn. (8 Pickle) 482.

2. BANKS AND BANKING. Equity. Suit by superinetndent of banks under Section 5973 of Code should be dismissed only after court has been fully advised as to facts.

The superintendent of banks should not be permitted to dismiss by consent a suit brought against the makers of a bond taken for the protection of depositors and unsecured creditors, but the court should be fully advised of the facts and should approve the compromise.

Code cited: Sections 5963, 5973.

Cases cited: Allen v. McCullough, 49 Tenn. (2 Heisk.) 174; Milly v. Harrison, 47 Tenn. (7 Cold.) 191.

3. PLEADING AND PRACTICE. Demurrers. What demurrer admits.

A demurrer does not admit allegations of adverse pleading contrary to facts judicially known by the court.

Citing: Chambliss' Gibson's Suits in Chancery, Sec. 304; 21 C. J. 445.

4. EVIDENCE. Judicial notice of facts learned in former hearing of same case.

The court may take judicial knowledge of facts which it has learned on an earlier hearing of the same case and of what it has done at a previous hearing of that case.

Citing: 23 C. J. 61; 15 R. C. L. 1111; Wigmore on Evidence, Sec. 2579; Jones Commentaries on Evidence, Sec. 431.

5. EVIDENCE. Writ of error coram nobis. Dismissal of petition for writ when allegations are contradicted by facts which the court judicially knows.

Where in a suit upon a bond the chancellor heard witnesses who established the fact that a proposed settlement was proper, and where a compromise decree, in reality an adjudication, was entered, the chancellor properly sustained a demurrer to a petition for the writ of error coram nobis, alleging that the bond was solvent and the decree was the result of collusion and deception. The allegations of the petition were contradicted by facts judicially known to the court.

6. WRIT OF ERROR CORAM NOBIS. Pleading and Practice. Contradiction by writ of fact previously determined at hearing on merits.

The writ of error coram nobis is not available to contradict a fact previously determined upon a hearing of an issue tried on its merits.

Case cited: Memphis German Savings Institution v. Hargan, 56 Tenn. (9 Heisk.) 496.

7. BANKS AND BANKING. Equity. Statutes. Power of superintendent of banks to compromise doubtful claim.

The superintendent of banks, acting as receiver, under orders of the chancery court, is empowered to compromise and settle doubtful claims with the approval and sanction of the court.

Code cited: Section 5973.

Citing: High on Receivers, Sections 177, 336.

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EDITORIAL BOARD ANNOUNCEMENT

This issue completes Volume XI of the "Review" and is the last number to be published by the present board. Officers for the next year are as follows:

Editor_____Chas. S. Badgett, Jr.
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Messrs. Laurent B. Franz, Jack S. Phelan, Ivan T. Privette, and Sam Davis Tatum have been elected to membership on the Student Editorial Board to fill vacancies which will result from the graduation of Messrs. S. F. Dye, E. Bruce Foster, Chas. H. Smith, Jr., John R. Stivers, Robt. J. Watson, and Wm. C. Wilson. Additional members will be elected in the fall.

RECENT CASE NOTES

AUTOMOBILES—THE FAMILY PURPOSE DOCTRINE.

J. W. Raines permitted his son, Bill Raines, to drive the family automobile to the theater, but gave him express instructions to limit its use to this trip. Contrary to the express instructions of his father, Bill went into Georgia to get Pauline Mercer. While returning to the home of Miss Mercer a collision occurred with the car of Mr. Jones. Miss Mercer sued J. W. Raines for injuries suffered in the collision. After the suit was commenced, and before the time of the trial, she married Bill Raines. HELD: The marriage extinguished all antenuptial rights of action for wrongs committed by one party upon the other. The Emancipation Acts of 1913 and 1919 have not changed this common law rule. Furthermore, the family purpose doctrine has no application here. Since there is no right of action against the servant (the son) there can be none against the master (the father).[1]

At common law neither spouse could maintain a right of action against the other for tort.[2] This was due to the legal fiction that the husband and wife were one in contemplation of law. Thus, the law forbade one to sue himself for a wrong he had committed. The law presumed there was a complete unity of interest of husband and wife.[3] It was against public policy to permit one spouse to sue the other. This would make public scandal of family discord, and would injure the reputation of the husband and wife and invade the sanctity of the home.

The fallacy of this public policy rule is perceived when one considers the fact that courts following it are open to divorce and alimony cases, and permit either spouse to prosecute a criminal case against the other; thus laying bare every act of the marriage relation.[4]

The right of one spouse to sue the other for tort is now largely controlled by statute in the different states. The cases are not in accord and in each instance one must look to the wording of the statutes; but even the difference in the wording of the respective statutes does not explain the lack of accord.[5] Under the Emancipation Acts of 1913 and 1919[6] the Supreme Court of Tennessee, in dealing with the criminal responsibility of the wife, holds that she is to be regarded as a legal entity, separate and distinct from her husband.[7] The same court, in dealing with the power of the wife to sue her husband in tort, declares that the common law unity of husband and wife still exist, and the said Acts of 1913 and 1919 have not changed it.[8]

The family purpose doctrine is a part of the law of Tennessee.[9] It is of com-

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1 Raines v. Mercer, ... Tenn. ...., 55 S. W. (2d) 263 (1932).

2 Tobin v. Gelrich, 162 Tenn. 96, 34 S. W. (2d) 1058 (1930); Note (1917) 6 A. L. R. 1031; Note (1907) 6 L. R. A. (N. S.) 191.

3 Tobin v. Gelrich, *supra*, note 2.

4 Fielder v. Fielder, 42 Okla. 124, 14 Pac. 1022 (1914).

5 Note (1917) 6 A. L. R. 1031.

6 Tenn. Code (1932), Sec. 8460. Chapter 26, Acts of 1913 and Chapter 126, Sec. I, Acts of 1919 are identical.

7 State v. Johnson, 152 Tenn. 184, 274 S. W. 12 (1925).

8 Lillienkamp v. Rippetoe, 133 Tenn. 62, 179 S. W. 628 (1915); Raines v. Mercer, *supra*, note 1.

9 Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1925); State v. Johnson, *supra*, note 7; 9 Tenn. L. Rev. 240.

paratively recent origin and rapid growth, and the law is not yet well settled.[10] The doctrine is a logical outgrowth of the common law doctrine of *respondeat superior*. It has its foundation in public policy and convenience. The one who makes it possible for his servant to injure another must be held responsible.[11] *Respondeat superior* applies only where the relation of master and servant exists,[12] but the courts often confuse master and servant with agency.

The dangerous instrumentalities doctrine is not a part of the law of Tennessee.[13] Yet, an automobile has certain inherent dangers to which the court must not close its eyes when cases arise where the head of a family permits his children "to go upon the streets with such dangerous instrumentalities".[14]

The age of the son or daughter using the family automobile is immaterial so long as he or she remains a member of the family. The dictates of natural justice demand that the owners of automobiles should be responsible for injuries resulting from their negligent operation. A judgment against a son or daughter without money or property would be empty form.[15] The family purpose doctrine is a product of judicial decision and not of legislative enactment in Tennessee. The court feels that liability should be placed on some responsible person in order to protect the public against the negligent use of automobiles. Generally, the head of a family is more able to bear this responsibility than the members of his family. The father can protect himself by prescribing the conditions upon which the automobile may be used, or prohibit its use altogether.

The family purpose doctrine is not only a rule of convenience to reach substantial justice, but it is a rule of absolute necessity under the conditions of modern society. This doctrine illustrates the ability of the common law to adapt itself to the ever-changing conditions and needs of society.

S. F. D.

BILLS AND NOTES—ACCELERATION PROVISIONS.

M made a promissory note to P the terms of which included the following: "Ninety days after date I promise to pay to order of P, One Hundred Twenty-five and no/100 Dollars, negotiable and payable at First National Bank, Brownstown, Indiana, with interest at rate of 8% per annum and attorney's fees . . . . . *P has full power to declare this note due, and take possession of said property* (a description of which was inserted above) *at any time he may deem this note insecure, even before maturity of same.*"

The question before the court was whether, due to the clause in italics, the above note was negotiable. HELD, that such clause rendered the note non-negotiable.

The grounds for the above decision may be found in the following excerpt from the court's decision: " 'An instrument to be negotiable must conform to the following requirements: 3. Must be payable on demand, or at a fixed or determinable future time.' Section 11360, Burns' 1926.

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10 Note (1928) 64 A. L. R. 845.
11 18 R. C. L. 786.
12 Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752 (1914).
13 *Ibid.*
14 King v. Smythe, 140 Tenn. 217, 204 S. W. 296 (1918).
15 *Ibid.*

"'An instrument is payable on demand: 1. Where it is expressed to be payable on demand, or at sight, or at presentation; or 2. In which no time for payment is expressed.' Section 11366, Burns' 1926.

"It is clear that the note in suit does not come within either of the classes of the notes which are payable on demand.

"'An instrument is payable at a determinable future time, within the meaning of this (Neg. Inst.) Act which is expressed to be payable: 1. At a fixed period after date or sight; or 2. On or before afixed or determinable future time specified therein; or 3. On or at a fixed period after the occurrence of a specified event, which is certain to happen. . . . .' Section 11363, Burns' 1926.

"The note in suit does not expressly provide that it is payable 'at a fixed period after date or sight.' On the contrary it expressly provides that the payee may declare it due at any time he may deem it insecure. The date of maturity is uncertain and remains uncertain until the payee 'deems himself insecure.' Hence this note does not fall in that class of notes covered by subsection 1 of section 11363, Burns' 1926.

"The note in suit does not expressly provide that the note is payable 'on or at a fixed period after the occurrence of a specified event which is certain to happen' . . . . Hence the note in suit does not belong to the class of notes covered by subsection 3 of section 11363, Burns' 1926.

"We have shown that the note in suit does not conform to the requirement that it 'must be payable on demand or at a fixed future time' unless it can be successfully contended that the note is expressed to be payable 'on or before a fixed or determinable future time specified therein.'

"It is apparent that the note does not expressly provide that it is payable 'on or before a fixed . . . . time specified therein.' In fact, it provides that the time of payment may be fixed by the payee."[1]

The court in the principal case, in reaching the above result, was not bound by any previous case or cases decided in that court, but chose to follow the weight of authority in the matter as expounded by the appellate courts of other states,[2] at the same time being fully aware of the more liberal and, apparently, the more sound view as is expressed in an article[3] in the Harvard Law Review by Mr. Zechariah Chaffee, Jr., and also by Mr. Brannan.[4]

According to Chaffee, such instruments simply express more fully the effect of paper payable on or before a fixed date at the option of the holder, which is clearly negotiable. It may be argued that the holder's insecurity is an objective fact which must be proved to accelerate payment. However, the phrase seems mere encouragement, and he can exercise his option to demand payment whether he really feels insecure or not. The point is, that insecurity is the usual state of mind accompanying a demand by the holder before maturity, and is naturally written in here. And, even if actual insecurity is necessary, it is not an extrinsic fact which the holder needs to investigate in order to determine whether he can exercise his option. However construed, the instrument is suitable for circulation, more so than the ordinary note

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1 Guio et al. v. Lutes, ... Ind. App. ...., 184 N. E. 416 (1933).

2 Murrell v. Exchange Bk., 168 Ark. 645, 271 S. W. 21, 44 A. L. R. 139 (1925); Peoples Bank v. Porter, 58 Cal. App. 41, 208 Pac. 200 (1922); Holliday St. Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N S.) 390, Am. Cas. 1912D 1; Great Falls Nat. Bk. v. Young, 67 Mont. 328, 215 Pac. 65 (1923); Puget Sound St. Bk. v. Wash. Pav. Co., 94 Wash. 504, 62 Pac. 870 (1917); 3 R. C. L. 910; 34 A. L. R. 888, note.

3 32 Harv. L. Rev. 747, 773.

4 Brannan, Neg. Inst. Law (5th ed. 1932), p. 140.

without an acceleration clause. The value is certain, and even the danger of insolvency is to some extent overcome.

"The Negotiable Instruments Law with its general 'on or before' clause[5] certainly seems to settle this point and allow the holder an option, but the decisions since the Act continue to argue that the 'insecure' clause makes the 'time of payment . . . . dependent absolutely upon the will and election of the payee' and ''dependent upon the future volition of' one other than the maker.'[6] Therefore it is said to be 'payable upon a contingency'[7] and invalid under the last sentence of section four.[8] That sentence has no proper application to these instruments, which fall within subdivision two of the same section.''[9]

Brannan, in commenting on Section 4(2) of the Negotiable Instruments Law and after citing cases holding an otherwise negotiable instrument which contains an acceleration provision to be non-negotiable, says: "It is submitted that these cases holding an instrument payable at a fixed time but accelerable at the option of payee or holder non-negotiable are directly contrary to the plain meaning of this section. Such instruments are certainly payable 'on or before a fixed . . . . time specified therein,' and to hold them non-negotiable is certainly a spurious construction of the act. Under a proper interpretation, these cases should be overruled.''[10]

It may be added to support further the view taken by Mr. Chaffee, and by Mr. Brannan, that such an acceleration provision in an instrument will certainly not detract from an instrument's marketability but on the contrary it will aid and enhance it. What sane person would not rather have an instrument which he may declare due and payable at a time when he feels that to wait until the date of maturity might prove detrimental to his rights, than one which does not give him such an option? There is slight ground for contention that the Negotiable Instruments Law expressly excludes such an instrument. Such an instrument is certainly payable on a day certain, because it must become payable, at any event, on the date of maturity set forth on its face, and therefore it is expressly included in Sec. 4(2) of the Negotiable Instruments Law. The only fault to be found with an instrument accelerable before maturity by the payee or holder when he deems himself insecure, is the fact that subsequent holders might not be able to ascertain whether such an instrument has been declared mature, and therefore a bona fide purchaser before the date of maturity as set forth on the face of the instrument might have taken after a previous holder had declared the note due and payable or brought suit on it, and as a result such purchaser might conceivably be declared not to be a holder in due course. However, subsequent purchasers need not inquire about the exercise of the option if they have no notice that it was exercised, for it is incidental. It has been held that as to holders in due course, ignorant of the dishonor, the instrument remains due for all purposes at the original maturity, and the acceleration is immaterial.[11] Section 52(2) of the Negotiable Instruments Law which provides that, "A holder in due course is a holder who has taken the instrument under the following circumstances: (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact," seems to

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5 N. I. L. Sec. 4 (2).

6 Puget Sound State Bank v. Washington Paving Co., *supra* note 2.

7 *Ibid.* 511; Iowa National Bank v. Carter, 144 Iowa 715, 123 N. W. 237, 241 (1909).

8 "An instrument payable on a contingency is not negotiable."

9 *Supra*, note 3, p. 775.

10 *Supra*, note 4.

11 Dunn v. O'Keefe, 5 M. & S. 282 (1816).

allay any possibility that a subsequent holder without notice of a prior exercise of the option would be declared a transferee after maturity. The above section of the Act, it is submitted, seems also expressly to permit an instrument with an acceleration provision, in that there would never be any occasion for the application of such subsection except in the case of a purchase of such an instrument after the exercise of the option, but before the face date of maturity.

There are a few cases which take the view that an instrument with an acceleration provision is nevertheless negotiable,[12] but such cases are admittedly in the minority.

So far as the writer is able to ascertain, there has been no Tennessee decision as to the negotiability or non-negotiability of an instrument, otherwise negotiable, which contains a provision allowing the payee or holder to declare it due and payable before its face date of maturity if he deems himself insecure. The Supreme Court of Tennessee has held a note to be negotiable which gave the payee the option to declare it due and payable, on the maker's failure to deposit additional security on demand if that pledged became unsatisfactory or less valuable.[13] The court, however, pointed out that in this case the acceleration of the date of maturity did not depend wholly upon the whim or caprice of the holder, but depended upon the omission or failure of the maker to furnish additional security when demanded. This distinction seems to be purely a technical one, but, nevertheless, it is the opinion of the writer that the Tennessee Court would follow the well established weight of authority should the occasion arise and declare that such an acceleration provision as that dealt with in the principal case, destroys negotiability. A very strong argument for the soundness of the above conclusion may be found in the decision of the Tennessee Supreme Court in the case of *First National Bank v. Russell*,[14] where it was held that the promissory note in question was not negotiable, because of its provision that judgment could be confessed on the note "at any time hereafter" and as a result of the provision its payment could be enforced by the entry of a judgment at any time, before or after maturity, at the discretion of the holder.

O. M. T., Jr.

BILLS AND NOTES—SURETYSHIP DEFENSES: EXTENSION OF TIME.

On April 15, 1924, R executed his negotiable promissory note in the sum of $4,000, payable to bearer 5 years after date (April 15, 1929), and secured same by a mortgage on certain real estate. Said note, shortly after its execution, was negotiated to H for a valuable consideration and without notice of any infirmity. A little later R sold and conveyed the mortgaged property securing said note to X, who assumed its payment as part of the purchase price, and H was duly notified of said facts. When the note matured, X was unable to pay it, and, upon his ap-

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12 White v. Hatcher, 135 Tenn. 609, 188 S. W. 61 (1916); West Point Banking Co. v. Gaunt, 150 Tenn. 74, 262 S. W. 38, 34 A. L. R. 862 (1924); Arnett v. Clark, 22 Ariz. 409, 198 Pac. 127 (1921); Commerce Trust Co. v. Guarantee Title & Trust Co., 113 Kan. 311, 214 Pac. 610 (1923); Mechanics and Metals Nat. Bank of New York v. Warner, 145 La. 1022, 83 So. 228 (1919); Dart Nat. Bank v. Burton, 241 N. W. 858 (Mich. 1932); Durham v. Rasco, 30 N. M. 16, 227 Pac. 599, 34 A. L. R. 838 (1924); Sommers v. Goulden, 147 Okla. 51, 294 Pac. 175 (1930); Empire Nat. Bank of Clarksburg, West Va. v. High Grade Oil Refining Co., 60 Pa. 255, 103 Atl. 602 (1918).

13 West Point Banking Co. v. Gaunt, *supra*, note 12.

14 124 Tenn. 618, 139 S. W. 734, Am. Cas. 1913A 203 (1911).

plication, the time of payment was extended one year without the knowledge or consent of R. Before the extended due date X died, and his estate is wholly insolvent. H demanded of R that he pay said note, which R refused to do. The mortgage was thereupon foreclosed, and after crediting the note with the proceeds of the sale, H filed a bill in equity against R to recover the balance due on said note.

The defense relied upon is that, when X assumed the payment of said note, he became primarily liable and R secondarily liable for its payment, and that R, being only secondarily liable, was discharged when H extended the time of payment at the request of X without R's consent.

HELD, that under the N. I. L., R was primarily liable and therefore was not discharged by the extension of time.[1]

A grantee of mortgaged premises who assumes the payment of the mortgage debt becomes the principal debtor and the mortgagor occupies the position of surety as to such mortgage debt;[2] and generally, an agreement for an extension of time entered into between the mortgagee and the grantee who has assumed the payment of the mortgage debt, if made on valid and sufficient consolidation so as to be legally enforceable, will discharge the mortgagor, unless the extension is assented to by the mortgagor.[3]

Before the N. I. L. this rule was applied regardless of whether the mortgage liability sought to be enforced was a general indebtedness or liability on a negotiable instrument.[4]

Section 60 of the N. I. L. provides that, "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse."[5]

Section 192 of the N. I. L. provides that, "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."[6]

It would seem incontestable that R, the maker of the note in question, by the terms thereof being "absolutely required to pay the same," is "primarily" liable thereon. The language of Section 192, *supra*, affirmatively excludes him from the classification of those "secondarily" liable.[7]

Before the N. I. L. the generally accepted rule was that parole evidence was admissible to show that a party to a negotiable instrument, though he appeared as the party primarily liable thereon and was absolutely required by the terms of the instrument to pay the same, was in fact known to be surety.[8] However, it is argued with considerable force that the N. I. L. makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of

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1 Atlantic Life Insurance Co. v. Carter, ... Tenn. ....., 57 S. W. (2d) 449 (1933). See also Peter v. Finzer, 116 Neb. 380, 217 N. W. 612 (1928); (1928) 42 Harv. L. Rev. 136; (1928) 26 Mich. L. Rev. 929; (1928) 6 Neb. L. Rev. 417. But Cf. Wright v. Bank of Chattanooga, ... Tenn. ....., 57 S. W. (2d) 800 (1933).

2 2 Jones, Mortgages (8th ed. 1928) Sec. 755; 2 Jones, Mortgages (7th ed. 1915), Secs. 591-592; 19 R. C. L. 373, 374; 50 C. J. 26.

3 19 R. C. L. 384; 2 Jones, *op. cit. supra*, note 2.

4 (1928) 42 Harv. L. Rev. 136.

5 Tenn. Code (1932), Sec. 7384.

6 Tenn. Code (1932), Sec. 7516.

7 Peter v. Finzer, *supra*, note 1.

8 *Supra*, note 4; Hening, *The Uniform Negotiable Instruments Law, Is It Producing Uniformity and Certainty in the Law Merchant?* (1911) 59 U. of Pa. L. Rev. 532.

the instrument signed,[9] and hence it is almost universally held that one primarily liable on a negotiable instrument cannot show liability in any other capacity.[10]

Section 119 of the N. I. L. provides that, "Negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which would discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."[11]

Section 120 of the N. I. L. provides that, "A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved:
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."[12]

The N. I. L. provides in definite terms that the instrument and hence one primarily liable, is discharged in one of five ways set forth in Section 119, *supra*. There is no mention in this section of a discharge of a person "primarily" liable by an extension of time. But, among the ways in which a party "secondarily" liable may be discharged as above set forth, in Section 120, *supra*, is "any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable, ..." From this it is argued that whatever interpretation might be required of Section 119, *supra*, containing an enumeration of the ways in which the instrument, and consequently the parties "primarily" liable thereon, might be discharged, if this provision stood alone, the inference arising from the omission of extension of time from such enumeration, and its inclusion among the ways in which parties "secondarily" liable may be discharged as above set forth in Section 120, *supra*, necessitates the conclusion that the legislature did not intend that persons "primarily" liable should be discharged in that manner. Or, in other words, parties to a negotiable instrument "primarily" liable theeron may be discharged only in the manner provided by section 119 of the N. I. L.[13]

As a general argument in support of the foregoing construction it is said that the N. I. L. should be construed so as to secure uniformity and certainty in laws throughout the country; that the words of the N. I. L. should be given their natural and ordinary meaning; that the obvious meaning of the N. I. L. should be adhered

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9 Peter v. Finzer, *supra*, note 1.
10 Note (1927) 48 A. L. R. 715.
11 Tenn. Code (1932), Sec. 7443.
12 Tenn. Code (1932), Sec. 7444.
13 Peter v. Finzer, *supra*, note 1.

to as closely as possible, without reference to the law as previously existing, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different states.[14]

It is submitted by Professor Brannan that the rule of the case in question is at variance with the well established doctrines of suretyship, and is not required by the provisions of sections 119 and 120 of the N. I. L. "The discharge of a party, who, though primarily liable, is known to the holder to be a surety, by giving time to the principal debtor seems to be covered by Section 119(4). But if this is not so, then, since the discharge of a surety-maker or surety-acceptor by an extension of time granted to the principal by a holder with knowledge of the relation, is neither a discharge of the instrument nor of a party secondarily liable, this should be regarded as an omitted case and, therefore, to be governed by the law merchant under Section 19615."[16]

A decided minority of the courts have construed Sections 119 and 120 as applicable only to holders in due course, and thus have adhered to the doctrines of suretyship under authority of Section 5817 of the N. I. L.[18]

The cases dealing with the question of suretyship defenses of parties primarily liable on a negotiable instrument have been very unsatisfactory and their results far from uniform.[19] However, there is no doubt that the majority rule as laid down by Tennessee Supreme Court is so well embodied and entrenched in the law of Bills and Notes that only an amendment of the N. I. L. could result in a general change in the rule.[20]

J. L. C., Jr.

CONTEMPT—OFFICERS OF COURT.

A member of the bar, one Tanner, was tried for contempt and found guilty.[1] He was engaged by the plaintiff in a civil action for damages, and the jury in said case returned a verdict for the plaintiff against the defendant in the sum of $12,000.00. The jury was discharged, and after one of them, George A. Anderson, a banker, had left the court room and reached the steps of the building, he was accosted by defendant Tanner and assailed for not having returned a larger verdict for his client, stating that, "it was a damned rotten verdict," and that because Anderson was a banker, "money meant more to you than human suffering, and you are responsible for this verdict." The juror was then followed a block or more

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14 Graham v. Shepherd, 136 Tenn. 418, 189 S. W. 867 (1916); Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912); Peter v. Finzer,, *supra*, note 1.

15 Tenn. Code (1932), Sec. 7519, which provides that, "In any case not provided for in this statute the rules of law and equity including the law merchant shall govern."

16 Beutel, Brannan's Negotiable Instruments Law (5th ed. 1932) 884, stating Brannan's adverse criticism of the rule.

17 Tenn. Code (1932, Sec. 7382, which provides that, "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable."

18 Fullerton Lumber Co. v. Snouffer, 139 Iowa 176, 117 N. W. 50 (1908); Long v. Shafer, 185 Mo. App. 641, 171 S. W. 690 (1914); (1928) 26 Mich L. Rev. 929.

19 Beutel, *op. cit. supra*, note 15, 879-897.

20 Brannan, *Some Necessary Amendments of the Negotiable Instruments Law* (1913), 26 Harv. L. Rev. 593-596.

1 Tanner v. United States, 62 Fed. (2d) 601 (C. C. A. 10th, 1933).

along the street and the statements substantially repeated. Upon complaint of Anderson the court adjudged the lawyer guilty of contempt, fined him $100.00, and suspended his right to practice until such fine was paid. The court justified its position by saying that all courts have the right to protect one officer of the court from an attack by another officer, and cited the section of the Federal Code which gives them the power to punish for contempt.[2]

In deciding the case the court says that no authority directly in point is to be found, and cites numerous authorities as to the duty of an attorney toward the court and its other officers, and the power of the courts to adjudge for contempt.[3]

The act complained of in the instant case is not one which constitutes direct contempt,[4] since it was not committed in the presence[5] of the court, or so near as to interrupt its proceedings.[6] If classified as constructive contempt it must be an act done which is not in the presence of the court, but which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice.[7] "To constitute constructive contempt of court, some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice, or bring the court or judge, or the administration of justice into disrespect."[8] It does not seem that there has been an obstruction, interruption, or prevention of the workings of justice. If the decision of the court is to be sustained, it is on the ground that the court or the administration of justice has been belittled, degraded, embarrassed, or brought into disrespect.

In the principal case the jury had returned a verdict, had been discharged, and were leaving the courtroom and building. After the jury has been discharged the

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2 36 Stat. 1163 (1911), 28 U. S. C. Sec. 385 (1926).

3 Bessette v. W. B. Conkey Co., 194 U. S. 324, 337 (1903); Michaelson v. U. S., 266 U. S. 42 (1924); Ex Parte Davis, 112 Fed. 139 (C. C. D. Fla. 1901); 6 R. C. L. 494.

4 13 Corpus Juris, p. 5.

5 U. S. v. Anonymous, 21 Fed. 761 (C. C. W. D. Tenn. 1884).

6 U. S. v. Anonymous, *supra*, note 5; Ex Parte McLeod, 120 Fed. 130 (N. D. Ala. 1903); U. S. v. Zanelo, 177 Fed. 536 (C. C. N. D. Ala. 1910); Asbestos Shingle, etc. Co. v. Johns-Manville Co., 189 Fed. 611 (C. C. S. D. N. Y. 1911); U. S. v. Huff, 206 Fed. 700 (S. D. Ga. 1913); Neel v. State, 9 Ark. 259 (1849); Watson v. People, 11 Colo. 4, 16 Pac. 329 (1881); Whitten v. State, 36 Ind. 196 (1871); Snyder v. State, 151 Ind. 533, 52 N. E. 152 (1898); In re Wood, 82 Mich. 75, 45 N. W. 1113 (1890); State v. Shepherd, 177 Mo. 205, 76 S. W. 79 (1903); In re Clark, 208 Mo. 121, 106 S. W. 990 (1907); Price v. Creme de Mohr Co., 78 Misc. 42, 137 N. Y. S. 732 (1912); State v. Woodfin, 27 N. C. 99 (1844); In re Oldham, 89 N. C. 23 (1883); State v. Root, 5 N. D. 47, 67 S. W. 590 (1896); State v. Applegate, 13 S. C. L. 110 (1822); Herald-Republican Publishing Co. v. Lewis, 142 Utah 188, 220, 129 Pac. 624 (1913); Commonwealth v. Stewart, 2 Va. Cases 320 (1822); State v. Jasper, 78 W. Va. 385, 88 S. E. 1096 (1916); State v. Eau Claire County Circuit Court, 9 Wis. 1, 72 N. W. 193 (1897).

7 Stuart v. Reynolds, 204 Fed. 709 (C. C. A. 5th 1913); Frowley v. Modoc County Superior Court, 158 Calif. 220, 110 Pac. 817 (1910); Ex Parte Northern, 18 Col. App. 52, 121 Pac. 1010 (1912); Holbrook v. Ford, 153 Ill. 633, 39 N. E. 1091, (1891); Stewart v. State, 140 Ind. 7, 39 N. E. 508 (1894); Flannagan v. Jepson, 177 Iowa 393, 158 N. W. 641 (1916); State v. Henthorne, 46 Kan. 613, 26 Pac. 937 (1891); Melton v. Commonwealth, 160 Ky. 642, 170 S. W. 37 (1914); Androscoggin, etc., R. Co. v. Androscoggin R. Co., 49 Me. 392 (1862); State v. Ives, 60 Minn. 478, 62 N. W. 831 (1895); In re Clarke, *supra*, note 6; Saal v. South Brooklyn R. Co., 122 App. Div. 364, 106 N. Y. S. 996 (1907); Smythe v. Smythe, 28 Okla. 266, 114 Pac. 257 (1911); Herald-Republican Publishing Co. v. Lewis, *supra*, note 6; Burdette v. Commonwealth, 103 Va. 838, 48 S. E. 878 (1904); Laramie National Bank v. Steinhoff, 7 Wyo. 464, 53 Pac. 299 (1898); 13 C. J., p. 5.

8 In re Dill, 32 Kan. 668, 689, 5 Pac. 39 (1884).

same jury cannot be reimpaneled in the case without the consent of the parties.[9] Because of this termination of the juror's function in that particular case there could be no direct influence upon its decision by the attorney's remark to the juror. The court classes both parties as officers of the court and says that power is given by statute[10] to protect its officers in the proper discharge of their sworn duty. The question then following is whether the juror, as a constituent part of the court, is engaged in the business devolved upon him by law after he has been discharged from one case, though still subject to be called in subsequent cases, and is then alone on the streets in the capacity of a private citizen.

It is submitted that difficulty seems to arise in distinguishing between a person's private and official activities in order to determine whether the rules of contempt have been violated by words spoken to him by another.

C. S. B., Jr.

CONTRACTS—"CONTINUING TO EMPLOY" AS CONSIDERATION.

"In consideration of the City Ice and Fuel Co., continuing to employ J. McKee", McKee agreed not to sell ice in a certain restricted district in St. Louis for a period of one year after leaving, "either voluntarily or otherwise" the employ of said company.[1]

This contract was brought to light in an injunction proceeding brought by the Ice Company to enjoin McKee from delivering ice within the designated area shortly after leaving their employment. At the date of the contract in question, February 14, 1931, McKee had worked for the company for some nineteen years. He continued on about a year after its making, when he quit, complaining of a reduction in wages a few weeks before. The court reversed a decree by the Chancellor dismissing the injunction petition, and remanded the case.

On the facts of the case, the enforcement of this contract would be justified from the standpoint of consideration in that McKee continued in the company's employ as long as he desired.[2] The court evidently construes the promise of the Ice Company to be, in effect, that they will continue to employ McKee as long as he wishes to work, provided no reasonable grounds for discharging him arise in the meantime.[3] Under this construction the company's promise is binding and therefore good consideration.[4] Most American courts, however, hold that a hiring, indefinite as to time, is terminable at the will of either party.[5] Under the general rule of

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9 Williams v. People, 44 Ill. 478 (1867); 35 C. J., p. 421.

10 *Supra*, note 2.

1 City Ice and Fuel Co. v. McKee, ... Mo. ...., 57 S. W. (2d) 443 (1933).

2 National Gum and Mica Co. v. Braendly, 27 App. Div. 219, 51 N. Y. S. 93 (1898); Vol. I Williston, *Contracts* (1926), Sec. 106.

3 City Ice and Fuel Co. v. Snell, 57 S. W. (2d) 440 (Mo. 1933).

4 Williston, *Contracts* (1926), Sec. 39.

5 Warden v. Hines, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529 (1908); Clarke v. Ryan, 95 Ala. 406, 11 So. 22 (1892); Lambie v. Sloss Iron and S. Co., 118 Ala. 427, 24 So. 108 (1898); Peacock v. Virginia-Carolina Chemical Co., 221 Ala. 680, 130 So. 411 (1930); St. Louis, etc. Ry. Co. v. Mathews, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467 (1897); Fulkerson v. Western Union Tel. Co., 110 Ark. 144, 161 S. W. 168 (1913); DeBrien v. Minturn, 1 Cal. 450 (1851); Davidson v. Laughlin, 138 Cal. 320, 68 Pac. 101 (1902); Kansas Pac. R. Co. v. Robinson, 3 Col. 142 (1876); Parks v. Atlanta, 76 Ga. 828 (1886); Allgood v. Feckonry, 162

construction then, the Ice Company's promise to continue to employ would furnish no consideration while the agreement was purely executory.[6]

Tennessee seemingly holds in accord with the majority view that employment for an indefinite time is terminable at the will of either party.[7]

J. S. P.

CRIMINAL LAW—ENTRAPMENT BY GOVERNMENT AGENTS AS DEFENSE.

Postal inspectors were in possession of proof that a certain man had made sales of obscene matter. In order to induce him to make an interstate shipment of it they prepared an order for a certain amount to be sent to an imaginary customer and address in another state. Their scheme was successful and the shipment was made in response to their order. The defendant was convicted of an interstate shipment of obscene matter and the Circuit Court of Appeals affirmed the judgment.[1]

In holding that the defendant was not entrapped on these facts the court followed the leading case of *Grimm v. U. S.*,[2] in which a conviction under very similar circumstances was upheld by the Supreme Court, and distinguished the same court's recent holding in *Sorrells v. U. S.*[3] by the showing that in the principal case the defendant, at the time of the alleged entrapment, was "already embarked in conduct morally indistinguishable from that charged."

Entrapment is not shown where the government facilitates or participates in the commission of a crime in order to detect the offender, but it is shown where the government induces or encourages a criminal act in order to obtain a victim to prosecute,[4] the decisions in regard to its nature and effect are as various and confusing as they are numerous.

The accused has been held not entitled to defend on the theory of entrapment: where he has knowingly and intentionally committed all the acts necessary to constitute the crime;[5] where the entrapping officers acted on a reasonable suspicion

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Ga. 777, 135 S. E. 314 (1926); Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359 (1904); Speeder Cycle Co. v. Teeter, 18 Ind. App. 474, 48 N. E. 595 (1897); Harrod v. Wyneman, 146 Iowa 718, 125 N. W. 812 (1910); Louisville, etc. Co. v. Offutt, 99 Ky. 427, 36 S. W. 181 (1896); Hudson v. Cincinnati, etc. Ry. Co., 154 S. W. 47 (Ky. 1913); Hardy v. Meyers, 206 Ky. 562, 267 S. W. 1110 (1925); Pitcher v. United Oil and Gas Syndicate, 174 La. 66, 139 So. 760 (1932); McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. 176 (1887); Steward v. Nutrena Feed Mills, 244 N. W. 813 (Minn. 1932); Martin v. New York Life Ins. Co., 148 N. Y. 117, 42 N. E. 416 (1895); Watson v. Gugino, 204 N. Y. 535, 98 N. E. 18 (1912); Exchange Bakery and Restaurant v. Riflin, 245 N. Y. 260, 157 N. E. 130 (1927); Roddy v. United Mine Workers, 41 Okl. 621, 139 Pac. 126 (1914); Christenson v. Pacific Coast Borax Co., 26 Ore. 302, 38 Pac. 127 (1894); Coffin v. Landis, 46 Pa. 426 (1864); Kirk v. Hartman, 63 Pa. 97 (1869); Booth v. National India Rubber Co., 19 R. I. 696, 36 Atl. 714 (1897); St. Louis Southwestern R. Co. v. Griffin, 106 Tex. 417, 171 S. W. 703 (1914); Island Lake Oil Co. v. Hewitt, 244 S. W. 193 (Texas 1922); Davidson v. Mackall-Paine Veneer Co., 149 Wash. 685, 271 Pac. 878 (1928).

6 Williston, *Contracts* (1926), Sec. 39.

7 St. Paul F. and M. Ins. Co. v. Ulbright, 48 S. W. 131 (Tenn. 1898).

1 U. S. v. Becker, 62 F. (2d) 1007 (C. C. A. 2d, 1933).

2 156 U. S. 604 (1895).

3 287 U. S. ...., 53 S. Ct. 210, 77 L. ed. 265 (1932).

4 *Ibid.*

5 Hyde v. State, 131 Tenn. 208, 174 S. W. 1127 (1915); U. S. v. Duff, 6 F. 45 (C. C. S. D. N. Y., 1881); Bates v. U. S., 10 F. 92 (C. C. N. D. Ill., 1881); U. S. v. Grimm, 50 F. 528(E. D. Mo., 1892), *aff'd* Grimm v. U. S., *supra*, note 2; Andrews v. U. S., 162 U. S. 420, 16 S. Ct. 798, 40 L. ed. 1023 (1896); Robinson v. U. S., 32 F.

that the defendant was engaged in the commission of a crime;[6] where the entrapping officers acted only to ascertain if a crime was being committed;[7] where the entrapping officers held out no more temptation than the defendant might be expected to meet with daily;[8] and where the act of the defendant was done in the regular course of an illegal business and the officers merely posed as customers.[9]

Where the "reasonable suspicion" test is applied[10] it has been held that the prosecution is entitled to introduce evidence of complaints and of former offenses to prove the basis of the officers' reasonable suspicion. If the defendant objects to the introduction of this rebuttal testimony after he has attempted to prove entrapment he withdraws the issue of entrapment from the case.[11]

The defense of entrapment has been held valid: where the government has tricked the defendant into the commission of a *malum prohibitum* act by hiding from him the fact which keeps it from being a lawful act;[12] where the defendant has been merely a passive instrument in the hands of his entrappers;[13] where the criminal design originated in the mind of the officer;[14] and where the criminal act was induced by the officers,[15] especially if employing over-persuasive methods,[16] or a threat to deprive the defendant of a lucrative government contract.[17]

It has been held that liquor cases do not fall under the general rule and that the doctrine of entrapment does not apply to them.[18] There seems to be no valid foundation for such an exception and *Sorrells v. U. S.* [19] ignores it.

(2d) 505 (C. C. A. 8th, 1928), 66 A. L. R. 468; Sorrells v. U. S., 57 F. (2d) 973 (C. C. A. 4th, 1932), *rev'd* Sorrells v. U. S. *supra* note 3; People v. Mills, 178 N. Y. 274, 70 N. E. 786 (1904); People v. Conrad, 92 N. Y. Sup. 606 (1905).

6 Billingsley v. U. S., 274 F. 86 (C. C. A. 6th, 1921); Roth v. U. S., 294 F. 475 (C. C. A. 6th, 1923); Spring Drug Co. v. U. S., 12 F. (2d) 852 (C. C. A. 8th, 1926); *cf.* U. S. v. Washington, 20 F. (2d) 160 (D. Neb. 1927).

7 U. S. v. Pappagoda, 288 F. 214 (D. Conn. 1923); U. S. v. Reisenweber, 288 F. 520 (C. C. A. 2d, 1923).

8 Scriber v. U. S., 4 F. (2d) 97 (C. C. A. 6th, 1925).

9 Lucadamo v. U. S., 280 F. 653 (C. C. A. 2d, 1922); U. S. v. Pappagoda, *supra* note 7; Nutter v. U. S., 289 F. 484 (C. C. A. 4th, 1923); Simmons v. U. S., 300 F. 321 (C. C. A. 6th, 1924); Weiderman v. U. S., 10 F. (2d) 745 (C. C. A. 8th, 1926); U. S. v. Becker, *supra*, note 1.

10 See *supra* note 6.

11 Corcoran v. U. S., 19 F. (2d) 901 (C. C. A. 8th, 1927).

12 U. S. v. Healy, 202 F. 349 (D. Mont., 1913); Voves v. U. S., 249 F. 191 (C. C. A. 7th, 1918).

13 State v. Mantis, 32 Idaho 724, 187 Pac. 268 (1920).

14 Lucadamo v. U. S., *supra* note 9; Gargano v. U. S., 24 F. (2d) 625 (C. C. A. 5th, 1928).

15 U. S. v. Adams, 59 F. 674 (D. Ore., 1894); Sam Yick v. U. S., 240 F. 60 (C. C. A. 9th, 1917); U. S. v. Echols, 253 F. 862 (S. D. Tex. 1918); Peterson v. U. S., 255 F. 433 (C. C. A. 9th, 1919); U. S. v. Lynch, 256 F. 983 (S. D. N. Y. 1918); U. S. v. Eman Mfg. Co, 271 F. 353 (D. Colo., 1920); Billingsley v. U. S., *supra*, note 6; U. S. v. Certain Quantities of Intoxicating Liquors, 290 F. 824 (D. N. H. 1923); Newman v. U. S., 299 F. 128 (C. C. A. 4th, 1924); U. S. ex rel. Hassel v. Mathues, 22 F. (2d) 979 (E. D. Pa. 1927); Sorrells v. U. S. *supra*, note 3; State v. McCornish, 59 Utah 58, 201 Pac. 637 (1921); Koscak v. State, 160 Wis. 255, 152 N. W. 181 (1915).

16 Woo Wai v. U. S., 223 F. 412 (C. C. A. 9th, 1915); Butts v. U. S., 273 F. 35, 18 A. L. R. 143 (C. C. A. 8th, 1921); Cermak v. U. S., 4 F. (2d) 99 (C. C. A. 6th, 1925).

17 U. S. v. Lynch, *supra*, note 15.

18 State v. Seidler, 267 S. W. 424 (Mo. 1924).

19 *Supra*, note 3.

The issue of entrapment is usually for the determination of the jury under appropriate instructions.[20]

The defense of entrapment, except where it vitiates an essential element of the crime, has never been recognized in Tennessee. The only case directly on the point as yet in this jurisdiction is *Hyde v. State*,[21] a prosecution for an illegal prescription of narcotics, in which, on a set of facts parallel to those of the principal case,[22] the defendant was held not entrapped. The court followed *Grimm v. U. S.*[23]

The two reasons most frequently given for permitting the defense of entrapment are: that the government is estopped, because of the acts of its agents, from prosecuting the defendant; and that public policy forbids a conviction on such a set of facts.[24] Even a casual survey of the cases reveals a marked trend on the part of the courts during the last few years in favor of releasing entrapped criminals.

L. B. F.

JUDGMENT—THE DOCTRINE OF RES JUDICATA.

In a recent case[1] one Shapiro was indicted in a state court. Subsequently thereto he was indicted, tried and convicted of another offense in a Federal court and sent to the Federal penitentiary in Leavenworth, Kansas. While serving his sentence, Shapiro was returned to the state that had indicted him and was there tried and convicted in the state court. Upon the expiration of his sentence in Leavenworth prison Shapiro was arrested by the Kansas authorities on an extradition warrant from the governor of the state that had previously convicted him. The defendant Shapiro sued out a writ of habeas corpus which was sustained on the theory that he was not a fugitive from justice. Shapiro then moved to a third state where he was again arrested on another extradition warrant from the state that had originally convicted him of an offense and he again sued out a writ of habeas corpus. The writ was dismissed. The court held that the defendant was a fugitive from justice and the discharge of the defendant under the Kansas judgment that he was not a fugitive from justice was not res judicata in a local habeas corpus proceeding raising the same issue.

Two interesting points are presented by this case, namely: the meaning of the term "Fugitive from Justice" and the application of the doctrine of res judicata.

The doctrine of res judicata was judicially promulgated for the first time in an early English case.[2] The court in that case propounded two rules which in substance are:[3]

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20 Newman v. U. S., *supra* note 15; Cermak v. U. S., *supra* note 16; Gargano v. U. S., *supra* note 14; Sorrells v. U. S., *supra* note 3. But *cf.* U. S. ex rel. Hassell v. Mathues, *supra* note 15 (defendant released on habeas corpus before trial); U. S. v. Lynch, *supra* note 15 (directed verdict for defendant); U. S. v. Healy, *supra* note 12 (court vacated judgment and sentence on its own motion).

21 *Supra* note 5.

22 *Supra* note 1.

23 *Supra* note 2.

24 U. S. v. Healy, *supra* note 12; U. S. v. Lynch, *supra* note 15; Voves v. U. S., *supra* note 12; Woo Wai v. U. S., *supra* note 16.

1 State ex rel. Shapiro v. Wall, Sheriff, ... Minn....., 244 N. W. 811 (1932).

2 The Duchess of Kingston's Case, 20 How. St. Tr. 355, 2 Smith's Leading Cases (8th ed.) 784 (1775).

3 Hunt v. Blackburn, 128 U. S. 464, 32 Law. Ed. 488 (1888); New Orleans v. Citizens Bank, 167 U. S. 371, 42 Law. Ed. 202 (1897); U. S. v. California, etc. Bridge Co., 245 U. S. 337, 62 Law. Ed. 332 (1917).

1. The judgment by a court of competent jurisdiction upon the merits of the case in litigation constitutes a bar to another action involving the same cause of action before the same or any other tribunal.

2. Any right, fact or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties whether the claim or demands of the two suits is the same or not.

The doctrine of res judicata is a rule of necessity and is based on public policy, that is, there shall be an end to litigation somewhere, and a person shall not be subjected to innumeral lawsuits for the same cause.[4]

Do the facts in the principal case[5] justify an application of the doctrine of res judicata? To determine this we must find what was decided in the Kansas hearing on the first extradition warrant. The Kansas court determined that the defendant Shapiro was not a fugitive from justice hence not subject to extradition. What does the term "Fugitive from Justice" signify? Being a fugitive from justice involves a question of status and as such is a matter of fact.[6] It has often been held that where the status in contest has once been determined in a habeas corpus proceeding the doctrine of res judicata will thereafter apply and is conclusive until the condition of the person whose status is in question has changed.[7]

It is evident that the court in the principal case was actuated by considerations of public policy in returning the defendant to the state that wanted him. It is submitted that the court erred in refusing to apply the doctrine of res judicata in the principal case as no showing was made that the status of the defendant had changed since the first habeas corpus proceeding.

J. R. S.

JUSTICIABILITY OF SUITS FOR DECLARATORY JUDGMENTS—FEDERAL RULE.

Suit was brought in a state court of Tennessee under the Uniform Declaratory Judgments Act[1] of that state to secure a judicial declaration that a state excise tax levied on the storage of gasoline[2] is, as applied to appellant, invalid under the Fourteenth Amendment of the Federal Constitution. A decree for appellees was affirmed by the state Supreme Court, and an appeal was taken to the United States Supreme Court.[3] That court assumed jurisdiction, and the judgment of the state court was affirmed.[4]

In 1927 the United States Supreme Court for the first time considered declaratory judgment procedure,[5] and at that time refused to recognize it. Other cases

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4 Ellis v. Staples, 28 Tenn. 238 (1848); Warwick v. Underwood, 40 Tenn. 238 (1859); Spellings v. Nashville, etc. Ry. Co., 7 Tenn. Civ. App. 133 (1916); U. S. v. Throckmorton, 98 U. S. 61, 25 Law. Ed. 93 (1878); Hart Steel Co. v. Ry. Supply Co., 244 U. S. 94, 61 Law. Ed. 1148 (1917).

5 State ex rel. Shapiro v. Wall, Sheriff, *supra* note 1.

6 (1928) 77 Penn. L. Rev. 135.

7 Ex parte Jilz, 64 Mo. 205 (1876); Weir v. Marley, 99 Mo. 488, 12 S. W. 798 (1899); In re Clark, 208 Mo. 142, 106 S. W. 990 (1907); In re Breck et al., 252 Mo. 302, 158 S. W. 843 (1913).

1 Chap. 29, Tennessee Public Acts, 1923.

2 Chap. 58, Tennessee Public Acts, 1923, as amended by Chap. 67, Tennessee Public Acts, 1925.

3 42 Stat. 366 (1925), 28 U. S. C. 344 (1926).

4 Nashville, C. & St. L. Ry. v. Wallace, Comptroller of Tenn., et al., 53 Sup. Ct. Rep. 345 (1933).

5 Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. Rep. 282 (1927).

since that time have been consistent in refusing to recognize such procedure,[6] although adopted by statute in twenty-nine states;[7] and this recent decision[8] in substance overrules the previous decisions and establishes a new policy in the Federal Courts.

Although the courts, both state and federal, are unanimous in saying that they will not try moot cases or render advisory opinions, the federal courts were apparently influenced by a Michigan decision which held that a statute authorizing declaratory judgments was unconstitutional.[9] The proceeding in which the decision was rendered was not based upon an actual controversy, and the court treated the proceeding as one of the kind the legislature intended to authorize, and held the statute invalid because the power to make a declaration of rights where no consequential relief can be had is not judicial and cannot be conferred upon the courts. Subsequent to this decision of the Michigan Supreme Court other state courts recognized the difference between declaratory judgments and mere moot cases and the rendering of advisory opinions,[10] the result being that the Michigan decision is not followed by courts of other states as authority for the proposition that declaratory

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6 New York v. Illinois and Sanitary District of Chicago, 274 U. S. 488 (1927); Willing v. Chicago Auditorium Ass'n., 277 U. S. 274 (1928); Federal Radio Comm. v. General Electric Co., et als., 281 U. S. 464 (1930); Arizona v. California, 283 U. S. 423 (1931); Lamoreaux v. Kinney, 41 F. (2d) 30 (C. C. A. 9th, 1930); Marty et ux. v. Nagle, Comm. of Immigration, 44 F. (2d) 695 (C. C. A. 9th, 1930); Cleveland Trust Co. v. Nelson et al., 51 F. (2d) 276 (E. D. Mich. 1931); United States v. Central Stockholders Corporation of Vallejo, et al., 52 F. (2d) 322 (C. C. A. 9th, 1931); City of Osceola, et al. v. Utilities Holding Corporation, 55 F. (2d) 155 (C. C. A. 8th, 1932); Commissioners of Internal Revenue v. Liberty Bank and Trust Co., 59 F. (2d) 320 (C. C. A. 6th, 1932).

7 See principal case, *supra* note 4, page 346, note 1: "The procedure authorized by this statute has been extensively adopted both in this country and abroad. It is said that the uniform act is in force in sixteen of the states and Puerto Rico, and that similar statutes have been enacted in thirteen states, Hawaii, and the Philippines. For a discussion of the history of this procedural device in France, Germany, Spain, Spanish America, Scotland, England and India, as well as in the United States, and types of controversies in which it has been invoked, see 28 Yale Law Journal 1, 105."

8 *Supra* note 4.

9 Anway v. Grand Rapids R. Co., 211 Mich. 592, 179 N. W. 350 (1920). See, however, Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930), holding a declaratory judgment statute valid. There, after citing cases from other jurisdictions, the court said: "In all except two the Anway case was cited and discussed. No court except our own has held a declaratory judgment law unconstitutional."

10 Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1923); Hodges et al. v. Hamblen County, et al., 152 Tenn. 395, 277 S. W. 901 (1925); Goetz, et al. v. Smith, et al., 152 Tenn. 451, 278 S. W. 417 (1925); Cummings v. Shipp, 156 Tenn. 595, 38 S. W. (2d) 1062 (1928); Perry v. City of Elizabethton, 160 Tenn. 102, 22 S. W. (2d) 359 (1929); General Securities Company v. Williams, 161 Tenn. 50, 29 S. W. (2d) 662 (1929); Morton v. Pacific Construction Company, ... Ariz. ...., 283 Pac. 281 (1929); Blakeslee v. Wilson, 190 Calif. 479, 213 Pac. 495 (1923); Braman v. Babcock, 98 Conn. 549, 120 Atl. 150 (1923); Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930); Zoercher v. Agler, ... Ind. ...., 172 N. E. 186 (1930); State ex rel. Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1922); Black v. Elkhorn Coal Corp., 233 Ky. 588, 26 S. W. (2d) 481 (1930); Washington-Detroit Theatre Co. v. Moore, *supra* note 9; McCrory Stores Corp. v. S. M. Braunstein, Inc., 102 N. J. L. 590, 134 Atl. 752 (1926); Board of Education v. Van Zandt, 119 Misc. 124, 195 N. Y. S. 297 (Sup. Ct. 1922), aff'd, 234 N. Y. 644, 138 N. E. 481 (1923); In re Kariher's Petition, 284 Pa. 455, 131 Atl. 265 (1925); Patterson's Exrs. v. Patterson, 144 Va. 113, 131 S. E. 217 (1926); City of Milwaukee v. Chicago and N. W. Ry., ... Wis. ...., 230 N. W. 626 (1930).

judgments are unconstitutional, and weight has been given to it as authority for such only in the federal courts.[11]

In the principal case[12] the court states that injunctive relief or execution of judgment is not an indispensable adjunct to the exercise of their decision. Further, the court states, "In determining whether this litigation presents a case within the appellate jurisdiction of this court, we are concerned, not with form, but with substance. Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance, as 'declaratory', but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts."

In holding the Tennessee Declaratory Judgment Statute constitutional, and drawing a sharp distinction between declaratory judgments and moot questions, the Tennessee Supreme Court held[13] that, "The only controversy necessary to invoke the action of the court and have it declare rights under our declaratory judgment statute is that the question must be real, and not theoretical; the person raising it must have a real interest, and there must be someone having a real interest in the question who may oppose the declaration sought. It is not necessary that any breach should be first committed, any right invaded, or any wrong done. The purpose of the Act is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status or other legal relations.'"

In requiring an actual controversy between parties directly in interest, considering injunctive relief or execution of judgment immaterial, and rendering decisions before any breach is committed, right invaded, or wrong done, the United States Supreme Court and the Tennessee Supreme Court have apparently reached identical results. The only point upon which they are inharmonious is in the use of definite terminology. The United States Court flatly refuses to employ any "label which the legislature has attached." Although a relatively unimportant matter, it is submitted that because of the sharp and well settled distinction drawn between declaratory judgments and moot questions by the state courts, the United States Supreme Court might have taken an additional step and sanctioned the terminology of what has become a well established form of procedure.

C. S. B., Jr.

WILLS—MUTUAL, HUSBAND AND WIFE, ORAL CONTRACT.

H and W, husband and wife, entered into an oral agreement to execute mutual wills, whereby, upon the death of either, the survivor should receive all the property, real and personal, of the decedent. In conformity with this agreement H and W executed at the same time separate wills devising and bequeathing to each other their entire and separate estates, both real and personal. Both wills were maintained in the home of the parties until the death of H when the will of H was admitted to probate. Thereafter another will of H, of subsequent date, revoking all former wills, was offered for probate and admitted as the last will and testament of the deceased. W had no prior knowledge of this will nor of H's intention to revoke his mutual will. In a bill against the heirs at law W denied the right of H to revoke and sought to impose a trust upon the property in her favor. HELD, two Justices

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11 *Supra* note 6.
12 *Supra* note 4.
13 Miller v. Miller, *supra* note 10.

dissenting, reversing the lower court; mutual wills, whereby parties reciprocally devise realty to each other, are not sufficient "written evidence" or "memoranda" of contract to meet the requirements of the Statute of Frauds.[1]

Mutual wills are those which are reciprocal in their provisions, giving the property of each testator to the other.[2] Mutual wills, like joint wills, when first considered by the English courts and early American courts, were disapproved for the reason that the implied covenant against revocation deprived the instrument of the quality of revocability, an essential characteristic of wills.[3] The validity of such wills is now well settled in both countries.[4]

A mutual will, like any other will, may be revoked.[5] If it is not made in pursuance of a contract the right of the testator to revoke is beyond question. If made in pursuance of a contract between the testators, such will stands upon the same footing as any contract, that is, the will itself may be revoked but the contract in pursuance of which the wills were made, may be enforced in an action at law for damages,[6] or by a bill in equity for specific performance.[7] Equity does not compel the execution of the will but specifically enforces it by fastening a trust upon the property in favor of the promisee.[8]

The rules of law governing ordinary contracts to convey realty apply with equal force and effect to contracts to devise realty.[9] A devise comes within the legal definition of one who takes by purchase and hence to an oral contract of the kind shown in the principal case the Statute of Frauds may be pleaded.[10] To satisfy the statute the will itself may be a sufficient memorandum,[11] provided it contains all the essential terms of the contract.[12] It is not essential that the contract be in writing, provided there is produced a writing containing the terms of the oral contract, and authenticated by the person to be charged.[13] The consideration need not be regarded in construing the statute, as part of the contract, but merely as an inducement to it. Therefore no principle of law is violated by the admission of parol evidence when it becomes necessary to be shown.[14]

The principal case when considered in the light of the dissenting opinion is fairly representative of the divergent views taken by the courts on the questions

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1 Gibson et al. v. Crawford, ... Ky. ...., 56 S. W. (2d) 985 (1932). Accord: Canada v. Ihmsen, 33 Wyo. 439, 240 Pac. 927 (1925). Contra: Brown v. Webster, 90 Nebr. 591, 134 N. W. 185 (1912.)

2 Carle v. Miles, 89 Kan. 540, 132 Pac. 146 (1913).

3 1 Page, Wills (2d ed. 1926), Sec. 86.

4 Evans v. Smith, 28 Ga. 98 (1859); Anderson v. Anderson, 181 Iowa 578, 164 N. W. 1042 (1917); Carle v. Miles, *supra* note 2.

5 Allen et al. v. Bromberg, 147 Ala. 317, 41 So. 771 (1906); Peoria Humane Society v. McMurtrie, 229 Ill. 519, 82 N. E. 319 (1907); In re Cawley's Estate, 136 Pa. 628, 20 Atl. 567, 102 L. R. A. 93 (1890); Doyle v. Fischer, 183 Wis. 599, 198 N. W. 763, 33 A. L. R. 733 (1914).

6 Stewart v. Todd, 190 Iowa 283, 173 N. W. 619, 20 A. L. R. 1272 (1919).

7 In re Rolls Estate, 193 Cal. 594, 226 Pac. 608 (1924); Peoria Humane Society v. McMurtrie, *supra* note 5; Stewart v. Todd, *supra* note 6; Morgan v. Sabborn, 225 N. Y. 454, 122 N. E. 696 (1916); Doyle v. Fischer, *supra* note 5.

8 Bolman et al. v. Overall, Exr. et al., 80 Ala. 451, 2 So. 624 (1887).

9 Pond v. Sheehan, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414 (1800); Ellis v. Cary, 74 Wis. 176, 42 N. W. 242, 4 L. R. A. 55 (1889).

10 Dickens v. McKinley, 163 Ill. 318, 45 N. E. 134 (1896); Gould v. Mansfield, 103 Mass. 408 (1869); Lord Walpole v. Lord Orford, 30 Eng. Rep. F. R. 1076 (1797).

11 McGee v. Blankenship, 95 N. C. 563 (1886).

12 Shied v. Stamps, 34 Tenn. 172 (1854); May v. Ward, 134 Mass. 127 (1880).

13 Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835 (1877).

14 Whitby v. Whitby, 37 Tenn. 473, 478 (1857).

therein raised, the majority opinion following the decided weight of authority on the essential points decided. A review of the related cases discloses no uniformity on questions of part performance to take the agreement out of the Statute of Frauds, the sufficiency of the will as memorandum to satisfy the statute, and the matters relating to revocation of mutual wills.

The weight of authority is to the effect that the mere making of a will by the plaintiff is not such part performance as is sufficient to take the agreement out of the Statute of Frauds.[15] It is an elementary rule of contract, that promises to make mutual wills are consideration for each other, yet the performance of such promise is not such part performance as will remove the agreement from the operation of the Statute of Frauds.[16] This is due to the ambulatory character of the act. This class of cases is to be distinguished from those wherein services are given in consideration for and on the faith of a promise to devise realty,[17] or where such contract is fully performed by one of the mutual testators and the benefits have been received and accepted by the other.[18] The weight of authority seems to hold that part performance in these cases lifts the agreement from the statute.[19]

Whether the reciprocal wills executed in pursuance of an oral compact constitute in themselves a sufficient memorandum of the agreement to satisfy the Statute of Frauds is a matter about which the courts are not in agreement. To obtain relief in equity the contract to make reciprocal wills must be clearly and definitely established.[20] In the case of joint and mutual wills it clearly appears that the document itself is sufficient evidence to establish the contract.[21] Mutual wills on the contrary are not intrinsic evidence of a contract,[22] nor do they in general constitute written evidence or memorandum of the agreement to meet the requirements of the statute.[23] It is possible that they may have been executed without reference to each other and on the same day by mere coincidence. It is also true that direct evidence of the agreement is not essential.[24] In determining whether the written will of each evidences the fact that a contract has been entered into by the parties whereby the will of each was written and executed, the situation and circumstances of the parties may be looked to, when necessary, to aid in arriving at the meaning of what they have written.[25] They may, however, when considered in the light of the circumstances, manifest a joint purpose which could not be consummated except

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15 Gould v. Mansfield, *supra* note 10; Everdell v. Hill, 27 Misc. Rep. (N. Y.) 285, 58 N. Y. Supp. 447 (1889); Hale v. Hale, 90 Va. 728, 19 S. E. 739 (1894). Contra: Brown v. Johanson, 69 Colo. 400, 194 Pac. 943 (1920); Brown v. Webster, *supra* note 1; Turnipseed v. Sirrine, 57 S. C. 559, 35 S. E. 757 (1900).

16 Hale v. Hale, *supra* note 15.

17 Bassett v. American Baptist Publication Society, 215 Mich. 126, 183 N. W. 747, 15 A. L. R. 213 (1921); Burt et al. v. McKibbin, ... Mo. ....., 188 S. W. 187 (1916).

18 Carmichael v. Carmichael, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596 (1888).

19 Contra: Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767 (1906).

20 Purcell v. Miner, 4 Wall. 513(U. S. 1866); Herrick v. Snyder, 59 N. Y. Supp. 229 (1899).

21 Rastetter et al. v. Hoenninger, 151 App. Div. 853, 136 N. Y. Supp. 961, 108 N. E. 210 (1915).

22 Williams v. Morris, 95 U. S. 444 (1877); Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265 (1898).

23 Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508 (1909); Edson v. Parsons, *supra* note 22; In re Ewell's Estate, 75 Wash. 391, 134 Pac. 1041 (1913).

24 Everdell v. Hill, *supra* note 15.

25 Jenkins v. Harrison, 66 Ala. 345, 360, 361 (1880).

through the co-operation and agreement of the parties in interest.[26] In *Canada v. Ihmsen*[27] the parties were total strangers. In the principal case the parties were husband and wife and the wills were made on the same day. In both these cases no contract was found. In *Doyle v. Fisher*[28] where the wills of husband and wife were single documents, executed at the same time, each testator knowing the will of the other, these facts were found conclusively to indicate that the wills resulted from mutual agreement and were in accordance therewith. In *Brown v. Webster*[29] there is the additional factor that the wills were witnessed by the same witnesses. In *Harris v. Morgan*[30] where four parties executed separate wills, simultaneously, at the same place and witnessed by the same persons each disposing of property to the survivor, the court had no difficulty in finding that these facts negative any conclusion but that they were executed pursuant to a joint compact or agreement and that each was executed in consideration of the other. They were necessarily considered as a part of one transaction to the same extent as though executed on one sheet of paper. Construed and considered together they constituted written evidence of a contract between the parties so that the contract did not rest entirely upon parol. Justice Grey, speaking in *Edson v. Parsons*,[31] gives us a guide saying, "I know of no absolute rule of law which impresses upon wills, similar in their cross provisions, that mutual character by force of which the survivor's estate comes under a trust obligation. I understand that something more is needed to warrant equitable intervention and, in the absence of express agreement, that it must be found in the circumstances which so surround the transaction as imperatively to compel the conclusion that the parties intended and undertook to bind themselves and their estates irrevocably in the event of the prior death of one."

Many cases use language which seems to say that the will is revocable during the life time of both the parties, but becomes irrevocable upon the death of either, at least, if the survivor takes under the will of the first to die, and that the revocation during the life time of both must be upon notice by the revoking party.[32] The apparent conflict in the cases seems attributable to the failure to distinguish clearly between the will itself and the right of action on the contract in pursuance of which the wills were made. They may be reconciled in part by recognizing the general principle that such a testamentary instrument may be revoked by either maker and the express or implied covenant against revocation will not prevent the probate of the later will duly executed by one of the parties, but equity may in a proper case give effect to the instrument as a contract. In this respect a will is said, though incorrectly it is submitted, to be irrevocable in equity.[33] An examination of the cases

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26 Harris v. Morgan, 157 Tenn. 140, 7 S. W. (2d) 53 (1928); Beckwith v. Talbott, 25 U. S. 289, 24 L. Ed. 496 (1877); Anderson v. Anderson, 181 Iowa 578, 164 N. W. 1042 (1917); Lee v. Butler, 167 Mass. 426, 46 N. E. 52 (1897).

27 *Supra* note 1.

28 *Supra* note 5.

29 *Supra* note 1.

30 *Supra* note 26.

31 *Supra* note 22.

32 Walker v. Yarbrough, 200 Ala. 458, 76 So. 390 (1917); Brown v. Johanson, *supra* note 15; Frazier v. Patterson, *supra* note 23; Campbell v. Dunkelberger, 172 Iowa 385, 153 N. W. 56 (1915); Carmichael v. Carmichael, *supra* note 18; Edson v. Parsons, *supra* note 22.

33 Brown v. Webster, *supra* note 1.

will disclose that the question involved was the validity of the contract and the power of law or equity to enforce it and not the irrevocable character of the will.[34]

E. H. S.

[34] See Frazier v. Patterson, *supra* note 23. 1 Page, Wills (2d ed. 1926), Sec. 88.

BOOK REVIEWS

CASES ON PLEADING AND PROCEDURE. By Charles E. Clark. Saint Paul: West Publishing Company, 1932, Vol. I and II.

Now that the second, and final, volume of Dean Clark's Cases on Pleading and Procedure has been published, one can intelligently review his work. Its value can be determined by discovering its purpose, evaluating that, and by then seeing how well that purpose has been carried out.

As clearly suggested in the prefaces to these volumes, the object of the books is to provide materials for courses in Common Law Pleading, Code Pleading, Equity Pleading, and parts of a course in Equity. Is this aim a proper one? There can be no question that in most schools these courses should be given and certainly there is no real objection to putting them within the compass of two books. Some might object to the inclusion in a procedure course of so much material on specific performance and other equitable remedies, but, before unfavorably criticising the work on that ground, one should carefully investigate the cases on those subjects. If he does, he will discover that they deal very largely with procedural matters. An underlying idea of both volumes is "to employ history not as an end itself but for the light it casts on present day rules." On the whole, that ideal is a proper one, and it is readily seen why Dean Clark stresses this. There can be no doubt that some casebooks have used altogether too much space in setting forth the historical development of procedural theories. However, it seems to the reviewer that there are some historical matters that should be dealt with which do not throw any appreciable light on present day rules. Thus, he believes that in a course on Common Law Pleading some mention should be made of Real Actions.

Let us next examine how well the author's objects have been carried out. To begin with, the usual scholariness of Dean Clark's works, including thorough research, is here present. In this collection of materials we find excerpts relating to controversies dating back to the eleventh century[1] and extracts from decisions rendered in 1932.[2] We also discover a broad range in the citation of law review articles and books. The author has not been content to deal only with materials devoted primarily to pleading. He has, rather, also investigated many writings in relation to other subjects, such as habit of thought, conflict of laws, logic, scientific method and the law, logical method and law.[3] His selected material is, on the whole, apt and teachable. Moreover, he has treated the various types of pleading separately, when necessary, and has kept his work within reasonable limits.

The writer would not arrange the materials as they are here found. He would deal with the elements of the various causes of actions first, for that is what is naturally done so that one may discover whether or not any cause of action exists. He would consider these all together, since he believes that to treat one type of action, including defensive pleadings, etc., and then to do the same thing with another kind of action is confusing. The consideration of parties and the joinder of actions should precede matters dealing with pleadings subsequent to the original pleading of the plaintiff, for that is when such points are dealt with. However,

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1 Vol. 1, p. 483.
2 Vol. 2, p. 632.
3 Vol. 1, pp. 107-116.

the thing that is of most concern is the fact that a rich mine of materials exists between the covers of these books and if one does not like the order of their appearance he can do his own changing of that order.

The idea of showing how a case is presented to a court is a good one, but a question may well be asked why the appellate record is spoken of[4] in a work not dealing with practice. Either it would, it seems, be better to stick to pleading proper or give the student a brief summary of the entire proceedings in a case.

Another question arises at this point. Have subjects been omitted from these volumes which should have been included? It is thought by the reviewer that somewhat more of the history of the important common law acts should have been included. The citations are present, but at least summaries of the excellent articles now existing should be printed, for, otherwise, few of the students using this series of books will get to know much about them, unless the teacher spends more class time than he should in providing the omission. A good example of what can be done along this line is found in the chapter on "Actions Concerning Realty."[5] These omissions were probably intentional, as the author believes too much attention has been paid to the history of pleading.

Though the writer may express his humble opinion as to ways in which he personally thinks the volumes being reviewed could be improved, he unreservedly congratulates Dean Clark upon his production of a scholarly and practical set of books. He has done the law school a valuable service.

CARL WHEATON.

Saint Louis University School of Law.

HANDBOOK OF THE LAW OF EVIDENCE. By John J. McKelvey. St. Paul: West Publishing Company. Fourth Edition, 1932, pp. xix, 576.

This volume is one of the Hornbook Series published by the West Publishing Company. The fact that this is the fourth edition of this text is the best evidence of its worth and popularity. The first edition was published in 1897. Since this book is so well known a detailed discussion of the problems of evidence presented therein and their treatment would be useless.

The author has made no startling changes in the subject matter of this edition. A few changes in presentation have been made. Some sections have been omitted, others have been added, and still others have been re-arranged. The notes have been revised and the citations brought up to date. In many instances the notes have been enlarged so as to include interesting and important cases and a comment thereon in relation to the rules or facts stated in the text. In addition the author has included citations to law review articles and notes. On the whole the fourth edition is an improvement upon the third edition.

In the preface the author states his intent to deal with the existing rules of evidence as they are. He states these rules clearly, concisely and convincingly, thus producing a text-book valuable to the law student, in that it gives him access to the entire field covered by the law of evidence, to the lawyer and judge, in that it furnishes to them a reliable and convenient statement of the law.

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[4] Vol. 1, pp. 14-16.
[5] Vol. 1, pp. 451-452.

The make-up of the volume is the standard form used throughout the Hornbook Series. The rule is stated in black faced type and is followed by discussion.

College of Law,
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HAROLD C. WARNER.

REGULATION OF PUBLIC UTILITIES. By Cassius M. Clay. New York: Henry Holt and Company, 1932, pp. xi, 309.

Public Utilities are of comparatively recent origin and are fast becoming a major factor in the complex civilization of the modern or machine age. Mr. Clay in this work gives an intelligent, comprehensive and readable discussion of public utilities and their relationship to our present economic and governmental problems, the essential thesis being that public regulation, at least of electric utilities, should be left, so far as is compatible with the national interest, to the separate states.

The viewpoint is non-technical rather than technical with an ably consummated aim to make the book one, not only for lawyers and economists, but one which gives to the ordinary reader a view of utilities and their relations with state and national government not afforded by the more technical works on this subject.

Divided into three parts, the history of utilities and their regulation is first considered, beginning with *Munn v. Illinois*, down to the present. Theories of valuation as related to the fixing of rates, the constitutional background for regulation and the power of the Supreme Court, given by the fourteenth amendment, to restrict state regulation are presented.

In Part II are considered the interstate features of transmission of electric power; the application of problems of state and national control being made to electric power only, other utilities being more or less analagous to this one. Absence of either state or federal regulations in some cases is pointed out as coincident with the burden necessarily placed on the small consumer rather than the heavy consumer.

Part III, the conclusion, discusses the two alternatives as regards utilities—complete license to private capital or public ownership. A choice, however, remains which is more in keeping with American liberalism—public regulation on a balance between commissions and state and federal courts. The past tendency of the Supreme Court to curtail the right of state regulation under the guise of unconstitutionality provided by the fourteenth amendment is contrasted to the recent decisions of the court and the present seeming tendency of liberalism rather than imperialism.

The volume, neatly bound, is in large readable print. Notes at the end of each chapter afford ample reference material for the more studious and are supplemented by a selected reference list of some sixty volumes following the closing chapter.

PAUL D. GODDARD.

Member Tennessee Bar.

RESTATEMENT OF THE LAW OF CONTRACTS. By the American Law Institute. St. Paul: American Law Institute Publishers, 1932. 2 Vol. pp. xli, 1129. $12.00.

Many books have been written on the subject of contracts; some of them good and some of them bad. Possibly the leading treatise on the subject covering 4182

pages with index and table of cases is by Professor Samuel Williston. The field of contracts is so large and comprehensive that well defined limitations do not exist.

The Committee on Contracts of the American Law Institute has prepared a remarkable work on the subject. Within the short space of 1129 pages one may find an answer to almost any question involving the fundamental law of contracts. The answer is concisely and precisely stated and explanatory comment and illustrations are given in most instances.

This work will be useful to the student beginning the study of law of Contracts because it will aid him in precisely phrasing a rule of law which he may find himself unable to do from the study of cases. It will be helpful to the practitioner because it will furnish him a respository for the fundamental law of contracts. It will be helpful to the Judge because it will supply him with the ruling law on the subject. To the law instructor, in my opinion, the book is invaluable. To him it will have many uses. To mention only one, he may use it in stating precisely rules of law. Short precise statements all too often are not found in the cases.

The work is arranged in two volumes including eighteen chapters with an excellent working index in Volume II. A full table of contents appears in Volume I. And he who can read can find the law. The print is large, a good quality of paper has been used and the binding is attractive.

It would be futile to attempt to summarize the contents. In brief the substantive law of contracts may be found in this work. Need one say more. Only one thing detracts and that is the absence of the comment and annotations which appear in the tentative drafts. I think the work would have been better if these comments and annotations had been included.

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HENRY B. WITHAM.

BOOKS RECEIVED

CASES ON PLEADING AND PROCEDURE. By Charles E. Clark. Saint Paul: West Publishing Company, 1932. Volume II, pp. ..... Price $.....

CASES ON VENDOR AND PURCHASER. By Milton Handler. Saint Paul: West Publishing Company, 1933. pp. xix, 925. Price $6.00.

CORBIN'S CASES ON CONTRACTS. By Arthur L. Corbin. Saint Paul: West Publishing Company. Second Edition, 1933. pp. 1250. Price $6.50.

REGULATION OF PUBLIC UTILITIES. By Cassius M. Clay. New York: Henry Holt & Company, 1932. pp. xi, 309.

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DECLARATION OF RIGHTS WITHOUT CONSEQUENTIAL RELIEF

By WILLIAM H. WICKER

Responsible clients ordinarily will perform their legal obligations and will limit their claims to their legal rights when they know exactly what their legal rights and obligations are. But predicting a court's reaction to a given cluster of facts is sometimes a hazardous task. There may be no local decision or statutory rule on the question, and the authorities in other jurisdictions may be in sharp conflict; or the local statutes or court decisions may be couched, either intentionally or inadvertently, in ambiguous expressions. The parties themselves or their draftsmen often inject the uncertain element into the problem of stating the law applicable to their case by inartistically drafting their deeds, will or contracts. Such instruments may contain ambiguous expressions susceptible of two or more interpretations each of which is equally objectively reasonable; or it may be necessary to interpret particular instruments in the light of changed social or economic conditions which were not even contemplated by their draftsmen. The common law afforded no remedy of general application for the situation where a competent lawyer felt that no amount of study on his part would enable him to make a safe prediction as to what a judge at a later stage would decide. There is an obvious need for a procedure which will lead to an authoritative declaration of law as applied to an existing dispute, even though no other or further relief can be claimed.

The declaratory judgment is the procedural reform that adequately supplies this need by authorizing the courts to make binding declarations of the respective rights and duties of the parties, even though no consequential relief can be claimed. On the occasion of the passage by the House of Representatives of the Federal Declaratory Judgment Act (it has not yet passed the Senate) the function of the declaratory judgment was picturesquely described as follows: "Under the present law

you take a step in the dark and then turn on the light to see if you have stepped in a hole. Under the declaratory judgment law you turn on the light and then take the step."[1] The primary advantage of a declaratory judgment over the usual executory judgment lies in the fact that one may be entered at an earlier stage in the controversy than the other, and the parties may thus obtain an authoritative declaration of their rights and duties before either party has taken any irretrievable action.

Declaratory relief has long been a familiar and much used portion of the law of judgments in most of the countries of continental Europe and has been employed extensively for several centuries in Scotland.[2] But except in a few equity cases of limited scope[3] the common law proceeded on the assumption that it was necessary for one party to commit or threaten to commit a wrongful act before the other party could get a court to decide the controversy. In 1852 the English Parliament adopted the Scottish declaratory relief practice by amending the act[4] governing the High Court of Chancery so as to provide:

> No suit in said court shall be open to objection on the ground that a mere declaratory decree or order is sought thereby, and it shall be lawful for the court to make binding declarations of rights without granting consequential relief.

But with characteristic conservatism the courts narrowly construed this section as authorizing declaratory relief only in cases where the plaintiff was entitled to consequential equitable relief but had elected to ask merely for a declaration of his rights.[5] In 1883 a Supreme Court Rule[6] adopted under the Judicature Act of 1873 broadened the basis of declaratory relief by making it applicable to both equity and law courts and mak-

1 Quoted in Borchard, *Declaratory Judgment*, 7 Tulane Law Review 412 (1933) from 69 Cong. Rec. 2108 (1928).

2 The two pioneer American essays showing the extent to which declaratory relief is employed in the various countries of the world are Sunderland, *A Modern Evolution in Remedial Rights*, 16 Mich. L. Rev. 69 (1917) and Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 Yale L. J. 1, 105 (1918).

3 Equitable decrees in bills *quia timet*, bills of the peace, bills to remove a cloud on title and bills for the cancellation of written instruments are purely declaratory decrees in so far as they merely declare the complainant's rights, but if, as is usual in such cases, the decree goes further and orders a surrender and cancellation of a written instrument, the decree is, of course, executory to that extent. Chancery decrees declaring marriages valid or void or parties legitimate or illegitimate and chancery decrees construing wills and trust deeds, are other examples of cases where equity since ancient times has taken jurisdiction for the purpose of granting pure declaratory relief.

4 15 and 16 Vict. C. Sec. 50.

5 Rooke v. Lord Kensington, 2 K. & J. 753, 69 Eng. Rep. R. 986 (1856); Lady Langdale v. Briggs, 8 De G. M. & G. 391, 44 Eng. Rep. R. 441 (1856).

6 Order XXV, Rule 5, of the Supreme Court Rules of 1883.

ing it clear that a plaintiff seeking declaratory relief need not have a cause of action entitling him to affirmative relief. It provided:

> No action or proceeding shall be open to objection on the ground that a mere declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not.

Apparently New Jersey was the first American state to pass an effective declaratory judgment act and New Jersey did not act until 1915. The New Jersey Act[7] is limited to equitable rights arising out of written instruments. It provides:

> Subject to rules, any person claiming a right cognizable in a court of equity, under a deed, will or other written instrument, may apply for the determination thereof, in so far as the same affects such right, and for a declaration of the rights of the persons interested.

Since 1915 there has been a strong movement in the United States by students of judicial administration and bar associations for adoption of declaratory judgment acts. In 1922 the National Conference of Commissioners on Uniform State Laws approved a draft of a Uniform State Act. By the end of the year 1932 thirty-two American jurisdictions had adopted declaratory judgment legislation. Seventeen of these jurisdictions[8] adopted the Uniform Act and the remaining fifteen other legislation.[9] The Uniform Act contains seventeen sections, but all of the sections except the first are mainly concerned with rules of construction, procedure and practice. The effective part of the Uniform Act is contained in section one, which reads as follows:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

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7 N. J. Laws 1915, Chap. 116, Sec. 7. This is the original New Jersey Act. New Jersey has since adopted the Uniform Declaratory Judgment Act.

8 Arizona, 1927; Colorado, 1923; Indiana, 1927; Nebraska, 1929; Nevada, 1929; New Jersey, 1924; North Carolina, 1931; North Dakota, 1923; Oregon, 1927; Pennsylvania, 1923; Porto Rico, 1931; South Dakota, 1925; Tennessee, 1923; Utah, 1925; Vermont, 1931; Wisconsin, 1927; Wyoming, 1923.

9 California, 1921; Connecticut, 1921; Florida, 1919; Hawaii, 1925; Kansas, 1921; Kentucky, 1922; Massachusetts, 1929; Michigan, 1919, amended in 1929; New Hampshire, 1929; New York, 1921; Ohio, 1931; Rhode Island, 1923; Philippines, 1930; South Carolina, 1922; Virginia, 1922.

It will be noted that the Uniform Act is very broad in its scope. Several of the other American declaratory judgment acts, for example the acts in Florida and South Carolina, expressly limit declaratory relief to actions based on written instruments. But most of the non-uniform American acts are as broad in scope as the Uniform Act; that is, they contain no substantial limitation as to subject matter.

It is easy to distinguish declaratory judgments from decisions in moot cases and advisory opinions. A moot case is one in which the issues are fictitious, dead, hypothetical or academic. A decision in such a case differs from a declaratory judgment in that it involves no actual live controversy affecting the rights and duties of the parties to the action. Of course, no court having full knowledge of all the facts will decide a moot question, and it is immaterial whether such a question is presented under the guise of a request for a declaratory judgment or an executory judgment. Thus in a Tennessee[10] case it was held that a declaratory judgment to determine the rights of ten of eighteen magistrates to hold a session of the Quarterly Court to transact county business, when the remaining eight magistrates refused to attend, will not be rendered, where the recalcitrant magistrates decided to co-operate before the question was presented to the court and no official action had been attempted by the complaining ten magistrates.

An advisory opinion is an opinion rendered by judges, not in the decision of a case between parties whose rights are involved, but in response to a request from the legislative branch or the executive branch of the government for information on a question of law. Such questions are usually submitted without reference to any specific facts, and judges, in giving advisory opinions, are acting as individuals and not in their judicial capacity. In the absence of constitutional or statutory provisions[11] requiring them to do so, judges cannot be compelled

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10 Hodges v. Hamblen County, 152 Tenn. 395, 277 S. W. 901 (1925). Moot cases are not within the purview of declaratory judgment acts. Nashville Trust Co. v. Drake, 162 Tenn. 356, 36 S. W. (2d) 905 (1931); Poore v. Poore, 201 N. C. 791, 161 S. E. 532 (1931); Ladner v. Siegel, 294 Pa. St. 368, 144 Atl. 274 (1928); Hogan v. Dungannon Lumber Co., 145 Va. 568, 134 S. E. 570.

11 The constitutions of seven states, Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota provide for the rendering of advisory opinions by the Justices of the Supreme Court. Five other states, Alabama, Delaware, Minnesota, Oklahoma and Vermont have similar statutory provisions. Clovis and Updegraff, *Advisory Opinions*, 13 Iowa Law Review 188 (1928).

to render advisory opinions.[12] Advisory opinion statutes have been held invalid under some of the American constitutions requiring a strict separation of the departments of government, as attempting to confer non-judicial power upon the judiciary.[13] Declaratory judgment acts do not purport to impose the duty of rendering advisory opinions upon the courts.[14] An advisory opinion binds no one, not even the judges. The doctrine of *stare decisis*[15] does not apply, and the doctrine of *res adjudicata* cannot apply, because the real party aggrieved is not before the judges. An action for a declaratory judgment requires a real controversy between real parties in interest, and the decision of the court is binding on the parties and also serves as a precedent for future cases.[16] The only difference between a declaratory judgment and an executory judgment lies in the fact that the former gives a successful plaintiff no right to an execution or other process to carry the judgment into effect. It does, however, make a final binding declaration of the rights and duties of the parties to the controversy. If one party does not subsequently act in conformity with this declaration the other party may bring an action for damages, and in that action the question decided in the declaratory judgment action is *res adjudicata.*

In America we have elaborate written constitutions, and usually as soon as legal innovations attempting a better adjustment of human differences are inaugurated, the cry of unconstitutionality is raised. *Anway v. Grand Rapids Railway*[17] was the first American case to consider the constitutionality of a declaratory judgment act. This case invovelved a question as to how a Michigan statute forbidding a seven day working week should be interpreted. Both the plaintiff employee and the defendant employer desired the court to hold that the

12 *In re Opinion of Justices,* 126 Mass. 557 (1878); Rice v. Austin, 19 Minn. 103, 18 Am. R. 330 (1872); *In re Opinion of Justices,* 62 N. H. 706 (1883).

13 Muskrat v. United States, 219 U. S. 346, 31 Sup. Ct. 250 (1910); In re State Senate, 10 Minn. 78 (1865); State v. Baughman, 38 Ohio St. 455 (1882).

14 Mulcahy v. Johnson, 80 Colo. 499, 252 Pac. 816 (1927); Reese v. Adamson, 297 Pa. 13, 146 Atl. 262 (1929). In Crawford v. Favour, 34 Ariz. 13, 267 Pac. 412 (1928) it was held that there was nothing in the Declaratory Judgment Act which would authorize an action by the Speaker of the Arizona House of Representatives against the Code Committee to determine whether a proposed bill for codification of laws complied with the constitutional requirements.

15 *In re Opinion of Justices,* 214 Mass. 599, 102 N. E. 464 (1913); *In re Opinion of Justices,* 3 Okla. Cr. 315, 105 Pac. 684 (1909).

16 McCrory's Stores Corp. v. S. M. Braunstein, 102 N. J. L. 590, 134 Atl. 752 (1926).

17 211 Mich. 292, 179 N. W. 350 (1920).

plaintiff had a right to work more than six days a week if he wanted to do so. The court would have been entirely justified in refusing to make a declaration on the ground that there was no real controversy between the parties. But instead of doing that, the court improperly assumed that the Declaratory Judgment Act required the court to give advice and to decide moot cases. Acting on this erroneous assumption, the court held that the Declaratory Judgment Act was unconstitutional, as attempting to impose upon the courts non-judicial functions. But fortunately all the other state courts refused to follow the Michigan Supreme Court in this erroneous interpretation of the scope of declaratory judgment acts. In 1929 the Michigan legislature amended its Declaratory Judgment Act by providing expressly that it applied only to "cases of actual controversies" and added a provision specifically giving to declarations of rights the effect of a final judgment. In 1930 in the case of *Washington Detroit Theater Company v. Moore,*[18] the Michigan Supreme Court in effect overruled the unfortunate decision in the *Anway* case by holding that the Declaratory Judgment Act as amended in 1929 was constitutional. Since the decision in the *Anway* case, the highest courts in at least sixteen states have considered arguments to the effect that declaratory judgment acts attempt to impose non-judicial powers upon the judiciary. All of these courts reached the ultimate unanimous conclusion that these arguments are without merit and that declaratory judgments are constitutional in every respect.[19]

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18 249 Mich. 673, 229 N. W. 618 (1930).

19 Arizona: Morton v. Pacific Constr. Co., 36 Ariz. 97, 283 Pac. 281 (1929); California: Blakeslee v. Wilson, 190 Cal. 479, 213 Pac. 495 (1923); Connecticut: Braman v. Babcock, 98 Conn. 549, 120 Atl. 150 (1923); Florida: Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930); Indiana: Zoercher v. Agler, 172 N. E. 186 (Ind. 1930); Kansas: State *ex rel.* Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1922); Kentucky: Black v. Elkhorn Coal Corp. 233 Ky. 588, 26 S. W. (2d) 481 (1930); Michigan: Washington-Detroit Theater Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930); Nebraska: Lynn v. Kearney County, 236 N. W. 192 (Neb. 1931); New Jersey: McCrory Stores Corp. v. S. M. Braunstein Inc., 102 N. J. L. 590, 134 Atl. 752 (1926); New York: Board of Education v. Van Zandt, 119 Misc. 124, 195 N. Y. Supp. 297 (Sup. Ct. 1922), Aff'd. 234 N. Y. 644, 138 N. E. 481 (1923); Pennsylvania: In re Kariher's Petition, 284 Pa. St. 455, 131 Atl. 265 (1925); Tennessee: Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1924); Virginia: Patterson's Ex'rs. v. Patterson, 144 Va. 113, 131 S. E. 217 (1926); Wisconsin: City of Milwaukee v. Chicago & N. W. Ry., 230 N. W. 626 (Wis. 1930); Wyoming: Holly Sugar Corporation v. Fritzler, 296 Pac. 206 (Wyo. 1931). The courts in the following nine other states have assumed the constitutionality of declaratory judgments: Colorado, Massachusetts, Nevada, North Dakota, Oregon Rhode Island, South Carolina, South Dakota and Utah. Borchard, *The Constitutionality of Declaratory Judgments,* 31 Col. L. Rev. 561 (1931).

In several cases[20] the United States Supreme Court has intimated by way of *dicta* that an action for a declaratory judgment was not a "case" or "controversy" within the meaning of the Federal Constitution, Article III, Sec. 2, limiting the judicial power of the United States to certain designated "cases" or "controversies". But in the recent case of *Nashville, Chattanooga & St. Louis Railway v. Wallace*[21] that court was faced for the first time with the necessity of deciding that question, and it came to the conclusion opposite to that expressed in these *dicta*. This case was brought under the Tennessee Declaratory Judgment Act by a railway against the state officials charged with the duty of collecting a gasoline storage tax imposed by a Tennessee statute. The defendants demanded payment of the tax in a specified amount on gasoline which the plaintiff used in its business as an interstate rail carrier, and the defendants were determined to enforce their demand. The plaintiff asked for a declaration that the gasoline storage tax statute, as applied to gasoline so used, is invalid under the commerce clause and the Fourteenth Amendment to the Federal Constitution. The Tennessee Supreme Court decided against the plaintiff's contentions. On the plaintiff's appeal to the Supreme Court of the United States, that Court unanimously held that, as the case was an adversary proceeding involving a real controversy

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20 Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. 282 (1927) Willing v. Chicago Auditorium Ass'n., 277 U. S. 274, 48 Sup. Ct. 507 (1928).

Liberty Warehouse Company v. Grannis was an action against a Kentucky prosecuting attorney to obtain a declaration that a certain Kentucky statute was unconstitutional. There was no proof that the plaintiff had violated the statute or that he contemplated doing so or that the defendant threatened to enforce the statute. The majority opinion, after pointing out the absence of adverse parties, said that there was no "case or controversy" and that a federal court "had no jurisdiction to entertain the petition for the declaratory judgment." In view of the fact that a declaratory judgment presupposes real adverse parties and a live controversy this statement is pure dictum.

Willing v. Chicago Auditorium Association was an action to remove a cloud on title brought in a state court. The case was removed to a federal court on the grounds of diverstiy of citizenship. The question was whether a certain 99-year old lease required the lessee to obtain the lessor's consent before tearing down an old building and erecting a new one. After stating that the doubt appeared on the face of the lease itself and that this was not a cloud on title within the federal rule the majority opinion went further and said: "The plaintiff seeks simply a declaratory judgment. To grant that relief is beyond the power conferred upon the federal judiciary." It will be noted that this quotation was not only unnecessary to the decision but it violates the rule that a constitutional question will not be decided unless necessary to a decision of the case.

Similar *dicta* regarding declaratory judgments appear in Liberty Warehouse Company v. Burley Tobacco Growers' Co-operation Marketing Association, 276 U. S. 71, 48 Sup. Ct. 291 (1928) and in Piedmont and Northern Ry. v. United States, 280 U. S. 469, 50 Sup Ct. 192 (1930).

21 53 Sup. Ct. 345 (1933).

finally determined by the court below, it was a "case or controversy" within the meaning of the Federal Constitution, even though the judgment contained no award of process or execution to carry it into effect.

Of course, the actual decision in the *Nashville Railway* case is limited to the holding that a declaratory judgment is a "case or controversy" in the constitutional sense, and that the Supreme Court of the United States will review declaratory judgments rendered in state courts, if the other pre-requisites to its appellate jurisdiction are present. All questions relative to the original jurisdiction of federal courts over actions for declaratory judgments are still undecided. But the opinion in the *Nashville Railway* case emphasized the purely procedural aspects of the declaratory judgment. The Supreme Court of the United States already possesses statutory power[22] to promulgate uniform procedural rules in equity cases for all federal courts. It would seem to follow that no congressional action is necessary to give federal district courts jurisdiction over suits in equity for declaratory judgments.[23] Whether an action for a declaratory judgment brought on the law side of a federal district court can be maintained would seem to depend upon the state in which the federal district court is located. The federal Conformity Act[24] requires proceedings in law actions to comply "as near as may be" to "the practice, pleadings and forms and modes of proceeding" of the courts of the state within which the federal court is held. It would seem to follow that declaratory judgment actions at law can be maintained in federal district courts in states having declaratory relief statutes, but a federal Declaratory Judgment Act is necessary to authorize such an action at law in a federal district court located in a state having no such state procedure.

Professor Edwin M. Borchard of Yale University has estimated that since 1919 American state courts have rendered seven hundred declaratory judgments and the courts of England and elsewhere thousands of such decisions.[25] The wide range of the controversies that have been settled by these decisions precludes any accurate statement in this short paper as to their

22 28 U. S. C. A. Sec. 723.

23 See Comment, 31 Mich. L. R. 707 (1933).

24 28 U. S. C. A. Sec. 724.

25 Borchard, *Declaratory Judgments*, 7 Tulane Law Review 388, 413 (1933). Professor Borchard's various monographic articles cn the subject of this paper have been of considerable assistance to the writer.

factual scope. Some illustrative Tennessee cases are stated in the note.[26] Our social and economic relations are undoubtedly becoming more and more complicated, and this fact increases the need for judicial relief against peril and insecurity. The need for developing preventative machinery on the civil side of the law is as great as the corresponding need in the criminal law field. The declaratory judgment, if properly used, is an efficient instrument of preventative justice. It removes the necessity of postponing an application for an authoritative determination of a controverted question until damage has resulted.

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26 A declaration was made that the comptroller of the state should pay the temporary judge appointed by the governor during the pendency of an election contest and not the judge whose term had expired and who claimed the right to hold over during the contest of an election resulting in his defeat. Graham v. England, 154 Tenn. 435, 288 S. W. 728 (1926). A bill by a public service corporation, challenging the jurisdiction of the public utilities commission to require the corporation to apply for certificates of necessity and convenience before making certain developments and seeking to have the rights of the parties defined, was held to present a proper case for a declaratory judgment. Tennessee Eastern Electric Co. v. Hannah, 157 Tenn. 582, 12 S. W. (2d) 372 (1928). Where the parties did not comply with Declaratory Judgment Acts Sec. 11 providing that the Attorney General of the State shall be served with a copy of the proceedings and shall be entitled to be heard in every case involving the constitutionality of a statute, the court has no jurisdiction to make a declaration as to the validity of a statute. Cummins v. Shipp, 156 Tenn. 595, 3 S. W. (2d) 1062 (1928). The constitutionality of a statute will be passed on in a declaratory judgment action only so far as the parties before the court have a real interest in the question. Goetz v. Smith, 152 Tenn. 451, 278 S. W. 417 (1925). A taxpayers' bill for a declaration as to the constitutionality of an act amending a city charter is insufficient as not showing that the complainant had a real interest in the subject of the action, in the absence of an averment that the act would result in additional taxation. Perry v. City of Elizabethton, 160 Tenn. 102, 22 S. W. (2d) 357 (1929). The plaintiffs' request for a declaration that they were not "general contractors" within the meaning of a statute imposing privilege tax on persons engaged in general contracting business was granted. Parmer v. Lindsey, 157 Tenn. 29, 3 S. W. (2d) 657 (1928). A claim that the law imposing an assessment on property owners for improvements had been repealed, was denied. Frazier v. City of Chattanooga, 156 Tenn. 346, 1 S. W. (2d) 786 (1928). A will was construed and a declaration was made that the executrix who was also the widow had the power to sell real estate for the support of herself and her children. Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1924). Where a life tenant executed a trust deed in fee, the remaindermen's action against a foreclosure purchaser for a declaration of the future rights and status of the parties was maintainable. Guy v. Culberson, 164 Tenn. 509, 51 S. W. (2d) 500. The trustee holding title to the property and the pledgee of notes secured by a mortgage are necessary parties to a declaration as to the validity of the mortgage. Harrill v. American Home Mortgage Co., 161 Tenn. 646, 32 S. W. (2d) 1023 (1930.)

THE BENEFIT THEORY OF TAXATION

By D. T. Krauss

The field of substantive law has a very close relationship to every aspect of human society. The principles and theories enunciated by courts concerning the aspects of human society, as expressed in judicial decisions, are not by any means insignificant in their import on the destiny of mankind. In adjudicating conflicting claims courts frequently reveal the legal concepts of the structure of the basic institutions of our society, which concepts have probably had as great a formative influence on our social institutions as that exerted by the non-legal specialists in the fields involved. Legal lore is rich in concepts concerning all aspects of our society. Such concepts, however, when involved in court decisions, may find their justification not in the social or economic realities of a given situation, but in the principles of the narrower field of jurisprudence.

Governments must secure money for their maintenance. The power to make compulsory levies on its citizens for its support is inherent in the sovereignty of governments. Such power is said to be legislative and not judicial in nature and is said to be limited only by constitutional prohibitions. Legislatures pass tax laws which, in effect, allocate the costs of government to the constituent elements of the population in whose welfare the government is concerned. Probably one of the earliest principles followed in the levying of taxes was that a tax was a payment for services received by the tax payer from his government or overlord. The payments and services made by a vassal to his overlord for protection in the feudal society of the middle ages can be explained on such a theory. This system broke down with feudal society, although it has somewhat of a counterpart today in the system of fees charged by governmental agencies for special services.

Constitutions, statutes, and courts in their decisions and dicta give expression to certain concepts and theories of taxation. It is the purpose of this article to examine one such theory of taxation, namely, that of taxation according to the benefits or advantages received by the taxpayer and to set forth the credence that has been given to this theory of taxation by the courts.

The maxim that taxes should be proportioned to the taxpayer according to benefits derived has made an appeal to American courts. This legal benefit theory of taxation seems to include two classes of recipients of benefits, namely, some territorial division or district or else, individuals. With reference to the first it is said a state cannot tax where it has jurisdiction over neither the owner nor the property.[1]

This article is concerned with the second type of recipient of the benefits. Indicative of the appeal to legal authorities of the benefit doctrine are numerous statements in the courts' decisions and in text books. Illustrative of the latter is the following statement from Cooley:[2]

> "If it were practicable to do, taxes levied by any government ought to be apportioned among the people according to the benefit which each receives from the protection the government affords him, but this is manifestly impossible. The values of life and liberty and of the social and family rights and privileges cannot be measured by any pecuniary standard; and by the general consent of civilized nations, income or the sources of income are almost universally made the basis upon which the ordinary taxes are estimated."

A distinction can also be made between "general" benefits and "special" benefits. General benefits fall upon all as a result of general governmental expenditure; while special benefits fall on those peculiarly and directly benefited by a governmental expenditure. Whatever validity might have been given, historically, to the doctrine of taxation according to special benefit or advantage accruing to a particular individual or his property, cases in which this doctrine has been in recent times supported by considerable authority can be classified into two groups. The one group of cases is a broad, general one, in which the benefit theory of taxation is stated arguendo as a justification for a particular scheme of taxation the validity of which is challenged, usually on constitutional grounds. The other group of cases can be broadly termed the special assessment or taxation for local improvement cases, in which the legality of a particular assessment upon certain property in order to finance a sidewalk, sewer, paving, or some other appurtenance is based upon the special benefit which the owner of the property receives from the improvement. A levy for a

1 Dewey v. Des Moines, 173 U. S. 193, 43 L. Ed. 665.

2 Cooley, *Taxation*, 4th Ed. 1929, Collaghan & Co., Chicago, page 213, Illinois Central R. R. Co. v. Decatur, 147 U. S. 190.

local improvement is sometimes designated as "special assessment" and is differentiated from a "tax" which is presumably for general purposes. The complexities of modern economic life would seem to eradicate such a distinction, although this distinction is made the basis of freeing special assessments from certain constitutional limitations, such as the uniformity rule.

Cases which can be grouped in the first classification will be examined first. The concept of benefit to the taxpayer is found in the doctrine running through inheritance tax cases, that a state can tax whenever its help is needed to enforce a right to property, and that to the property or person there flows some benefit for which the state can demand a quid pro qou in the form of a tax.

A case which has been used as a precedent for this group of cases is that of *Blackstone vs. Miller*.[3] Timothy B. Blackstone died, domiciled in Illinois, leaving a deposit of a considerable sum in New York. Justice Holmes held that this sum was subject to the transfer tax of the state of New York under its inheritance law even though New York State at that time recognized the law of the domicile as the taxing jurisdiction. The law of the State of New York permitted the creditor to collect the debt from the debtor in New York and without that law the right of the creditor would be gone. Such a tax did not violate the 14th Amendment to the Federal Constitution.

In a later case, decided by Justice Holmes, it was held that the State of Kentucky could levy an annual tax on a bank account in St. Louis held by one domiciled in Kentucky. The court said, "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the state so chooses, may be measured more or less by reference to the riches of the person taxed."[4]

In 1929 another case came before the United States Supreme Court. A Virginian, the beneficiary of a trust estate held by the trustee in Baltimore, Maryland, was assessed on the securities held by the trustee in Maryland. The majority opinion of the court held that such taxation was in violation of the 14th Amendment to the Constitution of the United States. Tangible personal property permanently located beyond the domicile of the owner was not taxable at such domicile and this case applied this

[3] 188 U. S. 189, 47 L. Ed. 439.
[4] Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54; 62 L. Ed. 145.

principle to intangibles.[5] Justice Holmes, in his minority opinion held to his previously expressed doctrine that "taxes generally are imposed upon persons for the general advantages of living within the jurisdiction, not upon property, although generally measured more or less by reference to the riches of the person taxed on grounds not of fiction but of fact."

Justice Holmes again dissented in another case decided in the same year. The imposition of an inheritance tax by the State of Minnesota on bonds held by a resident of New York was held to be violative of the 14th Amendment. The case of *Blackstone vs. Miller* was expressly overruled.[6] In his dissenting opinion, Justice Holmes holds to the doctrine of *Blackstone vs. Miller*. The bonds in dispute are taxable in the State of New York, but they should also be taxable in the State of Minnesota. The right of Minnesota to tax is based on the need of the creditor to require the help of Minnesota and for such help the State of Minnesota can demand a quid pro qou in return. The right of the creditor has a theoretical dependence upon the existence and benefits derived from the law of the domicile of the debtor.

Under the common law doctrine of "mobilia sequvntur personam" the state of the domicile of the decedent could exact a succession or inheritance tax on the tangible and intangible personal property of the decedent wherever such property might be located. In the case of *Frick vs. Pennsylvania,*[7] tangible personal property permanently located in the State of New York was not subject to a succession tax in the State of Pennsylvania. This was a denial of the common law doctrine previously followed. Apparently, some of the authorities desire to follow the rule of the *Frick case* making it applicable to a testamentary tax on intangibles, taxing them at their domicile on the theory of the benefits or privileges which the intangible property enjoys at its domicile.[8] In the California case of *Chambers vs. Mumford* the interest of a non-resident in a note held in California and a mortgage on California property, also held in California, was held to be not subject to the inheritance law in that state.[9] The court followed the common law doctrine that

5 Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; 50 L. Ed. 150.
6 Farmers Loan & Trust Co. v. State of Minnesota, 280 U. S. 204, 74 L. Ed. 377.
7 Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058.
8 People v. Griffith, 24 Ill. 532; 92 N. E. 313, Re Handayer, 150 N. Y. 37, 34 L. R. A. 235.
9 Chambers v. Mumford, 187 Cal. 228, 201 Pac. 588, 42 A. L. R. 342.

such intangibles are subject to testamentary taxation at the domicile of the decedent owner, but it recognized the contrary rule in the following language: "The rule supported by these authorities, as applying to those in action against non-residents of the state where the inheritance tax is claimed, is that if the owner must invoke the laws of that state to reduce his claims to possession, or secure the beneficial enjoyment thereof, and if the security and evidences of indebtedness are in that state, the property interest is one within the state and subject to the local tax."

Stock issued by a domestic corporation and held by a non-resident at the time of his death is not subject to a succession tax according to the decision in the case of the *First National Bank vs. Maine.*[10] The minority opinion in that case again followed the argument developed in previous cases that a tax on the "transfer by death" of such stock is justifiable on the grounds of control and benefit. The validity of such a tax is denied under the due process clause of the constitution.

The benefit doctrine of taxation is also given some validity in an income tax, however, this time by the majority opinion of the Supreme Court. The State of Mississippi levied an income tax on the income received by a person domiciled in the State but earned outside the State of Mississippi.[11] Such a tax does not violate the 14th Amendment to the Constitution of the United States. Justice Stone stated in dictum, "The obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expense of government and to distribute its burdens equally among those who enjoy its benefits. Hence, domicile in itself establishes a basis of taxation. Enjoyment of the privileges of residence within the State, and the attendant right to invoke the protection of its laws are inseparable from the responsibility for sharing the costs of government."

The situs of real and personal property and the domicile of the owner, in the case of intangibles and income, seem to give to a particular state jurisdiction to tax, the latter doctrine assuming that the situs of intangibles is the domicile of the owner. If taxation according to benefit received is a "just" theory of taxation, then it seems that on the basis of logic the

10 First National Bank v. Maine, 52 S. Ct. 174, 77 A. L. R. 1401.
11 Lawrence vs. State of Mississippi, 286 U. S. 276.

testamentary taxation of intangibles at their situs rather than at the domicile of the owner can commend itself to a considerable degree. The expenditures of a state may go in part to protect and benefit property evidenced by intangibles owned by a person domiciled in another state.

The group of cases known as special assessment or local improvement illustrate substantially the doctrine of taxation according to benefit. Property which is the chief beneficiary of local improvements is made to bear the costs of such improvements in proportion to the benefit derived. In the statutes and cases involving levies for local improvement, the legal benefit doctrine of taxation emerges in its best form. Courts have distinguished between general taxes and special assessment. The latter is sometimes said not to be a tax at all, and consequently, constitutional provisions pertaining to uniformity of assessment and equality of valuation of the property are said not to apply to special assessments.[12] The theory is that the cost of a local improvement is laid on abutting property because it is a payment for the benefit received by the property owner from the local improvement, which benefit is presumed to be a special benefit apart from that which the community at large receives from the improvement. The assessment of property for a local improvement is statutory, and in quite a few states the theory of benefit is strictly followed and no special levy, either for general purposes or special improvements, can be made on property unless the owner of the property receives an equivalent benefit.

The distinction between general taxes and special assessments rests on supposedly various differentiating characteristics. One court expresses this difference as follows: "A 'tax' is an enforced burden of contribution imposed by sovereign right for the support of the government, the administration plan, and to execute the various functions the sovereign is called to perform. A special assessment is like a tax in that it is an enforced contribution from the property; it may possess other points of similarity to a tax but it is inherently different and covered by entirely different principles."[13] Such a statement is not very convincing. It is said that special assessments are imposed on selected properties benefited and not on all the

12 Mayor, etc. of Birmingham v. Klein and note, 8 L. R. A. 369.

13 Klemm v. Davenport, 129 So. 904; 70 A. L. R. 156. See Cooley on Taxation, 3rd Ed., page 1152, and McQuillan on Municipal Corporations, Second Ed., Sec. 2166.

taxable property in a general taxing district. Courts are not clear in what ways a special assessment is "inherently different" from general taxation. That there is a difference in law between the two forms of taxation cannot be denied.

In a few jurisdictions some of the earlier statutes and cases made a distinction between the grounds on which the power to levy a special assessment rested and the grounds for the power of general taxation. Apparently, under the constitution of 1848 of the State of Illinois, the power to levy special assessments was sustained under the power of eminent domain. There had to be an equality of benefit and burden to sustain the constitutionality of a special assessment in Illinois, and any residue of cost above the benefit was payable under the constitutional rule of equality and uniformity of taxation.[14] Later a new constitution placed the power to levy special assessments under the general taxing power.

Another distinction that has been made between special assessments and general taxes is that while the latter rests on the general legislative power of taxation, the former is sustainable on the ground that it is an exercise of police power, on the theory that if several persons cannot enjoy their properties under certain conditions, the state can, under its police power, compel property owners to take such measures as will mutually benefit certain local properties.[15] Something can be said for this view in the case of certain types of local improvements which involve the abatement of nuisances resulting from the construction of sanitary sewers or the drainage of a swamp. This theory has been denied by most jurisdictions but it has had some validity in a few states.[16]

Such distinctions between special assessments and general taxes based on the sources of the power to levy the particular tax apparently have at the present time only a historical significance. Most jurisdictions place the power to impose a tax under the general tax power of the legislature. The most weighty distinction between a special assessment and the general tax seems to be that in the case of general taxation the money is spent in so many ways that no direct connection can be traced between the payment of the tax and the benefit, while

14 Chicago v. Larned, 34 Ill. 203.
15 26 R. C. L., page 24.
16 See Doughter v. Cowden, 72 N. J. L. 451; 11 Am. Ct. Rep. 680; Pueblo v. Crosby, 12 Colo. 593, 21 Pac. 899.

in the case of special assessment there is a direct connection traceable between the expenditure for the local improvement and the benefit.[17] The assumption is that there is a casual relation between the expenditure and benefit.

Apparently Tennessee was one jurisdiction which refused to make a distinction between local assessments, based on special benefit, and general taxation. Assessing the cost of street improvements on abutting lots was declared unconstitutional in the case of *McBean vs. Chandler.*[18] This case was followed for thirty years until the levy of special assessments for municipal local improvements was declared not unconstitutional because of the deprivation of the property owners taxed under the due process clause. This was in the case of *Arnold vs. Knoxville.*[19]

The benefit doctrine of taxation has been applied in statutes and judicial decisions to the effect that the financing of local improvements may be accomplished by a special assessment against such property as is benefited and to the extent of the benefit to the property. In theory the benefit to the property is equivalent to the amount of the assessment. No definite rule has been established as to what constitutes benefit. Apparently, the property assessed may be some distance from the improvement, the benefit to the property consisting of additional traffic facilities for the taxpayer.[20] Another rule is that the benefit is measured by the enhancement in the value of the property as a result of the improvement.[21] The court said in the case of *Elmwood vs. Rochester,* "The excess of the value with the improvement over the value without it, is the amount of the benefit. And in estimating the value of each lot regard must be had to the buildings and other improvements upon it." In a Massachusetts case it was said that the benefit "must be understood to be a pecuniary benefit resulting from the increased market value of its land and which cannot be predicated of land which has and can have no market value.[22] The right to use the improvement increases the market value of the property assessed." In a later decision, a Massachusetts court asserted that the rules

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17 25 R. C. L. 86.

18 McBean v. Chandler, 24 American Reports 308.

19 115 Tenn. 195, 90 S. W. 469. See also Reasonover et al. v. City of Memphis, 39 S. W. (2d) 1029.

20 Chicago v. Farwell, 284 Ill. 491; 120 N. E. 520. But see also in re. Taylor Avenue Improvement, 370 Pacific 827.

21 Elwood v. Rochester, 43 Hun. 102.

22 Mt. Auburn Cemetery v. City of Cambridge, 150 Mass. 12, 22 N. E. 66.

for ascertaining the amount of benefit are the same as those by which land values are dtermined in any other connection, and stated further:—"the inquiry is, how much has the particular improvement added to the fair market value of the property as between a willing seller and a willing buyer with reference to all the uses to which it is reasonably adapted and for which it is plainly available, prospective as well as present, by strangers as well as by the owner."[23]

This method of ascertaining the amount of benefit suggests the question whether or not the cost of the local improvement needs to be proportional to, and in no case exceeding, the amount of the benefit. Conceivably, a paved street or a sewer may not enhance the value of the property at all in the eyes of the prospective buyer. There seems to be evidence in certain cities that a special assessment against certain properties may actually decrease the value of the property.

Some statutes proportion the cost of improvement against abutting properties on the basis of some arbitrary rule, such as the front foot rule. Suppose such a method of allocating the cost of the improvement results in levies in excess of the benefit, is it unconstitutional under the due process clauses? The cases are filled with statements to the effect that a special assessment can only be made to the extent of the value of the special benefit. In the case of *Norwood vs. Baker* the United States Supreme Court said, "the exactions from the owner of private property of the cost of a public improvement in substantial excess—the special benefits accruing to him, is, to the extent of such excess, a taking under the guise of taxation of private property for public use without compensation."[24]

Apparently, however, a legislative body has the power to determine what district will be specially benefited by an improvement and then assess the cost of that improvement against the property in the district on the basis of some arbitrary rule such as the frontage rule, and such an assessment is not violative of the 14th Amendment to the United States Constitution, even though the levy does exceed the special benefits accrued. Such a levy probably is only unconstitutional if the excess above the amount of the special benefit amounts to confiscation. Such a view casts some suspicion on the validity of the doctrine of

23 Driscoll v. Inhabitants of Northbridge; 210 Mass. 151, 96 N. E. 59.
24 172 U. S. 269; Savannah v. Knight, 157 S. E. 309, 73 A. L. R. 1289.

taxation according to special benefit even in the case of local improvements.[25] If a legislature can improve a particular district and assess the cost against the property in the district, disregarding special benefits, the validity of the doctrine is considerably imperilled.

SUMMARY

Legislatures and courts in matters touching taxation base their decisions on certain assumptions. One assumption frequently made, in the establishment of equality and justice in taxation, is that people are taxed because of benefits accruing to them from government. Such benefits may be general or special. The benefit doctrine of taxation has been used to justify certain conclusions in inheritance tax, income tax, and personal property tax cases, but it has been the most used in the levying of special assessments. Benefits accruing to property have been said to be the basis for special assessment, but some doubt is cast on this application of the doctrine because of the legality of assessments of all costs of local improvements in certain districts determined by a legislative body.

25 French v. Baker Asphalt Paving Co., 181 U. S. 324; Swayne v. City of Hattiesburg, 147 Miss. 244, 111 So. 818; Collins vs. Phoenix, 54 Fed. 2nd S. 770.

A UNIFIED AND SELF-GOVERNING BAR

By EDSON R. SUNDERLAND[1]

The administration of justice involves two equally important elements, namely, the machinery and methods by which judicial proceedings are carried on, and the personnel which directs and controls the process.

The first of these elements has received by far the greater measure of attention from both the public and the profession. The intricacy and technicality of common law pleading was the primary cause of the great revolt, which produced the reformed American system known as code pleading. Even in those states where the so-called "Code" has not been adopted, legislation has in most instances abolished the worst abuses of the old system, and has provided methods better suited to the needs and the temper of our time. Similar problems have been encountered throughout the entire fields of trial and appellate practice, and an immense amount of effort has been devoted to the development of new devices and to the improvement of old ones for the purpose of increasing the efficiency of judicial procedure.

The results, nevertheless, are still unsatisfactory, and there has been a widespread movement to substitute procedure by rule of court for the more rigid plan of legislative regulation, in the belief that expert control of procedural processes would facilitate the employment of better methods.

But the problems of procedure present only one side of the picture. While, of course, efforts to provide more effective ways of conducting the business of the courts ought not to be relaxed, the vital question of maintaining an able and reliable personnel in control of the processes of litigation imperatively demands attention. The best machinery is useless without competent and responsible operators. If the public is to enjoy satisfactory service from the legal profession, the ability and character of its membership must be kept at a high level.

There are two ways of dealing with the problem of personnel in any social group, namely, by internal and by external supervision and control. If the first is to be employed the members

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of the group must be closely associated, strongly organized, and all must be held collectively responsible for the professional conduct of each. In dealing with individual violations of standards of behavior, the self interest of the group will furnish a strong inducement to maintain effective discipline within the organization. Only in that way can it hope to enjoy satisfactory relations with the public whose good will is necessary to its own success.

On the other hand, if the group is to be regulated and controlled from without, a strong organization within the group is undesirable. The public, acting through various governmental agencies, is less likely to meet successful resistence to its demands if it deals with individuals rather than with an organized association.

The latter method has been almost exclusively employed in this country in dealing with the legal profession as a social group. Organization among lawyers has been feared rather than encouraged. The profession has never been given disciplinary power over its own members. On the contrary, professional misconduct has been considered a wrong which the state itself, acting through the regular courts, should prosecute by direct proceedings against the offending individual. The bar as a group has had substantially nothing to do with the matter.

This method of controlling the conduct of lawyers has never proved satisfactory. Its fundamental weakness is its essentially criminal character.

It is quite true that the courts have repeatedly held that a proceeding to suspend, disbar or reprimand an attorney for misconduct is civil, not criminal, in its nature, since its purpose is to purify the bar, not to punish the respondent.[2] But this is a technical, not a realistic, view of the matter. The fact is that the public looks upon disciplinary proceedings against lawyers as substantially equivalent to accusations of crime, and their consequences are frequently no less serious. In this the public is right, for, as pointed out by the Supreme Court of Kansas:

> "The proceeding to disbar is often entitled in the name of the state, or the people, or the commonwealth. . . . Such a prosecution is for the public. It is always for misconduct on the part of the attorney. It is not for money or other property, and not

2 2 Thornton on Attorneys at Law, Sec. 867.

> to recover for any pecuniary loss sustained by the public, and it always involves disgrace to the defendant. . . . It takes away his business and his means of gaining a livelihood. And it does this, not for the purpose of giving the same to some other persons, or to the state, but simply to deprive the defendant of the same. The whole thing is in the nature of a criminal forfeiture. . . .''[3]

As a proceeding essentially criminal, it is too drastic to be effective. The mere public accusation alone may be sufficient to destroy a lawyer's professional career, irrespective of the outcome. This is so well understood that such proceedings are brought only as a last resort and in extreme cases.

Furthermore, when discipline is attempted, the publicity involved results in serious damage to the bar as a whole, for the public is likely to assume that the misconduct so widely advertised is typical of the profession.

It follows that the disciplinary methods by which we seek to create and maintain high standards of conduct at the bar are of little use in those cases where guidance, advice and warning are needed as deterrents against the formation of loose habits. Our system of discipline is completely lacking in flexibility, and cannot be adjusted to the infinitely varying degrees and conditions of dereliction, actual or potential, which arise out of the complexities of professional life.

Efforts are frequently made by the bar associations of our larger cities to provide unofficial tribunals, usually known as grievance committees, for the investigation of complaints against lawyers, without the undesirable feature of publicity. But their usefulness is seriously restricted by two conditions, namely, their lack of power to compel the attendance and testimony of witnesses and their want of authority to make or enforce disciplinary orders. Their influence upon the younger members of the bar is often valuable, but as general agencies for preserving high standards of professional conduct they leave much to be desired.

Conceding that the method of external control of professional conduct has largely failed of its purpose, is there any reason to expect greater success from a system of internal control exercised by the profession itself upon its own members?

England furnishes us with an excellent example of complete self-discipline on the part of the bar.

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[3] Peyton's Appeal (1874), 12 Kan. 398, 405.

The four Inns of Court, namely, Lincoln's Inn, the Inner Temple, the Middle Temple and Gray's Inn, have entire control of the bar of England. They are voluntary unincorporated societies, of very ancient origin, all of equal rank, all independent of the state, all outside the jurisdiction of the courts, and all subject only to the visitorial jurisdiction of the judges.

The Inns of Court were organized largely for the purpose of giving instruction to their members in the common law, and when they were deemed properly qualified the members were called to the bar by the particular Inn to which they were attached. This has been recognized as a necessary qualification for practicing before the bar of any of the superior courts of England, and the governing body of the Inn was the sole authority by which the position of advocate in the courts could be conferred or taken away. The benchers, as governors of the Inn, can refuse to admit a person as a student or to call a student to the bar, and they can expel any member or disbar a barrister already admitted. In so doing they are entirely outside the jurisdiction of the courts. Disbarment is a punishment inflicted by the benchers on a barrister who is guilty of any conduct unbecoming his profession, and there is no judicial review of their action by the English courts, although there is a right to appeal to the judges in their capacity as visitors of the Inns. There is no instance in modern times of any attempt by the courts to exercise the power of disbarment, though they have often inflicted punishment, by fine or imprisonment, for contempt of court committed in either the private or professional capacity of the barrister.[4]

This system of internal regulation and control of the profession has proved eminently satisfactory. The bar of England maintains the highest ethical standards and enjoys the complete confidence of the English public. The mere power on the part of the Inns to disbar their members for unprofessional conduct seems to render its exercise unnecessary, for there is no evidence that disciplinary action is of frequent occurrence in any of the Inns. In comparison with the multitude of disbarment cases which fill American law reports, and which have developed so large a body of law that almost 200 pages are required for their discussion in Thornton on Attorneys,[5] professional discipline in England appears to raise no problems for public concern. If

4 See 2 Halsburg's Laws of England, 358-366.
5 Vol. 2, pp. 1165-1339.

a system of control is to be judged by its results, the self government of the English bar must be considered entirely successful.

The same general plan of professional responsibility, power and control is employed in Canada. The Law Society of Upper Canada is a body corporate, of which every member of the Ontario bar is necessarily a member. The Society is governed by 30 benchers chosen by the members each year, who have power not only to make rules regarding legal education and admission to the bar but have the power to suspend and disbar. The statute provides:

> "When a barrister, solicitor or student-at-law is found by the benchers, after due inquiry by a committee of their number or otherwise, guilty of professional misconduct, or of conduct unbecoming a barrister, or solicitor or student-at-law, the benchers may disbar any such barrister, or suspend him from practicing as a barrister for such time as they may deem proper; may resolve that any such solicitor is unworthy to practice as a solicitor or that he should be suspended from practicing for a period to be named in the resolution; may expel from the Society, and the membership thereof, such student and strike his name from the books of the Society; or may refuse either absolutely or for a limited period to admit such student to the usual examinations, or to grant him the certificate of fitness necessary for him to be admitted to practice."[6]

After a barrister has been disbarred or suspended, and after a solicitor has been found unworthy to practice or has been suspended from practicing, a copy of the order of the benchers must be communicated to the senior registrar of the Supreme Court, and any such order may be set aside or varied at any time by the court.[7]

In France the bar, which includes every practicing advocate, is entirely under the regulation and control of its own members.

In every locality where there are six or more lawyers there is an organized bar, having a governing council elected by the members.[8] The membership of the council varies from five to fifteen, depending on the size of the bar, that in Paris, however, consisting of twenty-four.[9] Council members are elected by the direct votes of the registered lawyers belonging to the bar, but only those lawyers are eligible who have been registered for a certain number of years.[10]

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6 Rev. Stat. Ontario (1927), Ch. 192, Sec. 45.
7 Id., Secs. 46, 47, 48.
8 Appleton, Traite de la Profession d'Avocat, p. 123.
9 Id., p. 149.
10 Id., p. 150.

All disciplinary power over members of the bar ordinarily rests in the council,[11] but if it is for special reasons unable to function matters of discipline go to the court of appeal.[12]

The council may impose penalties consisting of warning, reprimand, suspension or disbarment.[13] Where the warning or reprimand carries with it loss of eligibility for membership in the council, and in every case of suspension or disbarment, an appeal lies to the court of appeal.[14]

The details of French disciplinary procedure differ among the various bars. Generally the president, when presented with a complaint, names an examiner to make a preliminary investigation. Quite commonly this part of the proceeding is kept secret even from the lawyer against whom it is directed, and he is informed of it only when the council decides to pursue the matter. If the case continues, the examiner hears what the accused has to say after he has been informed of the facts presented against him. The examiner may call witnesses, seek information from magistrates, and require the production of records. Every protection provided by the criminal law must be accorded to the accused. He must be confronted by the witnesses and informed of the evidence against him.[15]

Eight days after the examiner has made a report to the council, the accused appears before that body, and is accorded the assistance of one of his brethren. The session of the council is secret. Its decision is rendered by majority vote, and is entered on a special register. The accused is then notified of the result by the president of the bar.[16]

In case of an appeal the hearing takes place in chambers and is not public.[17]

That the standards of conduct of French lawyers are of the highest and most exacting character is universally recognized, and even slight infractions bring the prompt and vigorous censure of the bar.[18] Self-government, if not the only cause of the enviable position of the bars of France, has at least made

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11 Id., p. 441.
12 Id., p. 447.
13 Id., p. 464.
14 Id., p. 473.
15 Id., pp. 470, 471.
16 Id., pp. 472, 473.
17 Id., p. 483.
18 The French Bar, by Paul Fuller, 23 Yale Law Jour. 113 (Dec. 1913); The French Advocate, by John M. Zane, 14 Ill. Law Rev. 562 (March, 1920).

possible the development of the best professional traditions and practice.

In view of the unsatisfactory results obtained from our system of external control of the bar, which contrasts so strikingly with the highly effective systems of professional self-government found in other countries, it is not surprising that a strong movement has arisen in the United States for the establishment of a responsible self-governing bar to which every lawyer must belong.

Already an imposing array of favorable data has been obtained as a result of American experience with this method of professional control.

The first state to create an inclusive organized bar with power of discipline over its members was Idaho, in 1923; but two years of litigation and legislative amendment because of constitutional objections, postponed its effective operation until 1925. Alabama created a self-governing bar in 1923, New Mexico in 1925, California in 1927, Nevada in 1928, Oklahoma in 1929, Utah and South Dakota in 1931, and Washington and Arizona in 1933.

All of these states follow the same general plan regarding discipline of members. Power to disbar, suspend or reprimand is lodged in the bar itself, and all lawyers engaged in the practice of law are necessarily members of the organization and subject to its jurisdiction. Public accusation proceedings in the courts against lawyers charged with professional misconduct are entirely supplanted by the more flexible, direct and effective methods employed within the organization itself.

In size, activity and successful accomplishments, the California State Bar is the outstanding institution of its kind in this country, and a description of its organization and procedure may be taken as typical.[19]

The Board of Governors of the California State Bar is given power to disbar members, to discipline them by reproval, public or private, or by suspension from practice, and to pass upon petitions for reinstatement. The Board has power to create local administrative committees and to delegate to them such powers and duties as it may deem desirable, and to divide such

19 The California State Bar Act is Chap. 34, p. 38, of the Statutes of 1927, amended by Chap. 708, p. 1256, and Chap. 884, p. 1965, of the Statutes of 1929.

All the state bar acts then in force were collected and published as a booklet entitled State Bar Acts, Annotated, by the Conference of Bar Association Delegates, Feb. 2, 1931.

committees into units or sections with concurrent powers to handle the work more expeditiously. The local committees have power to receive and investigate complaints as to the conduct of members, to compel the attendance of witnesses and the production of books and documents, and to make findings and recommendations to the Board of Governors. The Board may, by rules, provide the mode of procedure in all cases of complaints against members, and the Supreme Court has the power of review over the decisions of the Board of Governors. The person complained against has the right to reasonable notice, to be represented by counsel, and is entitled to compel the attendance of witnesses and examine and cross-examine them.

When objection was made that members of the bar were subjected to an investigation by an informal and unsworn complaint, the Supreme Court, in sustaining the practice, said:

> "What innocent man would not prefer this method of handling a complaint to a public proceeding against him resting alone on the affidavit of a partisan, if not a prejudiced, client?"[20]

The effectiveness of this method of preventing improper practices by members of the bar has been amazing. During the first three and one-half years of the State Bar's activity, 2,943 complaints were filed, and 2,425 of them were dismissed after an investigation without the necessity of a formal hearing. Every one of these complaints represented a grievance by some client which was probably shared by his family and friends, and the records show that as a result of the informal investigation the great majority of the complainants were satisfied that the grievance was not justified. The value to the bar of such a method of removing grounds of dissatisfaction and hostility on the part of the public, is immeasurable.

The remainder of the complaints, 518 in number, went on to formal hearings before the Board of Governors, and of these 143 resulted in disciplinary action. There were 64 cases in which reprimands were administered, 43 in which suspensions were recommended, and 36 cases of disbarment. These 79 disbarments and suspensions in three and a half years were three times as many as took place during the entire 77 years of state history prior to the creation of the State Bar.[21]

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20 Herron v. State Bar of California (1931), 212 Cal. 196, 298 Pac. 474.

21 These figures, furnished by the secretary of the California Bar, are published in 11 Mich. State Bar Jour. 47 (Sept., 1931).

All investigations are conducted in private, the file is not open to public inspection, the formal hearing is also in private, and there is no public notice of the proceedings unless and until the Board of Governors recommends disbarment, suspension or a public reprimand.

Although foreign systems of bar organization were not followed as models, it is surprising how closely the American plan corresponds in essential features with the English and Canadian systems and particularly with the French.

This plan of organizing the entire practicing profession into a body politic and corporate with regulatory and disciplinary powers over the conduct of its members, has been subjected to every possible attack on constitutional grounds. The California act was held not to be unconstitutional as a local or special law,[22] nor as creating a corporation by special act,[23] nor as an intrusion by the legislature upon the judicial department.[24] It was declared to be a regulatory measure under the police power.[25] In Nevada the act was upheld against the contentions that it created a corporation by special act, that it was an unreasonable exercise of the police power, that it did not provide for due process of law and that it made for an improper distribution of governmental powers.[26]

The advantages of internal discipline over public prosecutions in the courts as a means for securing proper professional conduct and of ridding the bar of undesirable members, has strongly appealed to the lay public where general interest has been aroused in behalf of legislation creating bar autonomy.

During the 1933 session of the Missouri legislature a bill for the incorporation of a self-governing Missouri bar has been introduced, and it has been warmly supported by the St. Louis Post-Dispatch. In the course of a series of editorials urging the need for this reform, the paper said:

> "The legislature shows an indisposition to pass the bill. . . . We feel that this is because the legislators, particularly those out in the state, do not understand the perilous plight of society in the big cities. . . . It is in the city that rats in the law, like all other rats, are most numerous and fattest.

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22 State Bar v. Superior Court (1929), 207 Cal. 323, 278 Pac. 432.
23 Id.
24 Id.
25 Carpenter v. State Bar (1931), 81 Cal. Dec. 143.
26 In re Scott (1930), 53 Nev. 24, 292 Pac. 291.

"Let us consider the difference between disbarment proceedings as they are now practiced and as they would be under the proposed State bar act. . . .

"Under the present procedure someone would first need to volunteer the information to the Grievance Committee of the St. Louis Bar Association. Reference to the membership records would probably show that the offending lawyer is not a member of the Bar Association. . . . If the lawyer is not a member . . . he cannot be reproved or suspended. All the Grievance Committee can do is to hold a hearing.

"The date of the hearing arrives, but since the committee has no power to compel witnesses to attend, the lawyer . . . does not appear. It is a play without Hamlet. Or perhaps the offending lawyer attends but refuses to testify or produce papers. . . . Thus the agency of the Bar Association . . . is frequently defeated at the outset.

"But, we will say, the Grievance Committee decides to go ahead. Suit for disbarment is then filed. . . . The court then appoints a commissioner and makes an order on the Bar Association for funds to cover the taking of testimony and incidental expenses. In contested proceedings the costs are sure to reach $1000.

"If there were no other drawback to the present procedure, this item of expense would still constitute an almost prohibitory handicap. . . . One or two attempts at disbarment would constitute a yearly limit.

"All this would be changed by the proposed State bar act. . . . Every licensed attorney would automatically become a member of the organization whose authorized machinery calls for a board of governors, with power to formulate and enforce rules of professional conduct for all the lawyers of the state. Every lawyer therefore would become a part of a state-wide movement to purify his profession. . . .

"Under the proposed bar act it would be made the duty of local administrative committees . . . to watch for violations of the rules of conduct, . . . to receive and investigate complaints as to the conduct of members, to make findings and to report recommendations to the State Bar's Board of Governors. . . .

"What the proposed state bar act would do, then, in regard to the purification of this great profession would be to establish an orderly channel for accomplishing the work now performed only with great difficulty. The bar and the people both stand to benefit—the people through the elevation of legal standards, the bar through the higher popular esteem which would naturally result. There is no conjecture about it. It has been tried in several of the states and it works."[27]

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27 St. Louis Post-Dispatch, Thurs., Feb. 23, 1933, p. 23, under the title, Some Facts for the Legislature.

The legal profession in the United States has been put in the absolutely unsound position of having to carry responsibility for the misconduct of its undesirable members without having any power either to control their actions or to get rid of them. The responsibility cannot be avoided, for lawyers constitute so definite, distinctive and important a class, and exercise privileges so clearly monopolistic in their character, that the public has always assigned them a degree of unity far beyond what they actually possessed, and has looked upon the bad conduct of one as more or less typical of the attitude of all. Since this seems to be inevitable, the only reasonable and fair course is for the people to give the profession the power to carry that responsibility and then insist upon a high ethical standard of professional performance. All political experience indicates that it is futile to expect services of a public nature to be satisfactorily performed otherwise than by vesting adequate power in those chargeable with the character of the results. The movement for an integrated self-governing bar is in accord with that experience.

FEDERAL REGULATION OF HOURS OF LABOR IN INDUSTRY

By CLARENCE A. MILLER

The attention of students of constitutional law has been arrested by the proposals in the Seventy-Second Congress for the Federal regulation of hours of labor in industry.[1] The last-minute legislative jam prevented action on these proposals.[2] Similar legislation has been introduced in the present Congress,[3] and will, doubtless, be enacted into law. The purpose of this legislation is to bring about a thirty-hour work week in industry, in order that millions of industrial workers may be provided with opportunities for employment.[4] The high purpose of this legislation is appealing to all.[5] Its enactment, however, has been opposed on constitutional grounds.[6] The regulation of the hours of labor in industry is sought to be brought about by excluding from interstate and foreign commerce commodities mined, manufactured or produced by persons employed more than five days per week or six hours per day.[7] The sponsors of the

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1 The Black Bill, S. 5267, 72d Cong., 2d Sess.; The Connery Bill, H. R. 14518, 72d Cong., 2d Sess.

2 H. R. 14518 was reported to the House on February 10, 1933. See Cong. Rec., February 17, 1933 (Vol. 76, No. 60), pp. 4417-4426, for statement of Senator Black with reference to S. 5267.

3 S. 158, 73rd Cong., 1st Sess., was favorably reported to the Senate on March 30, 1933. See Senate Rep. No. 14. This bill was passed by the Senate on April 6, 1933, and a motion to reconsider was defeated on April 17, 1933.

H. R. 4557, 73rd Cong., 1st Sess., was favorably reported to the House on April 4, 1933. See House Rep. No. 24. No action has been taken on this bill.

4 See House Rep. No. 1999, on H. R. 14158, 72d Cong., 2d Sess., (1933); Senate Rep. No. 14, on S. 158, 73rd Cong., 1st Sess. (1933); House Rep. No. 24, on H. R. 4557, 73d Cong., 1st Sess. (1933).

"In a word, the drift of opinion and legislation now is to set labor apart and to withdraw it from its conditions and from the action of economic forces and their consequences, give it immunity from the pitilessness of life."—McKenna, J., dissenting, in Arizona Copper Co. v. Hammer, 250 U. S. 400, 438, 39 Sup. Ct. 553, 63 L. ed. 1058 (1919).

5 "The ethical right of every worker, man or woman, to a living wage, may be conceded."—Sutherland, J., in Adkins v. Children's Hospital, 261 U. S. 525, 558, 43 Sup. Ct. 394, 67 L. ed. 785, 24 A. L. R. 1238 (1923). Employment is a condition precedent to a living wage.

6 See House Report 1999, note 4 *supra*, p. 2; Hearings on S. 5267, before a subcommittee of the Committee on the Judiciary of the Senate, pp. 189-216, 253-257, 311-322 (1933); Hearings on H. R. 14105 (predecessor of H. R. 14518) before the Committee on Labor, H. of R., pp. 43-52, 87-103, 127-151 (1933).

7 These bills provide: "That no article or commodity shall be shipped, transported, or delivered in interestate or foreign commerce which was produced or manufactured in any mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment situated in the United States or in any foreign country in which any

legislation predicate it upon the "commerce clause" of the Constitution.[8] Those opposing it, upon constitutional grounds, assert that it invades the police power of the States,[9] specifically reserved to them by the Tenth Amendment, and that mining, manufacturing and production of commodities are not interstate commerce, and, therefore, beyond the power of Congress to regulate.[10]

With the exception of the so-called Child Labor Law,[11] which was held unconstitutional, [12] it is concededly a new departure for Congress to attempt to regulate the conditions under which commodities may be mined, manufactured or produced, as a condition precedent to their transportation in interstate commerce. So far, such regulation has been directed either to the instrumentalities[13] or actual subjects[14] of interstate commerce. The power of Congress to exclude articles from foreign commerce is absolute, and is not confined, as in the case of interstate commerce, to articles of an objectionable character.[15] Under its power to regulate foreign commerce, Congress has prohibited the importation of tea below standard.[16] It has also prohibited the importation of opium.[17] This power has been

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person was employed or permitted to work in the production of such article or commodity more than five days in any week or more than six hours in any day."

8 See Reports referred to in note 4 *supra.*

9 See hearings referred to in note 6 *supra.*

" * * * if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed."—Day, J., in Hammer v. Dagenhart, note 12 *infra,* at page 276.

10 See hearings referred to in note 6 *supra.*

11 39 Stat. L. 675 (1916).

12 Hammer v. Dagenhart, 247 U. S. 251, 38 Sup. Ct. 529, 62 L. ed. 1101, 3 A. L. R. 649, Ann. Cas. 1918E, 724 (1918).

13 The Interstate Commerce Act, as amended, (24 Stat. L. 379, c. 104, 49 U. S. C., 1-27) has been sustained in numerous cases, as a valid regulation of instrumentalities of interstate commerce. See Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024 (1917), sustaining the Adamson Law, 39 Stat. L. 721 (1916), 45 U. S. C., 65, 66, as a reasonable regulation of the hours of labor and wages of employees of railroads.

14 Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364 (1911); McDermott v. Wisconsin, 228 U. S. 115, 33 Sup. Ct. 431, 57 L. ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39 (1913); Seven Cases v. United States, 239 U. S. 510, 36 Sup. Ct. 190, 60 L. ed. 411 (1916).

15 The Abby Dodge, 223 U. S. 166, 32 Sup. Ct. 310, 56 L. ed. 390 (1912); U. S. v. Brig William, 2 Hall, L. J. 255, Fed. Cas. No. 16,700 (1808); U. S. v. Marigold, 9 How. 560, 13 L. ed. 257 (1850).

16 Buttfield v. Stranahan, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. ed. 525 (1904).

17 Brolan v. United States, 236 U. S. 216, 35 Sup. Ct. 285, 59 L. ed. 544 (1915); Yee Hem v. United States, 268 U. S. 178, 45 Sup. Ct. 470, 69 L. ed. 904 (1925).

held valid for the exclusion of aliens,[18] as well as to impose a duty tax on each alien passenger brought into the United States from a foreign country.[19]

Concededly, Congress has the power to regulate the instrumentalities of commerce, such as the railroads,[20] but there are limits to that power so far as fixing the hours of labor or wages may be concerned.[21]

In all those cases in which Congress has been sustained in the interdiction of the carriage from one State to another of certain commodities,[22] the basis of the regulation has been some inherent quality in the character of the thing regulated.[23] The

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18 Oceanic Steam Nav. Co. v. Stranahan, 214 U. S. 320, 29 Sup. Ct. 671, 53 L. ed. 1013 (1909).

19 Head Money Cases, 112 U. S. 580, 5 Sup. Ct. 247, 28 L. ed. 798 (1884).

20 See note 13 *supra*. See S. 1181 and H. R. 4597, 73rd Cong., 1st Sess., establishing a six-hour day for employees of carriers engaged in interstate commerce. No action has yet been taken on these bills.

21 "It is not too much to say that the ruling in Wilson v. New went to the border line, although it concerned an interstate common carrier in the presence of a nation-wide emergency and the possibility of great disaster." Taft, C. J., in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 544, 43 Sup. Ct. 630, 67 L. ed. 1103, 27 A. L. R. 1280 (1923).

22 Reid v. Colorado, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. ed. 108 (1902) sustained the exclusion from interstate commerce of diseased stock. The Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321, 47 L. ed. 492 (1903) sustained the power of Congress to punish the transmission of lottery tickets from one State to another. Its power to punish the transportation in interstate commerce of adulterated articles has been sustained. Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. ed. 364 (1911). Upon the same theory it has been sustained in its punishment of the transportation of women from one State to another for immoral purposes, commercial or otherwise. Hoke v. United States, 227 U. S. 308, 33 Sup. Ct. 281, 57 L. ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905 (1913); Caminetti v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168 (1917). Likewise, it has forbidden the introduction of intoxicating liquors into any State in which their use was prohibited. Clark Distilling Co. v. Western Md. R. Co., 242 U. S. 311, 37 Sup. Ct. 180, 61 L. ed. 326, L. R. A. 1917B, 1218, Ann. Cas. 1917B, 845 (1917). It has prohibited the transportation in interstate commerce of prize fight films. Weber v. Freed, 239 U. S. 325, 36 Sup. Ct. 131, 60 L. ed. 308, Ann. Cas. 1916C, 317 (1916). It has punished the transportation in interstate commerce of stolen automobiles by those with knowledge of the theft. Brooks v. United States, 267 U. S. 432, 45 Sup. Ct. 345, 69 L. ed. 699, 37 A. L. R. 1407 (1925). Similarly, it has punished the interstate transportation of any kidnaped person. Act of June 22, 1932, U. S. Stat. 72d Cong., 1st Sess., p. 326 (1932). The constitutionality of this statute has not yet been presented to the courts for adjudication.

These cases may all be distinguished from Hammer v. Dagenhart, note 12, *supra*, on the ground that articles made by child labor "could be properly transported without injuring any person who either bought or used them."—Taft, C. J., in Brooks v. United States, 267 U. S. 432, 438, 45 Sup. Ct. 345, 69 L. ed. 699, 37 A. L. R. 1407 (1924).

23 "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other States from the State of origin. In doing this it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce." Taft, C. J., in Brooks v. United States, 267 U. S. 432, 436, 45 Sup. Ct. 345, 69 L. ed. 699, 37 A. L. R.

Supreme Court has made it plain, however, that such regulation of the vast body of commodities can not be sustained.[24]

The authority of Congress to prohibit the transportation of commodities because of some previous condition of manufacture, and not because of any inherent quality of the goods themselves, has been expressly denied.[25] Where the same result has been sought in the name of a tax it has likewise been denied.[26] The power of regulation has been held to be wholly with the States.[27] Even the power of the States is limited.[28]

1407 (1925). Where, as in Hammer v. Dagenhart, note 12 *supra*, Congress has attempted to exercise a police power over a subject not committed to it, it has not been sustained. "The distinction to be observed is between the exercise of the power of Congress over a subject committed to it and its attempt to establish a regulation over a subject not committed to it."—Hughes, The Supreme Court of the United States, pp. 155-156 (1928).

24 "It is shown by the settled doctrine sustaining the right by regulation to absolutely prohibit lottery tickets and by the obvious consideration that such right to prohibit could not be applied to pig iron, steel rails or most of the vast body of commodities."—Wilson v. New, note 13 *supra*, at page 347.

25 Hammer v. Dagenhart, note 12 *supra*.

26 Bailey v. Drexel Furniture Co., 259 U. S. 20, 42 Sup. Ct. 499, 66 L. ed. 817, 21 A. L. R. 1437 (1922). See, Powell, Child Labor, Congress and the Constitution, 1 North Car. L. Rev. 61 (1922). Also, Hill v. Wallace, 259 U. S. 44, 42 Sup. Ct. 453, 66 L. ed. 822 (1922) holding invalid the Future Trading Act, 42 Stat. L. 187 (1921) which imposed a heavy penalty, in the name of a tax, on sales of grain for future delivery. Cf., Board of Trade of City of Chicago v. Olsen, 262 U. S. 1, 43 Sup. Ct. 470, 67 L. ed. 839 (1923) holding the Grain Futures Act, 1922, 42 Stat. L. 998, 7 U. S. C., 1-17, valid as a regulation of interstate commerce.

27 "In our view the necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States—a purely State authority."—Day, J., Hammer v. Dagenhart, note 12 *supra*, at page 276.

The power of the States to control child labor, either by prohibiting employment, limiting the hours of labor, or regulating the minimum wage, has uniformly been upheld. See cases collected in annotation in 12 A. L. R. 1216 (1921).

Minimum wage laws have been sustained in a number of States, as being within the police power. See cases collected in annotation in 24 A. L. R. 1259 (1924). These statutes, however, have been confined to the establishment of a minimum wage for women or minors. Where the statute has provided for the fixing of wages of all employees (including men) in certain specified industries, it has been stricken down. Wolff Packing Co. v. Court of Industrial Relations, note 16 *supra*. Cf., Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435, 61 L. ed. 830, Ann. Cas. 1918A, 1043 (1918).

28 "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State."—Peckham, J., in Lochner v. New York, 198 U. S. 45, 56, 25 Sup. Ct. 539, 49 L. ed. 937 (1905). The power of the States to regulate the hours of labor in industry, other than of women and minors, is limited to businesses "affected with a public interest." "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation."—Taft, C. J., in Wolff Packing Co. v. Court of Industrial Relations, note 16 *supra*, at pages 536, 537. See Brown, Police Power—Legislation for Health and Safety, 42 Harv. L. Rev. 866, 867-868 (1929).

The authority of Congress over interstate commerce can not be extended to the mining, manufacturing or production of commodities simply because they are later to be used or transported in interstate commerce.[29] Even if within its legislative domain, Congress may not, by its mere fiat, make these businesses "so affected with a public interest" as to enable it to control the hours of labor of the employees engaged therein.[30] The decisions of the Supreme Court make it clear that Congress has no power to control, either directly[31] or indirectly,[32] the

29 "Commerce succeeds to manufacture, and is not a part of it. * * * The fact that an article is manufactured for export to another State does not of itself make it an article of inter-state commerce. * * * If the national power extends to all contracts and combinations in manufacture, agriculture, mining, and other productive industries whose ultimate result may affect external commerce, comparatively little of business operations and affairs would be left for State control."—Fuller, C. J., in United States v. E. C. Knight Co., 156 U. S. 1, 12, 15 Sup. Ct. 249, 39 L. ed. 325 (1895).

"If the possibility, or, indeed, certainty of exportation of a product or articles from a State determines it to be in interstate commerce before the commencement of its movement from the State, it would seem to follow that it is in such commerce from the instant of its growth or production; and in the case of coals, as they lie in the ground. The result would be curious. It would nationalize all industries; it would nationalize and withdraw from State jurisdiction and deliver to Federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts, and the woolen industries of other States, at the very inception of their production or growth; that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are, in varying percentages, destined for and surely to be exported to States other than those of their production." McKenna, J., in Heisler v. Thomas Colliery Co., 260 U. S. 245, 259, 43 Sup. Ct. 83, 67 L. ed. 237 (1922).

"Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation. * * * Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce."—Van Devanter, J., in Oliver Iron Mining Co. v. Lord, 262 U. S. 172, 178, 43 Sup Ct. 526, 67 L. ed. 929 (1923).

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacturers and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. * * * If it be held that the term 'commerce' includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market?"—Lamar, J., in Kidd v. Pearson, 128 U. S. 1, 20-21, 9 Sup. Ct. 6, 32 L. ed. 346 (1888).

See Utah Power and Light Co. v. Pfost, 286 U. S. 165, 52 Sup. Ct. 548, 76 L. ed. 1038 (1932) for a case indicating that the Supreme Court is still of the opinions above expressed.

30 Wolff Packing Co. v. Court of Industrial Relations, note 21 *supra*, and cases therein cited.

31 See cases cited in notes 27, 28 and 29 *supra*.

32 See notes 12 and 26 *supra*.

mining, manufacturing or production of commodities within a State.

The proponents of the legislation believe that the reasons advanced for its enactment will so appeal to the present members of the Supreme Court that it will overrule *Hammer v. Dagenhart*[33] and the other precedents,[34] sustaining the validity of the law.[35] It does not seem likely, however, that the majority

33 See note 12 *supra*.

34 See note 29 *supra*.

35 "We are not hesitant to leave the question of constitutionality to the members of the Supreme Court, believing that the reasons advanced for the enactment of this legislation will appeal to the members of that body and further believing that the constitutional power given to the Congress to regulate interstate commerce permits the enactment of this legislation within the powers of the Congress."—House Rep. No. 1999, note 4 *supra*, p. 2; House Rep. No. 24, on H. R. 4557, 73rd Cong., 1st Sess., p. 2.

"There are those who express the opinion that, because of the decision of the United States Supreme Court in the child labor case such a law as you propose would be declared unconstitutional. I am unable to express an opinion on that, because I am not an attorney; but it is reasonable to conclude that there has been some change in the judicial attitude of the Supreme Court toward social and economic problems since the child labor case was decided; and the committee will probably remember that that decision was a 5-4 decision, and, owing to certain developments which had taken place, labor at least is of the opinion that if the same issue were presented to the court as the court is now constituted the court would take a far more liberal progressive, and broader view of the question than it did when that decision was rendered. So that is one reason we hope and believe that if the legislation is favorably acted upon, as proposed in this bill, we have reasonable grounds for hope that the court would sustain it."—From statement of Hon. William Green, President of the American Federation of Labor, Hearings on H. R. 14105, note 6 *supra*, p. 3.

"I think the committee will agree with you that the majority decision of the Supreme Court covers a case that is in line with this bill. In other words, the language of the bill is similar to the bill declared unconstitutional, but nevertheless I personally feel that times have changed and the court would change its previous decision, because we are facing a real crisis in the United States today."—Statement by Chairman, Committee on Labor, H. of R., Hearings on H. R. 14105, note 6 *supra*, p. 51.

"This measure, unlike the child labor bill, does not merely affect a small percentage of American workmen, in order to prevent working practices within their State, thought by Congress to be detrimental to those individual children working within the States. This bill has a broader base and a broader object. It is directed toward interstate commerce in its larger aspect. It affects not a small number of children, but millions of those engaged in interstate commerce. Interstate and foreign commerce have today reached such national proportions that the national economic soundness and prosperity depends upon its life and vitality. In our trading country if interstate and foreign commerce languish, the Nation languishes, and there must necessarily result national problems of want, destitution, misery, illness, and undernourishment.

"This bill, therefore, it is believed comes within the constitutional interpretation both of the majority and the minority of the Supreme Court in the child labor case."

Attention is called to the fact, however, that the child labor case was decided by a divided court of 5 to 4. Conditions today are different to conditions that existed when that case was decided. Laws must be interpreted to meet conditions that existed when that case was decided. Laws must be interpreted to meet conditions existing when the law is interpreted.

Our Constitution has been interpreted from time to time to meet new situations and conditions that could not have been foreseen by the writers of that great document. Its interpretation has made it possible to adjust laws written under its terms

of the Court as now constituted will overrule a long line of decisions in order to uphold the constitutionality of legislation that clearly invades the rights of the States.[36] The *Utah Power & Light Company Case*[37] reaffirms the principles announced in a long line of decisions heretofore referred to.[38] The views of the majority of the Court were not swayed by the able dissenting opinion of Mr. Justice Brandeis in the *Oklahoma Ice Case,*[39] where he discusses at length present economic conditions.[40] There are no cases of record in which the Court has been persuaded to permit changed economic conditions to override constitutional limitations, even though the Court has overruled its earlier decisions in thirty-five cases, and qualified and limited them many times.[41] Many of these earlier decisions were tax cases, and considered by the Court to be not well grounded. Others were overruled by reason of subsequent enactments of Congress. In one case[42] the Court based its decision upon

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to fit alike the oxcart and the aeroplane; the hand loom and the swift spinning of modern factories.—Senate Rep. No. 14, on S. 158, 73rd Cong., 1st Sess., p. 2.

In an attempt to bring the legislation within constitutional limitations, as "emergency" legislation, there has been inserted in S. 158, as passed by the Senate, a provision that it shall be effective for only two years. Cf., Block v. Hirsh, 256 U. S. 135, 41 Sup. Ct. 458, 65 L. d. 865, 16 A. L. R. 165 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 465, 65 L. ed. 877 (1921); Chastleton Corporation v. Sinclair, 264 U. S. 543, 44 Sup. Ct. 405, 68 L. ed. 841 (1924).

36 "In dealing with the child labor cases, from the standpoint of the power of Congress, the Court manifestly was not considering child labor from an economic or humanitarian point of view. Every member of the court might be opposed to child labor although unable to sustain the particular act as being within the power of Congress."—Hughes, The Supreme Court of the United States, pp. 38-39 (1928).

"No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, inquire into the motives of Congress."—Brandeis, J., in Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 161, 40 Sup. Ct. 106, 64 L. ed. 194 (1919).

"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."—Holmes, J., in Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 416, 43 Sup. Ct. 158, 67 L. ed. 322, 28 A. L. R. 1321 (1922).

37 See note 29 *supra.*

38 See note 29 *supra.*

39 285 U. S. 262, 52 Sup. Ct. 371, 76 L. ed. 747 (1932).

40 Pages 305-311.

41 Many of these cases are collected in the dissenting opinion of Mr. Justice Brandeis in Burnet v. Coronado Oil & Gas Co., 285 U. S. 393, 52 Sup. Ct. 443, 76 L. ed. 815 (1932), at pages 406-408. Sharp: Movement in Supreme Court Adjudication—A Study in Modified and Overruled Decisions, 46 Harv. L. Rev. 361-403 (1933), contains a critical discussion of these cases.

42 Farmers Loan Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371, 65 A. L. R. 1000 (1929), overruling Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1902). The fact that business is now conducted upon a national scale, making double taxation of securities an evil, was the principle reason assigned for the change of views of the court.

changed conditions, but this was a change in the way in which business is conducted.

Conceding the economic need for the proposed legislation, it was suggested to the committees of Congress, during the course of the hearings, that the proper procedure would be the proposal to the States of an amendment to the Constitution giving to the Federal Government the power to regulate hours of labor in industry.[43]

It is well settled that the courts will not declare a law unconstitutional unless in their judgment it is plainly so beyond rational doubt.[44] The courts take this position by reason of the fact that the laws are passed by a coordinate branch of the government, which is entitled to great respect,[45] presupposing that the members of Congress adhere to their oath of office obligating them to support the Constitution of the United States. Every member of Congress, therefore, has the duty of considering with care whether a bill violates the Constitution before voting upon it. This is recognized by all the leading authorities.[46] If the legislation be enacted into law, the country will await with interest the decision of the Supreme Court as to its constitutionality.[47].

The question presented to Congress, and, possibly, to the Supreme Court, is: Shall we continue to have a government of

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43 See Hearings on S. 5267, note 6 *supra*, pp. 311-322; Hearings on H. R. 14105, note 6 *supra*, pp. 87-103.

44 Legal Tender Cases, 12 Wall. 457, 20 L. ed. 287 (1871); Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496 (1870); Ogden v. Saunders, 12 Wheat. 213, 6 L. ed. 606 (1827); Fletcher v. Peck, 6 Cranch 87, 3 L. ed. 162 (1810); Trade-Mark Cases, 100 U. S. 82, 25 L. ed. 550 (1879).

45 "The judicial duty of passing upon the constitutionality of an act of Congress is one of great gravity and delicacy. The statute here in question has successfully borne the scrutiny of the legislative branch of the government, which, by enacting it, has affirmed its validity; and that determination must be given great weight."—Sutherland, J., in Adkins v. Children's Hospital, note 5 *supra*, at page 544.

46 See Remarks by Hon. Henry St. George Tucker, M. C., Congressional Record, August 17, 1922, p. 1255.

"The oath that we take to uphold and support the Constitution of this country is not limited to times when no emergencies exist. It applies at all times."—Senator Reed (Pa.), Cong. Rec. April 13, 1933, p. 1632.

47 "We have neither authority nor disposition to question the motives of Congress in enacting this legislation. The purposes intended must be attained consistently with constitutional limitations and not by an invasion of the powers of the States. This court has no more important function than that which devolves upon it the obligation to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution."—Day, J., in Hammer v. Dagenhart, note 12 *supra*, at page 276.

laws, with certainty of law, or a government of men, with uncertainty of law?[48]

48 "The Government of the United States has been emphatically termed a government of laws, and not of men."—Chief Justice Marshall.

"In Marbury v. Madison he (Marshall) established that fundamental principle of liberty that a permanent written constitution controls a temporary Congress."—4 Beveridge, Life of John Marshall, 430 (1919).

FORMS OF ACTIONS IN TENNESSEE

By Joseph Higgins

A word respecting the forms of action may well precede the treatment of the original writ or summons in a law action. It is true that under the modern statutes a summons may be in the most general terms and void of any suggestion as to the nature or form of action which the defendant is notified to meet and defend, yet it may be so drawn as to forecast the cause and form of action that is prompting the plaintiff to sue. In such case the declaration must assume that form which was impressed upon the action by the original process.

In the early history of the common law the original process in personal actions was in the nature of a bill and contained the essential elements of plaintiff's cause of action. This writ was changed by 2 Westminister 4, from a paper possessing the features of a pleading to a mere notice wherein the defendant is informed that he must appear at a certain court upon a certain day and answer a complaint at that time lodged with the clerk of the court. But notwithstanding this statutory reduction of that writ to the function of a mere notice, the worshippers of the common law formulism wrote into the statute a provision that the writ must bear on its face the stamp of forms of the action which defendant was to meet, such as trespass, *vi et armis,* or *assumpsit* or debt or covenant. A failure so to do rendered the writ void.

On the surface of things forms of action are virtually unknown in Tennessee courts. The real nature of an action is determined by the allegations of the initial pleading regardless of form.[1] Rare is the occasion when the action of assumpsit, debt, covenant, or trespass upon the case is mentioned. And yet the very principles of those actions are operating underneath at this time, and it is a healthy exercise and digression to dig them up from the past and give them consideration. These contrivances of the builders of the common law were not the work of a year or of a century. They were constructed amid an atmosphere of public good and sound public policy, and a departure from these frames brought a shock that is hard to

1 Union Canning Co. v. Lowe, 148 Tenn. 407.

realize at this time. It may be said that for a long time these forms were the framework of the entire system of jurisprudence prevailing in England and America, and that no branch of it was untouched thereby and probably no part of it uninfluenced by them. Notwithstanding the legislative declaration that forms of action at law were abolished, they in great measure dominate and shape the well-drawn pleadings in our courts. In view of the effort in Tennessee to destroy the common law forms of action, it may seem strange that such a declaration, that is, framed with all the meticulous care of a common law pleader, will pass muster at this time.[2] When the question of interposing general or special pleas is up for solution, a pondering of these common law forms of action seems to the well grounded lawyer to be necessary or at least extremely advisable.

The several forms of action developed as a part of the common law system prevailed in North Carolina in the year 1775, and they persisted and were a part of the jurisprudence of that state at the time of the separation of the territory of Tennessee therefrom and the erection of the latter into a state in 1796. There was no substantial enactment by the state of North Carolina prior to that year which wrought any material change in court procedure. Therefore, Tennessee lawyers began their career at the birth of the state with this system of pleading as a heritage. Needless to say, they cherished it with almost as much veneration as did Coke and Plowden and Kenyon who repeatedly declared their conviction that the preservation of these forms of action was necessary to the perpetuation of the British people.

And these forms, thus sacredly looked upon, were retained with virtually no modification for half of the first century of the state's existence. So late as 1836 our Supreme Court gave the stamp of its approval to the common law forms and referred to them as a most valued heritage and stated that it was the policy of the court and the state that they be observed. This was so declared in *Tappan vs. Campbell.*[3] It was further said that good pleading is honorable and excellent and that many a good cause is clearly lost for want of good and orderly pleading; and that it should be cultivated by all and is the foundation of every action and contains within itself the soundest logic.[4]

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2 Oliver v. Greenwood, 4 Higgins 535.

3 6 Yerger 463.

4 Roberts v. Stewart, 1 Yerg. 390; Cherry v. Hardin, 4 Heisk. 203.

At that time we had the action of assumpsit which had been created for the purpose of enabling a plaintiff to recover for the breach of any contract, express or implied, other than contracts under seal and of record. It was specifically adapted to the recovery of damages for the failure to perform an oral or simple undertaking. It had the general and again the special characteristics, the former taking the name of common counts of very general expression to be supplemented later by a bill of particulars. Special assumpsit was a form of pleading resorted to when the action was upon a definite written instrument.

Next in order was the action of debt upon a contract, express or implied, by express promise or by declaration of law for a specific sum of money due and payable at a certain time or upon demand. The great difference between debt and assumpsit is that the latter was broad enough and was designed to embrace damages of an uncertain amount which had to be arrived at by computation of the court or jury. The action of debt was devised for the recovery of a fixed sum which had been promised. It was an action of more simplicity than the former. But after a time there was an encroachment of assumpsit upon the field of debt, and even at the common law it was permissible to use assumpsit wherever debt would lie. But this rule did not work both ways; there could be no action in the nature of debt for recovery the amount of which had to abide the contingencies of a trial.

Covenant was a form of remedy contrived to meet contracts under seal. This action was quite narrow in its operation and restrictive in its defenses. It had its vogue during the time when seals imported certainty and sanctity to a written instrument. It had its origin in the days when few men could read and when written contracts were the exception and were generally executed under great solemnity.

The three foregoing remedies, long venerated as the most efficient methods of redressing wrongs or protecting rights of a contractual nature, were in time discovered to have the common root of an agreement or promise, express or implied. As public policy had for ages given them an unusual rigidity, this same public policy broadening with the stream of time found vent in a legislative declaration that all three of these remedies might be asked for in one and the same form of action. These com-

missioners, compiling Tennessee's first code, so declared in Section 2746, published in the year 1858 and carried into the Code of 1932 in Section 8563.

We think it significant that the legislators declared that all contracts might be sued upon in one and the same *form of action.* It will be difficult to read this word out of that Tennessee statute. Form is still emphasized to some degree. This position is strengthened by the provisions of the first statute in Tennessee providing for liberal amendments. This was the act of 1851-2, chapter 156, which with very little variation is reproduced as Section 8713 of the Code of 1932. Those parts having direct bearing upon the subject of this immediate writing are as follows: "No civil suit shall be dismissed . . . on account of the form of action . . . but the court shall have the power to change the form of action, and allow proper averments to be supplied."

The conception of some form of action persisted. Until the time of the passage of this act the parties could not by amendment or consent change the form of action. By this act such a change might be made, but some form had to be retained by the declaration. The very implication of a statute allowing amendments is that there is a standard or ideal which has been originally missed and which can be reached or approximated by a second effort.

It was through the Code of 1858, when considered as a whole, that forms of action such as we have been treating of were declared to be abolished in Tennessee, either expressly or by necessary implication in so far as actions upon contracts were concerned. There had been an effort in 1849 to introduce an action known as one upon the facts of the case, but strange to say, this was not deemed by the bench and bar of the state as affecting a radical change in common law procedure. The phraseology of this act which is in substance, Section 8564 of the Code of 1932, is quite suggestive of the principles and motivations behind the invention of the action of trespass upon the case. This is evidently the reason that this statute did not bring about a pronounced innovation.

It will be recalled by those familiar with the history of common law procedure that, in response to the clamor for an enlarged remedy for wrongs, parliament commanded the chancellors to devise and issue a new kind of writ which subsequently took the name of case or trespass upon the case. The direction

was to issue the writ which fitted the plaintiff's case, or if there was no known writ fitting plaintiff's situation, the draftsmen were ordered to feign a case similar to that presented by the plaintiff and frame a writ accordingly. It would seem at first view that the parliamentary mandate was that a new writ issue regardless of the nature of plaintiff's trouble. It is quaintly said by a liberal minded jurist that the chancellor should frame a writ such as will suit the plaintiff's individual situation. But the ever present conservatism of the common law judges constrained them in the end to discourage the issuance of novel processes, and they worked to this end by deciding that the chancellors must not improvise any writ unless it find somewhat of a counterpart in the old forms of action. The result was that the action of trespass on the case became as inflexible as any other.

But the oft repeated miscarriage of justice brought about by a slight error in the language of a declaration had its effect both in England and America, but always with a struggle with those who venerated form. Soon after the adoption of the Code of 1858 the conviction obtained in Tennessee that forms of actions such as were known to the common law had been thrown into the scrapheap. (A misconception as was shown by the provisions of an Act passed in February, 1860.) This Act was to the effect that the parties were not required to pursue the methods prescribed in the Code of 1858, but might plead in accordance with the common law. This was but an assertion that these old forms persisted and that they could be looked upon as still in existence although somewhat in a state of suspension. The result was that the common law with a few strictures upon phraseology in the declaration, was restored with almost all of its vigor and rigor. And this view, we repeat, became the accepted one and was consistently acted upon as shown in several decisions between 1861 and 1932.

And yet there remained on the statute books the very wording of Sections 2913-2917 of the first Code, which fact begat an uncertainty in the minds of students and beginners, especially as to what system of pleading prevailed in our state. We find that for some fifteen years after the passage of the Act of 1860 defendants followed the directions of the above enumerated Code sections, and a few of the judges looked upon the innovation with much favor. The substance of these sections was that if

the defendant interposed general denial of plaintiff's cause of action he was constrained to give simultaneous notice of all the defenses upon which he expected to rely at the hearing. If this had been the settled mode with respect to pleading, we would have had a system of special pleading, such as is implicit in code systems and such as now prevails in law cases in England.

We resume a consideration of the common law forms of action prevailing at the adoption of the Code of 1858 and which persisted beyond dispute at the time of the adoption of the Code of 1932, although not to the exclusion of the liberalizing provisions respecting declarations. We pass to actions ex delicto.

The first or primitive action was that of trespass. Naturally, this was the simplest and gave less room for dispute as to its framework and its operation. It was the form to be used in all delict actions where the wrong was directly inflicted and with force. It embraced personal injuries, damages to personal property, and wrongful entries upon real property. Its distinctive feature was that the wrong complained of was a direct and immediate result of force or power, or as it was anciently expressed, vi et armis.

This action was adapted to an age of violence. While not always essential, the elements of malice and willfulness afforded almost conclusive evidence of a direct infliction of wrong. It was not possible, under a declaration framed in trespass, to sustain a recovery where the consequence was indirect and where the mind went to the consequences instead of the means and methods. Hence, there was no form of pleading by means of which there could be a recovery for damages sustained by inadvertance. The primitive law makers did not undertake to cultivate attention and circumspection in the every day affairs of life. It was only when society reached a stage of composure and where there was a separation of activities and an impulse to material and commercial activity that a conviction was reached that men should be made to answer for the consequences of their indifference. After a long fight this duty of watchfulness became a rule of law.

More than four hundred years ago the English judges declared that there would always be provided or sanctioned by them a remedy for the breach of any duty imposed by law. Now when the obligation of due care was accepted as a part of the common law, the judges, the commons, and the crown

were impressed that a writ should be framed by means of which the sufferer from an infraction might obtain redress. The consequence was the adoption of the action of trespass on the case. This writ has a curious and interesting history which might be pursued with profit. This study cannot fail in benefit.

This action was the product of the times and of the needs of the times. No action is more pregnant with meaning when its implications are all considered. It demonstrates that it is wise to adhere to old forms and traditions, but to extend them to the needs of any age in which the old framework does not meet all situations. It is also most fruitful in juridical enlightenment in that it had its birth in a spirit of equity and long became known as a child of the chancellors' bosoms, and therefore, entitled to the utmost amplitude of operation. It is because of this origin that the simple plea of not guilty was the only one that was really needed by way of denial.

But even this helpful writ tended toward formalism, as seems inevitable with the jurisprudence whose developers and preservers strive always for a settled text of law and method of procedure. The principles that gave birth to this form of action are those that form the basis of our code provision to the effect that in all cases of injuries to the person or property redress may be had upon the facts of the case. This is really the old command of the sovereign that his chancellor shall issue to a plaintiff such writs as will suit the facts of his case.

The third common law delict action was that of trover. Its creation and its uses from the earliest times to the inauguration of the code system of pleading are quite interesting. For in none other is there a revelation of the long disputed attribute of flexibility in common law forms. It was designed first to meet the case of one who had found a chattel and had refused to deliver it up to the owner. Through a fiction often resorted to in primitive times in the juridical process, every wrongful appropriation of personal property was construed as a finding. The methods of transmuting language in a pleading were changed so as to make it appear that every chattel for which plaintiff sought to recover had been lost and subsequently found and appropriated by the finder.

Another peculiar turn in the action of trover was its extension to all sorts of conversion of personal property to another's use, thus diverting the mind of the court from the find-

ing, or detention, and concentrating it upon the advantages accruing to the alleged finder. In such instances the courts began early to sanction the waiving of the original trespass and entertaining the action as if the finder had promised to reimburse the owner. This transition was easy, for the action of assumpsit was approved in many cases where trespass on the case might have been sustained.

The distinction between trover and the action in the nature of an assumpsit should still be borne in mind for the reason that they called for different pleadings, and the recovery might vary in amount.

The actions of ejectment, detinue, and replevin were also surrounded by peculiarities which the modern statutes have in great measure taken away and helpfully so. The great distinction between the old forms and the later is that there may be a recovery not only for the property demanded, but likewise, damages for the provision of use, thus converting them into mixed actions.

Without discounting all attempts at simplification or procedure, we reiterate that a discriminating study of common law forms would be worthwhile. In fact, as was said by the Supreme Court in *Cherry v. Hardin*,[5] every innovation in pleading should be pondered in the light of the principles of the common law. It is further said that it was an erroneous assumption that the most liberal system of pleading to be found in codes affected an abolition or destruction of the fundamentals of the common law system.

It were a happy turn of events if the great principles of the common law system were blended with the practical purposes of the code method. This attempt has been made in Tennessee, and the bench and the bar can, by co-operation, bring forth a very satisfactory form and manner of pleading. They should unite in discouraging loosness, incoherence, and disorderly arrangement of parts in pleading. This can be done without importing into any particular form the immutability which characterized the common law.

The greatest innovation, with respect to the form of pleading, and particularly defensive pleading, was introduced by the Code of 1932. Its effect was to reverse the position of the parties who might give color or character to the pleading. It

[5] *Supra*, note 4.

will be remembered that under the Act of 1860 defendant had it in his power to convert the simplest kind of action into that common law form recognized or adapted to the kind of cases covered by the simplified declaration. This right is now taken away from a defendant and placed in effect in the hands of the plaintiff. Section 8767 of the Code of 1932 is as follows:

> "Or he may on motion of plaintiff, entered of record be ordered to plead specially his defenses, in which case he shall state the facts relied on truly and as briefly as may be, and no matter of defense not pleaded shall be shown in the evidence; and to such special plea the plaintiff shall reply, and the pleadings shall proceed to issue."

In the immediately preceding sections from 8757 to 8766 the defendant was and is given permission to plead generally or specially. There is every indication that the compilers of the old and the new Codes contemplated that all general and special pleas filed under the sections immediately above given should approximate the general and special pleas which the common law had adapted to general or special defenses.

The fact that the language of the Code of 1932 is a reproduction of corresponding sections of the Code of 1858, with the exception of a modification of pleas in abatement, we express the opinion that if the parties go to trial in the law court under the present system under pleas of the general issue, the case will have to be proceeded with in accordance with the common law procedure and its principles as formerly and as now understood. So that if the declaration be one in debt, a plea that the defendant is not indebted will admit of all the defenses known to the common law. And so on with respect to the seven or eight other forms or divisions of action which may be said to veil every ordinary action at law today.

We also are of the opinion that if a defendant puts in a plea of general denial and likewise numerous special pleas without any objection or question upon the part of the plaintiff, the case will be heard just as were actions of similar kind in Tennessee until the adoption of the Code of 1932. So that it is the plaintiff who is vested with the power to constrain the defendant to the position of a special pleader.

Another unsettled question is as to what becomes of a general denial after the plaintiff has moved to require the defendant to plead specially. We submit the following: If the defendant refuses to comply, plaintiff should be given judgment final or

interlocutory according as the court may be able or not to compute the amount of plaintiff's demand. For it must be remembered that the code provision is that no matter of defense unpleaded shall be available to the defendant after the plaintiff has called upon him to specify his defenses.

Another unsolved question is as to the elaborateness of those special pleas. This will arise when it is urged that certain pleas should be construed as denying the whole cause of action and putting the burden on the plaintiff to make out his case. Under most of the code systems the entering of special pleas does not deprive defendant of his right to insist that plaintiff make out his right to a recovery. But when the purpose of our modified code sections is brought into view, and we avail ourselves of the aid to be derived from the procedural amendments of England, we are of the opinion that the defendant must challenge, by appropriate plea, every element of plaintiff's cause of action. For instance, if the action be for damage to a horse, the special plea would be that plaintiff did not own the horse, or that he was not damaged, or that defendant did not inflict the injury, or that he wounded the horse in self defense, or that plaintiff was guilty of contributory negligence, or had been paid; and so on ad infinitum. A further example would be an action for a breach of contract. This special plea would be that defendant never promised, or that he never breached, or that plaintiff breached first, or that the contract had been rescinded.

This method of pleading is quite novel, but we unhesitatingly approve it, convinced that it will tend very much to the clarifying of issues and the expediting of hearings. It may be said that we shall be constrained to make special pleading a peculiar study. If so, it will turn out that we become the devotees of a science and an art much commended by the learned judges during the middle period of a common law development. We shall indeed arrive at the stage where pleadings will be the means and the implements for the administration of justice.

BAR ASSOCIATION SECTION

Tentative

Program of the Fifty-second Annual Session

of the

Bar Association of Tennessee,

Knoxville, Tennessee,

June 9 and 10, 1933.

Headquarters: Hotel Andrew Johnson.

Meetings:

Hotel Andrew Johnson

Cherokee Country Club

Friday, June 9, 1933—Hotel Andrew Johnson

10:00 A. M.

(Daylight Saving Time)

Invocation.....Rev. Walter A. Smith

Official Welcome.....Hon. John T. O'Connor
Mayor of Knoxville

Address of Welcome.....Frank Montgomery
President, Knoxville Bar Association

Response.....Mr. J. E. Holmes, Memphis

President's Address.....Mr. Harley G. Fowler, Knoxville

Announcements.....A. L. Heiskell, Secretary

Report of Treasurer.....Mr. W. L. Owen, Memphis

Report of Central Council.....Mr. T. G. McConnell, Knoxville

Report of Committee on New Members.....Mr. Harry T. Poore, Knoxville

Report of Committee on Constitutional
Amendments.....Mr. D. W. Harper, Martin

Report of Committee on Unification of the Bar.....Mr. J. B. Sizer, Chattanooga

Report of Committee on Municipal Law.....Mr. Chas. M. Bryan, Memphis

Report of Committee on Legal Education and Admission to the Bar.....Mr. Edward T. Seay, Nashville

Report of Committee on Publication.....Mr. Chas. S. Coffey, Nashville

Miscellaneous Business

12:30 P. M.—Recess

12:45 P. M.

Luncheon at Hotel Andrew Johnson, Courtesy of the Knoxville Bar

1:00 P. M.

Luncheon for Visiting Ladies.....Hotel Andrew Johnson
Courtesy of the Knoxville Bar

Friday, June 9, 1933—Cherokee Country Club

3:00 P. M.

Address.....Hon. James M. Beck

Member of Congress and former Solicitor General of the United States.
Subject: The Future of the Constitution.

Reception by President and Mrs. Fowler.....Cherokee Country Club

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7:30 P. M.

Annual Dinner at Hotel Andrew Johnson

Mr. William Baxter Lee, Toastmaster

Speakers:

The Honorable Edwin P. Morrow, Ex-Governor of the State of Kentucky. Subject: "Kentucky Tales of the Bench, Bar, and Stump."

Mr. Clarence Templeton, of the Jellico Bar. Subject: "Mules".

Dinner tendered by the Knoxville Bar Association. Ladies invited.

Dancing.

Saturday, June 10, 1933—Hotel Andrew Johnson

8:30 A. M.

University of Tennessee Alumni Breakfast
Vanderbilt University Alumni Breakfast

10.00 A. M.

Report of Committee on Jurisprudence and Law Reform.....Mr. J. E. Holmes, Memphis

Report of Committee on Judicial Administration and Remedial Procedure.....Mr. J. A. Susong, Greeneville

Report of Committee on Uniform Laws.....Mr. Albert Akers, Nashville

Report of Committee on Legislation.....Mr. T. W. Schlater, Jr., Nashville

Report of Committee on Grievance.....Mr. D. Sullins Stuart, Cleveland

Report of Committee on Obituaries.....Mr. Bennett Eslick, Pulaski

New and Unfinished Business

Election of Officers

11:30 A. M.

Adjournment

12:00 Noon

Automobile Trip to the Great Smoky Mountains National Park and Luncheon there.

Courtesy of the Knoxville Bar.
Ladies invited.

Automobiles will be provided for transportation to and from the Cherokee Country Club and the Great Smoky Mountains National Park.

Courtesies of Cherokee Country Club and Holston Hills Country Club are extended to all visitors.

The following Committee on Arrangements and Entertainment has been appointed by Mr. Frank Montgomery, President of the Knoxville Bar Association: Mr. C. Raleigh Harrison, Chairman; Mr. Charles E. Donaghy; Mr. Thomas G. McConnell; Mr. William Baxter Lee; Mr. Ray H. Jenkins; Mr. John M. Kelly; Mr. Clyde W. Key; Mr. Joel H. Anderson; Mr. Sam E. Young.

STATEMENT FROM TREASURER

Several years ago it was the custom for the treasurer to send a membership card to each member who paid his dues, which card attested to the fact that he was a member in good standing of the Bar Association of Tennessee for the current year. It was ascertained that some of the members retained this card, while others did not; and consequently, the utmost economy being necessary in order to meet the expenses of the Association out of the dues, the membership cards were discontinued. The increase of postage from two cents to three cents augmented the expenses of the office considerably, it being necessary to mail out between five and six thousand statements, letters and circulars during the year. To save the expense of sending receipts, the remitter's check serving for that purpose, receipts are not mailed except when especially requested.

However, as some of the members have lately expressly requested the membership cards, the treasurer will send same when requested by notation at time of remittance, but believing that the number so desired will be small, the treasurer will follow the same plan as in case of receipts, and avoid the expense of sending such cards to those who do not especially desire same.

NOTICE TO LAWYERS

The Tennessee Bar Association meets in Knoxville June 9th and 10th. All members should immediately pay their dues, and those lawyers who are not members should join without further delay.

The lawyers at Knoxville plan to make the coming meeting the greatest in the history of the Association. Speakers of national reputation have been obtained and interesting forms of entertainment are being planned. No lawyer can afford not to be an active member of the State Association.

—Committee on New Members.

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HEADNOTES*

(Recent Tennessee Supreme Court Decisions)

THE ATLANTIC LIFE INSURANCE CO. v. J. M. CARTER ET AL

(Opinion filed February 25, 1933, by Mr. Justice McKinney)

1. BILLS AND NOTES. Effect of extension of time upon liability of one signing negotiable instrument as maker.

The maker of a negotiable instrument secured by a mortgage on real estate is not released by an extension of time given without his consent to a grantee of the mortgaged land who, with knowledge of the holder of the note, had assumed and agreed to pay the note.

Act construed: Acts 1899, Ch. 94 (Code Sections 7325-7519).

Cases approved: Peter v. Finzer, 116 Neb. 380, 65 A. L. R. 1419; Continental Mut. Sav. Bank v. Elliott, 166 Wash. 283, 81 A. L. R. 1005.

2. BILLS AND NOTES. One signing as maker is primarily liable.

Under the Negotible Instruments Law, one who signs a negotiable instrument as maker is "primarily" liable thereon and may be discharged only in the ways provided by statute.

Case approved: Union Trust Co. v. McGinty, 212 Mass. 205.

3. STATUTES. Bills and Notes. Construction of Negotiable Instruments Law.

In order to effectuate the purpose of the Negotiable Instruments Law, which was to make uniform throughout the country the law with respect to negotiable instruments, its provisions will be given their natural and common meaning without unnecessary resort to that which had been the law of this State prior to its adoption.

Case approved: Union Trust Co. v. McGinty, 212 Mass. 205.

4. BILLS AND NOTES. Payee as holder in due course.

The payee of a negotiable instrument may be a holder in due course.

Case approved: Snyder v. McEwen, 148 Tenn. (21 Thomp.) 423.

5. BILLS AND NOTES. Effect of extension of time upon liability of accommodation maker or surety.

An accommodation maker or surety upon a negotiable instrument is not, under the Negotiable Instruments Law, discharged by an extension of time granted to the principal, such as would have discharged the accommodation maker or surety prior to the adoption of the Act.

Citing: Annotation in 48 A. L. R. 716; Long v. Mason, 273 Mo. 266; Smith v. Blackford (S. Dak.), 228 N. W. 469.

W. W. CHUMBLEY ET AL v. PEOPLES BANK & TRUST COMPANY

(Opinion filed March 18, 1933, by Mr. Justice Cook.)

1. CONSTITUTIONAL LAW. Judges. Disqualification of Judges.

The purpose of the constitutional provision which forbids a judge to preside in any cause in which he is interested, or in which he may have been counsel, is to insure for every litigant the cold neutrality of an impartial court.

Constitution cited: Article 6, Sec. 11.

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*NOTE: These Headnotes furnished by courtesy of the Attorney General's office at Nashville.

Cases cited: Waterhouse v. Martin, 7 Tenn. (Peck) 373; Harrison v. Wisdom, 54 Tenn. (7 Heisk.) 110; Reams v. Kearns, 45 Tenn. (5 Cold.) 218; In Re Cameron, 126 Tenn. (18 Cates) 658.

2. JUDGES. Attorney and client. Constitutional Law. Disqualification of attorney to act as judge in client's litigation.

One who has represented a litigant as attorney in a cause is conclusively presumed to have a pecuniary interest in the result and therefore is disqualified by constitutional provision to preside in the cause as judge, even after severance of the relation of attorney and client.

Constitution cited: Article 6, Sec. 11.

Citing: State v. Hocker, 25 L. R. A. 115; 33 C. J. 1003; 15 R. C. L. 535.

3. JUDGES. Attorney and client. Constitutional Law. Disqualification of judge because of having been counsel.

In order to disqualify a judge on the ground of having been a counsel in a case, the relation of attorney and client must have existed at some time.

4. JUDGES. Constitutional Law. Justices of Supreme Court held not disqualified to determine validity of Code.

The fact that a suit involves the constitutionality of the Code of Tennessee, and that the Supreme Court, in accordance with statute, appointed the Code Commission which drafted the Code and publicly commended the industry and ability of members of the Commission, does not disqualify from hearing the cause the Justices of the Supreme Court, either as counsel or as interested in the litigation.

Code cited: Section 10500.

Act cited: Acts 1929, Chapter 48.

5. JUDGES. Interest which disqualifies judge.

The interest which disqualifies a judge is a direct pecuniary or property interest, or one which involves some individual right in the subject matter of the litigation, whereby a liability or pecuniary gain must accrue on the event of suit.

Citing: Ex Parte Alabama State Bar Association, 12 L. R. A. 136; 33 C. J. 992, 994.

6. JUDGES. Interest which does not disqualify judge.

Interest in a public question merely as a citizen of the State or the member of a civic body is not such interest as disqualifies a judge.

Citing: Harrison v. Wisdom, *supra;* Meyer v. San Diego, 41 L. R. A. 765; 33 C. J. 995; 15 R. C. L. 537.

MRS. E. P. TIPTON v. SPARTA WATER COMPANY

(Opinion filed March 18, 1933, by Mr. Chief Justice Green.)

1. CONTRACTS. Municipal Corporations. Waters. Action by individual for breach of contract between municipality and water company.

Where a contract between a municipality and a water company for the supply of water contains no provision that it shall inure to the benefit of any citizen aggrieved, one whose property has been damaged by fire because of the failure of the water company to fulfill its contract cannot maintain an action on the contract against the water company to recover damages for the injury thus caused.

Cases approved: Foster v. Water Company, 71 Tenn. (3 Lea) 42; Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24; Irvine v. Chattanooga, 101 Tenn. (17 Pickle) 291.

Citing: Annotation in 38 A. L. R. 505; Woodbury v. Tampa Waterworks Co., 57 Fla. 243; Paducah Lbr. Co. v. Paducah Water Supply Co., 89 Ky. 340; Gorrell v. Greensboro Water Supply Co., 124 N. C. 328.

2. TORTS. Municipal Corporations. Waters. Action in tort by individual injured by failure of water company to fulfill contract with municipality.

An action in tort cannot be maintained against a water company by one whose property has been damaged by fire because of the failure of the water company to fulfill its contract with a municipality to furnish water for fire protection.

Cases approved: Foster v. Water Company, *supra;* Longmeid v. Holliday, 6 L. & Eq. Rep. (Eng.) 562; Davidson v. Nichols, 11 Allen (Mass.) 514; Coughtry v. Glove Woolen Co., 56 N. Y. 127; Houck v. Cape Girardeau Waterworks & Electric Light Co. (Mo. App.) 114 S. W. 1099; Fowler v. Athens City Waterworks Co., 83 Ga. 219; German Alliance Ins. Co. v. Home Water Supply Co., 226 U. S. 220; and other cases collected in note, 38 A. L. R. 527.

3. COURTS. Doctrine of stare decisis.

A question of law settled by a decision which has stood for many years without legislative action and upon the faith of which contracts have been based will not be approached as if it were an open question.

MRS. REGINA COHEN v. OSCAR F. NOEL AND JOHN H. NOEL, TRUSTEES, ET AL

(Opinion filed February 11, 1933, by Mr. Chief Justice Green.)

1. CONTRIBUTION. Torts. Rule as to contribution among joint tort feasors.

The general rule is that where two parties participate in the commission of a tort and one party suffers damage thereby, he is not entitled to indemnity or contribution from the other party.

Cases cited: Anderson v. Saylors, 40 Tenn. (3 Head) 551; Rhea v. White, 40 Tenn. (3 Head) 121; Maxwell & Co. v. L. & N. R. Co., 1 Cooper's Chy. 8; Merryweather v. Nixon, 8 T. R. 186.

2. CONTRIBUTION. Equity. Exception to general rule respecting contribution among joint tort feasors.

Where several are jointly responsible for an act not necessarily nor ordinarily unlawful, one who acted without moral guilt or wrongful intent in the commission of the act, and who has paid the damages caused thereby, may recover contribution from the other wrongdoers.

Case approved: Central Bank & Trust Co. v. Cohn, 150 Tenn. (23 Thomp.) 375; Ford v. Brown, 114 Tenn. (6 Cates) 467.

Citing: Pomeroy's Equitable Remedies, Vol. 2, Sec. 916.

3. TORTS. Contribution. Negligence. Exception to general rule respecting contribution among joint tort feasors.

An exception to the rule that there can be no contribution or indemnification between tort feasors is found in cases where one of them made the condition that caused the damage and the other merely failed to detect or remedy that condition.

Citing: Washington Gas Light Co. v. Dist. of Col., 161 U. S. 316; Lowell v. Boston & L. R. Corp., 23 Pick. 24, 34 Am. Dec. 33; Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475; Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 144 N. Y. 663; Gray v. Boston Gas Light Co., 114 Mass. 149; Union Stock Yards Co. v.

Chicago, etc. R. Co., 196 U. S. 217; Notes in 2 Anno. Cas. 528, Anno. Cas. 1913B, 938; 36 L. R. A. (N. S.) 583, 16 Am. St. Rep. 254.

Case overruled: Holland v. Ry. & Lt. Co., 6 Hig. 68.

4. CONTRIBUTION. Torts. Negligence. Facts considered and held to be exception to general rule against contribution among tort feasors.

A declaration alleged that defendants operated a public garage and that plaintiff was the customer who sent her car in charge of a servant to defendant's garage; that defendants were painting the garage and had placed a ladder in one of the run-ways, upon which an employee was standing; that defendants gave no notice to drivers of cars of the obstruction in the run-way; that plaintiff's car entered the dimly lighted garage and plaintiff's servant failed to see the ladder and the painter, as a result of which the employee was injured; that such employee in an action had recovered from the plaintiff for the injuries; and that plaintiff sues defendant for indemnity. HELD: This declaration is not demurrable, but states a cause of action under the exception to the general rule above cited.

THE FEDERAL LAND BANK OF LOUISVILLE ET AL. v. MONROE COUNTY

(Opinion filed February 25, 1933, by Mr. Chief Justice Green.)

1. EMINENT DOMAIN. Remedy of landowner.

The taking of land, even though wrongful, by a condemnor authorized to expropriate for public purposes, leaves the landowner no redress except to sue for his damages under the statute.

Cases approved: Colcough v. Nashville & N. W. R. Co., 39 Tenn. (2 Head) 172; Sanders v. Railroad, 101 Tenn. (17 Pick.) 206; Doty v. Telephone & Telegraph Co., 123 Tenn. (15 Cates) 329; Lea v. Louisville & N. R. Co., 135 Tenn. (8 Thomp.) 560; Armstrong v. Illinois Central R. Co., 153 Tenn. (26 Thomp.) 283; Campbell v. Lewisburg & N. R. Co., 160 Tenn. (7 Smith) 477.

2. EMINENT DOMAIN. Mortgages. Deeds. Right of action for land expropriated does not pass under deed or mortgage, when.

After the actual taking of land, the claim of the landowner becomes a personal claim for damages which will not pass to a subsequent vendee or mortgagee of the land unless such claim is especially assigned. This is true whether the condemnation suit be filed prior to or subsequent to the execution of the deed or mortgage.

Case approved: County of Obion v. Edwards, 159 Tenn. (6 Smith) 491.

LIFE AND CASUALTY INSURANCE CO. v. MRS. EUNICE CANTRELL

(Opinion filed March 18, 1933, by Mr. Justice Cook.)

1. INSURANCE. Construction of contract favorable to insured.

Ambiguities in contracts of insurance are construed most favorably to the insured, with the intention of the parties prevailing.

2. INSURANCE. Accident Insurance. Policy covering accident to "motor-driven automobile" held to cover accident to truck.

An insurance policy which insures against death by accident to a "private motor-driven automobile in which the insured is riding or driving" protects a policy holder killed by accident to a motor truck in which he was driving.

Cases approved: Moore v. Life and Accident Ins. Co., 162 Tenn. (9 Smith) 382; Inman v. Life and Casualty Ins. Co., 164 Tenn. (11 Smith) 12; Metcalf v.

Life and Casualty Ins. Co. (Ky.) 42 S. W. (2d) 909; Brame v. Life and Casualty Ins. Co. (Ky.), 22 S. W. (2d) 439.

Cases differentiated: State v. Freels, 136 Tenn. (9 Thomp.) 483; Hemlock Tire Co. v. McLemore, 151 Tenn. (24 Thomp.) 99.

3. WORDS AND PHRASES. "Automobile" defined.

The word "automobile" indicates a motor-driven, fast-moving vehicle mounted on four wheels, and such a vehicle is an automobile whether called a runabout, a coupe, a coach, a sedan, a town car, a speed wagon, a delivery wagon or a truck.

LEON SILVERMAN v. CITY OF CHATTANOOGA

(Opinion filed March 8, 1933, by Mr. Justice Chambliss.)

1. MUNICIPAL CORPORATIONS. Aeroplanes. Power of municipality to maintain airport beyond corporate limits.

For corporate purposes, including the maintenance of a municipal airport, municipal corporations may own property lying outside the corporate boundaries and may exercise the usual powers incident to ownership.

Code cited: Section 3334 (Shannon's Code, Section 1922).

Cases cited: City of Nashville v. Vaughn, 158 Tenn. (5 Smith) 498; Reams v. Board of Aldermen of McMinnville, 155 Tenn. (2 Smith) 222.

2. MUNICIPAL CORPORATIONS. Aeroplanes. Statutes. Charter held to confer power to pass ordinance applicable to municipal airport beyond corporate limits.

A charter act conferring upon the city power to regulate public grounds "belonging to the city in or out of the corporate limits" and to pass ordinances to carry out the intent of the act authorizes the enactment and enforcement of ordinances regulating the operation of aircraft at a municipal airport lying outside of the corporate limits.

Act construed: Private Acts of 1929, Chapter 2.

Case differentiated: Malone v. Williams, 118 Tenn. (10 Cates) 390.

Citing: In Re Blois, 179 Calif. 291.

3. WORDS AND PHRASES. "Regulate" defined.

The word "regulate" means "to adjust or control by rule, method or governing principle or laws" or "to subject to governing principles or laws."—Bouvier's Law Dictionary.

GRANT HUNT v. STOCKELL MOTOR CAR COMPANY, ET AL.

(Opinion filed February 25, 1933, by Mr. Justice Swiggart.)

SALES. Conditional sales. Replevin. Consent of purchaser to repossession by seller held inferable under facts of case, notwithstanding irregularity in replevin suit.

A mere irregularity in an action of replevin by which a conditional seller recovered possession of property after default will not render the seller liable for conversion when the purchaser had actual knowledge of the default, repossession, advertisement and sale and did not dispute the default, reclaim the property or protest the sale.

Cases approved: Mitchell v. Automobile Sales Company, 161 Tenn. (8 Smith) 1; Murray v. Federal Motor Truck Sales Corp., 160 Tenn. (7 Smith) 140.

STATE OF TENNESSEE v. SOUTHERN LUMBER MANUFACTURING CO. ET AL.

(Opinion filed February 25, 1933, by Mr. Chief Justice Green.)

1. TAXATION. Statutes. Collection of delinquent taxes. Suit to collect delinquent State and County taxes when municipality refuses to join therein.

A suit to collect delinquent State and County taxes upon property located in a city is proper without undertaking to collect municipal taxes when the municipality has refused to certify to the county trustee or to the tax attorney lists of delinquent taxes.

Code cited: Section 1591.

2. TAXATION. Statutes. Collection of delinquent taxes. Suit to collect delinquent State and County taxes when municipality refuses to join therein.

The statute which requires tax suits to be brought "in the name of the State, in its own behalf and for the use and benefit of the county, and of any municipality certifying the lists of delinquent taxes" does not permit a city to defeat the right of the State and County to collect delinquent taxes by refusing to join therein.

Code cited: Section 1591.

3. TAXATION. Equity. Collection of delinquent taxes. Reference to ascertain other taxes due.

The reference which the Chancellor should order in a tax suit to determine the amount of taxes due on the property, other than those sued for, need not be made before the sale but may be made after the sale before confirmation or even after confirmation before distribution of the proceeds of the sale.

Cases cited: State v. Collier, 160 Tenn. (7 Smith) 403; Williams v. Whitmore, 77 Tenn. (9 Lea) 262.

Code cited: Sections 1601, 1678.

HERBERT L. REDMAN v. DuPONT RAYON COMPANY

(Opinion filed February 11, 1933, by Mr. Chief Justice Green.)

1. WORKMEN'S COMPENSATION. Action for compensation is transitory.

An action based on the Workmen's Compensation Act is transitory.

Case approved: Chambers v. Sanford & Treadway, 154 Tenn. (1 Smith) 134; Harr v. Booher, 146 Tenn. (19 Thomp.) 694; Hall v. Southall Bros., 146 Tenn. (19 Thomp.) 129.

2. VENUE. Corporations. Statutes. Venue of suits against corporations.

The venue of suits against corporations, except such suits as may be instituted by original attachment, is limited to counties where the corporation has an office, agency or resident director.

Code cited: Sections 8643, 8669 (Shannon's Code, 4516, 4542).

Case cited: Brewer v. Glass Casket Co., 139 Tenn. (12 Thomp.) 97.

3. WORKMEN'S COMPENSATION. Venue. Corporations. Venue of action for compensation against corporation.

The venue of suits against corporations under the Compensation Act is limited to counties where the corporation has an office, agency or resident director, the provisions of the Compensation Act respecting venue (Code, Sec. 6885) not being exclusive.

Code cited: Sections 6885, 8640.

Case cited: Chambers v. Sanford & Treadway, *supra.*

H. G. DAVIS ET AL v. D. D. ROBERTSON, RECEIVER, ET AL.

(Opinion filed February 11, 1933, by Mr. Chief Justice Green.)

1. WRIT OF ERROR CORAM NOBIS. Pleading and Practice. Writ may issue at instance of party in interest.

The writ of error coram nobis will lie at the instance of a party in interest, although such person is not a party in name.

Case approved: McLemore v. Durivage, 92 Tenn. (8 Pickle) 482.

2. BANKS AND BANKING. Equity. Suit by superinetndent of banks under Section 5973 of Code should be dismissed only after court has been fully advised as to facts.

The superintendent of banks should not be permitted to dismiss by consent a suit brought against the makers of a bond taken for the protection of depositors and unsecured creditors, but the court should be fully advised of the facts and should approve the compromise.

Code cited: Sections 5963, 5973.

Cases cited: Allen v. McCullough, 49 Tenn. (2 Heisk.) 174; Milly v. Harrison, 47 Tenn. (7 Cold.) 191.

3. PLEADING AND PRACTICE. Demurrers. What demurrer admits.

A demurrer does not admit allegations of adverse pleading contrary to facts judicially known by the court.

Citing: Chambliss' Gibson's Suits in Chancery, Sec. 304; 21 C. J. 445.

4. EVIDENCE. Judicial notice of facts learned in former hearing of same case.

The court may take judicial knowledge of facts which it has learned on an earlier hearing of the same case and of what it has done at a previous hearing of that case.

Citing: 23 C. J. 61; 15 R. C. L. 1111; Wigmore on Evidence, Sec. 2579; Jones Commentaries on Evidence, Sec. 431.

5. EVIDENCE. Writ of error coram nobis. Dismissal of petition for writ when allegations are contradicted by facts which the court judicially knows.

Where in a suit upon a bond the chancellor heard witnesses who established the fact that a proposed settlement was proper, and where a compromise decree, in reality an adjudication, was entered, the chancellor properly sustained a demurrer to a petition for the writ of error coram nobis, alleging that the bond was solvent and the decree was the result of collusion and deception. The allegations of the petition were contradicted by facts judicially known to the court.

6. WRIT OF ERROR CORAM NOBIS. Pleading and Practice. Contradiction by writ of fact previously determined at hearing on merits.

The writ of error coram nobis is not available to contradict a fact previously determined upon a hearing of an issue tried on its merits.

Case cited: Memphis German Savings Institution v. Hargan, 56 Tenn. (9 Heisk.) 496.

7. BANKS AND BANKING. Equity. Statutes. Power of superintendent of banks to compromise doubtful claim.

The superintendent of banks, acting as receiver, under orders of the chancery court, is empowered to compromise and settle doubtful claims with the approval and sanction of the court.

Code cited: Section 5973.

Citing: High on Receivers, Sections 177, 336.

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EDITORIAL BOARD ANNOUNCEMENT

This issue completes Volume XI of the "Review" and is the last number to be published by the present board. Officers for the next year are as follows:

Editor_____Chas. S. Badgett, Jr.
Business Manager_____Edgar H. Snodgrass
Case Note Editor_____Oscar M. Tate, Jr.
Book Review Editor_____Virginia Akans

Messrs. Laurent B. Franz, Jack S. Phelan, Ivan T. Privette, and Sam Davis Tatum have been elected to membership on the Student Editorial Board to fill vacancies which will result from the graduation of Messrs. S. F. Dye, E. Bruce Foster, Chas. H. Smith, Jr., John R. Stivers, Robt. J. Watson, and Wm. C. Wilson. Additional members will be elected in the fall.

Editor of the *George Washington University Law Review;* Assistant General Counsel of the American Short Line Railroad Association.

JOSEPH HIGGINS, member of the Tennessee Bar for many years; also a member of the Florida Bar; President of the Tennessee Bar Association, 1916-17; has held various positions on the courts of Tennessee, having for several years been a Circuit Judge and an Associate Justice of the Court of Civil Appeals; now engaged in active practice at Nashville, Tennessee.

EDITORIAL BOARD ANNOUNCEMENT

This issue completes Volume XI of the "Review" and is the last number to be published by the present board. Officers for the next year are as follows:

Editor_____Chas. S. Badgett, Jr.
Business Manager_____Edgar H. Snodgrass
Case Note Editor_____Oscar M. Tate, Jr.
Book Review Editor_____Virginia Akans

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RECENT CASE NOTES

AUTOMOBILES—THE FAMILY PURPOSE DOCTRINE.

J. W. Raines permitted his son, Bill Raines, to drive the family automobile to the theater, but gave him express instructions to limit its use to this trip. Contrary to the express instructions of his father, Bill went into Georgia to get Pauline Mercer. While returning to the home of Miss Mercer a collision occurred with the car of Mr. Jones. Miss Mercer sued J. W. Raines for injuries suffered in the collision. After the suit was commenced, and before the time of the trial, she married Bill Raines. HELD: The marriage extinguished all antenuptial rights of action for wrongs committed by one party upon the other. The Emancipation Acts of 1913 and 1919 have not changed this common law rule. Furthermore, the family purpose doctrine has no application here. Since there is no right of action against the servant (the son) there can be none against the master (the father).[1]

At common law neither spouse could maintain a right of action against the other for tort.[2] This was due to the legal fiction that the husband and wife were one in contemplation of law. Thus, the law forbade one to sue himself for a wrong he had committed. The law presumed there was a complete unity of interest of husband and wife.[3] It was against public policy to permit one spouse to sue the other. This would make public scandal of family discord, and would injure the reputation of the husband and wife and invade the sanctity of the home.

The fallacy of this public policy rule is perceived when one considers the fact that courts following it are open to divorce and alimony cases, and permit either spouse to prosecute a criminal case against the other; thus laying bare every act of the marriage relation.[4]

The right of one spouse to sue the other for tort is now largely controlled by statute in the different states. The cases are not in accord and in each instance one must look to the wording of the statutes; but even the difference in the wording of the respective statutes does not explain the lack of accord.[5] Under the Emancipation Acts of 1913 and 1919[6] the Supreme Court of Tennessee, in dealing with the criminal responsibility of the wife, holds that she is to be regarded as a legal entity, separate and distinct from her husband.[7] The same court, in dealing with the power of the wife to sue her husband in tort, declares that the common law unity of husband and wife still exist, and the said Acts of 1913 and 1919 have not changed it.[8]

The family purpose doctrine is a part of the law of Tennessee.[9] It is of com-

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1 Raines v. Mercer, ... Tenn. ...., 55 S. W. (2d) 263 (1932).

2 Tobin v. Gelrich, 162 Tenn. 96, 34 S. W. (2d) 1058 (1930); Note (1917) 6 A. L. R. 1031; Note (1907) 6 L. R. A. (N. S.) 191.

3 Tobin v. Gelrich, *supra*, note 2.

4 Fielder v. Fielder, 42 Okla. 124, 14 Pac. 1022 (1914).

5 Note (1917) 6 A. L. R. 1031.

6 Tenn. Code (1932), Sec. 8460. Chapter 26, Acts of 1913 and Chapter 126, Sec. I, Acts of 1919 are identical.

7 State v. Johnson, 152 Tenn. 184, 274 S. W. 12 (1925).

8 Lillienkamp v. Rippetoe, 133 Tenn. 62, 179 S. W. 628 (1915); Raines v. Mercer, *supra*, note 1.

9 Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1925); State v. Johnson, *supra*, note 7; 9 Tenn. L. Rev. 240.

paratively recent origin and rapid growth, and the law is not yet well settled.[10] The doctrine is a logical outgrowth of the common law doctrine of *respondeat superior*. It has its foundation in public policy and convenience. The one who makes it possible for his servant to injure another must be held responsible.[11] *Respondeat superior* applies only where the relation of master and servant exists,[12] but the courts often confuse master and servant with agency.

The dangerous instrumentalities doctrine is not a part of the law of Tennessee.[13] Yet, an automobile has certain inherent dangers to which the court must not close its eyes when cases arise where the head of a family permits his children "to go upon the streets with such dangerous instrumentalities".[14]

The age of the son or daughter using the family automobile is immaterial so long as he or she remains a member of the family. The dictates of natural justice demand that the owners of automobiles should be responsible for injuries resulting from their negligent operation. A judgment against a son or daughter without money or property would be empty form.[15] The family purpose doctrine is a product of judicial decision and not of legislative enactment in Tennessee. The court feels that liability should be placed on some responsible person in order to protect the public against the negligent use of automobiles. Generally, the head of a family is more able to bear this responsibility than the members of his family. The father can protect himself by prescribing the conditions upon which the automobile may be used, or prohibit its use altogether.

The family purpose doctrine is not only a rule of convenience to reach substantial justice, but it is a rule of absolute necessity under the conditions of modern society. This doctrine illustrates the ability of the common law to adapt itself to the ever-changing conditions and needs of society.

S. F. D.

BILLS AND NOTES—ACCELERATION PROVISIONS.

M made a promissory note to P the terms of which included the following: "Ninety days after date I promise to pay to order of P, One Hundred Twenty-five and no/100 Dollars, negotiable and payable at First National Bank, Brownstown, Indiana, with interest at rate of 8% per annum and attorney's fees . . . . . *P has full power to declare this note due, and take possession of said property* (a description of which was inserted above) *at any time he may deem this note insecure, even before maturity of same.*"

The question before the court was whether, due to the clause in italics, the above note was negotiable. HELD, that such clause rendered the note non-negotiable.

The grounds for the above decision may be found in the following excerpt from the court's decision: " 'An instrument to be negotiable must conform to the following requirements: 3. Must be payable on demand, or at a fixed or determinable future time.' Section 11360, Burns' 1926.

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10 Note (1928) 64 A. L. R. 845.
11 18 R. C. L. 786.
12 Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752 (1914).
13 *Ibid.*
14 King v. Smythe, 140 Tenn. 217, 204 S. W. 296 (1918).
15 *Ibid.*

"'An instrument is payable on demand: 1. Where it is expressed to be payable on demand, or at sight, or at presentation; or 2. In which no time for payment is expressed.' Section 11366, Burns' 1926.

"It is clear that the note in suit does not come within either of the classes of the notes which are payable on demand.

"'An instrument is payable at a determinable future time, within the meaning of this (Neg. Inst.) Act which is expressed to be payable: 1. At a fixed period after date or sight; or 2. On or before afixed or determinable future time specified therein; or 3. On or at a fixed period after the occurrence of a specified event, which is certain to happen. . . . .' Section 11363, Burns' 1926.

"The note in suit does not expressly provide that it is payable 'at a fixed period after date or sight.' On the contrary it expressly provides that the payee may declare it due at any time he may deem it insecure. The date of maturity is uncertain and remains uncertain until the payee 'deems himself insecure.' Hence this note does not fall in that class of notes covered by subsection 1 of section 11363, Burns' 1926.

"The note in suit does not expressly provide that the note is payable 'on or at a fixed period after the occurrence of a specified event which is certain to happen' . . . . Hence the note in suit does not belong to the class of notes covered by subsection 3 of section 11363, Burns' 1926.

"We have shown that the note in suit does not conform to the requirement that it 'must be payable on demand or at a fixed future time' unless it can be successfully contended that the note is expressed to be payable 'on or before a fixed or determinable future time specified therein.'

"It is apparent that the note does not expressly provide that it is payable 'on or before a fixed . . . . time specified therein.' In fact, it provides that the time of payment may be fixed by the payee."[1]

The court in the principal case, in reaching the above result, was not bound by any previous case or cases decided in that court, but chose to follow the weight of authority in the matter as expounded by the appellate courts of other states,[2] at the same time being fully aware of the more liberal and, apparently, the more sound view as is expressed in an article[3] in the Harvard Law Review by Mr. Zechariah Chaffee, Jr., and also by Mr. Brannan.[4]

According to Chaffee, such instruments simply express more fully the effect of paper payable on or before a fixed date at the option of the holder, which is clearly negotiable. It may be argued that the holder's insecurity is an objective fact which must be proved to accelerate payment. However, the phrase seems mere encouragement, and he can exercise his option to demand payment whether he really feels insecure or not. The point is, that insecurity is the usual state of mind accompanying a demand by the holder before maturity, and is naturally written in here. And, even if actual insecurity is necessary, it is not an extrinsic fact which the holder needs to investigate in order to determine whether he can exercise his option. However construed, the instrument is suitable for circulation, more so than the ordinary note

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1 Guio et al. v. Lutes, ... Ind. App. ...., 184 N. E. 416 (1933).

2 Murrell v. Exchange Bk., 168 Ark. 645, 271 S. W. 21, 44 A. L. R. 139 (1925); Peoples Bank v. Porter, 58 Cal. App. 41, 208 Pac. 200 (1922); Holliday St. Bank v. Hoffman, 85 Kan. 71, 116 Pac. 239, 35 L. R. A. (N S.) 390, Am. Cas. 1912D 1; Great Falls Nat. Bk. v. Young, 67 Mont. 328, 215 Pac. 65 (1923); Puget Sound St. Bk. v. Wash. Pav. Co., 94 Wash. 504, 62 Pac. 870 (1917); 3 R. C. L. 910; 34 A. L. R. 888, note.

3 32 Harv. L. Rev. 747, 773.

4 Brannan, Neg. Inst. Law (5th ed. 1932), p. 140.

without an acceleration clause. The value is certain, and even the danger of insolvency is to some extent overcome.

"The Negotiable Instruments Law with its general 'on or before' clause[5] certainly seems to settle this point and allow the holder an option, but the decisions since the Act continue to argue that the 'insecure' clause makes the 'time of payment . . . . dependent absolutely upon the will and election of the payee' and ''dependent upon the future volition of' one other than the maker.'[6] Therefore it is said to be 'payable upon a contingency'[7] and invalid under the last sentence of section four.[8] That sentence has no proper application to these instruments, which fall within subdivision two of the same section.''[9]

Brannan, in commenting on Section 4(2) of the Negotiable Instruments Law and after citing cases holding an otherwise negotiable instrument which contains an acceleration provision to be non-negotiable, says: "It is submitted that these cases holding an instrument payable at a fixed time but accelerable at the option of payee or holder non-negotiable are directly contrary to the plain meaning of this section. Such instruments are certainly payable 'on or before a fixed . . . . time specified therein,' and to hold them non-negotiable is certainly a spurious construction of the act. Under a proper interpretation, these cases should be overruled.''[10]

It may be added to support further the view taken by Mr. Chaffee, and by Mr. Brannan, that such an acceleration provision in an instrument will certainly not detract from an instrument's marketability but on the contrary it will aid and enhance it. What sane person would not rather have an instrument which he may declare due and payable at a time when he feels that to wait until the date of maturity might prove detrimental to his rights, than one which does not give him such an option? There is slight ground for contention that the Negotiable Instruments Law expressly excludes such an instrument. Such an instrument is certainly payable on a day certain, because it must become payable, at any event, on the date of maturity set forth on its face, and therefore it is expressly included in Sec. 4(2) of the Negotiable Instruments Law. The only fault to be found with an instrument accelerable before maturity by the payee or holder when he deems himself insecure, is the fact that subsequent holders might not be able to ascertain whether such an instrument has been declared mature, and therefore a bona fide purchaser before the date of maturity as set forth on the face of the instrument might have taken after a previous holder had declared the note due and payable or brought suit on it, and as a result such purchaser might conceivably be declared not to be a holder in due course. However, subsequent purchasers need not inquire about the exercise of the option if they have no notice that it was exercised, for it is incidental. It has been held that as to holders in due course, ignorant of the dishonor, the instrument remains due for all purposes at the original maturity, and the acceleration is immaterial.[11] Section 52(2) of the Negotiable Instruments Law which provides that, "A holder in due course is a holder who has taken the instrument under the following circumstances: (2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact," seems to

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5 N. I. L. Sec. 4 (2).

6 Puget Sound State Bank v. Washington Paving Co., *supra* note 2.

7 *Ibid.* 511; Iowa National Bank v. Carter, 144 Iowa 715, 123 N. W. 237, 241 (1909).

8 "An instrument payable on a contingency is not negotiable."

9 *Supra*, note 3, p. 775.

10 *Supra*, note 4.

11 Dunn v. O'Keefe, 5 M. & S. 282 (1816).

allay any possibility that a subsequent holder without notice of a prior exercise of the option would be declared a transferee after maturity. The above section of the Act, it is submitted, seems also expressly to permit an instrument with an acceleration provision, in that there would never be any occasion for the application of such subsection except in the case of a purchase of such an instrument after the exercise of the option, but before the face date of maturity.

There are a few cases which take the view that an instrument with an acceleration provision is nevertheless negotiable,[12] but such cases are admittedly in the minority.

So far as the writer is able to ascertain, there has been no Tennessee decision as to the negotiability or non-negotiability of an instrument, otherwise negotiable, which contains a provision allowing the payee or holder to declare it due and payable before its face date of maturity if he deems himself insecure. The Supreme Court of Tennessee has held a note to be negotiable which gave the payee the option to declare it due and payable, on the maker's failure to deposit additional security on demand if that pledged became unsatisfactory or less valuable.[13] The court, however, pointed out that in this case the acceleration of the date of maturity did not depend wholly upon the whim or caprice of the holder, but depended upon the omission or failure of the maker to furnish additional security when demanded. This distinction seems to be purely a technical one, but, nevertheless, it is the opinion of the writer that the Tennessee Court would follow the well established weight of authority should the occasion arise and declare that such an acceleration provision as that dealt with in the principal case, destroys negotiability. A very strong argument for the soundness of the above conclusion may be found in the decision of the Tennessee Supreme Court in the case of *First National Bank v. Russell*,[14] where it was held that the promissory note in question was not negotiable, because of its provision that judgment could be confessed on the note "at any time hereafter" and as a result of the provision its payment could be enforced by the entry of a judgment at any time, before or after maturity, at the discretion of the holder.

O. M. T., Jr.

BILLS AND NOTES—SURETYSHIP DEFENSES: EXTENSION OF TIME.

On April 15, 1924, R executed his negotiable promissory note in the sum of $4,000, payable to bearer 5 years after date (April 15, 1929), and secured same by a mortgage on certain real estate. Said note, shortly after its execution, was negotiated to H for a valuable consideration and without notice of any infirmity. A little later R sold and conveyed the mortgaged property securing said note to X, who assumed its payment as part of the purchase price, and H was duly notified of said facts. When the note matured, X was unable to pay it, and, upon his ap-

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12 White v. Hatcher, 135 Tenn. 609, 188 S. W. 61 (1916); West Point Banking Co. v. Gaunt, 150 Tenn. 74, 262 S. W. 38, 34 A. L. R. 862 (1924); Arnett v. Clark, 22 Ariz. 409, 198 Pac. 127 (1921); Commerce Trust Co. v. Guarantee Title & Trust Co., 113 Kan. 311, 214 Pac. 610 (1923); Mechanics and Metals Nat. Bank of New York v. Warner, 145 La. 1022, 83 So. 228 (1919); Dart Nat. Bank v. Burton, 241 N. W. 858 (Mich. 1932); Durham v. Rasco, 30 N. M. 16, 227 Pac. 599, 34 A. L. R. 838 (1924); Sommers v. Goulden, 147 Okla. 51, 294 Pac. 175 (1930); Empire Nat. Bank of Clarksburg, West Va. v. High Grade Oil Refining Co., 60 Pa. 255, 103 Atl. 602 (1918).

13 West Point Banking Co. v. Gaunt, *supra*, note 12.

14 124 Tenn. 618, 139 S. W. 734, Am. Cas. 1913A 203 (1911).

plication, the time of payment was extended one year without the knowledge or consent of R. Before the extended due date X died, and his estate is wholly insolvent. H demanded of R that he pay said note, which R refused to do. The mortgage was thereupon foreclosed, and after crediting the note with the proceeds of the sale, H filed a bill in equity against R to recover the balance due on said note.

The defense relied upon is that, when X assumed the payment of said note, he became primarily liable and R secondarily liable for its payment, and that R, being only secondarily liable, was discharged when H extended the time of payment at the request of X without R's consent.

HELD, that under the N. I. L., R was primarily liable and therefore was not discharged by the extension of time.[1]

A grantee of mortgaged premises who assumes the payment of the mortgage debt becomes the principal debtor and the mortgagor occupies the position of surety as to such mortgage debt;[2] and generally, an agreement for an extension of time entered into between the mortgagee and the grantee who has assumed the payment of the mortgage debt, if made on valid and sufficient consolidation so as to be legally enforceable, will discharge the mortgagor, unless the extension is assented to by the mortgagor.[3]

Before the N. I. L. this rule was applied regardless of whether the mortgage liability sought to be enforced was a general indebtedness or liability on a negotiable instrument.[4]

Section 60 of the N. I. L. provides that, "The maker of a negotiable instrument by making it engages that he will pay it according to its tenor; and admits the existence of the payee and his then capacity to indorse."[5]

Section 192 of the N. I. L. provides that, "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."[6]

It would seem incontestable that R, the maker of the note in question, by the terms thereof being "absolutely required to pay the same," is "primarily" liable thereon. The language of Section 192, *supra*, affirmatively excludes him from the classification of those "secondarily" liable.[7]

Before the N. I. L. the generally accepted rule was that parole evidence was admissible to show that a party to a negotiable instrument, though he appeared as the party primarily liable thereon and was absolutely required by the terms of the instrument to pay the same, was in fact known to be surety.[8] However, it is argued with considerable force that the N. I. L. makes no provision for the proof of another and different relation than that expressly undertaken and defined by the tenor of

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1 Atlantic Life Insurance Co. v. Carter, ... Tenn. ....., 57 S. W. (2d) 449 (1933). See also Peter v. Finzer, 116 Neb. 380, 217 N. W. 612 (1928); (1928) 42 Harv. L. Rev. 136; (1928) 26 Mich. L. Rev. 929; (1928) 6 Neb. L. Rev. 417. But Cf. Wright v. Bank of Chattanooga, ... Tenn. ....., 57 S. W. (2d) 800 (1933).

2 2 Jones, Mortgages (8th ed. 1928) Sec. 755; 2 Jones, Mortgages (7th ed. 1915), Secs. 591-592; 19 R. C. L. 373, 374; 50 C. J. 26.

3 19 R. C. L. 384; 2 Jones, *op. cit. supra*, note 2.

4 (1928) 42 Harv. L. Rev. 136.

5 Tenn. Code (1932), Sec. 7384.

6 Tenn. Code (1932), Sec. 7516.

7 Peter v. Finzer, *supra*, note 1.

8 *Supra*, note 4; Hening, *The Uniform Negotiable Instruments Law, Is It Producing Uniformity and Certainty in the Law Merchant?* (1911) 59 U. of Pa. L. Rev. 532.

the instrument signed,[9] and hence it is almost universally held that one primarily liable on a negotiable instrument cannot show liability in any other capacity.[10]

Section 119 of the N. I. L. provides that, "Negotiable instrument is discharged:

1. By payment in due course by or on behalf of the principal debtor;
2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;
3. By the intentional cancellation thereof by the holder;
4. By any other act which would discharge a simple contract for the payment of money;
5. When the principal debtor becomes the holder of the instrument at or after maturity in his own right."[11]

Section 120 of the N. I. L. provides that, "A person secondarily liable on the instrument is discharged:

1. By any act which discharges the instrument;
2. By the intentional cancellation of his signature by the holder;
3. By the discharge of a prior party;
4. By a valid tender of payment made by a prior party;
5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved:
6. By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable, or unless the right of recourse against such party is expressly reserved."[12]

The N. I. L. provides in definite terms that the instrument and hence one primarily liable, is discharged in one of five ways set forth in Section 119, *supra*. There is no mention in this section of a discharge of a person "primarily" liable by an extension of time. But, among the ways in which a party "secondarily" liable may be discharged as above set forth, in Section 120, *supra*, is "any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument unless made with the assent of the party secondarily liable, ..." From this it is argued that whatever interpretation might be required of Section 119, *supra*, containing an enumeration of the ways in which the instrument, and consequently the parties "primarily" liable thereon, might be discharged, if this provision stood alone, the inference arising from the omission of extension of time from such enumeration, and its inclusion among the ways in which parties "secondarily" liable may be discharged as above set forth in Section 120, *supra*, necessitates the conclusion that the legislature did not intend that persons "primarily" liable should be discharged in that manner. Or, in other words, parties to a negotiable instrument "primarily" liable theeron may be discharged only in the manner provided by section 119 of the N. I. L.[13]

As a general argument in support of the foregoing construction it is said that the N. I. L. should be construed so as to secure uniformity and certainty in laws throughout the country; that the words of the N. I. L. should be given their natural and ordinary meaning; that the obvious meaning of the N. I. L. should be adhered

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9 Peter v. Finzer, *supra*, note 1.
10 Note (1927) 48 A. L. R. 715.
11 Tenn. Code (1932), Sec. 7443.
12 Tenn. Code (1932), Sec. 7444.
13 Peter v. Finzer, *supra*, note 1.

to as closely as possible, without reference to the law as previously existing, unless necessary to dissolve obscurity or doubt, especially in instances where there was a difference in the law in the different states.[14]

It is submitted by Professor Brannan that the rule of the case in question is at variance with the well established doctrines of suretyship, and is not required by the provisions of sections 119 and 120 of the N. I. L. "The discharge of a party, who, though primarily liable, is known to the holder to be a surety, by giving time to the principal debtor seems to be covered by Section 119(4). But if this is not so, then, since the discharge of a surety-maker or surety-acceptor by an extension of time granted to the principal by a holder with knowledge of the relation, is neither a discharge of the instrument nor of a party secondarily liable, this should be regarded as an omitted case and, therefore, to be governed by the law merchant under Section 19615."[16]

A decided minority of the courts have construed Sections 119 and 120 as applicable only to holders in due course, and thus have adhered to the doctrines of suretyship under authority of Section 5817 of the N. I. L.[18]

The cases dealing with the question of suretyship defenses of parties primarily liable on a negotiable instrument have been very unsatisfactory and their results far from uniform.[19] However, there is no doubt that the majority rule as laid down by Tennessee Supreme Court is so well embodied and entrenched in the law of Bills and Notes that only an amendment of the N. I. L. could result in a general change in the rule.[20]

J. L. C., Jr.

CONTEMPT—OFFICERS OF COURT.

A member of the bar, one Tanner, was tried for contempt and found guilty.[1] He was engaged by the plaintiff in a civil action for damages, and the jury in said case returned a verdict for the plaintiff against the defendant in the sum of $12,000.00. The jury was discharged, and after one of them, George A. Anderson, a banker, had left the court room and reached the steps of the building, he was accosted by defendant Tanner and assailed for not having returned a larger verdict for his client, stating that, "it was a damned rotten verdict," and that because Anderson was a banker, "money meant more to you than human suffering, and you are responsible for this verdict." The juror was then followed a block or more

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14 Graham v. Shepherd, 136 Tenn. 418, 189 S. W. 867 (1916); Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912); Peter v. Finzer,, *supra*, note 1.

15 Tenn. Code (1932), Sec. 7519, which provides that, "In any case not provided for in this statute the rules of law and equity including the law merchant shall govern."

16 Beutel, Brannan's Negotiable Instruments Law (5th ed. 1932) 884, stating Brannan's adverse criticism of the rule.

17 Tenn. Code (1932, Sec. 7382, which provides that, "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable."

18 Fullerton Lumber Co. v. Snouffer, 139 Iowa 176, 117 N. W. 50 (1908); Long v. Shafer, 185 Mo. App. 641, 171 S. W. 690 (1914); (1928) 26 Mich L. Rev. 929.

19 Beutel, *op. cit. supra*, note 15, 879-897.

20 Brannan, *Some Necessary Amendments of the Negotiable Instruments Law* (1913), 26 Harv. L. Rev. 593-596.

1 Tanner v. United States, 62 Fed. (2d) 601 (C. C. A. 10th, 1933).

along the street and the statements substantially repeated. Upon complaint of Anderson the court adjudged the lawyer guilty of contempt, fined him $100.00, and suspended his right to practice until such fine was paid. The court justified its position by saying that all courts have the right to protect one officer of the court from an attack by another officer, and cited the section of the Federal Code which gives them the power to punish for contempt.[2]

In deciding the case the court says that no authority directly in point is to be found, and cites numerous authorities as to the duty of an attorney toward the court and its other officers, and the power of the courts to adjudge for contempt.[3]

The act complained of in the instant case is not one which constitutes direct contempt,[4] since it was not committed in the presence[5] of the court, or so near as to interrupt its proceedings.[6] If classified as constructive contempt it must be an act done which is not in the presence of the court, but which tends to belittle, to degrade, or to obstruct, interrupt, prevent, or embarrass the administration of justice.[7] "To constitute constructive contempt of court, some act must be done, not in the presence of the court or judge, that tends to obstruct the administration of justice, or bring the court or judge, or the administration of justice into disrespect."[8] It does not seem that there has been an obstruction, interruption, or prevention of the workings of justice. If the decision of the court is to be sustained, it is on the ground that the court or the administration of justice has been belittled, degraded, embarrassed, or brought into disrespect.

In the principal case the jury had returned a verdict, had been discharged, and were leaving the courtroom and building. After the jury has been discharged the

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2 36 Stat. 1163 (1911), 28 U. S. C. Sec. 385 (1926).

3 Bessette v. W. B. Conkey Co., 194 U. S. 324, 337 (1903); Michaelson v. U. S., 266 U. S. 42 (1924); Ex Parte Davis, 112 Fed. 139 (C. C. D. Fla. 1901); 6 R. C. L. 494.

4 13 Corpus Juris, p. 5.

5 U. S. v. Anonymous, 21 Fed. 761 (C. C. W. D. Tenn. 1884).

6 U. S. v. Anonymous, *supra*, note 5; Ex Parte McLeod, 120 Fed. 130 (N. D. Ala. 1903); U. S. v. Zanelo, 177 Fed. 536 (C. C. N. D. Ala. 1910); Asbestos Shingle, etc. Co. v. Johns-Manville Co., 189 Fed. 611 (C. C. S. D. N. Y. 1911); U. S. v. Huff, 206 Fed. 700 (S. D. Ga. 1913); Neel v. State, 9 Ark. 259 (1849); Watson v. People, 11 Colo. 4, 16 Pac. 329 (1881); Whitten v. State, 36 Ind. 196 (1871); Snyder v. State, 151 Ind. 533, 52 N. E. 152 (1898); In re Wood, 82 Mich. 75, 45 N. W. 1113 (1890); State v. Shepherd, 177 Mo. 205, 76 S. W. 79 (1903); In re Clark, 208 Mo. 121, 106 S. W. 990 (1907); Price v. Creme de Mohr Co., 78 Misc. 42, 137 N. Y. S. 732 (1912); State v. Woodfin, 27 N. C. 99 (1844); In re Oldham, 89 N. C. 23 (1883); State v. Root, 5 N. D. 47, 67 S. W. 590 (1896); State v. Applegate, 13 S. C. L. 110 (1822); Herald-Republican Publishing Co. v. Lewis, 142 Utah 188, 220, 129 Pac. 624 (1913); Commonwealth v. Stewart, 2 Va. Cases 320 (1822); State v. Jasper, 78 W. Va. 385, 88 S. E. 1096 (1916); State v. Eau Claire County Circuit Court, 9 Wis. 1, 72 N. W. 193 (1897).

7 Stuart v. Reynolds, 204 Fed. 709 (C. C. A. 5th 1913); Frowley v. Modoc County Superior Court, 158 Calif. 220, 110 Pac. 817 (1910); Ex Parte Northern, 18 Col. App. 52, 121 Pac. 1010 (1912); Holbrook v. Ford, 153 Ill. 633, 39 N. E. 1091, (1891); Stewart v. State, 140 Ind. 7, 39 N. E. 508 (1894); Flannagan v. Jepson, 177 Iowa 393, 158 N. W. 641 (1916); State v. Henthorne, 46 Kan. 613, 26 Pac. 937 (1891); Melton v. Commonwealth, 160 Ky. 642, 170 S. W. 37 (1914); Androscoggin, etc., R. Co. v. Androscoggin R. Co., 49 Me. 392 (1862); State v. Ives, 60 Minn. 478, 62 N. W. 831 (1895); In re Clarke, *supra*, note 6; Saal v. South Brooklyn R. Co., 122 App. Div. 364, 106 N. Y. S. 996 (1907); Smythe v. Smythe, 28 Okla. 266, 114 Pac. 257 (1911); Herald-Republican Publishing Co. v. Lewis, *supra*, note 6; Burdette v. Commonwealth, 103 Va. 838, 48 S. E. 878 (1904); Laramie National Bank v. Steinhoff, 7 Wyo. 464, 53 Pac. 299 (1898); 13 C. J., p. 5.

8 In re Dill, 32 Kan. 668, 689, 5 Pac. 39 (1884).

same jury cannot be reimpaneled in the case without the consent of the parties.[9] Because of this termination of the juror's function in that particular case there could be no direct influence upon its decision by the attorney's remark to the juror. The court classes both parties as officers of the court and says that power is given by statute[10] to protect its officers in the proper discharge of their sworn duty. The question then following is whether the juror, as a constituent part of the court, is engaged in the business devolved upon him by law after he has been discharged from one case, though still subject to be called in subsequent cases, and is then alone on the streets in the capacity of a private citizen.

It is submitted that difficulty seems to arise in distinguishing between a person's private and official activities in order to determine whether the rules of contempt have been violated by words spoken to him by another.

C. S. B., Jr.

CONTRACTS—"CONTINUING TO EMPLOY" AS CONSIDERATION.

"In consideration of the City Ice and Fuel Co., continuing to employ J. McKee", McKee agreed not to sell ice in a certain restricted district in St. Louis for a period of one year after leaving, "either voluntarily or otherwise" the employ of said company.[1]

This contract was brought to light in an injunction proceeding brought by the Ice Company to enjoin McKee from delivering ice within the designated area shortly after leaving their employment. At the date of the contract in question, February 14, 1931, McKee had worked for the company for some nineteen years. He continued on about a year after its making, when he quit, complaining of a reduction in wages a few weeks before. The court reversed a decree by the Chancellor dismissing the injunction petition, and remanded the case.

On the facts of the case, the enforcement of this contract would be justified from the standpoint of consideration in that McKee continued in the company's employ as long as he desired.[2] The court evidently construes the promise of the Ice Company to be, in effect, that they will continue to employ McKee as long as he wishes to work, provided no reasonable grounds for discharging him arise in the meantime.[3] Under this construction the company's promise is binding and therefore good consideration.[4] Most American courts, however, hold that a hiring, indefinite as to time, is terminable at the will of either party.[5] Under the general rule of

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9 Williams v. People, 44 Ill. 478 (1867); 35 C. J., p. 421.

10 *Supra*, note 2.

1 City Ice and Fuel Co. v. McKee, ... Mo. ...., 57 S. W. (2d) 443 (1933).

2 National Gum and Mica Co. v. Braendly, 27 App. Div. 219, 51 N. Y. S. 93 (1898); Vol. I Williston, *Contracts* (1926), Sec. 106.

3 City Ice and Fuel Co. v. Snell, 57 S. W. (2d) 440 (Mo. 1933).

4 Williston, *Contracts* (1926), Sec. 39.

5 Warden v. Hines, 163 Fed. 201, 90 C. C. A. 449, 25 L. R. A. (N. S.) 529 (1908); Clarke v. Ryan, 95 Ala. 406, 11 So. 22 (1892); Lambie v. Sloss Iron and S. Co., 118 Ala. 427, 24 So. 108 (1898); Peacock v. Virginia-Carolina Chemical Co., 221 Ala. 680, 130 So. 411 (1930); St. Louis, etc. Ry. Co. v. Mathews, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467 (1897); Fulkerson v. Western Union Tel. Co., 110 Ark. 144, 161 S. W. 168 (1913); DeBrien v. Minturn, 1 Cal. 450 (1851); Davidson v. Laughlin, 138 Cal. 320, 68 Pac. 101 (1902); Kansas Pac. R. Co. v. Robinson, 3 Col. 142 (1876); Parks v. Atlanta, 76 Ga. 828 (1886); Allgood v. Feckonry, 162

construction then, the Ice Company's promise to continue to employ would furnish no consideration while the agreement was purely executory.[6]

Tennessee seemingly holds in accord with the majority view that employment for an indefinite time is terminable at the will of either party.[7]

J. S. P.

CRIMINAL LAW—ENTRAPMENT BY GOVERNMENT AGENTS AS DEFENSE.

Postal inspectors were in possession of proof that a certain man had made sales of obscene matter. In order to induce him to make an interstate shipment of it they prepared an order for a certain amount to be sent to an imaginary customer and address in another state. Their scheme was successful and the shipment was made in response to their order. The defendant was convicted of an interstate shipment of obscene matter and the Circuit Court of Appeals affirmed the judgment.[1]

In holding that the defendant was not entrapped on these facts the court followed the leading case of *Grimm v. U. S.*,[2] in which a conviction under very similar circumstances was upheld by the Supreme Court, and distinguished the same court's recent holding in *Sorrells v. U. S.*[3] by the showing that in the principal case the defendant, at the time of the alleged entrapment, was "already embarked in conduct morally indistinguishable from that charged."

Entrapment is not shown where the government facilitates or participates in the commission of a crime in order to detect the offender, but it is shown where the government induces or encourages a criminal act in order to obtain a victim to prosecute,[4] the decisions in regard to its nature and effect are as various and confusing as they are numerous.

The accused has been held not entitled to defend on the theory of entrapment: where he has knowingly and intentionally committed all the acts necessary to constitute the crime;[5] where the entrapping officers acted on a reasonable suspicion

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Ga. 777, 135 S. E. 314 (1926); Davis v. Fidelity Fire Ins. Co., 208 Ill. 375, 70 N. E. 359 (1904); Speeder Cycle Co. v. Teeter, 18 Ind. App. 474, 48 N. E. 595 (1897); Harrod v. Wyneman, 146 Iowa 718, 125 N. W. 812 (1910); Louisville, etc. Co. v. Offutt, 99 Ky. 427, 36 S. W. 181 (1896); Hudson v. Cincinnati, etc. Ry. Co., 154 S. W. 47 (Ky. 1913); Hardy v. Meyers, 206 Ky. 562, 267 S. W. 1110 (1925); Pitcher v. United Oil and Gas Syndicate, 174 La. 66, 139 So. 760 (1932); McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 Atl. 176 (1887); Steward v. Nutrena Feed Mills, 244 N. W. 813 (Minn. 1932); Martin v. New York Life Ins. Co., 148 N. Y. 117, 42 N. E. 416 (1895); Watson v. Gugino, 204 N. Y. 535, 98 N. E. 18 (1912); Exchange Bakery and Restaurant v. Riflin, 245 N. Y. 260, 157 N. E. 130 (1927); Roddy v. United Mine Workers, 41 Okl. 621, 139 Pac. 126 (1914); Christenson v. Pacific Coast Borax Co., 26 Ore. 302, 38 Pac. 127 (1894); Coffin v. Landis, 46 Pa. 426 (1864); Kirk v. Hartman, 63 Pa. 97 (1869); Booth v. National India Rubber Co., 19 R. I. 696, 36 Atl. 714 (1897); St. Louis Southwestern R. Co. v. Griffin, 106 Tex. 417, 171 S. W. 703 (1914); Island Lake Oil Co. v. Hewitt, 244 S. W. 193 (Texas 1922); Davidson v. Mackall-Paine Veneer Co., 149 Wash. 685, 271 Pac. 878 (1928).

6 Williston, *Contracts* (1926), Sec. 39.

7 St. Paul F. and M. Ins. Co. v. Ulbright, 48 S. W. 131 (Tenn. 1898).

1 U. S. v. Becker, 62 F. (2d) 1007 (C. C. A. 2d, 1933).

2 156 U. S. 604 (1895).

3 287 U. S. ...., 53 S. Ct. 210, 77 L. ed. 265 (1932).

4 *Ibid.*

5 Hyde v. State, 131 Tenn. 208, 174 S. W. 1127 (1915); U. S. v. Duff, 6 F. 45 (C. C. S. D. N. Y., 1881); Bates v. U. S., 10 F. 92 (C. C. N. D. Ill., 1881); U. S. v. Grimm, 50 F. 528(E. D. Mo., 1892), *aff'd* Grimm v. U. S., *supra*, note 2; Andrews v. U. S., 162 U. S. 420, 16 S. Ct. 798, 40 L. ed. 1023 (1896); Robinson v. U. S., 32 F.

that the defendant was engaged in the commission of a crime;[6] where the entrapping officers acted only to ascertain if a crime was being committed;[7] where the entrapping officers held out no more temptation than the defendant might be expected to meet with daily;[8] and where the act of the defendant was done in the regular course of an illegal business and the officers merely posed as customers.[9]

Where the "reasonable suspicion" test is applied[10] it has been held that the prosecution is entitled to introduce evidence of complaints and of former offenses to prove the basis of the officers' reasonable suspicion. If the defendant objects to the introduction of this rebuttal testimony after he has attempted to prove entrapment he withdraws the issue of entrapment from the case.[11]

The defense of entrapment has been held valid: where the government has tricked the defendant into the commission of a *malum prohibitum* act by hiding from him the fact which keeps it from being a lawful act;[12] where the defendant has been merely a passive instrument in the hands of his entrappers;[13] where the criminal design originated in the mind of the officer;[14] and where the criminal act was induced by the officers,[15] especially if employing over-persuasive methods,[16] or a threat to deprive the defendant of a lucrative government contract.[17]

It has been held that liquor cases do not fall under the general rule and that the doctrine of entrapment does not apply to them.[18] There seems to be no valid foundation for such an exception and *Sorrells v. U. S.* [19] ignores it.

(2d) 505 (C. C. A. 8th, 1928), 66 A. L. R. 468; Sorrells v. U. S., 57 F. (2d) 973 (C. C. A. 4th, 1932), *rev'd* Sorrells v. U. S. *supra* note 3; People v. Mills, 178 N. Y. 274, 70 N. E. 786 (1904); People v. Conrad, 92 N. Y. Sup. 606 (1905).

6 Billingsley v. U. S., 274 F. 86 (C. C. A. 6th, 1921); Roth v. U. S., 294 F. 475 (C. C. A. 6th, 1923); Spring Drug Co. v. U. S., 12 F. (2d) 852 (C. C. A. 8th, 1926); *cf.* U. S. v. Washington, 20 F. (2d) 160 (D. Neb. 1927).

7 U. S. v. Pappagoda, 288 F. 214 (D. Conn. 1923); U. S. v. Reisenweber, 288 F. 520 (C. C. A. 2d, 1923).

8 Scriber v. U. S., 4 F. (2d) 97 (C. C. A. 6th, 1925).

9 Lucadamo v. U. S., 280 F. 653 (C. C. A. 2d, 1922); U. S. v. Pappagoda, *supra* note 7; Nutter v. U. S., 289 F. 484 (C. C. A. 4th, 1923); Simmons v. U. S., 300 F. 321 (C. C. A. 6th, 1924); Weiderman v. U. S., 10 F. (2d) 745 (C. C. A. 8th, 1926); U. S. v. Becker, *supra*, note 1.

10 See *supra* note 6.

11 Corcoran v. U. S., 19 F. (2d) 901 (C. C. A. 8th, 1927).

12 U. S. v. Healy, 202 F. 349 (D. Mont., 1913); Voves v. U. S., 249 F. 191 (C. C. A. 7th, 1918).

13 State v. Mantis, 32 Idaho 724, 187 Pac. 268 (1920).

14 Lucadamo v. U. S., *supra* note 9; Gargano v. U. S., 24 F. (2d) 625 (C. C. A. 5th, 1928).

15 U. S. v. Adams, 59 F. 674 (D. Ore., 1894); Sam Yick v. U. S., 240 F. 60 (C. C. A. 9th, 1917); U. S. v. Echols, 253 F. 862 (S. D. Tex. 1918); Peterson v. U. S., 255 F. 433 (C. C. A. 9th, 1919); U. S. v. Lynch, 256 F. 983 (S. D. N. Y. 1918); U. S. v. Eman Mfg. Co, 271 F. 353 (D. Colo., 1920); Billingsley v. U. S., *supra*, note 6; U. S. v. Certain Quantities of Intoxicating Liquors, 290 F. 824 (D. N. H. 1923); Newman v. U. S., 299 F. 128 (C. C. A. 4th, 1924); U. S. ex rel. Hassel v. Mathues, 22 F. (2d) 979 (E. D. Pa. 1927); Sorrells v. U. S. *supra*, note 3; State v. McCornish, 59 Utah 58, 201 Pac. 637 (1921); Koscak v. State, 160 Wis. 255, 152 N. W. 181 (1915).

16 Woo Wai v. U. S., 223 F. 412 (C. C. A. 9th, 1915); Butts v. U. S., 273 F. 35, 18 A. L. R. 143 (C. C. A. 8th, 1921); Cermak v. U. S., 4 F. (2d) 99 (C. C. A. 6th, 1925).

17 U. S. v. Lynch, *supra*, note 15.

18 State v. Seidler, 267 S. W. 424 (Mo. 1924).

19 *Supra*, note 3.

The issue of entrapment is usually for the determination of the jury under appropriate instructions.[20]

The defense of entrapment, except where it vitiates an essential element of the crime, has never been recognized in Tennessee. The only case directly on the point as yet in this jurisdiction is *Hyde v. State*,[21] a prosecution for an illegal prescription of narcotics, in which, on a set of facts parallel to those of the principal case,[22] the defendant was held not entrapped. The court followed *Grimm v. U. S.*[23]

The two reasons most frequently given for permitting the defense of entrapment are: that the government is estopped, because of the acts of its agents, from prosecuting the defendant; and that public policy forbids a conviction on such a set of facts.[24] Even a casual survey of the cases reveals a marked trend on the part of the courts during the last few years in favor of releasing entrapped criminals.

L. B. F.

JUDGMENT—THE DOCTRINE OF RES JUDICATA.

In a recent case[1] one Shapiro was indicted in a state court. Subsequently thereto he was indicted, tried and convicted of another offense in a Federal court and sent to the Federal penitentiary in Leavenworth, Kansas. While serving his sentence, Shapiro was returned to the state that had indicted him and was there tried and convicted in the state court. Upon the expiration of his sentence in Leavenworth prison Shapiro was arrested by the Kansas authorities on an extradition warrant from the governor of the state that had previously convicted him. The defendant Shapiro sued out a writ of habeas corpus which was sustained on the theory that he was not a fugitive from justice. Shapiro then moved to a third state where he was again arrested on another extradition warrant from the state that had originally convicted him of an offense and he again sued out a writ of habeas corpus. The writ was dismissed. The court held that the defendant was a fugitive from justice and the discharge of the defendant under the Kansas judgment that he was not a fugitive from justice was not res judicata in a local habeas corpus proceeding raising the same issue.

Two interesting points are presented by this case, namely: the meaning of the term "Fugitive from Justice" and the application of the doctrine of res judicata.

The doctrine of res judicata was judicially promulgated for the first time in an early English case.[2] The court in that case propounded two rules which in substance are:[3]

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20 Newman v. U. S., *supra* note 15; Cermak v. U. S., *supra* note 16; Gargano v. U. S., *supra* note 14; Sorrells v. U. S., *supra* note 3. But *cf.* U. S. ex rel. Hassell v. Mathues, *supra* note 15 (defendant released on habeas corpus before trial); U. S. v. Lynch, *supra* note 15 (directed verdict for defendant); U. S. v. Healy, *supra* note 12 (court vacated judgment and sentence on its own motion).

21 *Supra* note 5.

22 *Supra* note 1.

23 *Supra* note 2.

24 U. S. v. Healy, *supra* note 12; U. S. v. Lynch, *supra* note 15; Voves v. U. S., *supra* note 12; Woo Wai v. U. S., *supra* note 16.

1 State ex rel. Shapiro v. Wall, Sheriff, ... Minn....., 244 N. W. 811 (1932).

2 The Duchess of Kingston's Case, 20 How. St. Tr. 355, 2 Smith's Leading Cases (8th ed.) 784 (1775).

3 Hunt v. Blackburn, 128 U. S. 464, 32 Law. Ed. 488 (1888); New Orleans v. Citizens Bank, 167 U. S. 371, 42 Law. Ed. 202 (1897); U. S. v. California, etc. Bridge Co., 245 U. S. 337, 62 Law. Ed. 332 (1917).

1. The judgment by a court of competent jurisdiction upon the merits of the case in litigation constitutes a bar to another action involving the same cause of action before the same or any other tribunal.

2. Any right, fact or matter in issue and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which judgment or decree is rendered upon the merits is conclusively settled by the judgment therein and cannot again be litigated between the parties whether the claim or demands of the two suits is the same or not.

The doctrine of res judicata is a rule of necessity and is based on public policy, that is, there shall be an end to litigation somewhere, and a person shall not be subjected to innumeral lawsuits for the same cause.[4]

Do the facts in the principal case[5] justify an application of the doctrine of res judicata? To determine this we must find what was decided in the Kansas hearing on the first extradition warrant. The Kansas court determined that the defendant Shapiro was not a fugitive from justice hence not subject to extradition. What does the term "Fugitive from Justice" signify? Being a fugitive from justice involves a question of status and as such is a matter of fact.[6] It has often been held that where the status in contest has once been determined in a habeas corpus proceeding the doctrine of res judicata will thereafter apply and is conclusive until the condition of the person whose status is in question has changed.[7]

It is evident that the court in the principal case was actuated by considerations of public policy in returning the defendant to the state that wanted him. It is submitted that the court erred in refusing to apply the doctrine of res judicata in the principal case as no showing was made that the status of the defendant had changed since the first habeas corpus proceeding.

J. R. S.

JUSTICIABILITY OF SUITS FOR DECLARATORY JUDGMENTS—FEDERAL RULE.

Suit was brought in a state court of Tennessee under the Uniform Declaratory Judgments Act[1] of that state to secure a judicial declaration that a state excise tax levied on the storage of gasoline[2] is, as applied to appellant, invalid under the Fourteenth Amendment of the Federal Constitution. A decree for appellees was affirmed by the state Supreme Court, and an appeal was taken to the United States Supreme Court.[3] That court assumed jurisdiction, and the judgment of the state court was affirmed.[4]

In 1927 the United States Supreme Court for the first time considered declaratory judgment procedure,[5] and at that time refused to recognize it. Other cases

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4 Ellis v. Staples, 28 Tenn. 238 (1848); Warwick v. Underwood, 40 Tenn. 238 (1859); Spellings v. Nashville, etc. Ry. Co., 7 Tenn. Civ. App. 133 (1916); U. S. v. Throckmorton, 98 U. S. 61, 25 Law. Ed. 93 (1878); Hart Steel Co. v. Ry. Supply Co., 244 U. S. 94, 61 Law. Ed. 1148 (1917).

5 State ex rel. Shapiro v. Wall, Sheriff, *supra* note 1.

6 (1928) 77 Penn. L. Rev. 135.

7 Ex parte Jilz, 64 Mo. 205 (1876); Weir v. Marley, 99 Mo. 488, 12 S. W. 798 (1899); In re Clark, 208 Mo. 142, 106 S. W. 990 (1907); In re Breck et al., 252 Mo. 302, 158 S. W. 843 (1913).

1 Chap. 29, Tennessee Public Acts, 1923.

2 Chap. 58, Tennessee Public Acts, 1923, as amended by Chap. 67, Tennessee Public Acts, 1925.

3 42 Stat. 366 (1925), 28 U. S. C. 344 (1926).

4 Nashville, C. & St. L. Ry. v. Wallace, Comptroller of Tenn., et al., 53 Sup. Ct. Rep. 345 (1933).

5 Liberty Warehouse Co. v. Grannis, 273 U. S. 70, 47 Sup. Ct. Rep. 282 (1927).

since that time have been consistent in refusing to recognize such procedure,[6] although adopted by statute in twenty-nine states;[7] and this recent decision[8] in substance overrules the previous decisions and establishes a new policy in the Federal Courts.

Although the courts, both state and federal, are unanimous in saying that they will not try moot cases or render advisory opinions, the federal courts were apparently influenced by a Michigan decision which held that a statute authorizing declaratory judgments was unconstitutional.[9] The proceeding in which the decision was rendered was not based upon an actual controversy, and the court treated the proceeding as one of the kind the legislature intended to authorize, and held the statute invalid because the power to make a declaration of rights where no consequential relief can be had is not judicial and cannot be conferred upon the courts. Subsequent to this decision of the Michigan Supreme Court other state courts recognized the difference between declaratory judgments and mere moot cases and the rendering of advisory opinions,[10] the result being that the Michigan decision is not followed by courts of other states as authority for the proposition that declaratory

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6 New York v. Illinois and Sanitary District of Chicago, 274 U. S. 488 (1927); Willing v. Chicago Auditorium Ass'n., 277 U. S. 274 (1928); Federal Radio Comm. v. General Electric Co., et als., 281 U. S. 464 (1930); Arizona v. California, 283 U. S. 423 (1931); Lamoreaux v. Kinney, 41 F. (2d) 30 (C. C. A. 9th, 1930); Marty et ux. v. Nagle, Comm. of Immigration, 44 F. (2d) 695 (C. C. A. 9th, 1930); Cleveland Trust Co. v. Nelson et al., 51 F. (2d) 276 (E. D. Mich. 1931); United States v. Central Stockholders Corporation of Vallejo, et al., 52 F. (2d) 322 (C. C. A. 9th, 1931); City of Osceola, et al. v. Utilities Holding Corporation, 55 F. (2d) 155 (C. C. A. 8th, 1932); Commissioners of Internal Revenue v. Liberty Bank and Trust Co., 59 F. (2d) 320 (C. C. A. 6th, 1932).

7 See principal case, *supra* note 4, page 346, note 1: "The procedure authorized by this statute has been extensively adopted both in this country and abroad. It is said that the uniform act is in force in sixteen of the states and Puerto Rico, and that similar statutes have been enacted in thirteen states, Hawaii, and the Philippines. For a discussion of the history of this procedural device in France, Germany, Spain, Spanish America, Scotland, England and India, as well as in the United States, and types of controversies in which it has been invoked, see 28 Yale Law Journal 1, 105."

8 *Supra* note 4.

9 Anway v. Grand Rapids R. Co., 211 Mich. 592, 179 N. W. 350 (1920). See, however, Washington-Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930), holding a declaratory judgment statute valid. There, after citing cases from other jurisdictions, the court said: "In all except two the Anway case was cited and discussed. No court except our own has held a declaratory judgment law unconstitutional."

10 Miller v. Miller, 149 Tenn. 463, 261 S. W. 965 (1923); Hodges et al. v. Hamblen County, et al., 152 Tenn. 395, 277 S. W. 901 (1925); Goetz, et al. v. Smith, et al., 152 Tenn. 451, 278 S. W. 417 (1925); Cummings v. Shipp, 156 Tenn. 595, 38 S. W. (2d) 1062 (1928); Perry v. City of Elizabethton, 160 Tenn. 102, 22 S. W. (2d) 359 (1929); General Securities Company v. Williams, 161 Tenn. 50, 29 S. W. (2d) 662 (1929); Morton v. Pacific Construction Company, ... Ariz. ...., 283 Pac. 281 (1929); Blakeslee v. Wilson, 190 Calif. 479, 213 Pac. 495 (1923); Braman v. Babcock, 98 Conn. 549, 120 Atl. 150 (1923); Sheldon v. Powell, 99 Fla. 782, 128 So. 258 (1930); Zoercher v. Agler, ... Ind. ...., 172 N. E. 186 (1930); State ex rel. Hopkins v. Grove, 109 Kan. 619, 201 Pac. 82 (1922); Black v. Elkhorn Coal Corp., 233 Ky. 588, 26 S. W. (2d) 481 (1930); Washington-Detroit Theatre Co. v. Moore, *supra* note 9; McCrory Stores Corp. v. S. M. Braunstein, Inc., 102 N. J. L. 590, 134 Atl. 752 (1926); Board of Education v. Van Zandt, 119 Misc. 124, 195 N. Y. S. 297 (Sup. Ct. 1922), aff'd, 234 N. Y. 644, 138 N. E. 481 (1923); In re Kariher's Petition, 284 Pa. 455, 131 Atl. 265 (1925); Patterson's Exrs. v. Patterson, 144 Va. 113, 131 S. E. 217 (1926); City of Milwaukee v. Chicago and N. W. Ry., ... Wis. ...., 230 N. W. 626 (1930).

judgments are unconstitutional, and weight has been given to it as authority for such only in the federal courts.[11]

In the principal case[12] the court states that injunctive relief or execution of judgment is not an indispensable adjunct to the exercise of their decision. Further, the court states, "In determining whether this litigation presents a case within the appellate jurisdiction of this court, we are concerned, not with form, but with substance. Hence, we look not to the label which the legislature has attached to the procedure followed in the state courts, or to the description of the judgment which is brought here for review, in popular parlance, as 'declaratory', but to the nature of the proceeding which the statute authorizes, and the effect of the judgment rendered upon the rights which the appellant asserts."

In holding the Tennessee Declaratory Judgment Statute constitutional, and drawing a sharp distinction between declaratory judgments and moot questions, the Tennessee Supreme Court held[13] that, "The only controversy necessary to invoke the action of the court and have it declare rights under our declaratory judgment statute is that the question must be real, and not theoretical; the person raising it must have a real interest, and there must be someone having a real interest in the question who may oppose the declaration sought. It is not necessary that any breach should be first committed, any right invaded, or any wrong done. The purpose of the Act is to 'settle and to afford relief from uncertainty and insecurity with respect to rights, status or other legal relations.'"

In requiring an actual controversy between parties directly in interest, considering injunctive relief or execution of judgment immaterial, and rendering decisions before any breach is committed, right invaded, or wrong done, the United States Supreme Court and the Tennessee Supreme Court have apparently reached identical results. The only point upon which they are inharmonious is in the use of definite terminology. The United States Court flatly refuses to employ any "label which the legislature has attached." Although a relatively unimportant matter, it is submitted that because of the sharp and well settled distinction drawn between declaratory judgments and moot questions by the state courts, the United States Supreme Court might have taken an additional step and sanctioned the terminology of what has become a well established form of procedure.

C. S. B., Jr.

WILLS—MUTUAL, HUSBAND AND WIFE, ORAL CONTRACT.

H and W, husband and wife, entered into an oral agreement to execute mutual wills, whereby, upon the death of either, the survivor should receive all the property, real and personal, of the decedent. In conformity with this agreement H and W executed at the same time separate wills devising and bequeathing to each other their entire and separate estates, both real and personal. Both wills were maintained in the home of the parties until the death of H when the will of H was admitted to probate. Thereafter another will of H, of subsequent date, revoking all former wills, was offered for probate and admitted as the last will and testament of the deceased. W had no prior knowledge of this will nor of H's intention to revoke his mutual will. In a bill against the heirs at law W denied the right of H to revoke and sought to impose a trust upon the property in her favor. HELD, two Justices

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11 *Supra* note 6.
12 *Supra* note 4.
13 Miller v. Miller, *supra* note 10.

dissenting, reversing the lower court; mutual wills, whereby parties reciprocally devise realty to each other, are not sufficient "written evidence" or "memoranda" of contract to meet the requirements of the Statute of Frauds.[1]

Mutual wills are those which are reciprocal in their provisions, giving the property of each testator to the other.[2] Mutual wills, like joint wills, when first considered by the English courts and early American courts, were disapproved for the reason that the implied covenant against revocation deprived the instrument of the quality of revocability, an essential characteristic of wills.[3] The validity of such wills is now well settled in both countries.[4]

A mutual will, like any other will, may be revoked.[5] If it is not made in pursuance of a contract the right of the testator to revoke is beyond question. If made in pursuance of a contract between the testators, such will stands upon the same footing as any contract, that is, the will itself may be revoked but the contract in pursuance of which the wills were made, may be enforced in an action at law for damages,[6] or by a bill in equity for specific performance.[7] Equity does not compel the execution of the will but specifically enforces it by fastening a trust upon the property in favor of the promisee.[8]

The rules of law governing ordinary contracts to convey realty apply with equal force and effect to contracts to devise realty.[9] A devise comes within the legal definition of one who takes by purchase and hence to an oral contract of the kind shown in the principal case the Statute of Frauds may be pleaded.[10] To satisfy the statute the will itself may be a sufficient memorandum,[11] provided it contains all the essential terms of the contract.[12] It is not essential that the contract be in writing, provided there is produced a writing containing the terms of the oral contract, and authenticated by the person to be charged.[13] The consideration need not be regarded in construing the statute, as part of the contract, but merely as an inducement to it. Therefore no principle of law is violated by the admission of parol evidence when it becomes necessary to be shown.[14]

The principal case when considered in the light of the dissenting opinion is fairly representative of the divergent views taken by the courts on the questions

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1 Gibson et al. v. Crawford, ... Ky. ...., 56 S. W. (2d) 985 (1932). Accord: Canada v. Ihmsen, 33 Wyo. 439, 240 Pac. 927 (1925). Contra: Brown v. Webster, 90 Nebr. 591, 134 N. W. 185 (1912.)

2 Carle v. Miles, 89 Kan. 540, 132 Pac. 146 (1913).

3 1 Page, Wills (2d ed. 1926), Sec. 86.

4 Evans v. Smith, 28 Ga. 98 (1859); Anderson v. Anderson, 181 Iowa 578, 164 N. W. 1042 (1917); Carle v. Miles, *supra* note 2.

5 Allen et al. v. Bromberg, 147 Ala. 317, 41 So. 771 (1906); Peoria Humane Society v. McMurtrie, 229 Ill. 519, 82 N. E. 319 (1907); In re Cawley's Estate, 136 Pa. 628, 20 Atl. 567, 102 L. R. A. 93 (1890); Doyle v. Fischer, 183 Wis. 599, 198 N. W. 763, 33 A. L. R. 733 (1914).

6 Stewart v. Todd, 190 Iowa 283, 173 N. W. 619, 20 A. L. R. 1272 (1919).

7 In re Rolls Estate, 193 Cal. 594, 226 Pac. 608 (1924); Peoria Humane Society v. McMurtrie, *supra* note 5; Stewart v. Todd, *supra* note 6; Morgan v. Sabborn, 225 N. Y. 454, 122 N. E. 696 (1916); Doyle v. Fischer, *supra* note 5.

8 Bolman et al. v. Overall, Exr. et al., 80 Ala. 451, 2 So. 624 (1887).

9 Pond v. Sheehan, 132 Ill. 312, 23 N. E. 1018, 8 L. R. A. 414 (1800); Ellis v. Cary, 74 Wis. 176, 42 N. W. 242, 4 L. R. A. 55 (1889).

10 Dickens v. McKinley, 163 Ill. 318, 45 N. E. 134 (1896); Gould v. Mansfield, 103 Mass. 408 (1869); Lord Walpole v. Lord Orford, 30 Eng. Rep. F. R. 1076 (1797).

11 McGee v. Blankenship, 95 N. C. 563 (1886).

12 Shied v. Stamps, 34 Tenn. 172 (1854); May v. Ward, 134 Mass. 127 (1880).

13 Lee v. Cherry, 85 Tenn. 707, 4 S. W. 835 (1877).

14 Whitby v. Whitby, 37 Tenn. 473, 478 (1857).

therein raised, the majority opinion following the decided weight of authority on the essential points decided. A review of the related cases discloses no uniformity on questions of part performance to take the agreement out of the Statute of Frauds, the sufficiency of the will as memorandum to satisfy the statute, and the matters relating to revocation of mutual wills.

The weight of authority is to the effect that the mere making of a will by the plaintiff is not such part performance as is sufficient to take the agreement out of the Statute of Frauds.[15] It is an elementary rule of contract, that promises to make mutual wills are consideration for each other, yet the performance of such promise is not such part performance as will remove the agreement from the operation of the Statute of Frauds.[16] This is due to the ambulatory character of the act. This class of cases is to be distinguished from those wherein services are given in consideration for and on the faith of a promise to devise realty,[17] or where such contract is fully performed by one of the mutual testators and the benefits have been received and accepted by the other.[18] The weight of authority seems to hold that part performance in these cases lifts the agreement from the statute.[19]

Whether the reciprocal wills executed in pursuance of an oral compact constitute in themselves a sufficient memorandum of the agreement to satisfy the Statute of Frauds is a matter about which the courts are not in agreement. To obtain relief in equity the contract to make reciprocal wills must be clearly and definitely established.[20] In the case of joint and mutual wills it clearly appears that the document itself is sufficient evidence to establish the contract.[21] Mutual wills on the contrary are not intrinsic evidence of a contract,[22] nor do they in general constitute written evidence or memorandum of the agreement to meet the requirements of the statute.[23] It is possible that they may have been executed without reference to each other and on the same day by mere coincidence. It is also true that direct evidence of the agreement is not essential.[24] In determining whether the written will of each evidences the fact that a contract has been entered into by the parties whereby the will of each was written and executed, the situation and circumstances of the parties may be looked to, when necessary, to aid in arriving at the meaning of what they have written.[25] They may, however, when considered in the light of the circumstances, manifest a joint purpose which could not be consummated except

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15 Gould v. Mansfield, *supra* note 10; Everdell v. Hill, 27 Misc. Rep. (N. Y.) 285, 58 N. Y. Supp. 447 (1889); Hale v. Hale, 90 Va. 728, 19 S. E. 739 (1894). Contra: Brown v. Johanson, 69 Colo. 400, 194 Pac. 943 (1920); Brown v. Webster, *supra* note 1; Turnipseed v. Sirrine, 57 S. C. 559, 35 S. E. 757 (1900).

16 Hale v. Hale, *supra* note 15.

17 Bassett v. American Baptist Publication Society, 215 Mich. 126, 183 N. W. 747, 15 A. L. R. 213 (1921); Burt et al. v. McKibbin, ... Mo. ....., 188 S. W. 187 (1916).

18 Carmichael v. Carmichael, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596 (1888).

19 Contra: Goodloe v. Goodloe, 116 Tenn. 252, 92 S. W. 767 (1906).

20 Purcell v. Miner, 4 Wall. 513(U. S. 1866); Herrick v. Snyder, 59 N. Y. Supp. 229 (1899).

21 Rastetter et al. v. Hoenninger, 151 App. Div. 853, 136 N. Y. Supp. 961, 108 N. E. 210 (1915).

22 Williams v. Morris, 95 U. S. 444 (1877); Edson v. Parsons, 155 N. Y. 555, 50 N. E. 265 (1898).

23 Frazier v. Patterson, 243 Ill. 80, 90 N. E. 216, 27 L. R. A. (N. S.) 508 (1909); Edson v. Parsons, *supra* note 22; In re Ewell's Estate, 75 Wash. 391, 134 Pac. 1041 (1913).

24 Everdell v. Hill, *supra* note 15.

25 Jenkins v. Harrison, 66 Ala. 345, 360, 361 (1880).

through the co-operation and agreement of the parties in interest.[26] In *Canada v. Ihmsen*[27] the parties were total strangers. In the principal case the parties were husband and wife and the wills were made on the same day. In both these cases no contract was found. In *Doyle v. Fisher*[28] where the wills of husband and wife were single documents, executed at the same time, each testator knowing the will of the other, these facts were found conclusively to indicate that the wills resulted from mutual agreement and were in accordance therewith. In *Brown v. Webster*[29] there is the additional factor that the wills were witnessed by the same witnesses. In *Harris v. Morgan*[30] where four parties executed separate wills, simultaneously, at the same place and witnessed by the same persons each disposing of property to the survivor, the court had no difficulty in finding that these facts negative any conclusion but that they were executed pursuant to a joint compact or agreement and that each was executed in consideration of the other. They were necessarily considered as a part of one transaction to the same extent as though executed on one sheet of paper. Construed and considered together they constituted written evidence of a contract between the parties so that the contract did not rest entirely upon parol. Justice Grey, speaking in *Edson v. Parsons*,[31] gives us a guide saying, "I know of no absolute rule of law which impresses upon wills, similar in their cross provisions, that mutual character by force of which the survivor's estate comes under a trust obligation. I understand that something more is needed to warrant equitable intervention and, in the absence of express agreement, that it must be found in the circumstances which so surround the transaction as imperatively to compel the conclusion that the parties intended and undertook to bind themselves and their estates irrevocably in the event of the prior death of one."

Many cases use language which seems to say that the will is revocable during the life time of both the parties, but becomes irrevocable upon the death of either, at least, if the survivor takes under the will of the first to die, and that the revocation during the life time of both must be upon notice by the revoking party.[32] The apparent conflict in the cases seems attributable to the failure to distinguish clearly between the will itself and the right of action on the contract in pursuance of which the wills were made. They may be reconciled in part by recognizing the general principle that such a testamentary instrument may be revoked by either maker and the express or implied covenant against revocation will not prevent the probate of the later will duly executed by one of the parties, but equity may in a proper case give effect to the instrument as a contract. In this respect a will is said, though incorrectly it is submitted, to be irrevocable in equity.[33] An examination of the cases

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26 Harris v. Morgan, 157 Tenn. 140, 7 S. W. (2d) 53 (1928); Beckwith v. Talbott, 25 U. S. 289, 24 L. Ed. 496 (1877); Anderson v. Anderson, 181 Iowa 578, 164 N. W. 1042 (1917); Lee v. Butler, 167 Mass. 426, 46 N. E. 52 (1897).

27 *Supra* note 1.

28 *Supra* note 5.

29 *Supra* note 1.

30 *Supra* note 26.

31 *Supra* note 22.

32 Walker v. Yarbrough, 200 Ala. 458, 76 So. 390 (1917); Brown v. Johanson, *supra* note 15; Frazier v. Patterson, *supra* note 23; Campbell v. Dunkelberger, 172 Iowa 385, 153 N. W. 56 (1915); Carmichael v. Carmichael, *supra* note 18; Edson v. Parsons, *supra* note 22.

33 Brown v. Webster, *supra* note 1.

will disclose that the question involved was the validity of the contract and the power of law or equity to enforce it and not the irrevocable character of the will.[34]

E. H. S.

[34] See Frazier v. Patterson, *supra* note 23. 1 Page, Wills (2d ed. 1926), Sec. 88.

BOOK REVIEWS

CASES ON PLEADING AND PROCEDURE. By Charles E. Clark. Saint Paul: West Publishing Company, 1932, Vol. I and II.

Now that the second, and final, volume of Dean Clark's Cases on Pleading and Procedure has been published, one can intelligently review his work. Its value can be determined by discovering its purpose, evaluating that, and by then seeing how well that purpose has been carried out.

As clearly suggested in the prefaces to these volumes, the object of the books is to provide materials for courses in Common Law Pleading, Code Pleading, Equity Pleading, and parts of a course in Equity. Is this aim a proper one? There can be no question that in most schools these courses should be given and certainly there is no real objection to putting them within the compass of two books. Some might object to the inclusion in a procedure course of so much material on specific performance and other equitable remedies, but, before unfavorably criticising the work on that ground, one should carefully investigate the cases on those subjects. If he does, he will discover that they deal very largely with procedural matters. An underlying idea of both volumes is "to employ history not as an end itself but for the light it casts on present day rules." On the whole, that ideal is a proper one, and it is readily seen why Dean Clark stresses this. There can be no doubt that some casebooks have used altogether too much space in setting forth the historical development of procedural theories. However, it seems to the reviewer that there are some historical matters that should be dealt with which do not throw any appreciable light on present day rules. Thus, he believes that in a course on Common Law Pleading some mention should be made of Real Actions.

Let us next examine how well the author's objects have been carried out. To begin with, the usual scholariness of Dean Clark's works, including thorough research, is here present. In this collection of materials we find excerpts relating to controversies dating back to the eleventh century[1] and extracts from decisions rendered in 1932.[2] We also discover a broad range in the citation of law review articles and books. The author has not been content to deal only with materials devoted primarily to pleading. He has, rather, also investigated many writings in relation to other subjects, such as habit of thought, conflict of laws, logic, scientific method and the law, logical method and law.[3] His selected material is, on the whole, apt and teachable. Moreover, he has treated the various types of pleading separately, when necessary, and has kept his work within reasonable limits.

The writer would not arrange the materials as they are here found. He would deal with the elements of the various causes of actions first, for that is what is naturally done so that one may discover whether or not any cause of action exists. He would consider these all together, since he believes that to treat one type of action, including defensive pleadings, etc., and then to do the same thing with another kind of action is confusing. The consideration of parties and the joinder of actions should precede matters dealing with pleadings subsequent to the original pleading of the plaintiff, for that is when such points are dealt with. However,

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1 Vol. 1, p. 483.
2 Vol. 2, p. 632.
3 Vol. 1, pp. 107-116.

the thing that is of most concern is the fact that a rich mine of materials exists between the covers of these books and if one does not like the order of their appearance he can do his own changing of that order.

The idea of showing how a case is presented to a court is a good one, but a question may well be asked why the appellate record is spoken of[4] in a work not dealing with practice. Either it would, it seems, be better to stick to pleading proper or give the student a brief summary of the entire proceedings in a case.

Another question arises at this point. Have subjects been omitted from these volumes which should have been included? It is thought by the reviewer that somewhat more of the history of the important common law acts should have been included. The citations are present, but at least summaries of the excellent articles now existing should be printed, for, otherwise, few of the students using this series of books will get to know much about them, unless the teacher spends more class time than he should in providing the omission. A good example of what can be done along this line is found in the chapter on "Actions Concerning Realty."[5] These omissions were probably intentional, as the author believes too much attention has been paid to the history of pleading.

Though the writer may express his humble opinion as to ways in which he personally thinks the volumes being reviewed could be improved, he unreservedly congratulates Dean Clark upon his production of a scholarly and practical set of books. He has done the law school a valuable service.

CARL WHEATON.

Saint Louis University School of Law.

HANDBOOK OF THE LAW OF EVIDENCE. By John J. McKelvey. St. Paul: West Publishing Company. Fourth Edition, 1932, pp. xix, 576.

This volume is one of the Hornbook Series published by the West Publishing Company. The fact that this is the fourth edition of this text is the best evidence of its worth and popularity. The first edition was published in 1897. Since this book is so well known a detailed discussion of the problems of evidence presented therein and their treatment would be useless.

The author has made no startling changes in the subject matter of this edition. A few changes in presentation have been made. Some sections have been omitted, others have been added, and still others have been re-arranged. The notes have been revised and the citations brought up to date. In many instances the notes have been enlarged so as to include interesting and important cases and a comment thereon in relation to the rules or facts stated in the text. In addition the author has included citations to law review articles and notes. On the whole the fourth edition is an improvement upon the third edition.

In the preface the author states his intent to deal with the existing rules of evidence as they are. He states these rules clearly, concisely and convincingly, thus producing a text-book valuable to the law student, in that it gives him access to the entire field covered by the law of evidence, to the lawyer and judge, in that it furnishes to them a reliable and convenient statement of the law.

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[4] Vol. 1, pp. 14-16.
[5] Vol. 1, pp. 451-452.

The make-up of the volume is the standard form used throughout the Hornbook Series. The rule is stated in black faced type and is followed by discussion.

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HAROLD C. WARNER.

REGULATION OF PUBLIC UTILITIES. By Cassius M. Clay. New York: Henry Holt and Company, 1932, pp. xi, 309.

Public Utilities are of comparatively recent origin and are fast becoming a major factor in the complex civilization of the modern or machine age. Mr. Clay in this work gives an intelligent, comprehensive and readable discussion of public utilities and their relationship to our present economic and governmental problems, the essential thesis being that public regulation, at least of electric utilities, should be left, so far as is compatible with the national interest, to the separate states.

The viewpoint is non-technical rather than technical with an ably consummated aim to make the book one, not only for lawyers and economists, but one which gives to the ordinary reader a view of utilities and their relations with state and national government not afforded by the more technical works on this subject.

Divided into three parts, the history of utilities and their regulation is first considered, beginning with *Munn v. Illinois*, down to the present. Theories of valuation as related to the fixing of rates, the constitutional background for regulation and the power of the Supreme Court, given by the fourteenth amendment, to restrict state regulation are presented.

In Part II are considered the interstate features of transmission of electric power; the application of problems of state and national control being made to electric power only, other utilities being more or less analagous to this one. Absence of either state or federal regulations in some cases is pointed out as coincident with the burden necessarily placed on the small consumer rather than the heavy consumer.

Part III, the conclusion, discusses the two alternatives as regards utilities—complete license to private capital or public ownership. A choice, however, remains which is more in keeping with American liberalism—public regulation on a balance between commissions and state and federal courts. The past tendency of the Supreme Court to curtail the right of state regulation under the guise of unconstitutionality provided by the fourteenth amendment is contrasted to the recent decisions of the court and the present seeming tendency of liberalism rather than imperialism.

The volume, neatly bound, is in large readable print. Notes at the end of each chapter afford ample reference material for the more studious and are supplemented by a selected reference list of some sixty volumes following the closing chapter.

PAUL D. GODDARD.

Member Tennessee Bar.

RESTATEMENT OF THE LAW OF CONTRACTS. By the American Law Institute. St. Paul: American Law Institute Publishers, 1932. 2 Vol. pp. xli, 1129. $12.00.

Many books have been written on the subject of contracts; some of them good and some of them bad. Possibly the leading treatise on the subject covering 4182

pages with index and table of cases is by Professor Samuel Williston. The field of contracts is so large and comprehensive that well defined limitations do not exist.

The Committee on Contracts of the American Law Institute has prepared a remarkable work on the subject. Within the short space of 1129 pages one may find an answer to almost any question involving the fundamental law of contracts. The answer is concisely and precisely stated and explanatory comment and illustrations are given in most instances.

This work will be useful to the student beginning the study of law of Contracts because it will aid him in precisely phrasing a rule of law which he may find himself unable to do from the study of cases. It will be helpful to the practitioner because it will furnish him a respository for the fundamental law of contracts. It will be helpful to the Judge because it will supply him with the ruling law on the subject. To the law instructor, in my opinion, the book is invaluable. To him it will have many uses. To mention only one, he may use it in stating precisely rules of law. Short precise statements all too often are not found in the cases.

The work is arranged in two volumes including eighteen chapters with an excellent working index in Volume II. A full table of contents appears in Volume I. And he who can read can find the law. The print is large, a good quality of paper has been used and the binding is attractive.

It would be futile to attempt to summarize the contents. In brief the substantive law of contracts may be found in this work. Need one say more. Only one thing detracts and that is the absence of the comment and annotations which appear in the tentative drafts. I think the work would have been better if these comments and annotations had been included.

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HENRY B. WITHAM.

BOOKS RECEIVED

CASES ON PLEADING AND PROCEDURE. By Charles E. Clark. Saint Paul: West Publishing Company, 1932. Volume II, pp. ..... Price $.....

CASES ON VENDOR AND PURCHASER. By Milton Handler. Saint Paul: West Publishing Company, 1933. pp. xix, 925. Price $6.00.

CORBIN'S CASES ON CONTRACTS. By Arthur L. Corbin. Saint Paul: West Publishing Company. Second Edition, 1933. pp. 1250. Price $6.50.

REGULATION OF PUBLIC UTILITIES. By Cassius M. Clay. New York: Henry Holt & Company, 1932. pp. xi, 309.

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