Tennessee Law Review

Volume 9
Issue 1 *1930-1931*

Article 1

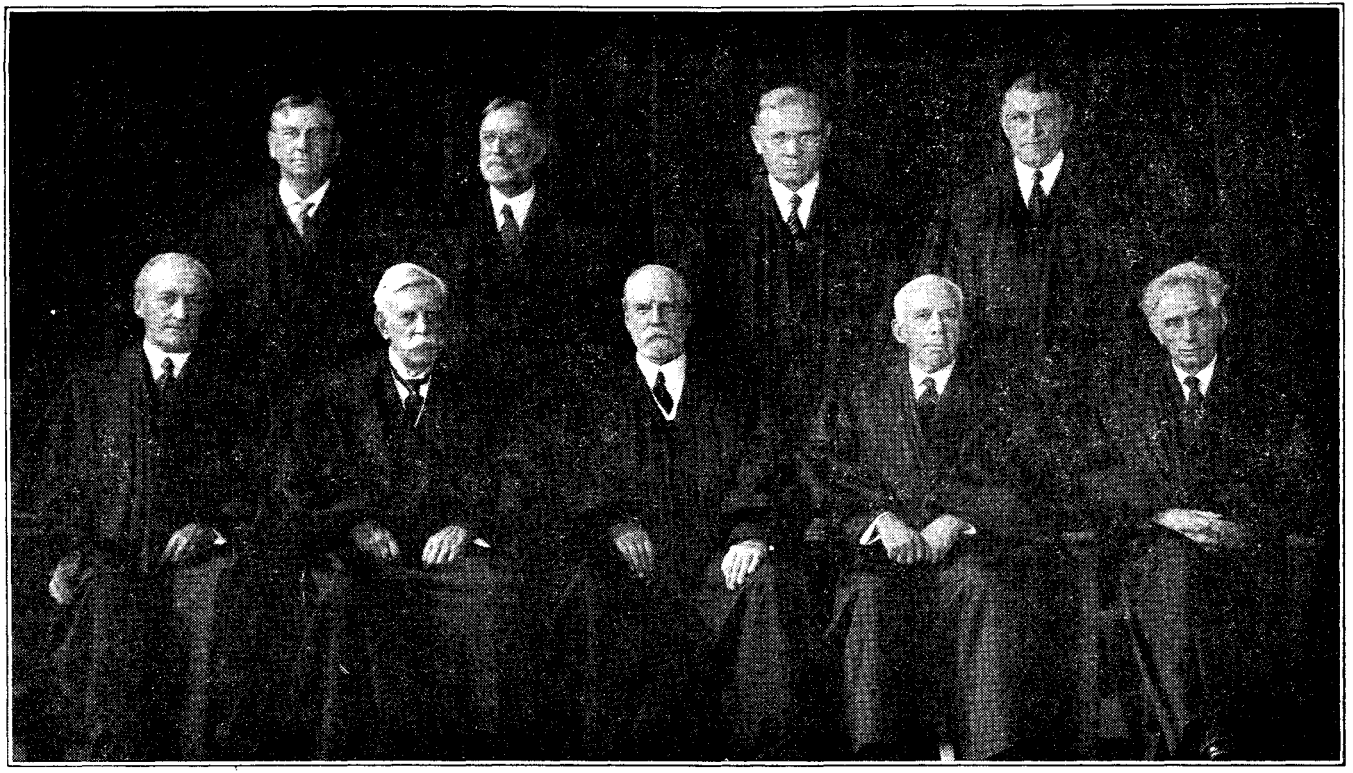
1931

Volume 9 (1930-1931)

TENNESSEE LAW REVIEW

VOLUME 9

1930-1931



UNITED STATES SUPREME COURT

Standing, left to right: Justices Stone, Sutherland, Butler and Roberts. Seated, left to right: Justices McReynolds, Holmes, Chief Justice Hughes, Justices Van Devanter and Brandeis The official photograph was made exclusively by Harris & Ewing.

Tennessee Law Review

Volume 9 DECEMBER, 1930 Number 1

OUR JUSTICE OF THE PEACE COURTS— A PROBLEM IN JUSTICE

ROBERT S. KEEBLER

"Justice," exclaimed Daniel Webster, "is the greatest interest of mankind on earth." To promote and administer justice among men is a primary concern of Government. It is one of the three functions of the State, without which no organized society can exist.

Judicial reform in England became a major issue one hundred years ago under the leadership of Jeremy Bentham. Literature came to his aid in the pen of Charles Dickens. For forty years the question was agitated in Parliament, with royal commissions composed of the best legal minds of the realm attempting to find a way out of the medieval morass of delays, subterfuges, artificialities, incongruities and injustices which flourished in the name of law and justice. This archaic condition was ended by the Judicature Act of 1873; the effect of which was so salutary and immediate that in 1887 Lord Bowen was able truthfully to say in an address celebrating Queen Victoria's Jubilee:

> "It may be asserted without fear of contradiction that it is not possible for an honest litigant in Her Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation. The expenses of the law are still too heavy, and have not diminished *pari passu* with other abuses. But law has ceased to be a scientific game that may be won or lost by playing some particular move."

The virtue of the Judicature Act was that it created a single, unified court with its own rule-making and admin-

istrative authority independent of petty control by Parliament. With unity and simplicity came strength.

Judicial reform in the United States began about seventy-five years ago. Code pleading began to take the place of the highly technical forms of the common law; and it became fashionable to provide an elaborate mechanism of procedure and court rules by legislative act. This encroachment by the Legislature on the business of the courts has worked disaster. The complexity, the intricacy, the hard and fast statutory rules, have bred technicalities and confusion. Our judicial system has not been able to mold its forms and machinery to fit the rapidly changing conditions of American life. Within the last fifty years the structure of our society has undergone a revolution; America has emerged from a rural country of sparse population and vast spaces to a nation of great cities with the most highly developed industry and commerce which the world has ever seen. But our judicial machinery, ill enough adapted to the frontier conditions for which is was created, is entirely out of place in our modern world.

It has often been pointed out that the law has not kept pace with the progress shown in other professions, notably medicine; and lawyers have been charged with being remiss in remodeling the tools of their profession to fit the needs of our present time. This criticism is not without justification; but it must be kept in mind that the problem of law reform is much more difficult than progress in medicine. A young medical scientist can house himself in his laboratory and experiment on mice and guinea pigs to his heart's content. He can determine the actions and re-actions of certain processses with mathematical accuracy; and when he has isolated a new germ or developed a new serum, or discovered a new method of treatment for a specific malady, his work can immediately be checked and scientifically appraised. The entire profession is ready to embrace any new discoveries. But laws cannot be so tested. The whole body of society is the lawyer's laboratory; and the effect of every law may be good, bad or indifferent in specific cases, requiring an appraisal of

all its operations, political, social and economic, before it can be determined whether any law is good or bad. Even then, men will argue about the wisdom of a law. One must have the vision of a philosopher and statesman with the background of a historian in order to be able wisely to appraise any law. Granted that it can be scientifically demonstrated that a particular law is bad. This is not enough. The law must be repealed or changed. Who is going to do it? The lawyer must earn his bread and meat. Granted that he is willng to make the sacrifice of time and effort required to agitate for the repeal of the law. He must convince his constituents. He must convince the Legislature. And, it may be that, to effect a change, it will be necessary to re-organize the whole structure of Government. The problem of the lawyer is by no means as simple as that of the physician. Even in the face of great difficulties, the law has made notable progress. On the substantive side, there has been developed a body of laws covering the entire field of property rights and human relations. This body of laws has been classified, crystalized and made available for the instant use of the humblest practitioner in the profession. Much progress has also been made in making uniform the substantive laws on important subjects in all our American states. It may be boldly stated that the present development of substantive law accords more nearly with human reason and the highest ideals of human conduct than any prior development in the history of the law; and that the present development is one of the greatest achievements of human reason which the world has yet seen.

Under the leadership of the American Bar Association, the American Judicature Society, and other groups of lawyers and students of jurisprudence, there has been much discussion within the last two decades concerning the entire reorganization of our courts. It is not enough that we should have good substantive laws. We must have good courts which will speedily, wisely, justly and economically administer them. Much of the discussion has centered around our criminal courts; and the clamor for reform has become so insistant that

President Hoover not long ago appointed a Crime Commission to survey the entire field of criminal law and practice as applied to the Federal Government.

Notable reforms have also been made in some of our larger cities during the last twenty years. Starting with Chicago in 1904, the movement to unify and simplify the administration of our Municipal Courts has extended to Cleveland, Detroit, Milwaukee, Pittsburgh, New York, Philadelphia, Atlanta, and other large cities; whose courts have undergone radical re-organizations along lines designed to place the administration of justice in the hands of competent and trained judges with the administrative control and rule-making power lodged in the courts themselves.

There has also been considerable progress in the organization of the appellate courts of our several states, designed to speed up the disposition of cases and to relieve the congestion of court dockets; and model acts have been prepared and proposed for the re-organization of the entire judicial machinery of our several states; but any radical reform in this direction is beyond legislative control, and must depend on constitutional changes, requiring years of agitation and the arousing of the electorate on matters with which they have no familiarity whatever. In England an act of Parliament can accomplish the most radical reforms which in this country must await the tedious delay of constitutional conventions. If within the next generation, we can reach the point which England reached in 1873, we will have made a degree of progress beyond the dreams of our most hopeful reformers.

On surveying the whole field of judicial adminstration, it is readily apparent that the courts which are least satisfactory and are least amenable to reform are our Justice of the Peace Courts, at the foundation of the entire structure. Here are the courts which touch elbows with the common man, the laborer unjustly deprived of his day's wage, the creditor trying to collect his small account, the tenant about to be put into the street for failure to pay for his week's lodging — in short, those ignorant and impecunious elements of our popu-

lation who constitute our social problem. This is the danger point to our security. It is of little avail to say that we have a United States Supreme Court of great and learned men capable of deciding matters involving vast sums and intricate questions of law, touching the rights of the rich and powerful, if our petty courts do not administer justice in the small everyday affairs of life. Any court which leaves a man baffled, delayed, disgusted and distrustful, makes an enemy of the established order, and should do so; and that court is most important in our political organization which has the most intimate contacts with the great masses of men.

Doubtless, our Justice of the Peace Courts have not been the center of any great reform movement because of the fact that an appeal can easily be taken to another tribunal more adequate to attain the ends of justice. Our leading lawyers do not practice in Justice of the Peace Courts at all, thinking it beneath their dignity; and such work as they are forced to take in these petty courts is turned over to novices at the bar, who themselves are glad to reach the day when they can turn their backs on these courts and practice their profession in a more congenial atmosphere.

But no lawsuit is small; for justice is never a small thing. The smallest matter may be of supreme moment in the life of the individual affected. What avail is it that a litigant may be able to get more evenhanded justice six months or a year hence in another tribunal, after long months of anxious waiting and the expenditure of perhaps more than the amount involved? A starving man must have bread today. Justice delayed is justice denied. Expensive justice is not justice.

In order properly to appreciate the present situation, it may be profitable to survey briefly the history of courts held by Justice of the Peace.

In England prior to the reign of Edward III, there were no Justice of the Peace, but there existed a class of offices known as Conservators or Wardens of the Peace. By the Act of I Edward III c. 16, certain persons were appointed as Conservators of the Peace by commission from the King. They had

no judicial functions, their powers being merely ministerial. By subsequent statutes during the same reign, certain judicial powers were conferred upon the Conservators, which were gradually enlarged, and the appellation of Justice of the Peace was given them. These Justices were required to be drawn from the ranks of the esquires, knights and large land owners; and even to this day our Justice are familiarly known as "squires."

At no time during the long history of Justice of the Peace in England have they ever been empowered to exercise jurisdiction in civil matters. They have never heard private suits. The bulk of their work relates to offenses strictly criminal; in addition to which they have exercised certain duties in licensing public houses, fixing the local tax rates, and administering the poor laws and education acts. The royal commission issued to Justice of the Peace in England assigns to them "the duty of keeping and causing to be kept all ordinances and statutes for the good of the peace and the preservation of same, and for the quiet rule and government of the people, and further assigns to you and every two or more of you to inquire the truth more fully by the oath of good and lawful men of the country of all and all manner of felonies, poisonings, enchantments, sorceries, arts, magic, trespasses, forestallings, regratings, engrossings and extortions whatever."

Up to the year 1835 Justices of the Peace were not allowed any compensation for their services. In that year provision was made by Parliament for salaried or stipendiary magistrates in the larger cities, with salary to be fixed by the local government approved by the Secretary of State, and with no allowance of fees. Stipendiary magistrates were required to be barristers of at least seven years' standing. The unpaid borough magistrates in rural communities continue to exist to this day. Every unsalaried justice is required to appoint a fit person to be his salaried clerk, who must have substantial legal qualifications.

How has this system worked in England? "The whole Christian world," said Lork Coke, "hath not the like office as justice of the peace if duly executed." But the office for the most part does not seem to have been "duly executed." The type of magistrate immortalized in Sir Roger de Coverley and Squire Allworthy was rare indeed, and Smollett's "Justice Gobble" and "Justice Buzzard" and Fielding's "Justice Thrasher" seem to have been pictures truer to life. Fielding himself was at one time a justice of the peace, and did great credit to the office. His picture of the typical justice of the peace as portrayed in "Justice Thrasher" reads as follows: ("Amelia", Vol. 1 c. 2.)

"Mr. Thrasher, the justice before whom the prisoners above mentioned were now brought, had some few imperfections in his magistratal capacity. I own I have been sometimes inclined to think that this office of a justice of peace requires some knowledge of the law, for this simple reason: because, in every case which comes before him, he is to judge and act according to law. Again, as these laws are contained in a great variety of books, the statutes which relate to the office of a justice of the peace making themselves at least two large volumes in folio; and that part of his jurisdiction which is founded on the common law being dispersed on above a hundred volumes, I cannot conceive how this knowledge should be acquired without reading; and yet certain it is, Mr. Thrasher never read one syllable of the matter.

This perhaps was a defect; but this was not all: for where mere ignorance is to decide a point between two litigants, it will always be an even chance whether it decides right or wrong; but sorry I am to say, right was often in a much worse situation than this, and wrong hath often had five hundred to one on his side before that magistrate, who, if he was ignorant of the laws of England, was yet well versed in the laws of nature. He perfectly well understood that fundamental principal so strongly laid down in the institutes of the learned Rochefoucault, by which the duty of self-love is so strongly enforced, and every man is taught to consider himself as the center of gravity, and to attract all things thither. To speak the truth plainly, the justice

was never indifferent in a cause but when he could get nothing on either side."

Dean Swift, Steele, Fielding and Smollett denounced the system of "trading justice" in vehement terms. The justices line their pockets with toll taken from pick-pockets and keepers of disorderly houses; and they swept the streets at night with spies, arresting on the slightest pretext to extort bail fees which their clerks were forced to split with them. "The Justices of Middlesex," said Edmund Burke without contradiction in the year 1870, "were generally the scum of the earth; some of whom were notorious men of such infamous character that they were unworthy of any employ whatever, and others so ignorant that they could scarcely write their own names."

By the Justices of the Peace Act of 1906, all qualifications by estate were done away; and in 1909 a royal commission was appointed to consider and report whether any and what steps should be taken to faciliate the selection of the most suitable persons to be Justices of the Peace irrespective of creed or political opinion. In the great centers of population the system of salaried and law-trained magistrates has been generally adopted, and an extension of this system to the country districts has often been advocated. It may be safely predicted that the days of the ignorant, unsalaried justices of the peace in England are numbered; and that salaried experts will soon sit where political squires and country gentlemen have dispensed with justice for so many centuries.[1]

Our own country was born under the democratic tradition, opposed to centralized authority and distrustful of laws and institutions. From the very outset, with few exceptions, our justices of the peace have been elected by small local constitutencies without regard to training or qualifications, and with little or no responsibility to any supervision or centralized control; and their powers and duties have been

---

[1] For description of the English system, see WEBB'S, "ENGLISH LOCAL GOVERNMENT." (Longmans & Co., 1906), and REDLICH & HIRST'S "LOCAL GOVERNMENT IN ENGLAND" (McMillan & Co., 1903).

greatly enlarged over the English prototype. In addition to the criminal jurisdiction exercised by English justices of the peace, our justices have always exercised petty civil jurisdiction; and this civil jurisdiction has in general been extended with time rather than curtailed. We can now fairly define a justice of the peace under our American system to be a judicial officer of inferior rank holding a court, usually not of record, and having civil jurisdiction of a limited nature for the trial of minor causes, and exercising petty criminal jurisdiction for the conservation of the peace, the preliminary hearing of complaints and the commitment of offenders. The civil jurisdiction of Justices ranges from $50.00 to $1000.00. In Tennessee Justices exercise jurisdiction in tort and contract cases up to $500.00, and on negotiable instruments up to $1000.00.[2]

The reason for the existence of justice courts is to have local courts always at hand ready for the issuance of criminal warrants, the fixing of bail bonds, the binding over of offenders, and the trail of petty causes, without awaiting the action of a court of record, which meets perhaps only once or twice a year. The usual practice is for the legislature to divide the counties of the state into civil districts, and for the voters in each civil district to elect one or more magistrates, whose jurisdiction is co-extensive with the county. The Constitution of the State of Tennessee[3] provides that there shall not be more than twenty-five civil districts in each county, or four for ever hundred square miles; and that two justices shall be elected in each district, except at county seats, which shall elect three justices. The legislature may also provide additional justices in incorporated towns. The term of office is six years, and any citizen twenty-one years of age is eligible. No legal training or judicial experience is necessary, and no compensation is provided, except the fees and costs earned by the justice in the course of his judicial business. The jurisdiction of our justices of

---

[2] TENN ANN. CODE (Shannon's, 1917) §5935.

[3] Article 6, section 15.

the peace is purely statutory. The sole provision of the Constitution of Tennessee with respect to the judicial power of justices of the peace reads as follows (Article 6, Section 1):

> "The judicial power of this state shall be vested in one Supreme Court, and such Circuit and Chancery and other inferior courts as the legislature shall from time to time ordain and establish; in the judges thereof and in justices of the peace. The legislature may also vest such jurisdiction in corporation courts as may be deemed necessary. Courts to be holden by justices of the peace may also be established."

It has often been held by our Supreme Court that the jurisdiction of courts held by justices of the peace and other inferior tribunals rests exclusively within the legislative discretion, as well as the determination of the necessity or expediency of establishing special courts, with general or limited subject matter jurisdiction, or general or limited territorial jurisdiction.[4]

Our Supreme Court has held that the quarterly county court is so recognized by our State Constitution as one of the institutions of the state existing at the time of the adopion and the establishment of the constitution, as to make it a constitutional court that cannot be abolished by the legislature; but it is a constitutional court only for the purposes of performing the functions imposed upon it by the Constitution, embracing the election of coroner and ranger and the filling of vacancies in the office of sheriff, trustee and register. All the other powers of the quarterly court are purely statutory; and such court may by statute be deprived of its statutory powers.[5] Our quarterly county court exercises no judicial functions whatever as a collective body; and the individual members, being justices of the peace, exercise only

---

[4] State v. Turk, M. & Y. 287 (8 Tenn. 1827); Bank v. Cooper, 2 Yer. 599, 615, 616 (10 Tenn. 1831); Moore v. State, 5 Sneed 512, 513 (37 Tenn. 1858); Ellis v. State, 8 Pick. 85, 95 (92 Tenn. 1890) See also Prescott v. Duncan, 126 Tenn. 106, 148 S.W. 229 (1912).

[5] Prescott v. Duncan, *supra* note 4.

such judicial functions as the legislature may determine.

Professor Roscoe Pound in an address before the American Bar Association at Saratoga in 1917, said:

> "The determination of justice in petty causes by magistrates and justices' courts, as it is still carried on in the greater part of our land, is a humiliating anachronism."

A writer in the American Judicature Society Journal (Vol. 3, No. 1, pp.13-14) says:

> "Among people of high capacity for self-government the office of justice of the peace has degenerated until it possesses no dignity and no reward. The occasionally capable justice cannot offset the prevelent Dogberry type, and his dependence upon fees tends powerfully to undermine his integrity. There is as much good material in the average community for public service of this kind as ever; but we have created an environment which effectually excludes wisdom, talent and pride of service."

Who in the course of his experience has not known a justice of the peace who could decide with fairness and justice all matters brought before him, and who was respected and admired by his fellow citizens? But who, familiar with present conditions, does not know that this is the exception and not the rule? Who does not know that in popular parlance a "J. P." court means a "judgement for plaintiff" court? Have you ever examined a justice's docket? It is safe to assume without an accurate check that ninety-five per cent of all judgements rendered by justices of the peace in Shelby County are for the plaintiff. The writer has examined the docket of one justice of the peace where, in the run of more than one hundred cases, not a single decision was rendered in favor of a defendant.

Have you ever visited a justice's court? You usually find it in some dingy basement, or up a rickety flight of stairs, or in a dirty, ill-smelling place such as you would associate with some cheap, tawdry business. It is not such a place as you would care to be caught in; your presence there would call for explanation and apology. You would not wish your wife

or daughter to go there even as a witness. It is not the environment of justice.

Where is the justice of the peace who has ever studied law, or who could pass the entrance examination to any accredited college? Some, perhaps the majority, are kindly men who make good friends and neighbors; but as ministers of law and justice they are strangly out of joint with the times. And it is the system which has made them. So long as the present system continues, we must expect worse rather than better men; for every year the system becomes more antiquated and less suited to our needs.

What are the standards to be demanded of a court of justice today? The rough and ready rule-of-thumb methods of our ancestors will not suffice. The 'squire who can attend to his court between seasons at the plow, or after he returns from following his hounds — this benevolent old gentleman of reddish face and genial soul is as much out of place in our modern life as side-whiskers and surreys. We do not need them and they are virtually extinct. Modern justice demands trained minds, ripened by experience, free from interest or bias, devoted exclusively to the business at hand, with no cross currents or distractions, operating in an atmosphere of justice, and co-ordinated and integrated into a judicial system whose business it is to turn out in the least possible time with the least possible expense judicial opinions founded in law and justice and adequate to the facts involved.

Let us test our present day justice of the peace courts by these standards.

A good judge should have a mind trained in the rules and standards which he must apply,and ripened by experience. No experience whatever is required by law for our justices of the peace. No knowledge of the law is required. Any citizen twenty-one years of age may offer himself for election; and in order for the job to be attractive to any citizen nowadays, it is a reasonably safe assumption that he has a keen taste for petty politics, that he has little education and no legal training whatever, and that he is a mis-fit in the world of bus-

iness and affairs. The exception to this generalization is rare enough to be worthy of a Congressional medal.

A good judge should be free from interest or bias in the matter brought before him. How can a justice of the peace hold the scales of justice even? The miracle is that they sometimes do. But consider that here is a system of petty judges, holding courts which are not courts of record, with no supervision, check or control, with no salary provided by the county or state, dependent on the fees taxed against the litigating parties for their very bread and meat, with elections at infrequent intervals, and dependent for re-election upon local constituents who may be entirely ignorant of their judicial acts. A department store, for example, turns over all its old unpaid accounts to the court of a justice of the peace for collection. The justice must decide in favor of the client who brings him the business, or the client will take his business elsewhere. Often the justice talks over the case with the plaintiff at the time of his filing suit, and helps him prepare the writ or summons. It is so notorious that our justices are not only ill-trained and incapable of trying causes, but also overwhelmingly predisposed in favor of the plaintiff who brings the business, that the defendant often does not appear at all; preferring to allow a judgement to go against him by default and to prosecute an appeal to the Circuit Court of the County, where the cause is heard *de novo*. Of course due allowance must be made for the fact that many defendants have no meritorious defense, and that they take an appeal merely for a delay of six months or longer in meeting their obligations; that they often perjure themselves in appealing on the pauper's oath in lieu of giving a cost bond; and that they do not appear in court to defend on the merits even after the case has been reached on appeal, suffering final judgement by default to be had against them. But after making all these allowances, it is perhaps safe to say that *bona fide* defendants conscious of a just defense and assured of ultimate victory do not appear before the justices of the peace to defend in half the cases. The dice are loaded against them and they know it. Many skilled lawyers

for defendants, taking advantage of the easy access to the appellate courts where the case is heard *de novo*, appear in the justice's court merely to hear the plaintiff's testimony; and they carefully refrain from showing their own hand until the case is reached on appeal. Under any adequate system of judicial administration, this situation would be impossible.

The fee system of compensation to public officials is one of the most corrupting influences in our entire political system. It blights whatever it touches. The judge must favor his friends who bring him the business. Justice must give hostages to fortune. Not only so, but unscrupulous magistrates will send out their deputies and constables to bring in business; drawing into the toils of the law negroes and ignorant, defenseless persons on a Saturday night while their pay envelopes are still in their pockets, and when it is cheaper to pay a small fine and the justice's costs, than to pay a bondsman to bail them out of the county jail. It is a spider web to entrap the weak. Rich and powerful gamblers and bootleggers and other violators of the law, guilty of offenses a thousand times more flagrant, are left unmolested; and the poor negro crap-shooter or the ignorant day laborer carrying a half pint on his hip must pay the toll. Unless the defendant pleads guilty, the justice of the peace must bind the defendant over to await the action of the grand jury. The state pays no costs to the justice. He must get his fees out of the defendant or not at all; and so by all the arts and refinements of coaxing and coercion, brow-beating and persuasion, the poor fellow is led into pleading quilty and taking a small fine with a cost bill usually much greater than the fine itself, rather than hire a lawyer, pay a bondsman, and await the uncertainties and delays of a criminal trial. Some of the justices of the peace in Tennessee have been known to earn more than the Chief Justice of our Supreme Court. It is an iniquitous system. A judge should draw his salary from the state whose constitution and laws he is sworn to support and administer. and not from parties appearing before him; and such salary should be sufficient to keep him and his family in decency

and comfort, both allowing and requiring him to devote all of his time and talent to his judicial business.

Any court which is designed to administer justice in a direct and conclusive way should be a court of record. That is to say, there should be kept on file a complete statement of the plaintiff's demand and the defendant's answer, with a minute entry of the orders and judgment of the court thereon. There is no reason why any litigant should be put to two or more trials in order to develop the facts of any case. The world is moving too fast to take up the time of lawyers, judges, juries and witnesses with two or more trials *de novo*. The court of original jurisdiction should be administered by a judge capable of administering the law, familiar with the rules of evidence, capable of instructing a jury, where a jury is demanded, and capable of making up a record to be passed on to a reviewing tribunal in the event of an appeal. To allow a court nowadays to sit and hear causes without legal training and without a record of the proceedings except the merest docket entries, is to tolerate a court which in the economy of judicial administration is worse than useless.

Any adequate judicial system should be closely integrated, with harmony and co-operation among all the units of administration. But with the excessive number of justices of the peace, all dependent upon the fees of office for their livelihood, we have competition and rivalry. In Shelby County three trained and salaried judges could easily try all the cases now brought before the twenty-five magistrates of the county, and Shelby County has fewer justices than any county in the state in proportion to population.

There should be decency and dignity permeating the very administration of a court of justice. This is not true, generally speaking, of our justices of the peace courts. Every litigant should feel that he is presenting his cause before the throne of law and justice. The majesty of the State, yea, the dignity and majesty of Justice herself, are involved in every judicial opinion. However petty the cause, the litigant should be impressed with the majesty of the forces set

in motion for or against him. Tried by such standards, our justice courts are sadly wanting.

He who enters upon the work of a judge should eschew all other callings. His office should not be made subject to the vicissitudes of petty politics. He should pursue his calling with single minded devotion. But our justices of the peace are politicians. We have created a hybrid type of public officers in whom we have combined legislative, executive and judicial functions. Such a combination breeds conflict. One function will suffer at the expense of another. However prudent such a mixing of incompatible elements may have been a hundred years ago, it is a deplorable situation today. Who are our local politicians? Are they not our justices of the peace? It is a matter of common knowledge among the advocates of constitutional reform in this state, that our justices of the peace have been largely responsible for our inability to amend our constitution, in spite of repeated referendums and the most glaring need of reform. Our justices have seen the handwriting on the wall, and they have entrenched themselves against the day of their downfall.

All our courts should be subject to oversight and administrative supervision, not only to enforce sound principles of accounting and economy of operation, but also to promote uniformity of practice and efficiency of administration. The public should know what is going on in our courts. There is no check or supervision of our justices of the peace. No auditor checks their books. No supervisor see that cases are properly docketed and records preserved. Who among us knows what fees any justice of the peace receives, or what fines he collects? To be sure, all fines are supposed to be reported quarterly to the Chairman of the County Court; but it is left largely, if not entirely, to the integrity of the justice of the peace to make a proper accounting. The amount so reported is insignficant. Most of our justices are probably honest, but it is a bad system and tends to breed inefficiency and corruption.

It would seem that such a judicial system, so out of joint

with the times, so very repugnant to the very name of justice, should by this time have worked its own dissoution. It is fundamental that the judgment of any court which has a personal interest in the cause being tried, is void for bias. No judge can sit in his own case.

A few years ago it seemed that the Supreme Court of the United States had sounded the death knell of our old justice of the peace system. There came before it in the year 1927 the case of Tumey v. State of Ohio, (273 U. S. 510). In this case Tumey was brought before a local judge in Ohio charged with unlawfully possessing intoxicating liquors. Under the Ohio law, the judge was given a percentage of the costs and fees in the event of conviction, but nothing if the defendant was discharged. The facts clearly show that Tumey was guilty, and the minimum fine was imposed. He appealed on the ground that the judge was disqualified to try the case, and that the judgment was void. The Ohio courts ruled against him; but he carried the case to the Supreme Court of the United States, which held that it is a denial of due process of law in violation of the Constitution of the United States to subject the liberty and property of a defendant to the judgement of a court, the judge of which has a direct, personal, substantial or pecuniary interest in reaching a conclusion against him in the case. The judgment of the Ohio courts was overruled, and the case remanded.

The underlying philosophy of this case should wipe out our old justice of the peace court system; but unfortunately, it does not do so. Theoretically, our justices can tax the costs against either party in civil cases; and they are justified by the theory but not by the fact. The Tumey cases put an end to the trial of criminal cases by petty courts where they must look to the defendant for their fees. But in Tennessee our justices cannot try criminal cases unless the defendant pleads guilty. If he pleads guilty, he is estopped to complain of the fine and costs taxed against him. If he pleads not guilty, he is bound over to the state. If the state turns him loose, the justice goes without his fees; hence the great pressure which

is brought to bear on accused persons to plead guilty. Here again our justices of the peace are vindicated in theory, but not in fact. And so in spite of the Tumey case, we still have our justice of the peace courts flourishing among us.

Is there a way out? Many have despaired, thinking that our justices' courts are entrenched behind our State Constitution, that impregnable document against which reformers have expended their energies in vain. But the case is not so hopeless. The jurisdiction of our justices of the peace is fixed by the legislature; and what the Legislature has given, the legislature can take away. So far as the Constitution is concerned, the Legislature might strip our justice of the peace of all authority except to meet in quarterly session to elect the County Coroner and County Ranger. Or the legislature might empower them to issue writs of arrest or other summary process returnable to a County Judge, denuding them of all jurisdiction to try causes, civil or criminal.

The fact that petty judges are needed in rural communities remote from county seats, and that it would be too expensive to employ trained judges for such small constituencies has to some persons seemed a reason for retaining our present system, modified only in the larger urban centers. But fortunately with telephones and good roads and other facilities for rapid communication now wide-spread and well-nigh universal, our counties have become very small. Today it is about as easy to traverse an entire county as it was to traverse a civil district a few generations ago. In Shelby County, for example, in spite of the fact that our justices of the peace are enjoined to hold court within their several districts, practically all the magisterial work of the entire county is done in the down-town district of the city of Memphis.

Students of American Jurisprudence have been at work on this problem. Notable successes have been achieved in reorganizing the courts of some of the larger cities. Reform in rural districts has not been so rapid. The American Judicature Society has been most active in studying all problems relating to judicial reform; and the proposal is made by that

Society that our justice of the peace system be supplanted by a County Court system, with a County Judge for each forty thousand population; the Judge to possess the legal and other qualifications now required of our Circuit and Chancery judges; and the County Court to have jurisdiction of all civil cases involving not more than $500.00, all criminal cases of the grade of misdemeanor, and all non-contested probate matters. It is proposed that the County Judge shall hold court anywhere in the county to suit the convenience of his constituents, always keeping his court open at the county seat. The proposal contemplates that one justice of the peace be retained in each civil district to be known as a District Magistrate; and that District Magistrates shall have authority to issue summary writs and to hear such matters as the County Judge may refer to them; these magistrates to be paid a small annual stipend for their services. Of course this court would be a court of record, and would be empowered to impanel juries when necessary. In furtherance of this proposed system, the American Judicature Society has prepared a model act for adoption by our several states. In order to adopt the proposal in toto, it would probably require a Constitutional Amendment in most of our states.

In the year 1926 the Legislature of Mississippi passed an act (Sections 725-738, Hemingway's Mississippi Code, 1927) which probably makes as close an aproach to the proposal of the American Judicature Society as could be made under the Mississippi Constitution. The Constitution of that State makes courts of justices of the peace a part of the judicial system, and provides that they shall have jurisdiction in civil matters not exceeding the sum of $200.00, and also jurisdiction in criminal matters where the punishment does not extend beyond a fine and imprisonment in the county jail. The Legislature of Mississippi therefore could not abolish justice of the peace courts. What it did was to create a County Court in each county with a population in excess of thirty-five thousand inhabitants having jurisdiction concurrent with with justices of the peace in all matters civil and criminal,

and jurisdiction concurrent with the Circuit and Chancery Courts in all matters of law and equity up to $1000.00 and with jurisdiction to try misdemeanors and issue writs of habeas corpus. The county judge is required to possess all the qualifications of a Circuit Judge or Chancellor, and receives a salary of $3,600.00 per year. He is elected for a four-year term. His court is a court of record; the jury to consist of twelve men, nine of whom may, except in a criminal case, agree upon and return a verdict. There is an official court stenographer. An appeal lies to the Circuit Court on the record as made. It is optional with the less populous counties to adopt the same system if desired. The salutary effects of this new law are already apparent. In counties having such a county court, the justice of the peace are thrown largely out of business; and the members of the bar are delighted to be able to try their cases with dispatch before a competent judge. In spite of the opposition of the justices of the peace, this system of county courts will doubtless make rapid headway throughout the State; and the justices of the peace will gradually be starved out of existence.

There is no reason why the Mississippi plan could not be adopted in other states without the necessity of Constitutional change. In Tennessee, where the jurisdiction of justice of the peace courts is dependent entirely upon the Legislature, a system of county courts might be set up alongside our justice of the peace courts, as in Mississippi; or in line of our justice of the peace courts, by the passage of an Act abolishing in whole or in part the present jurisdiction of our Justices of the Peace. Under the County Court system it would be unnecessary to create special Small Debtors' Courts as in Kansas and Oregon; and the system could be readily adapted, by adding aditional judges and specializing their functions, to fit the needs of counties containing large cities.

With such a system in operation, we would be well on our way toward the larger work of unifying and simplifying our judicial machinery; which must be done if justice is to be administered with economy and efficiency. When jus-

tice is brought down to the man in the street, and when the humblest citizen can bring his complaint to court knowing that it will be disposed of by a competent judge without fear, favor or delay, we shall buttress our whole social order, and we shall provide a firm foundation upon which justice may erect her temple. Such a foundation we do not now have, nor shall have until this ancient anarchronism is done away.

Our public minded lawyers have a great work now to do in remolding the tools of their profession to fit the requirements of a new age. The work requires a high order of intelligence and dedication to the public good. Every man is interested to win his case. The physician can win his case best by using all the knowledge which scientific research can disclose. The whole world applauds his progress. But the lawyer can win his case often by taking advantage of a bad law or a bad judicial system. No law or court is so bad that it does not sometimes help a lawyer to win his case. The legal reformer must combat human nature. Not all men will applaud. Many profit by the inequity of our system. Every advance must be a personal sacrifice and over heated opposition. But it is the proud heritage of the legal profession that there have never been lacking those who were willing to make the sacrifice and able to win the day. For the stars are on the side of justice and progress; and in due season all the ancient institutions which stand in our pathway must topple down. One of these is the justice of the peace system. Its day is done, and it must give way to an orderly, economic and efficient administration of justice.

REQUIREMENTS FOR ADMISSION TO THE BAR IN TENNESSEE

HENRY B. WITHAM

The Bar of Tennessee as evidenced by the proceedings of the Bar Association of Tennessee has been, so far back as records go, a progressive body, interested in having the membership of the Bar of the highest quality. Throughout the recorded proceedings of the Bar Association of Tennessee one finds reports, speeches and resolutions all directed to making the Bar membership the best in the land. Suggestions relative to bettering the processes of justice, recommendations in regard to the government of the state, and advice anent legal education and admission to the bar have all been a part of the deliberations of the Association. Throughout the whole history of the Association its recommendations, suggestions and advice have been judicious and in progressive parallel with any state in the Union.

This article purports to deal particularly with legal education and admission to the Bar in Tennessee and it is important to note what the Association has recommended in this respect. At the first annual meeting of the Association in 1882 in the report of the Committee on Legal Education and Admission to the Bar appeared the following statements:

> "It would be difficult, for many reasons, to overestimate the value of legal education at the present time. Education makes the lawyer; the lawyer, the judge; the judge interprets the laws of the Commonwealth, and defines the rights and duties of her citizens. Confidence, stability, contentment make a free people prosperous.
>
> "The committee recognizes the fact that — to a community of lawyers who have every day striking proofs of the high honors that learning and mental vigor bring within the profession, and the great esteem they bring from without — no argument need be made in order to preserve the present standard of professional education. We

ask, though for an advance movement now, with one accord; it will be irrestible. A broader culture is demanded; a more difficult and diffused *curriculum*; the toil will be greater, but the toiler will more easily master the great problems of the future in our profession, and be better prepared for posts of higher distinction. It seems especially appropriate that the first meeting of the Association, should be marked by its expression of a determination to elevate the standard of legal education and learning."[1]

"We take for granted that he (the lawyer) is to be instructed generally and fully in universal history, and in the arts and sciences, in the history of the common and civil law, deeply. To be a competent counsel for a banking institution, he must be educated in finance, be familiar with the contemporaneous legislation on that subject, both at home and abroad; must know the law governing negotiable securities, not only in his own State, but in other States, and in foreign countries; and that necessarily involves an acquaintance with federal, inter-state and international law. To advise intelligently for a marble quarry, a coal mine, iron works, mills, etc., he must know something of geology, mineralogy, chemistry, mechanics, hydraulics, etc.; for a railroad company, besides an intimate familiarity with the doctrines of the law of carriers, he must know how to run an engine, lay a track, build a car, construct a bridge; he must study the best means for the preservation of life and property in transit, and know those subtle and unseen forces that govern trade and traffic, laying behind, and superior to, all declared laws."[2]

"The Committee recommend that the term of study be fixed at two years; they wish it were so they could have said three years. This last number has been adopted in many of the States, and may be said to meet the approval of the entire profession. It would be too radical, though, they fear, to advance at one step beyond two years; the plan would not be feasible. They hope their successors very soon may recommend three years. Less than two years, they are convinced, would be doing great injustice to the student, the profession and the general public — the last

---

[1] Bar Ass'n of Tenn. Proceedings 1882, p. 49.

[2] Bar Ass'n of Tenn. Proceedings 1882, p. 56.

of whom must be the chief sufferers from our mistakes."[3]

The above quotations from the Committee's report at the first annual meeting in 1882 show the attitude of the Association relative to education at that time. This attitude has never changed from that time to this; from 1882 to 1930. The recommendations of the Committee in Legal Education and Admission to the Bar to the effect that at least two years law study are necessary have remained the same throughout forty-eight years; almost half a century.[4] At the 1930 meeting held in Chattanooga last June this committee's report accorded with the recommendations made by the 1882 committee and in addition contained advices as to how the fulfillment of the recommendations might be brought about. The report, which was adopted by the convention is as follows:

"By action taken at former meetings, this association is very definitely committed to the proposition that the requirements for admission to the bar should be raised to meet the standards of the progressive thought and action of today on this subject.

"It is thought advisable to call to the attention of the Associaion the provisions of Chapter 154 of the Acts of 1919, wherein it is provided:

" 'The Supreme Court shall prescribe rules to regulate the admission of persons to practice law and providing for a uniform system of examinations, which shall govern and control admission to practice law, and such Board in the performance of its duties.'

"The Constitutionality of this act is questioned on account of the restrictions in its caption. So far, the Act has not been challenged by any legal proceedings.

"The Supreme Court has promulgated certain rules, among them Rule 5, which in part provides:

---

[3] Bar Ass'n of Tenn. Proceedings 1882, p. 60.

[4] See the reports of the Committee on Legal Education and Admission to the Bar in the published proceedings of the Bar Ass'n of Tenn. and in particular Vol. 36 at p. 74 (1917), Vol. 37 at pp. 31 to 52 (1918), Vol. 38 at p. 70 (1919), Vol. 39 at p. 35 (1920), Vol. 41 at p. 147 (1922), Vol. 42 at p. 119 (1923), Vol. 46 at p. 154 (1927) and Vol. 47 at p. 127 (1928).

" 'The application papers shall be such as to satisfy the Board (1) That the applicant is a citizen of the United States, and the State of Tennessee; (2) that he has been a resident of the State of Tennessee for at least one year before presenting his application; (3) that he intends to reside in Tennessee permanently and practice his profession; (4) that he is a person of integrity and good character; (5) that for at least one year, he has studied the principles of law and equity in a reputable law school or in the office of some reputable lawyer who has been a member of the Supreme Court for at least five years — such one year's study of the law to be preceded by at least a high school education, or its equivalent; and (6) that he has completed a course of the subjects enumerated in Rule 7.'

Rule 7 is as follows:

" 'Candidates for admission must present themselves prepared for examination on the following subjects: Constitutional Law, including the Constitution of the United States, and of the State of Tennessee; wills, suretyship, bailments, criminal law, equity, the law of real and personal property, evidence, landlord and tenant, contracts, partnership, corporations, torts, agency, negotiable instruments, domestic relations, pleading and practice, professional ethics.'

"Before admission to the Bar is allowed, the applicant should have a general education, a legal education, and moral character. There is unanimity of thought on this proposition. The controversy arises about the degree of general education and legal education which should be required.

"A recent report of the Committee on Legal Education of the Massachusetts Bar Association contains this clause:

" 'We shall not attempt to set an impossible standard. We do not seek to confine the practice of the law to a few favored individuals, or to exact requirements which will take so much time and money that the poor man of good parts will find it impossible to qualify. On the contrary, we shall bear in mind that what the community wants is that anyone who has the necessary intelligence and perserverance to obtain an education, and is of sufficient moral fiber to be faithful to the courts and to his clients, shall have an opportunity to serve the public by devoting his energies to the profession of the law.'

"The question of general education is solved to an ex-

tent by the requirements for admission to accredited law schools. In most of these, a two-year college course, or its equivalent, is required for admission to the schools. It is the hope and belief that those law schools which do not have this requirement will in due time rise to this standard of admission. It is a mistaken viewpoint to lower the standard of education to give easy access to the profession of the law to those who are lacking either in mental equipment or ambition that would impel them to acquire an education sufficient in degree to enable them to begin the study of the law with the reasonable hope of becoming proficient and honorable members of the profession.

"In *In Re Bergeron, Petitioner,* 220 Mass. 472, 476, we find this language:

" 'The interest of the public in the intelligence and learning of the bar is most vital. Manifestly the practice of the law is not a craft, nor trade, nor commerce. It is a profession whose main purpose is to aid in the doing of justice according to law between the State and the individual, and between man and man. Its members are not, and ought not to be, hired servants of their clients. They are independent officers of the Court, owing a duty as well to the public as to private interests. No one not possessing a considerable degree of general education and intelligence can perform this kind of service. Elemental conditions and essential facts as to the practice of law must be recognized in the standards to be observed in admission to the bar.

" 'The right of any person to engage in the practice of the law is slight in comparison with the need of protecting the public against the incompetent.'

"We take this view that the provision in the rule now in force in this State, allowing the study of the principles of law and equity in the office of some reputable lawyer who has been a member of the Supreme Court for at least five years, should be done away with. This method of preparation has almost completely passed out, and in our opinion, does not furnish a sufficient basis of legal education to justify admission to the bar.

"We repeat the recommendations in reports of previous committees of this association, of increasing the requirements to two years previous study, and we think this study should be made in a reputable school of law.

"We therefore recommend to the Supreme Court the careful consideration of this recommendation, and express the hope that as soon as they may deem it wise, under the conditions existing in our State, to make these requirements that they amend their present rules so as to provide this requirement.

"We further recommend that the Committee on Legislation be directed to prepare a bill free from constitutional objection, reenacting the provisions of Chapter 154 of the Acts of 1919, giving to the Supreme Court of the State the power to prescribe rules to regulate the admission of persons to practice law in the State of Tennessee, and that they take the necessary steps at the oncoming legislature to have this bill enacted into law. We feel that this is a wise provision, greatly preferable to leaving the matter of prescribing the requirements for admission to the bar to the legislature. By placing the power in the hands of the Supreme Court, the rules can be changed from time to time to meet existing conditions, and in this way, our State in its requirements can be kept abreast of the best thought and action upon this very important question."[5]

Such a constancy of reports by this committee leads one to consider why. Aside from the fact that the committee has been composed during most of its existence of nine members and that so many persons couldn't be wrong all the time, in order to explain the committees' stand, there is set out below an excerpt from the recommendations of the 1895 meeting. This excerpt shows the general foundation for the recommendations which have been presented during forty-eight years and in addition it is a recommendation relative to legal qualifications for admission to the bar. It is as follows:

"—Legal Qualifications—In advocating the raising of the standard of legal qualifications for admission to the bar, I can use no better evidence than the words of Leroy Parker in a paper read before the '94 session of the New York Bar Association, which are as follows: 'Why, like other callings in which men engage for a livelihood, is the

---

[5] Vol. 49 Proceedings of Bar Ass'n of Tenn. at p. ..... (1930).

bar not open for all who choose to practice law, each one taking his chances of success or failure in winning confidence and custom, as men do in trade, manufacture, or commerce? The answer is apparent. It is because law is an element of civilized society which regulates all the delicate relations between man and man, and determines his relation to material things; relations so infinitely complex and so interdependent, that to know how they are regulated or determined is a profound science; a science which must be well known before one ought to be permitted to serve as counsel for one party or another when such relations are impaired. It is a science to be dealt with by those only who through deep learning, especial capacity, and high character can know it well, apply it understandingly, and will never employ it for base or ignoble purposes. It is for the purpose of determining, as far as possible, whether those who seek to enter upon this high service possess the necessary qualifications for it, that there have been established from time to time, certain formalities or regulations, as to the study of law and admission to practice, which shall test the extent of the knowledge of such aspirants and determine their fitness for membership in our honorable profession.'

"To members of the bar are often entrusted the protection of the most precious rights of liberty and property. Incompetency may cause these rights to be injured or destroyed. Incompetency often delays and inconveniences legal proceedings, unnecessarily consumes the time and endurence of courts, lawyers, and parties, adds cumbersome court costs and other expenses, destroying public faith in the fair administration of justice and reducing public confidence in the entire profession.

"Again, the average young lawyer rarely accomplishes anything in the practice within from one to three years from the time of his admission to the bar. He is universally regarded as incompetent. Business is withheld on this account. It seems that it would be better for both the applicant and his future clients, that his admission be deferred until he is reasonably safe to trust with legal matters."[6]

There is no doubt that the Bar Association of Tennessee

---

[6] Vol. 14 Proceedings of Bar Ass'n of Tenn. p. 137 (1895).

has been progressive and in accord with the great majority of the Associations in the other states in its recommendations for sufficient legal training. The above statements show the past and present desires of the Bar Association in regard to the learning of the bar applicant. Have these desires been fulfilled?

In considering the answer to the above question it is important to examine a few statistics. There are this fall approximately 760 law students in Tennessee. 165 of them are in law schools requiring two years pre-legal and three years legal study. About 345 of them are in law schools requiring three years legal but no pre-legal work and 222 of them are in a law school which requires one year of legal study and no pre-legal work.

At the present time there appears to be no urgent need for a greater number of lawyers in Tennessee. The number of applicants admitted to the bar of the state each year is probably greater than can be successfully assimilated. But it does not follow that there is no demand for properly equipped lawyers; those who are fit in the sense that they have a comprehensive knowledge of the problems of state and their obligation thereto. The State of Tennessee needs lawyers of this mark. In the American Bar Association Journal of November 1928 appeared an interesting article, "Supply and Demand in Legal Profession" by Mr. H. C. Horack, advisor to the Council of Legal Education. In this article he pointed out that in determining the proper number of lawyers needed for any community two obvious elements should be considered. One was the number of persons in the community i.e., the population, and the other was the wealth of the community. In contrasting the supply of physicians with that of lawyers he pointed out that every one in a given community may become ill and need a physician and as a result the number of physicians needed in any community depends upon the number of persons within it. But not so with lawyers. It is not every person within a community needs a lawyer. Aside from criminals it is usually those that have some bus-

iness that require a lawyer's services. In other words, if an individual has some wealth, in the economic sense, he may at some time or other demand a lawyer's advice. In short, Mr. Horack concluded, the demand in any community for physicians is dependent upon population and the demand for lawyers is dependent upon population multiplied by wealth.

The following table with its explanation was used by Mr. Horack and is set out here to show the situation in Tennessee in so far as numbers of lawyers are concerned.

"On the basis of population per lawyer times per capita wealth, the following tables based upon the last census figures (1920) present the condition of the supply of lawyears in each state, treating the situation in the United States as normal or 100%. Whether this average for the United States represents an actual excess or a shortage in the supply of lawyers may be judged to some extent by viewing the situation in states having more or less than the average number of lawyers. Thus, if Iowa, having the fewest lawyers in proportion to its population and wealth, nevertheless appears to have an actual over-supply, it may be inferred that the situation here used as the norm, in fact represents a gross over-supply for the whole country. In column I is shown the proportion of the normal supply of lawyers possessed by each state; column II shows the normal number of lawyers to which the various states should be entitled, based on each one hundred lawyers actually listed:

	I	II
Iowa	.611	163
Pennsylvania	.614	162
South Dakota	.618	161
Wisconsin	.655	152
North Dakota	.663	150
Connecticut	.675	148
Kansas	.682	146
Rhode Island	.695	143
New Hampshire	.700	142
Deleware	.707	141
Michigan	.719	139
Nebraska	.741	134
Wyoming	.743	134

West Virginia	.750	133
Minnesota	.800	125
New Jersey	.887	112
Utah	.909	110
Louisiana	.910	109
North Carolina	.915	109
Ohio	.930	107
Arizona	.950	105
Indiana	.966	103
Massachusetts	.998	100
Maine	1.015	98
Vermont	1.028	97
New Mexico	1.039	96
Illinois	1.041	94
Virginia	1.053	94
Nevada	1.067	93
South Carolina	1.068	93
Montana	1.088	91
Oregon	1.094	91
Missouri	1.148	86
Idaho	1.152	86
Washington	1.154	86
Alabama	1.220	81
California	1.237	80
TENNESSEE	1.239	80
Florida	1.253	79
Colorado	1.254	79
New York	1.304	76
Arkansas	1.335	74
Mississippi	1.339	74
Maryland	1.381	72
Texas	1.430	69
Georgia	1.683	59
Kentucky	1.708	58
Oklahoma	1.876	53"

The above table shows the numbers of lawyers in the various states. No attempt was made to classify the numbers relative to quality e.g., attained success or training. The table shows Tennessee to have an over-supply of almost one-fourth in numbers. This is figured on the basis that all lawyers

throughout the entire United States are needed. Very probably there is now, in numbers, throughout the United States as a whole, an over-supply. In 1920 in the United States as a whole there was one lawyer for every 862 persons. In 1921 in England and Wales there was one lawyer for every 2,111 persons. In 1921 in Canada there was one lawyer for every 1319 persons. In Australia the same year, one lawyer for every 1470 persons. In 1900 in Austria, one lawyer for every 4005 persons. In Belgium in 1928 one lawyer for every 2611 persons. In Bulgaria in 1926 one lawyer for every 2242 persons. In Czechoslovakia in 1928 one lawyer for every 3868. In Denmark in 1927 one lawyer for every 2460 persons. In France in 1928 one lawyer for every 4585 persons. In Germany in 1928 one lawyer for every 4134 persons. In Greece in 1928 one lawyer for every 1191. In Hungary in 1927 one lawyer for every 1508. In Italy in 1925 one lawyer for every 2310 persons. In the Netherlands in 1927 one lawyer for every 1689 persons. In Poland in 1927 one lawyer for every 7325 persons. In Sweden in 1928 one lawyer for every 16,450 persons. The United States with three times the population of England and Wales has seven times as many lawyers.[7] Since this is true the over-supply in Tennessee is relatively larger. The table above shows nothing, as before stated, relative to the *kind* of lawyer in Tennessee. It informs us only as to numbers and it appears we have too large a number.

Some information in regard to the quality of lawyer Tennessee is obtaining in so far as training is concerned, is shown by the data below, which show the number passed and failed in relation to the educational training of the applicants. These data were compiled from the June 1930 examination and were furnished by Mr. R. I. Moore, Secretary and Treasurer of the Board of Law Examiners of Tennessee.

---

[7] Alexander B. Andrews, "Legal Education and Admission to the Bar," Bar Ass'n of North Car. Proceedings 1929.

Passed No.	*Percent*		*Failed*
9	52.9	Office study plus high school	8
1	100.	Office study plus one year college	
1	100.	Office study plus two years college	
0		Office study plus three years college	
0		Office study plus four years college	
23	47.9	Law School study one year plus high school	25
7	88.8	Law School Study two years plus high school	2
31	91.	Law School study three years plus high school	3
7	100.	Law School study one year plus one year college	
6	100.	Law School study one year plus two years college	
6	100.	Law School study one year plus three years college	
12	100.	Law School study one year plus four years college	
14	100.	Law School study two years plus two years college	
10	100.	Law School study three years plus two years college	
8	100.	Law School study three years plus three years college	
7	100.	Law School study three years plus four years college	

From the above it appears that only twenty-five out of one hundred eighty, or less than 14% of the applicants had the educational training that is recommended by the American Bar Association.[8]

The quality of bar applicants in other states is at the present apparently better than in Tennessee. In 1929 thirty-one states and Hawaii and the Philippine Islands required three years law study before the applicant was eligible to take the bar examination.[9] Several more required two years. In addition there are fifteen states viz., Colorado, Connecticut, Idaho, Illinois, Kansas, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Pennsylvania, West Virginia, Wisconsin and Wyoming that require all candidates for admission to their respective bars to have completed two years of college work in addition to three years law study. Unless the American Bar Association and about forty states are wrong

---

[8] Vol. 14 Am. Bar Ass'n Journal, p. 567 (1928).

[9] Alexander B. Andrews, "Legal Education and Admission to the Bar," Bar Ass'n of N. Car. Proceedings 1929, p. 8.

we are in Tennessee getting inferior quality lawyers as a class and getting them in larger quantities than we need good ones. It is significant from the above bar examination data that those who took the pains to secure more education were the successful ones as a class in the bar examination. It must follow that these same well prepared ones will be the type of lawyer desired. They will be the ones who appreciate their obligation to the state so that Tennessee may be in the words of Robert Maynard Hutchins, President of the University of Chicago, a place where "lawyers are not merely making money out of the misfortunes of others, but are intelligent, well trained men, helping to shape the law to meet the changing conditions of society.

Tennessee legislatures have shown the proper concern in protecting the public from unskilled tradesmen and from quacks in the healing professions. Twelve months apprentice training and an examination are necessary before one may follow the trade of a barber.[10] To become a master plumber one must have had four years actual experience as a journeyman plumber and must pass an examination.[11] For a master electrician rank one must show three years experience as an electrical workman and pass an examination.[12] Before one is eligible to be an architect he must have completed four years work or have had that much training in school.[13] The same is true for an engineer.[14] A veterinarian must pass an examination or complete three years of schooling of six months each.[15] To practice chiropractic one must complete three school years of six months each of professional study.[16] To practice os-

---

[10] Tenn. Pub. Acts 1929, c. 118.

[11] Tenn. Ann. Code (Shannon, 1917) §3098 a 336.

[12] Tenn. Ann. Code (Shannon, 1917) §3079 a 212.

[13] Tenn. Ann. Code (Supp. 1926) §3654 a 108.

[14] Tenn. Ann. Code (Supp. 1926) §3654 a 108.

[15] Tenn. Ann. Code (Shannon, 1917) §5654 a 69.

[16] Tenn. Ann. Code (Supp. 1926) §3654 a 119.

teopathy three years of nine months each are required.[17] To be an optometrist it is necessary that one complete two years training of eight months each.[18] For the practice of professional nursing two years of hospital training are necessary.[19] A registered pharmacist must have four years practical experience.[20] To become a dentist one must be graduated from a reputabe school of dentistry and pass an examination,[21] and for a physician and surgeon one must have been graduated from a medical school which is equal to the College of Medicine of the University of Tennessee[22] and in addition must pass the state examination.[23]

But to practice law in Tennessee it is only necessary that one have a high school education *or its equivalent* and in addition study law one year.[24] This standard is set by the Supreme Court.

Since the standards for admission in Tennessee are so low and so far behind the progress of other states and since the Bar Association of Tennessee has time and again recommended raising them the inquiry why they have not been raised is quite pertinent. The legislature in passing Chapter 154 of the Public Acts of 1919 apparently intended to give the Supreme Court full power to set the standards higher. And evidently soon after the passage of this Act the Supreme Court was visited by a special committee from the Bar Association of Tennessee in support of an Association resolution urging more stringent requirements. This committee reported to the

---

17 Tenn. Ann. Code (Shannon, 1917) §3654 a 5.

18 Tenn. Ann. Code (Supp. 1926) §3654 a 19.

19 Tenn. Ann. Code (Shannon, 1917) §3654 a 49.

20 Tenn. Ann. Code (Supp. 1926) §3654 a 49.

21 Tenn. Ann. Code (Shannon, 1917) §3630.

22 Tenn. Ann. Code (Shannon, 1917) §3609 a 6.

23 Tenn. Ann. Code (Shannon, 1917) §3609 a 9.

24 Tenn. Pub. Acts 1903, c. 247, as amended by Tenn. Pub. Acts 1919, c. 154. Rule 5 of Supreme Court rules governing admission to the Bar.

Association at its 1920 meeting as follows:

"To the Hon. Giles L. Evans, President:

"The undersigned, constituting a special committee appointed to appear before the Supreme Court in support of a resolution of the Bar Association, passed in 1918, urging more stringent qualifications for admission to the bar, respectfully report as follows:

"The resolution in question recommended that all applicants for admission to the bar should have a high school education or its equivalent, and should have studied law for a period of not less than two years in some reputable law school or in the law office of some reputable lawyer who has been a member of the bar of the Supreme Court for at least five years.

"We ascertained upon investigation that a former committee of the Bar Association had urged the adoption of these requirements upon the Supreme Court, and that the Supreme Court had thereupon adopted the requirements in amost the very words of the resolution adopted by the Bar Association, but with the sole exception that the required period of study in a law school was fixed at one year instead of two years, and it was explained to us by the Chief Justice that, in consequence of the interposition of the World War, and the circumstance that many young men who were preparing or were planning to prepare for admission to the bar had been interrupted in their studies in order to serve their country abroad, the Court was of opinion that this was not an expedient time to exact a two-years' requirement, but that later on, and after this situation had passed, the court would, he felt sure, be disposed to make this exaction.

"In view of the fact that the resolution had been so recently presented to and acted on by the Supreme Court, and that the condition on which its action in the matter was based still existed to some extent, we felt that no good purpose could be accomplished by urging the matter upon the Court again at this time.

Respectfully submitted,

(Signed) Chas. C. Trabue, *Chairman.*
T. A. Wright.
R. F. Spragins."

But after the *inexpediency* of the immediate post-war period had passed it was discovered that Chapter 154, Tennessee Public Acts of 1919 might be unconstitutional due to its being an amendatory statute and having a restrictive caption. The holding in *Hays v. Federal Chemical Co.*[25] would indicate that this act which provided "The Supreme Court shall prescribe rules to regulate the admission of persons to practice law——" may be unconstitutional. If such is the case it is submitted that it is necessary for the next legislature to proceed forthwith to re-enact the 1919 act[26] with a proper caption. This will cure any defect in the legislation giving the Supreme Court the power to prescribe rules to regulate the admission of persons to practice law. With all shackles removed the Supreme Court will be able to put into effect standards of admission in Tennessee in accordance with the recommendation of the Bar Association of Tennessee and in line with the standards in the large majority of states.

---

[25] 151 Tenn. 169, 268 S.W. 883 (1925).

[26] Tenn. Pub. Acts 1919, c. 154.

A TYRANNY OF LAWS

ROBT. M. JONES

Civil liberty is freedom from restraint by any laws save that which conduces in a greater or less degree to the general welfare.

To do what I will is natural liberty. To do what I will, consistently with the equal rights of others, is civil liberty, which is the only liberty possible in a state of civilized society.

If I wish to act, in every instance, in accordance with my own unrestrained will, I am made to reflect that all others may do the same, in which case I shall meet with so many checks and obstructions to my own will that my happiness and liberty will be far less than if I, with the rest of the community, were subject to the restraint of laws applying equally to all.

So it is, that proper and adequate laws are essential to the well being and good order of society; but legal restraint, for no other reason than mere restraint, is unphilosophical and inherently wrong, because it amounts to a deprivation of a portion of natural liberty without any compensating benefits to the public at large.

Since, therefore, every law imposed upon a people amounts to a partial deprivation of liberty, such deprivation ought to be overbalanced by a commensurate public advantage resulting from the law. Any law without such compensating benefits is a bad law, and should never have been enacted, and should be repealed.

The balancing of restraints and advantages in law making is the delicate task of government. Carter, in his "Origin and Function of Law," defines the function of government as follows:

"It is the function of government to define the limits or sphere in which the individual may act as a member of

the social state, without at the same time encroaching upon the freedom of others."

Government is and always has been one of the most intricate of sciences, although it has often been committed to clumsy and unscientific hands. The wisest of the ancients devoted their lives to the study of government as a profound science. The moderns seem inclined too often to employ it as a matter of political expediency.

As said, to live under civil government is to surrender a portion of our natural liberty for the common good, in order that that which remains to us may be the better safeguarded and protected by the strong arm of the law. Thus law both protects and limits liberty; and it may just as truthfully be said that liberty may be destroyed by law. The Romans furnish a concrete example. Every nation has its representative principle, its national spirit. With the Greeks it was Beauty; with the Persians it was Light; with the Romans it was Law. Law was the dominant master. Law regulated everything. A citizen could not fix a price upon his own goods. The oppressions of law, with the resulting burden of taxation, destroyed the spirit of the people and cheapened the desire for life; and so history tells us that the Romans thus oppressed, became an easy prey to the incursions of the northern barbarians, who were welcomed as deliverers and saviours.

The fathers of our Republic were statesmen. They had tasted and knew the meaning of tyranny. They saw with prophetic vision that governments may be made the instruments of tyranny. They therefore sought to erect a government that would not only save the people from their rulers, but would also save the people from themselves; save the minority from the majority, and the majority from the minority. And so they erected a tri-powered government, consisting of the executive, the legislative and the judicial, and commanded each of these coordinate bodies to keep hands off the other. Function within your own sphere and no further. This gave the essentials of a strong and durable government.

That constitution is perhaps the briefest charter of liberties ever given to a civilized people. It has been pronounced by the ablest English statesmen the greatest governmental document "ever struck off from the brain of man." It was direct, clear, simple, and instilled with the spirit of liberty. It was born of a mental environment that voiced the conviction that "that people is best governed which is least governed."

But notwithstanding the superior character of our government under the Constitution, and notwithstanding the liberty, happiness and prosperity of the people under it, it is not fool-proof; it has the imperfections of all human inventions, and is impotent in itself to perpetuate the blessings it secured, unless the people themselves be alert to preserve their heritage under it. For let it never be forgotten that we may heedlessly throw away our birthright, surrender the inestimable blessings vouchsafed to us, and erect a despotism within the Constitution itself. This may be done by law without violating the letter of the Constitution.

May we not pause to ask, if we have not already embarked on that perilous sea? Are we not leaving the open road, where we have found happiness, liberty, peace and prosperity, and taking to the untrodden forests of blind experimentation?

So much for generalities. What I started out to say was on the particular subject of excessive and needless legislation. I am now referring to legislation by the several States and by the federal Congress.

In recent years an epidemic has infested this country, which, for want of a better name, I will call Legislative Mania. The disease is not organic; it results from excessive and unskillful doctoring. The patient is the Government. The nostrums administered are the saturnalia of laws which have been imposed upon the people in recent years.

There are more than 100,000 laws on the statute books of this country, regulating the conduct of human beings. To these amazing figures from 10,000 to 20,000 laws are added about every two years. There is no appearance of cessation, but the process goes on with increasing persistency.

Can you conceive that 100,000 laws are needed to regulate the conduct and activities of well disposed, civilized people? Can the mind imagine the necessity of 10,000 additional laws every two years? These laws cover the entire gamut of human activity.

As I have already said, law-making is an intricate science, and just and proper laws cannot be made haphazardly. It requires the trained brain of the statesman, to so change and adjust the delicate machinery of government as to produce the greatest benefits, and at the same time cause the least friction, inconvenience, and hardship to the subjects.

John Stuart Mill, a statesman as well as an economist, said:

"There is hardly any kind of intellectual work which so much needs to be done by minds trained to the task through laborious study as the business of making laws."

Sir Henry Maine, in his "Ancient Law," seems to sound the true note of legislative philosophy when he says, in substance, that law should follow, not precede, a crystalized public opinion that such law is really needed or desired; that it should follow just one step behind the ascertained felt need for such law.

That sounds reasonable, for until public opinion calls for it, or until its need has been discovered, the law will prove a shackle, and naturally will not meet with that hearty obedience from the people which all laws should command.

But it may be urged that Maine's philosophy is too slow. It is too slow for the modern idea, but the modern idea of law making is entirely too swift. It keeps the people in a perpetual turmoil, trying to adjust themselves to their new laws. It must be remembered that civilization itself is a slow process. It moves like Homer's gods through space, one step taken and ages have rolled away.

In the Constitutional Convention, Hamilton foresaw the excesses of law-making. He said:

"The facility and excess of lawmaking seem to be the disease to which all governments are most liable. It will be

of little avail to the people that the laws are made by men of their own choice, if the laws are so voluminous that they cannot be read, or are so incoherent that they cannot be understood."

The modern statesman has reversed Maine's philosophy. The modern statesman has a passion for legislation, and legislate he will. What does he care whether the people are ready and prepared for a new rule in the form of a law? What does he care whether the people ever read or understand the laws? He must make laws, and so he conjures his brain to find a subject on which to exercise the powers of his statesmanship; he passes a law, for which, may be, there is absolutely no need, and one which the people may not desire. They must, nevertheless, adjust themselves to the law, or they will be lawbreakers.

Will the people ever stop to think that in the passage of every law they surrender another modicum of their liberty? Do they ever stop to think that the enactment of every new law entails directly or indirectly so much increase of taxation? Will the people ever take in the trite dictum of John Marshall that "the power to tax is the power to destroy"? It might be equally as well said that the power to legislate is the power to destroy. Taxation has become one of the big questions in this country. In the maze of law-making, the tax burden increases from year to year, until the backs of the people are already bent and well-nigh broken under the enormous load. To meet the annual tax budget, scarcely any species of property or any occupation is left untaxed. In what lawful activity can the citizens engage to make an honest living without paying for the privilege of doing so? The scale of taxation ranges all the way from the largest business, to barbers, cobblers, well-drillers, etc. In some states, a barber dare not put a razor on your face until he has obtained authority from the State; nor can the poor cobbler put a new heel on your shoe until he has paid the State for the privilege. If we can scarcely live under our tax burden, there is no escape by death, for then

our estates will have to contribute to the payment of the undertaker's privilege tax.

Wherever you go, wherever you turn, you will unwittingly find yourself being prodded by the chastening hand of the law. With every law the fetters are wound so much tighter around the almost prostrate form of American Liberty. We are straight-jacketed in a mold of laws. Will we stop before reaching the breaking point? We have already attained a speed that makes it difficult to apply the brakes. I am reminded of the story of the boy who went out one morning to break his bull to drive. He fastened one end of a rope to the bull's head and the other to his own body, and started. The bull became obstreperous and started to run away, taking the boy with him. As they sailed down the road at break-neck speed, a by-stander yelled to the boy, "Where are you going?" to which the boy replied, "Ask the bull!" If it be asked where, as a nation, are we going, the reply is, "Ask the lawmakers!"

Notwithstanding this great deluge of laws, the shameful fact remains that our beloved America, of all the civilized nations of the world, is the one where life and property are least secure. Not only this, but a tyranny of needless laws is helping to make an army of criminals, and tending to destroy respect for all law and authority.

There are some things that law cannot do. It cannot make a man good; it cannot make him moral; it cannot make him kind, or courteous, or considerate; it cannot control his thoughts; it cannot imprison his mind. We may some day learn that fact.

I cannot yet believe that we are willing to chain ourselves to a political monasticism made by law, in order to free ourselves from contact with a wicked world, with all its enticements and temptations. Character is builded by meeting and overcoming the obstacles and temptations of this hurly-burly world. Happiness is said to be "our being's end and aim." It is the *summum bonum*. To the extent you destroy the

liberty of a people, to that extent you destroy their happi ness.

Mark you, I am not inveighing against proper or needed legislation, I am talking of unreasonable and needless regulations which have a tendency to destroy the liberty and initiative of the people. The law has obtruded itself into some of life's most sacred precincts, to correct wrongs which should be left to the intelligent instincts of the people themselves, to be worked out through the orderly processes of education and enlightenment. Many of life's problems are not proper subjects for legal adjustment. To raise the race to a higher state of physical and mental perfection would be a wonderful accomplishment, but can this be safely done by applying at once a drastic system of eugenics? A properly balanced diet would promote good health and prolong life, but who is willing to have his daily menu fixed by statute?

The fetish for creating boards, commissions and administrative bureaus has become a burden to business and a "weariness to the flesh," to say nothing of the vastly increased cost of government. It is a well known fact that practically every business has been regulated almost to the strangling point. I have not the time here to go into details.

For time out of mind our predecessors were fairly successful in making their advent into this world, but in this modern age it requires the aid of the federal government to be properly born; and to meet this crying need, the government has created a Bureau of Maternity and Infant Hygiene, with an annual appropriation not to exceed $1,000,000.00, to be distributed to those States accepting the provision of the Act and matching the sum which the government distributes to the particular State. Now, let all the States fall in line, and hereafter let all the children of America be born according to the most approved methods of the art.

It will be amusing to note just a few of the many unique laws that get into our statute books. For instance:

A law that where two trains meet at the crossing of another railroad both trains shall come to a full stop and neither

may proceed until the other has passed. I wonder how many convictions have been had under this statute.

A law to prohibit tipping. Our State enacted such a law in 1913; and repealed it in 1925. If there was ever a prosecution under this law I never heard of it, and if anybody ever refrained in the least from tipping the fact has not yet been disclosed.

The statute of a certain State making it unlawful to "sleep on the floor of the State House." (It will be observed that it is not unlawful to sleep in any other part of the Capitol, and it would seem to be allowable to lie upon the floor so long as the person does not sleep.)

A law to prohibit whistling on Sunday.

A law that children may not graduate from the 8th grade until they can repeat from memory the first verse of the Star Spangled Banner.

A law that no jackass shall be ridden more than six miles an hour. (Obviously this law is wholly unncesessary. Nature takes care of the situation.)

A law to regulate the length of bed sheets in hotels.

A law to prohibit public exhibitions of snake eating.

A law to regulate the dimensions of a loaf of bread.

The above all became laws, "the public welfare requiring it."

Following is a list of bills that have been proposed for passage by the legislatures of different States:

That a wife must countersign her husband's checks before he can draw any money from his personal bank account.

A bill against kissing. (Here, of course, the public health was involved.)

A bill that a female should not be called "a flapper."

A bill that a woman should not bob her hair.

A bill to prohibit gossip. (This bill has been held up until adequate jail facilities can be provided.)

A bill to regulate the length of women's skirts. This of course, was a protest against short skirts. (It just so happened that the senator who introduced this bill was a blind man.)

Tennessee Law Review

Volume 9 DECEMBER, 1930 Number 1

Published by the Students of the College of Law of the University of Tennessee in the months of December, February, April and June
T. ASBURY WRIGHT FOUNDATION

Subscription Price $1.50 Single Copies 50 Cents

CONTRIBUTORS TO THIS ISSUE

ROBERT SAMUEL KEEBLER was graduated from Washington and Lee University in 1908 with the dgeree of A.B., and from Harvard University in 1913 with the degree of A.M., and from the Harvard Law School in 1914 with the degree of LL.B. Since 1924 he has been engaged in the practice of law at Memphis, Tennessee.

HENRY B. WITHAM is a graduate of the State University of Iowa, A.B. 1919, J.D. 1925. At the present time he is Acting Dean and Professor of Law in the University of Tennessee College of Law.

ROBERT M. JONES was graduated from Grant University with the degree of B.S., and was graduated from the University of Tennessee College of Law with the degree of LL.B. in 1904. He has been Professor of Law in the University of Tennessee College of Law since 1922, serving as part-time Professor since 1926. He has been Chancellor of the Eleventh Chancery Division of Tennessee since 1926.

EDITORIAL REQUEST

The following Law College Alumni are lost so far as records in the Law College are concerned. We want very much to know the addresses of all the Alumni and will greatly appreciate information relative to the correct present address of the following persons. The names are given with their last known addresses and their year of graduation. Can any of the readers of the TENNESSEE LAW REVIEW give us the information desired? Please send any information to Dean of the Law College, University of Tennessee.

Ayres, Philip T., Southland Hotel, Dallas, Tex. 1906
Burke, Lawrence T., 1709 McGregor St., Wichita Falls, Tex. 1925
Cohen, Abraham, Lyceum Bldg., Memphis, Tenn. 1902
Emery, Walter 1903
Haaga, Jos. A., Peoria, Ill. 1909
Joyner, William, Boston Bldg., Denver, Colo. 1901
Keith, Cecil S., c/o Ford Brenner Ltd. Co., Shreveport, La. 1918
Kipp, Virgil S., 406 Jefferson St., Red Bluff, Calif. 1910
McKenzie, Allie E., 314 Empire Bldg., Knoxville, Tenn. 1918
Meyerhoff, William, 639 Investment Bldg., Washington, D. C. 1897
Mynatt, Benj. H., 30 S. Walnut St., Akron, Ohio 1912
Wallace, Chas. A., 2600 L. C. Smith Bldg., Seattle, Wash. 1903

CASE NOTES

COMMERCE: THE RIGHT OF A STATE TO TAX MOTOR BUSSES ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE

The Legislature of the State of Tennessee passed an act placing a privilege tax upon all automobile busses operating upon state highways and running into other states. The Act

EDITORIAL REQUEST

The following Law College Alumni are lost so far as records in the Law College are concerned. We want very much to know the addresses of all the Alumni and will greatly appreciate information relative to the correct present address of the following persons. The names are given with their last known addresses and their year of graduation. Can any of the readers of the TENNESSEE LAW REVIEW give us the information desired? Please send any information to Dean of the Law College, University of Tennessee.

Ayres, Philip T., Southland Hotel, Dallas, Tex. 1906
Burke, Lawrence T., 1709 McGregor St., Wichita Falls, Tex. 1925
Cohen, Abraham, Lyceum Bldg., Memphis, Tenn. 1902
Emery, Walter 1903
Haaga, Jos. A., Peoria, Ill. 1909
Joyner, William, Boston Bldg., Denver, Colo. 1901
Keith, Cecil S., c/o Ford Brenner Ltd. Co., Shreveport, La. 1918
Kipp, Virgil S., 406 Jefferson St., Red Bluff, Calif. 1910
McKenzie, Allie E., 314 Empire Bldg., Knoxville, Tenn. 1918
Meyerhoff, William, 639 Investment Bldg., Washington, D. C. 1897
Mynatt, Benj. H., 30 S. Walnut St., Akron, Ohio 1912
Wallace, Chas. A., 2600 L. C. Smith Bldg., Seattle, Wash. 1903

CASE NOTES

COMMERCE: THE RIGHT OF A STATE TO TAX MOTOR BUSSES ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE

The Legislature of the State of Tennessee passed an act placing a privilege tax upon all automobile busses operating upon state highways and running into other states. The Act

also provided that the revenue from such tax should go exclusively into the general funds of the state.[1] The Interstate Transit, Inc., a foreign corporation operating a line of motor busses doing an interstate business exclusively, brought an action against the County Court Clerk of Davidson County to recover the amount of taxes paid under the Act on the theory that a state did not have the right to impose such a tax in order to obtain revenue for the general fund of such state. *Held,* by the Tennessee Supreme Court that the tax did not violate the "commerce clause" of the Federal Constitution.[2]

The United States Constitution has expressly given to Congress the power to regulate interstate commerce, and to make all laws necessary and proper for carrying that power into execution.[3] Acting under this power Congress has assumed to regulate interstate commerce of certain kinds by means of the Interstate Commerce Act,[4] which governs interstate commerce by railroads and other designated agencies, but it clearly does not assume to regulate interstate commerce by means of motor vehicles. Thus, we have a field which Congress has the right to occupy but has not yet done so. In the absence of action by Congress, how far may the states go in regulating such commerce?[5]

It is without the power of a state directly to regulate, prohibit, or burden interstate commerce.[6] The states may, as long as they do no more than legitimately exercise their re-

---

[1] Pub. Acts Tenn. 1927, c. 89.

[2] Interstatet Transit, Inc. v. Lindsey, —Tenn.—, 29 S. W. (2d) 257 (1930).

[3] U. S. Const. Art. 1, §8.

[4] U. S. Comp. St. §8563 et seq.

[5] See Interstate Transit Co. v. Derr, —Mont.—, 228 Pac. 624 (1924).

[6] Adams Express Co. v. Kentucky, 214 U.S. 218, 29 Sup. Ct. 633, 53 L. ed. 972 (1909); Baltic Mining Co. v. Mass., 231 U. S. 68, 34 Sup. Ct. 16, 58 L. ed. 127 (1913); Rosenberger v. Pacific Express Co., 241 U.S. 48, 36 Sup. Ct. 510, 60 L. ed. 880 (1916).

served police power, enact laws which will be valid although they may incidently affect interstate commerce.[7] In the absence of federal legislation covering the subject a state may impose, even upon vehicles using the highways exclusively in interstate commerce, non-discriminatory regulations for the purpose of insuring the public safety and convenience; users of them may be required to contribute to their cost and upkeep, and a license fee no larger in amount than is reasonably required to defray the expense of administering the regulations may be demanded.[8]

In the principal case, the corporation admits that a fee can be lawfully exacted by the state from a motor bus company that is using the highways of the state although such company is engaged exclusively in interstate commerce; but it contends that the revenue derived therefrom must go for the maintenance of the highways and not into the general fund of such state, and as a consequence thereof, that this portion of the Tennessee Revenue Act of 1927 is unconstitutional. The court in holding the Act to be constitutional followed the decision of the United States Supreme Court in the case of *Clark v. Poor*.[9] In that case the Act in question provided that the company should obtain a certificate to operate, and also should pay an annual tax graduated to the number and capacity of the vehicles used. The question was raised as to whether the state could use part of the money obtained thereby for the maintenance of the higways, and part of it for the enforcement of the Act. Upon this point, Mr. Justice

---

[7] Minnesota Rate Cases, 230 U.S. 352, 33 Sup. Ct. 729, 57 L. ed. 1511 (1912); Standard Food Co. v. Wright, 225 U.S. 540, 32 Sup. Ct. 784, 56 L. ed. 1197 (1912); Savage v. Jones, 225 U.S. 501, 32 Sup. Ct. 715, 56 L. ed. 1182 (1912); Hendrick v. Maryland, 235 U.S. 610, 35 Sup. Ct. 140, 59 L. ed. 385 (1914).

[8] Hendrick v. Maryland, *supra*, note 7; Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916); Morris v. Duby, 274 U.S. 135 (1927); Clark v. Poor, 274 U.S. 554, 47 Sup. Ct. 702, 71 L. ed. 1200 (1927); Sprout v. South Bend, 277 U.S. 163, 48 Sup. Ct. 502, 72 L. ed. 837 (1928).

[9] *Supra* note 8.

Brandeis, speaking for the court, said: "Since the tax is assessed for a proper purpose and is not objectionable in amount, the use to which the proceeds are put is not a matter which concerns the plaintiffs." However, the facts of *Clark v. Poor* are distinguishable from the facts of the principal case, in that ,the Act in the principal case provided that the revenue should go into the general fund of the state with nothing said as to whether any portion of such revenue should be used for the regulation and maintenance of the state highways, whereas, the Act in *Clark v. Poor* provided that the revenue should go for the maintenance of the highways, and for the enforcement of the Act itself. In the case of *Sprout v. South Bend*,[10] decided by the United States Supreme Court after the decision of *Clark v. Poor*, a city ordinance provided that anyone operating a motor bus upon its streets should pay a flat tax each year to the city, and the purpose to which the proceeds of the tax were to be applied was not shown. In an action by a company engaged exclusively in interstate business protesting against the validity of this ordinance, the Supreme Court held it to be invalid, and Mr. Justice Brandeis delivering the opinion of the court, said: "It is true that a state may impose even on motor vehicles engaged exclusively in interstate commerce, a reasonable charge as their fair contribution to the cost of constructing and maintaining the public highways. * * * But, no part of the license fee here in question may be assumed to have been prescribed for that purpose. A flat tax substantial in amount and the same for busses plying the streets continuously in local service, and for busses making as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the highways. And there is no suggestion, either in the language of the ordinance or the construction put upon it by the Supreme Court of Indiana, that the proceeds of the license fees are in any part to be applied to the construction and maintenance of the city streets." *Sprout v. South Bend*

---

[10] *Supra* note 8.

is also to be distinguished from the principal case, in that the Act in the principal case pertained to busses doing only an interstate business, while the Act in *Sprout v. South Bend* applied to busses doing both intra- and interstate traffic. The principal case presents a different question from those presented by the cases of *Clark v. Poor* and *Sprout v. South Bend*. It is, can the state tax motor busses engaged exclusively in interstate commerce and put the revenue obtained therefrom into the general funds of the state?

The United State Supreme Court which is the ultimate authority upon the point involved has never decided the question. It is submitted, that before a state can apply the proceeds of such a tax on motor busses engaged exclusively in interstate commerce to the general funds of such state, the state must guarantee to the carrier that an equivalent amount will be applied to the construction and maintenance of the public highways; otherwise, such a tax would be an undue burden upon interstate commerce. Consequently, it would seem that the Act in the principal case is unconstitutional as a violation of the "commerce clause" of the Federal Constitution.

H.D.E.

CORPORATIONS—BEQUEST TO A CORPORATION PROHIBITED FROM EITHER RECEIVING OR USING PROPERTY IS NOT VOID, BUT ONLY VOIDABLE AT OPTION OF THE STATE

A bequest of money was made to a corporation which by its charter was prohibited from either receiving or using property for the purpose named by the testator. In an action by the heirs of the testator to set aside the gift it was held that the bequest was not void but was only voidable on an attack by the state.[1]

The holding in the principal case is in accord with the

---

[1] Bank of Commerce v. Banks, —Tenn.—, 29 S.W. (2d) 658 (1930).

weight of authority.[2] The rule is perhaps best stated in the words of the court in the case of *Kerfoot v. Farmers Bank*,[3] decided by the Supreme Court of the United States in 1910. Quoting the language of the court: "In the absence of a clear expression of legislative intention to the contrary, a conveyance of property to a corporation for a purpose not authorized by its charter is not void, but voidable, and the sovereign alone can object. Neither the grantor nor his heirs nor third persons can impugn it upon the ground that the grantee has exceeded its powers."[4] Other U. S. Supreme Court cases[6] support the rule of *Kerfoot v. Farmers Bank, supra.*

As stated in the Georgia case of *Kohlruss v. Zachery*, "It is undoubtedly the general rule that such conveyances to a corporation *ultra vires* convey a title defeasable only by the state."[7] However, there is a line of cases in Illinois which hold directly *contra* to the majority view, i. e., hold that no title passes to the corporation.[8] The view that title held *ultra*

---

[2] Smith v. Sheely, 79 U.S. 358 (1870); Jones v. Habersham, 107 U.S. 174 (1882); South & N. R. Co. v. Highland R., 119 Ala. 106, 24 So. 114 (1898); White v. Howard, 38 Conn. 342 (1871); Am. Mtg. Co. v. Tennille, 87 Ga. 28, 13 S.E. 158 (1891); Hamsher v. Hamsher, 132 Ill. 273, 23 N.E. 1123 (1890); Pilliard v. Angola R., 46 Ind. App. 719, 91 N.E. 829 (1910); Farrington v. Putnam, 90 Me. 405, 37 Atl. 652 (1897); Hanson v. Little Sisters of the Poor, 79 Md. 434, 32 Atl. 1052 (1894); Wall v. Darby, 132 Miss. 93, 95 So. 791 (1923); Chambers v. St. Louis, 29 Mo. 543 (1860); State v. Benovelent Ass'n, 107 Okla. 228, 232 Pac. 35 (1925); Collins v. Doyle's Ex'r., 119 Va. 63, 89 S.E. 88 (1916); Zinc Co. v. Bank, 103 Wis. 125, 79 N.W. 229 (1899).

[3] 218 U.S. 281 (1910).

[4] *Supra* note 3 at 286.

[5] Smith v. Sheely, *supra* note 2, Jones v. Habersham, *supra* note 2.

[6] 139 Ga. 625, 77 S.E. 812 (1913).

[7] See cases *supra* note 2.

[8] Connole v. City, 67 Ill. 568 (1873); Imperial Co. v. Board of Trade, 238 Ill. 100, 87 N.E. 167 (1909); People v. Shedd, 241 Ill. 155, 89 N.E. 332 (1909); Walker v. Taylor, 252 Ill. 424, 96 N. E. 1055 (1911). *Contra*, Hamsher v. Hamsher, 132 Ill. 273, 23 N. E. 1123 (1890).

vires is subject to attack by the heirs of the grantor or third persons other than the state is supported by the leading case of *Matter of McGraw*,[9] where the heirs of the testator were allowed to set aside a bequest where the gift would have exceeded the amount which the corporation could receive and hold under its charter. Other well considered cases support the rule last mentioned.[10]

It has been held that no collateral attack will be allowed on the power of the corporation to be a conduit of title.[11] Thus a bona fide purchaser from the corporation gets valid title.[12] A grantor of property which it was *ultra vires* for the corporation to receive, cannot recover the property or have his conveyance set aside as a cloud on title.[13] Nor could the corporation sue the grantor and recover back the purchase price.[14] Consistently then, the corporation may enforce all the usual incidents of ownership,[15] and on the other hand property held *ultra vires* is not exempt from taxation as the property of the corporation.[16]

The Tennessee authority[17] is almost uniformly in support of the general rule[18] and the principal case. However, the

---

[9] 111 N. Y. 66, 19 N. E. 233 (1888).

[10] Cromie v. Orphans Home, 66 Ky. 365 (1867); Davidson v. Chambers, 56 N. C. 253 (1857); Wood v. Howard, 16 R. I. 98, 17 Atl. 324 (1889); House of Mercy v. Davidson, 90 Tex. 529, 39 S. W. 924 (1897).

[11] Morris v. Hall, 41 Ala. 510 (1868). See extension note, WARREN'S, CASES ON PRIVATE CORPORATIONS (1919) 691.

[12] State v. Benevolent Ass'n., 107 Okla. 228, 232 Pac. 35 (1925).

[13] Morris v. Hall, *supra* note 11.

[14] Baird v. Bank of Wash., 11 S.&R. 411 (Pa. 1824).

[15] Reynolds v. Bank, 112 U. S. 405 (1884).

[16] Evangelical Society v. Boston, 204 Mass. 28, 90 N.E. 572 (1910).

[17] Barrow v. Nashville & Charlotte Turnpike, 28 Tenn. 306 (1848); Memphis Lumber Co. v. Security Co., 143 Tenn. 136, 226 S. W. 182 (1920).

[18] *Supra* note 2.

case of *Heiskell v. Chickasaw Lodge*[19] made a distinction not mentioned in other cases, the court there saying that the conveyance is not void if the rights of the corporation are already vested in possession, and thus that the state alone may object; but if the rights have not vested in possession the heirs of the grantor may raise the question as was done in the case of *McGraw's Estate, supra.* But in the later case of *Cheatham v. Nashville Trust Co.*,[20] the Tennessee Court of Chancery Appeals refused to follow the Heiskell case *supra,* saying that the decision in the McGraw case upon which the court relied in the Heiskell case was based on the New York Statute of Wills which expressly declared such devises to be void. To the writer the distinction which was made in the case of *Heiskell v. Chickasaw Lodge supra,* seems without a logical foundation; for it is submitted that the capacity of a person or corporation to receive and hold title should not in any way depend upon the fact of possession or the lack of it.

R. R. R.

CRIMINAL LAW—IMMUNITY FROM INDICTMENT

Defendant was indicted for the manufacture of whiskey and the possession of a still. His plea in abatement, the substance of which was that at some previous time of the Criminal Court he was subpœnæd to appear before the grand jury, was duly sworn, and asked numerous questions concerning the offense "about which he is herein indicted," was upon appeal by the State sustained. *Held,* by the Supreme Court of Tennessee, that a witness forced to testify before a grand jury respecting an offense cannot be indicted for that offense whether or not his testimony before the grand jury was such as might

---

[19] 87 Tenn. 685, 11 S. W. 825 (1889).

[20] Affirmed orally by the Supreme Court of Tennessee, March 9, 1900, 57 S. W. 202 (1900).

form the basis of prosecution against him,[1] the ruling being based on a Tennesee statute providing that "no witness shall be indicted for any offense in relation to which he has testified before a grand jury."[2]

The Fifth Amendment to the Federal Constitution provides that no person shall be compelled in any criminal case to be a witness against himself.[3] As can be seen, the language of this Amendment limits the privilege to criminal cases only;[4] but the object of the Amendment is to insure that "a person shall not be compelled, when acting as a witness in any investigation, to give testimony which may tend to show that he has committed a crime. Therefore, it is entirely consistent with the Constitutional provision, that the privilege of not being a witness against himself is to be exercised in a proceeding before the grand jury."[5]

This Amendment to the Federal Constitution furnishes immunity to a person from incriminating himself in a Federal Court, but such immunity is not secured in the Courts of the various state jurisdictions by any part of the Federal Constitution.[6] A provision similar to this Amendment to the Federal Constitution is found in the constitution of every state except two, New Jersey and Iowa.[7]

It is well settled that a witness may waive this privilege

---

[1] State v. Stone, —Tenn.—, 29 S.W. (2d) 250 (1930).

[2] Tenn. Ann. Code (Shannon, 1917) §7048.

[3] Constitution of U. S. Amendment 5.

[4] Counselman v. Hitchcock, 142 U.S. 547 (1891); U. S. v. Goldman, 28 F. (2d) 424 (D. Conn. 1928); See Fennel v. Wilmot, 217 N.Y. Supp. 477 (1926).

[5] Counselman v. Hitchcock, *supra* note 4 at 547, 563. See Dunagan v. State, 102 Tex. Cr. App. 404, 278 S.W. 432 (1925).

[6] Twining v. N. J., 211 U.S. 78 (1908).

[7] See Twining v. N. J., *supra* note 6 at 92. See Constitution of Tenn., Art. 1, §10; Constitution of California, Art. 1, §13; Constitution of New York, Art. 1, §6.

of refusing to answer as to incriminating matters;[8] and the incriminating nature of the evidence, if it is given by the witness voluntarily, does not prohibit its use against him.[9] It is generally held that a witness waives this privilege when he testifies without objection on his part;[10] furthermore, if he voluntarily takes the stand in his own behalf, he impliedly waives his immunity and may be examined at length as to all matters material to the case.[11]

Usually, the constitutional exemption of a witness from self-incrimination does not excuse him from answering, where it is provided by statute that his testimony can never be used against him for the offense disclosed.[12]

The statute[13] in the principal case, granting immunity from prosecution for any offense in relation to which the witness has testified before a grand jury, was intended "to obviate the constitutional inhibition against compelling a witness to incriminate himself."[14] The court in the principal case in compelling the witness to testify before the grand jury, where he is given such statutory immunity from subsequent indictment, seems to be in harmony with the majority rule.[15] Furthermore, the court added that if the testimony before the grand jury related to an offense, it is immaterial whether the

---

[8] Ex parte Frendel, 17 Ala. App. 563, 85 So. 878 (1920); State v. Luquire, 191 N.C. 479, 132 S.E. 162 (1926); State v. Smith, —S. D.—, 228 N.W. 240 (1929).

[9] Raffel v. U. S., 271 U.S. 494 (1926); Pandolfo v. Biddle, 8 F. (2d) 142 (C.C.A. 8th 1925); Gentry v. Commonwealth, 215 Ky. 728, 286 S.W. 1040 (1926); State v. Luquire, *supra* note 8.

[10] State v. Grosmilkle, 189 Wis. 17, 206 N.W. 895 (1926).

[11] State v. Heavener, 146 S.C. 138, 143 S.E. 674 (1928).

[12] U.S. v. Ernest, 280 Fed. 515 (D. Mont. 1922); Lockett v. State, 145 Ark. 415, 224 S.W. 952 (1920); People v. Schwartz, 78 Cal. App. 561, 248 Pac. 990 (1926).

[13] See *suprta* note 2.

[14] Hirsch v. State, 67 Tenn. 89, 91 (1874).

[15] See cases *supra* note 12.

testimony was such as could be the basis of prosecuiton against him.[16] The case seems sound and is in line with previous Tennessee decisions.[17]

H.M.H.

CRIMINAL LAW—IRRESISTIBLE IMPULSE AS A DEFENSE TO CRIMINAL PROSECUTION

The Supreme Court of Tennessee has recently held that if the defendant killed another under irresistible impulse, resulting from an insane delusion concerning his wife's supposed illicit relations with the deceased, at a time when admittedly the faculty of ascertaining the wrongful nature of his act exsisted, he could be convicted of manslaughter but not of murder in the second degree.

Many and varied tests have been laid down from time to time to determine the mental capacity necessary to render a person criminally responsible for his acts but the one generally used at present is the so-called "right and wrong' test established in the famous *McNaghten's Case*.[2] This case and those adhering to its rule declare in effect that though a person be suffering from insanity, yet if at the time he committed the alleged crime, he could understand the nature of the act charged and could distinguish right from wrong as to such act, he is responsible therefor.[3] Though this may be taken as an

---

16 State v. Stone, *supra* note 1, 250.

17 State v. Hatfield, 40 Tenn. 231 (1860); Hirsch v. State, 67 Tenn. 89 (1874); Wireman v. State, 146 Tenn. 676, 244 S.W. 488 (1922); State v. Hensley, 159 Tenn. 689, 21 S.W. (2d) 631 (1929).

1 Davis v. State, —Tenn.—, 28 S.W. (2d) 992 (1930).

2 McNaghten's Case, 1 C. & K. 130, 8 Eng. Reprint 718 (1843); Kefauver, *Insanity as a Defence in Criminal Proceedings* (1929) 8 Tenn. L. Rev. 26.

3 Dove v. State, 3 Heisk. (50 Tenn.) 348 (1872); Johnson v. State, 100 Tenn. 254, 450 S.W. 436 (1898); Bond v. State, 129 Tenn. 75, 165 S.W. 229 (1914); Watson v. State, 133 Tenn. 198, 180 S.W. 168 (1915); McElroy v. State, 146 Tenn. 442, 242 S.W. 883

authoritative statement of the present law it has been much criticised and even rejected in some American jurisdictions.[4]

One form of insanity is irresistible impulse. Clark by way of definition says that "properly speaking, a person acts under an insane irresistible impulse when, from disease of the mind, he is incapable of restraining himself though he may know that he is doing wrong."[5] The weight of authority is to the effect that the existence of an uncontrollable insane impulse to commit a crime does not modify the criminal responsibility for the act if there is nevertheless the capacity to distinguish right from wrong as to the act.[6] Other jurisdictions, however, hold that though there may have been capacity to perceive the nature of his act yet if defendant's free will

---

(1922); Perkins v. U.S., 142 C.C.A. 638, 228 Fed. 408 (C.C.A. 4th 1915); McNaron v. State, 20 Ala. App. 529, 104 S. 339 (1925); Bell v. State, 120 Ark. 530, 180 S.W. 186 (1915); People v. Sloper, 198 Cal. 238, 244 Pac. 362 (1922); Hinson v. State, 152 Ga. 243, 109 S.E. 661 (1921); Southers v. Com., 209 Ky. 70, 272 S.W. 26 (1925); Com. v. Rogers, 7 Metc. (Mass.) 500, 41 Am. Dec. 458 (1844); Com. v. Stewart, 255 Mass. 9, 15 N.E. 74, 44 A.L.R. 579 (1926); State v. Rose, 271 Mo. 17, 195 S.W. 1013 (1917); State v. James, 96 N.J.L. 132, 114 Atl. 553, 16 A.L.R. 1141 (1921); State v. Close, —N.J.—, 148 Atl. 764 (1930); People v. Schmidt, 216 N.Y. 324, 110 N.E. 945, L.R.A. 1916 D, 519 (1915); Watson v. State, —Okla.—, 287 Pac. 816 (1930); Com. v. Hallowell, 223 Pa. 494, 72 Atl. 845 (1909); State v. Bethune, 88 S. C. 401, 71 S.E. 29 (1911); State v. Evans, 94 W. Va. 47 117 S. E. 885 (1923).

[4] Parsons v. State, 81 Ala. 577, 2 So. 854 (1887); State v. Pike, 49 N.H. 399 (1871); State v. Jones, 50 N.H. 369 (1871).

[5] CLARK, CRIMINAL LAW (3 ed. 1915) 70.

[6] Johnson v. State, *supra* note 3; Wilcox v. State, 94 Tenn. 106, 28 S.W. 312 (1894); People v. Morrisawa, 180 Cal. 148, 179 Pac. 188 (1919); People v. Sloper, *supra* note 3; Davis v. State, 44 Fla. 32, 32 So. 822 (1902); Collins v. State, 88 Fla. 578, 102 So. 880 (1925); State v. White, 112 Kan. 83, 209 Pac. 660 (1922); State v. Knight, 9 5Me. 467, 50 Atl. 276, 55 L.R.A. 373 (1901); Spencer v. State, 69 Md. 28, 13 Atl. 809 (1888); Com. v. Rogers, *supra* note 3; State v. Scott, 41 Minn. 365, 43 N.W. 62 (1889); Cunningham v. State, 56 Miss. 269 (1879); State v. Riddle, 245 Mo. 452, 150 S.W. 1044 (1912); State v. Carrigan, 94 N.J.L. 566, 111 Atl. 927 (1920); Flanagan v. People, 52 N.Y. 467 (1873); Cannon v. State, 41 Tex. Cr. 489, 56 S.W. 351 (1900); Oborn v. State, 143 Wis. 249, 126 N.W. 737, 31 L.R.A. (N.S.) 966 (1910).

was destroyed he is not to be charged with responsibility for the offense.[7] The majority rule is even declared by statute in some few jurisdictions.[8]

Tennessee in a number of earlier decisions has quite definitely followed the rule of *McNaghten's Case.*[9] As regards the effect of irresistibe impulse, the court says in the principal case, "while the court fully appreciates the force of the reasoning of the courts accepting the doctrine of irresistible impulse and the logic of the position from the standpoint of the psychiatrist, ... there are many grave objections to the doctrine in its practical application. The majority of the court think it wise to adhere to the right and wrong test."[10] Thus it seems that the court refuses to adopt the defense of irresistible impulse as a modification of the "right and wrong" test except to the extent that it may reduce the crime charged from that of murder in the second degree to that of manslaughter. The holding seems sound and the case definitely states the Tennessee law on the much discussed subject of irresistible impulse, at least as a defense to a murder charge.

J.G.F.

---

[7] Parsons v. State, *supra* note 4; Green v. State, 64 Ark. 523, 43 S.W. 973 (1898); Ryan v. People, 60 Colo. 425, 153 Pac. 756 (1916); State v. Johnson, 40 Conn. 136 (1873); Allams v. State, 123 Ga. 500, 51 S.E. 506 (1905); Meyer v. People, 156 Ill. 126, 40 N.E. 490 (1895); People v. Lowhone, 292 Ill. 32, 126 N.E. 620 (1920); Plake v. State, 121 Ind. 433, 23 N.E. 273 (1890); Banks v. Com., 145 Ky. 800, 141 S.W. 380 (1911); Hall v. Com., 155 Ky. 541, 159 S.W. 1155 (1913); Com. v. Cooper, 219 Mass. 1, 106 N.E. 545 (1914); Blackburn v. State, 23 Ohio 146 (1872); Com. v. De Marzo, 223 Pa. 573, 72 Atl. 893 (1909); Com. v. Calhoun, 238 Pa. 474, 86 Atl. 472 (1913).

[8] State v. Scott, 41 Minn. 365, 43 N.W. 62 (1889); People v. Taylor, 138 N.Y. 398, 34 N.E. 275 (1893); People v. Silverman, 181 N.Y. 235, 73 N.E. 980 (1905); State v. Hassing, 60 Ore. 81, 118 Pac. 195 (1911).

[9] See Tenn. cases cited *supra* note 3.

[10] Davis v. State, *supra* note 1 at 996.

FRAUDULENT CONVEYANCES—INADEQUACY OF CONSIDERATION

X owned property worth $10,000. On August 30, 1921, he conveyed it to defendant, his daughter, in consideration of the sum of $4,000, in Liberty bonds, which had been paid over in June, 1921. On August 31, 1921, X gave his note to plaintiff for $20,000. *Held*, that plaintiff was entitled to recover $5,000 from the defendant on the basis of inadequate consideration in fraud of creditors.[1]

The Statue of 13 Elizabeth provides that a fraudulent conveyance made for the purpose of hindering, delaying and defrauding creditors is void.[2] The Statute does not, however, define a *fraudulent conveyance*, and the law furnishes no test whereby it may be determined whether a conveyance is fraudulent other than an adjudication of what acts are "badges of fraud."[3] A badge of fraud is a fact calculated to throw suspicion upon a transaction, and calling for an explanation.[4]

The court seems to have decided the present case on the basis of constructive fraud, as there was no evidence to show that the defendant was guilty of actual fraud. The courts are prone to work out constructive fraud (1) where the nature of the transaction and relation of the parties are such that a reasonably prudent man would have been put on such inquiry as would lead to a knowledge of fraud;[5] or (2) where the consideration is so grossly inadequate as to shock the conscience of the court.[6] The facts of the principal case are not

---

[1] Horvath v. Tacey, —Mich.—, 231 N.W. 575 (1930).

[2] Statute 13 Elizabeth, c. 5 (1570).

[3] Clarke v. Philomath College, 99 Ore. 366, 193 Pac. 470 (1920).

[4] BUMP, FRAUDULENT CONVEYANCES (1872) 76.

[5] Swanson Automobile Co. v. Stone, 187 Iowa 309, 174 N.W. 247 (1919).

[6] Foster v. Pugh, 20 Miss. 416 (1849); Briant v. Jackson, 99 Mo. 585, 13 S.W. 91 (1889); Jaeger v. Kelley, 52 N.Y. 274 (1873); Goddard v. Weil, 165 Pa. 419, 30 Atl. 1000 (1895); Foggin v. Furbee, 89

such as would lead one to infer that the defendant was put on such notice that he should, as a reasonably prudent man, have inquired into the fraudulent acts of the grantor, X; and thus the case is left to rest on the "gross inadequacy" rule. Grossly inadequate consideration has been defined as a consideration so far short of the real value of property as to shock a correct mind.[7]

The courts vary in their interpretation as to what constitutes great enough disparity between the true value of the property and the price paid to render the transaction *mala fide*.[8] Where X conveyed one-fourth interest in property valued at $40,000 to Y in consideration of $1,020, the price was held to be grossly inadequate and the conveyance was rendered fruadulent.[9] Where A conveyed to B in consideration of $500, property valued at $1,200, the price was held not so inadequate as to render the conveyance invalid and fraudulent.[10] Where C conveyed to D lands valued at $12,000 in consideration of $10,000, the conveyance was held valid. Where G in consideration of $200 conveyed to P property worth $800, it was held that in the absence of other fraud the consideration was not so inadequate as to render the conveyance fraudulent.[12] Hence it necessarily follows that what some courts would hold to be gross inadequacy of consideration, sufficient to shock a "correct mind," others might not so hold.

G. W. W.

W. Va. 170, 109 S.E. 754 (1921); Fernhaber v. Stein 182 Wis. 61 195 N.W. 906 (1923).

[7] McGee v. Wells, 57 S.C. 280, 35 S.E. 529 (1900); MOORE, FRAUDULENT CONVEYANCES, § .... (1908) 234.

[8] McGee v. Wells, *supra* note 7; Flook v. Armentrout's Adm's, 100 Va. 638, 42 S.E. 686 (1902).

[9] Maloy v. Berkin, 11 Mont. 138, 27 Pac. 442 (1891).

[10] Hunt v. Hicks, 94 Ga. 624, 21 S.E. 208 (1894).

[11] Linn v. Brown, 182 Ky. 166, 206 S.W. 287 (1918).

[12] Feigley v. Feigley, 7 Md. 537 (1855).

PARENT AND CHILD—PARENT'S LIABILITY FOR TORT TO CHILD

The plaintiff, during minority, was injured while employed by his father, the defendant. At the time of the injury the plaintiff lived with his father, and received wages for his services, minus an amount for board. The father was protected by employer's liability insurance, and the plaintiff sues for injuries received in the employment of the defendant. *Held*, that the child would not be denied the right to sue where the father was protected by insurance.[1]

All decisions prior to the principal case deny the minor child the right to sue his parent for a tort.[2] The child is under a disability to sue, because it is for the best interests of society that the family peace and unity be preserved.[3] The parent is given an absolute immunity from suit by the child for personal injuries of all kinds, for the authorities have been loath to draw the line of demarcation between the kind of torts inflicted.[4] It is well settled, however, a parent may be held criminally liable for excessive force in the exercise of the

---

[1] Dunlap v. Dunlap, —N.H.—, 150 Atl. 905 (1930).

[2] Mesite v. Kirchenstein, 109 Conn. 77, 145 Atl. 753 (1929); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Elias v. Collins, 237 Mich. 175, 211 N.W. 88 (1926); Taubert v. Taubert, 103 Minn. 247, 114 N.W. 763 (1908); Miller v. Pelzer, 159 Minn. 375, 199 N.W. 97 (1924); Hewlitt v. George, 68 Miss. 703, 9 So. 885 (1891); Damiano v. Damiano, —N.J.—, 153 Atl. 3 (1928); Sorrentino v. Sorrentino, 248 N.Y. 626, 162 N.E. 551 (1928); Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 92 Wis. 260, 212 N.W. 787 (1927). The courts grant the minor the right to sue its parent for rights arising from property or contrtact, Preston v. Preston, 102 Conn. 96, 128 Atl. 292 (1925). Also if the defendant is one standing in *loco parentis* the minor child is allowed to sue for a tort. Treschman v. Treschman, 28 Ind. App. 206, 61 N.E. 961 (1901).

[3] Hewlitt v. George, *supra* note 2, at 711.

[4] Roller v. Roller, *supra* note 2, at 244-245.

right to control and correct the child.[5]

The court in the principal case grants the parent only a qualified privilege from suit by the child for a tort.[6] In the principal case the parent is given a wide scope in the use of this privilege in the exercise of parental control of the child, because the court realizes the danger of destroying the harmonious family relations if the child is allowed to sue for excessive punishment due to mistaken judgment. However, the court holds that the parent's privilege is no defense to a suit by the child if the parent is protected by insurance against an injury not arising out of the parental control. It is true there is no parental authority involved, but it is submitted the court should not impose a liability on an insured parent and exempt from liability an uninsured parent. Such illogical reasoning can be supported only on the ground that to hold the uninsured parent liable would tend to disrupt the tranquility of the home, because the family financial status would be impaired. Also by *dictum* the court holds that the privilege of the parent from suit is no answer to an action by the child for a malicious injury. Again, it is correct to hold that the malicious acts upon the child are not within the scope of the parental authority; but in such a case, the family exchequer is nevertheless open to the payment of damages if there is no protection by insurance.

Tennessee is in accord with the authorities denying the child a right to sue its parent for a tort.[7] The Supreme Court of Tennessee makes no distinction between the torts inflicted.[8] It is submitted that since society has an interest in the preservation of the family unit, distinction between wil-

---

[5] Johnson v. State, 21 Tenn. 283 (1842); Hinkle v. State, 127 Ind. 490, 26 N.E. 777 (1890).

[6] Dunlap v. Dunlap, *supra* note 1, at 915.

[7] McKevey v. McKevey, 111 Tenn. 388, 77 S.W. 664 (1903).

[8] See McCurdy, *Torts Between Persons in Domestic Relations*, (1930) 43 Harv. L. Rev. 1030, 1056-1086, for a learned discussion of the problem of suits between parent and child.

ful and negligent injuries is practicable. The state, through its criminal laws, will afford the child adequate protection from the parent's wilful or malicious abuse.

C.F.B.

SEARCHES AND SEIZURES: EFFECT ON HUSBAND OF WIFE'S CONSENT TO AN UNREASONABLE SEARCH OF THEIR HOME IN HUSBAND'S ABSENCE

In a recent Tennessee case the defendant was convicted in the trial court of possessing a still. The sole error assigned on appeal was the admission of the testimony of three officers, who searched the defendant's premises without a warrant. The officers testified that they searched the premises when the defendant's wife and her mother were the only persons at home, the defendant being temporarily absent. The officers stated they told defendant's wife that defendant was suspected of making and selling whiskey and that they would like to inspect the premises, but that they had no search warrant, whereupon defendant's wife invited the officers in and the still was found. The appellate court held the evidence was inadmissible and reversed the conviction. The reversal was based on the holding that the implied coercion was responsible for the wife's consent to the search. The Court stated that "the force of a demand by one plainly in a position to enforce it is not weakened by being given the form of an invitation," and that "duress is not less controlling because accomplished by polite means." Since it was not shown affirmatively by the record that defendant's wife acted freely and voluntarily, coercion was implied from the circumstances of the search.[1]

The essential factor in this case is whether the search of defendant's house was an unreasonable search, and thus a violation of Article 1, Section 7 of the Constitution of the State of Tennessee. If the search was made with the consent of the owner, either directly or indirectly, it was a reasonable

---

[1] Byrd v. State, —Tenn.—, 30 S.W. (2d) 273 (1930).

search, since consent waives the necessity of a search warrant.[2] Otherwise, the search was unreasonable, since the officers were not acting under the authority of such a warrant.[3]

The opinion in the principal case expressly refrains from deciding the question of whether a wife, in her husband's absence, can consent to a search of their home, this question being reserved until it is directly presented. However, there are several rulings on this point in other jurisdictions. One holding is that a wife's consent to a search cannot in any way affect her husband's constitutional privilege of freedom from an authorized search.[4] A second group of decisions state that the wife has no power to make such a waiver implied from her marital status,[5] thus intimating that the waiver is binding if made by a wife with authority otherwise acquired. On the other hand, it has been held that a wife, by virtue of her marital status alone, has authority to waive the neccessity of a warrant in a search of her husband's premises.[6]

The principal case turned on whether the wife's waiver was freely and voluntarily given. In deciding this point, the general rules as to a waiver of the constitutional right of freedom from an unreasonable search are applicable. In any case, the waiver must be clear and positive.[7] If the consent of the

---

[2] Dillon v. United States, 279 Fed. 639 (C.C.A. 2nd, 1921); Maldonado v. United States, 284 Fed. 853 (C.C.A. 5th, 1922); Windsor v. United States, 286 Fed. 51 (C.C.A. 6th, 1923); United States v. Williams, 295 Fed. 219 (D. Mont. 1924); Paramore v. State, 161 Ga. 166, 129 S. E. 772 (1925); Shade v. State, 196 Ind. 665, 149 N.E. 348 (1925); Baskin v. State, 92 So. 556 (Miss. 1922).

[3] Hughes v. State, 145 Tenn. 544, 238 S.W. 588, 20 A.L.R. 639 (1922); Clark v. State, 159 Tenn. 215, 17 S.W. (2d) 916 (1929).

[4] Cofer v. United States, 37 F. (2d) 677 (C.C.A. 5th, 1930); Potowick v. Commonwealth, 198 Ky. 843, 250 S.W. 102 (1923); Veal v. Commonwealth, 199 Ky. 634, 251 S.W. 648 (1923).

[5] United States v. Rykowski, 267 Fed. 866 (S. D. Ohio 1920); Hümes v. Taber, 1 R.I. 464 (1850).

[6] Grim v. Robison, 31 Neb. 540, 48 N.W. 388 (1891).

[7] United States v. Lydecker, 275 Fed. 976 (W.D. N.Y. 1921); Tobin v. State, 36 Wyo. 368, 255 Pac. 788 (1927).

owner is given due to the influence of a faulty search warrant, it is held that the waiver is of no effect.[8] One case goes so far as to hold that a mere showing of an officer's badge and the statement that the officer is there to make a search constitutes such coercion as to invalidate the owner's consent to the search.[9]

These general rules as to the voluntary character of the waiver are construed very strictly when the consent to a search is given by the wife of the defendant. Where the wife admits officers after they have told her they have come to search the premises, coercion in obtaining the wife's consent is usually implied.[10] It has been held, in another jurisdiction, that consent of the wife must be voluntary with the desire to invite a search, thus preventing a waiver by mere acquiesence in or non-resistance to officers without a search warrant.[11] One case bases its decision on the theory that the mere presence of officers is such coercion as to make the wife's consent ineffectual.[12]

In view of these decisions which show a tendency to imply coercion in obtaining the wife's consent wherever possible, the decision in the principal case is sound, although it carries the theory of implied coercion to its extreme limit. The principal case establishes the Tennessee rule that coercion

---

[8] Salata v. United States, 286 Fed. 125 (C.C.A. 6th, 1923); Cofer v. United States, 37 F. (2d) 677 (C.C.A. 5th, 1930); United States v. Olmstead, 7 F. (2d) 760 (W.D. Wash. 1925); Meno v. State, 197 Ind. 16, 164 N.E. 93 (1925); Comer v. State, —Ind.—, 167 N.E. 545 (1929); Carignano v. State, 238 Pac. 507 (Okl. Cr. App. 1925) (consent by wife); Rose v. State, 254 Pac. 509 (Okl. Cr. App. 1927) (consent by wife).

[9] United States v. Slusser, 270 Fed. (S.D. Ohio 1921).

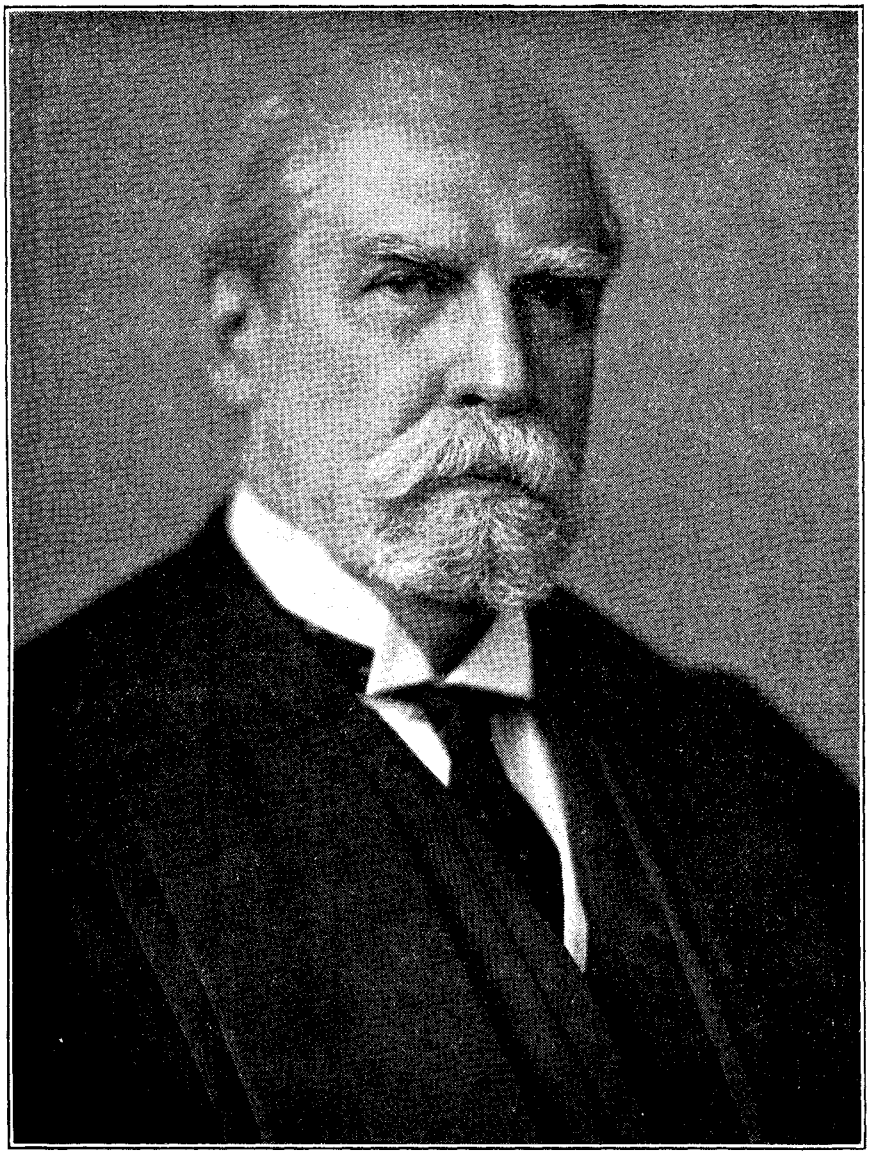
[10] Amos v. United States, 255 U.S. 298, 41 Sup. Ct. 266, 65 L. ed. 654 (1921); Duncan v. Commonwealth, 198 Ky. 841, 250 S.W. 101 (1923); Maupin v. State, 260 Pac. 92 (Okl. Cr. App. 1927).

[11] State v. Bonolo, —Wyo.—, 270 Pac. 1065 (1928).

[12] Meredith v. Commonwealth, 215 Ky. 705, 286 S.W. 1043 (1926).

will be implied whenever there are any circumstances indicating that the wife's consent to the search was influenced by anything other than her own free will.

W.W.K.



HON. CHARLES EVANS HUGHES
Chief Justice of the United States Supreme Court

Tennessee Law Review

Volume 9 FEBRUARY, 1931 Number 2

REGARDNG REQUIREMENTS FOR ADMISSION TO THE BAR

HERBERT NACE

"New occasions teach new duties,
Time makes ancient good uncouth."

This truth finds fulfillment in the progress and necessities of the practice of law. We are today frequently advised by national leaders of the legal profession that those requirements for admission to the Bar, which were in force when most of them came into the practice, are now inadequate, in view of the changed demands upon lawyers.

Years ago Abraham Lincoln studied Blackstone at odd moments, when not engaged in his necessary duties incident to earning a living. Who will deny that Lincoln became one of the best lawyers any community ever had? Most men then, preparing for the law, studied in the officies of older practitioners, but now, as is stated in Circular No. 22 on Legal Education, distributed by the United States Department of the Interior, "as preparation for admission to the Bar, 'reading Law' in a law office, has almost entirely disappeared." Today there seems to be no question among most of the outstanding lawyers but that it is next to impossible for one to adequately prepare himself for the practice, by nothing more than office study. The attention in this connection is at present being centered upon the amount of academic and law school training which should be required of those who apply for the right to enter the practice.

The changes which have occured in the field of law are much like the transitions which have marked other lines of act-

ivity, as illustrated by an incident of not so many years ago, while the writer was in law school. We had come to a subject in the Common Law Pleadings course in which there had been a good many changes. After listening to several answers, our teacher, as though wrapt in thoughts of his boyhood days, let his black spectacle cord wrap itself around a second finger, and said: "Gentlemen, this part of our Common Law Pleadings course, with its frequent changes and transitions reminds me of the days when I was a boy, as compared with the present. The other evening my children came into the house about the time when I got home from the office and said that they were going to drive down to the farm, forty miles from here. By the time I had taken a walk and a nap, they were home again, ready for dinner. Why when I was a boy living down there on the farm to which they went that afternoon, if some of our folks were going on a thirty mile trip they'd first plan for it a week ahead of time and then when finally the eventful day had arrived, they would arise in the morning with the coming up of the sun, that there might be nothing to prevent an early start with our two best horses hitched to the family buggy. Perhaps, though, I should explain for the benefit of those of you who have been reared in the city among automobiles and Fords; a buggy was a piece of furniture supported by two axles, it rolled along on four wheels and was drawn by a horse or mule which was attached thereto by harness."

The changes in the requirements of the legal profession, in recent years, have scarcely been less marked than the changes in transportation, yet Tennessee finds herself not far from the bottom of the list when a comparison is made of the regulations by the various states, for admission to the practice of law. The Volunteer State is taking her place as a leader in matters regarding industries, culture, highways and educational institutions, as well as with respect to other important lines of endeavor, yet there are thirty states which unquestionably rank ahead of us in their prerequisites for admission to the Bar, while still eight other jurisdictions may also be said to have substan-

tially higher standards in this respect than are in force in our own commonwealth. Should we not give an added amount of attention to this consideration, especially in view of the traditions to be upheld, the outstanding Bar of which Tennessee is now the possessor, and the leadership which the Volunteer State is taking in almost all others respects. Let us "be not the last to cast the old aside."

TENNESSEE HAS ADVANTAGEOUS FORM OF PROCEDURE

At least two factors contribute to increase the strength of the Bar in a state and to give it particular recognition: (1) a uniformly high standard of training and (2) a system of procedure which is conducive to broad development. In so far as relates to the training required of her lawyers, as has been set out, Tennessee's regulations are lower than those of thirty-eight states. However as to our procedure, Mr. Justice James C. McReynolds of The Supreme Court remarked to Judge Thomas H. Malone of Nashville, several years ago, that one reason Tennessee has produced so many outstanding lawyers and judges is because of the maintenance of separate law and equity courts, and the system of pleading therein used, as contrasted with the Code system obtaining in many states. Mr. Justice McReynolds' observation along this line is not by any means novel for it was recognized more than one hundred years ago that in certain jurisdictions it is next to impossible for a practitioner to become thoroughly grounded in the fundamentals of the law. On September 27, 1810, after Mr. Justice Cushing had died and President Jefferson had decided to nominate Levi Lincoln for the vacancy, Jefferson wrote to Gallatin, regarding the prospective appointment:

> "Can any other bring equal qualifications to those of (Levi) Lincoln? I know he is not deemed a profound common lawyer, but was there ever a profound common lawyer known in one of the Eastern States? There never was, nor never can be, one from these States, the basis of their law is neither common nor civil; it is an original, if any

> compound can be so called. Its foundation seems to have been laid in the spirit and principles of Jewish law, incorporated with some words and phrases of the common law, and an abundance of notions of their own. This makes an amalgam *sui generis;* and it is well known that a man first and thoroughly initiated into the principles of one system of law can never become pure and sound in any other. Lord Mansfield was a splendid proof of this. Therefore I say there never was, nor never can be a profound common lawyer from these States * * * ."

Tennessee has provided for her Bar the distinct advantage of a form of procedure which enables her lawyers to become thoroughly grounded in fundamentals and to develop broadly. This is likely responsible, in part, for the fact that only from New York, Pennsylvania, Ohio and Massachusetts have more justices been chosen for the Supreme Court, than from Tennessee. New York has had the largest number of appointments, that is, nine; Massachusetts and Ohio come next with seven; then Pennsylvania with six; Virginia with five and Tennessee with the same number in the persons of Justices John Catron, Howell Edmunds Jackson, Horace Harmon Lurton, James Clark McReynolds and Edward Terry Sanford. Twenty-two states have never been represented upon the Court. Can Tennessee expect to continue to exemplify that which recognition of this sort indicates if through the coming years she has lower requirements for admission to the Bar, than thirty-eight other states in the Nation?

Exceptional Opportunities Afforded Lawyers

While it is true that, regardless of admission requisites, every jurisdiction will have some particularly able practitioners as well as others who are comparatively weak, still adequate minimum requirements regarding training and character, as to the legal profession as a whole, should be in force in every state, for lawyers have it within their power to perform a higher service than opportunity affords any who engage in other secular callings. Conversely, members of the legal profession are en-

abled, if they choose, to perpetrate shrewder frauds than can be accomplished by those without legal training, and the reputation of one member of the Bar affects the regard accorded every other member; much more so than is true in most other callings.

It is an axiom of many phases of life that those positions which make possible the richest benefactions likewise open the door for most consummate chicanery. Exceptional situations of this kind like keenest natural intellects, when utilized in one direction, may enable the perpetration of grossest fraud while if exercised beneficially may accomplish the greatest good. Like temptations, such opportunities do not destroy but "merely test the strength of individuals, and are stumbling-blocks or stepping-stones, that lead to infamy or fame, acording to the use made of them."

We see illustrations of the truth just mentioned as we consider the position of a high public official, an individual of wealth, a woman, or a military genius. An official high in governmental station may give unselfishly of his energy, time and ability so that not only those now living but posterity as well, may reap the harvest of his service, or he may subserve the ends of government to individual greed, even to the extent of disgracing himself and besmirching the record of his commonwealth or nation. A person of wealth may continually be a community's endowment, giving of his time and as expedient, of his means, for the advancement of worth-while endeavors. On the other hand wealth may enable one to throttle public opinion by influence upon the press, to split a church through envious littleness, or to influence a public servant to effect selfish ends as against the common welfare. A woman may be "the noblest work of the Creator" or she may be the most insidious agent of vicious purpose.

Benedict Arnold and Ethan Allen both served in the Revolutionary Army. Each was offered British gold to betray his cause. Allen resisted and his memory lives in the affections of those who know his courage. Arnold yielded and though he had crowned himself with glory by his bravery at Saratoga, and

until the time of his abasement was the hero of the American Revolution, second only to General Washington; from the day when Arnold betrayed his country he was ever shunned and a few years later died "in a rude garret near the loneliest outskirts of the city of London," with no one but a strange minister near; a traitor, despised. The identical abilities and opportunities which made possible his never-to-be-forgotten glory at Saratoga, when subjected to temptation, brought Benedict Arnold to ignominy. So it is with the career of a lawyer, as was exemplified by the life of Burr.

Aaron Burr, the son of Reverend Aaron Burr, the first president of Princeton College, grandson of Jonathan Edwards the second president of Princeton College, than whom no man on this continent had better blood in his veins, an honor graduate from Princeton at the age of sixteen, the youngest lieutenant-colonel in the Revolutionary Army at one time, a natural leader who became the idol of his soldiers, Alexander Hamilton's competitor for the best legal practice in New York City, United States Senator, at the age of thirty-five, one of the most popular men in the nation and perhaps the leader of the American Bar, the vice-president whose dignity, ability and impartiality in the impeachment trial of Justice Chase was unanimously commended by the Senate at the close of his term; but who, two years after he retired from the vice-presidency, was tried in Richmond for treason and though he escaped conviction because no overt act was proved, thereafter, even under an assumed name, he was banished from England, banished from France, then wandered from country to country but always was faced by those who knew of his shame. Though Burr had escaped conviction upon a technicality he had deceived the British Minister in his attempt to secure money; he had deceived Hamilton regarding the famous water bill; and he had taken advantage of any situation throughout life. Though Burr returned to the United States after wandering from country to country, abroad, and again built up an ample law practice, he died a broken and unenvied man. The confidence which had

been placed in him had been betrayed.

So it has ever been and so it will ever be that those who debauch the advantages which nature and fortune have given them, must pay the penalty. Still individuals are not always responsible for having used advantages for selfish ends. Environment plays its part. We owe it to every individual or group to see to it that temptation is reduced to the minimum and that idealism is emulated to the maximum. This is particularly true as to young men entering the practice of law.

NATION-WIDE TREND TOWARD HIGHER REQUIREMENTS

Realizing the seriousness of its opportunities and the gravity of its responsibilities, a large number of leading lawyers throughout the Nation are becoming increasingly insistent that admission to the Bar shall be adequately safeguarded and its integrity preserved. When we consider the standing of the individuals who are urging higher requirements for admission to the practice of law, we may well consider long before taking issue with them.

Speaking as the representative of the American Bar Association, about two years ago, President Gurney E. Newlin said:

> "During the early period of our existence there were no requirements in order for a man to practice law. However, with the development of the country, the increase in the value of property, it was learned that special training was required for one to be competent to practice law. With the increase of laws that have been passed, with the growth of business and industry, the complexity of our living and social conditions, the requirements of such special training have constantly increased. It has been said that an incompetent lawyer was worse than no lawyer at all. The American Bar Association has approved certain standards of education which in its opinion are the minimum for a man to receive in order to be entitled to practice. The section on Legal Education and Admission to the Bar has the responsibility of obtaining the adoption of those standards and of certifying and of checking up on those schools that come up to them. A young man, when he determines to adopt the law as a profession, is en-

titled to know to what requirements he must conform, and a client is also entitled to know whether or not the lawyer with whom he is consulting has attained the minimum standing established by the Association. It is the effort of the Association through this section constantly to increase the learning and intellectual ability of the members of the profession."

Mr. Henry Upson Sims, President of the American Bar Association last year, penned the opinion during the summer of 1929:

"But aside from the cooperation of the legislatures in effecting the reduction in the future, of our numbers, there is no help to be gotten toward raising the dignity of the Bar from outside the profession. There are no patents of nobility for the lawyers in America, as there are in England. The Bar must depend then upon itself to meet the peril of the situation. It must arouse the respect of the public by its own efforts at upbuilding. It must aspire to a position of leadership, deserve such a position, and maintain it. And to that end it must maintain the highest respect for itself."

"* * * While other professions are becoming better organized to support their duties and privileges in a developing society, the bar is nearly everywhere losing ground."

"* * * But if the bar will rouse itself from its lethargy, if it will realize that next to government itself it is the greatest factor in society, * * * all these deficiencies will be readily corrected."

President Nicholas Murray Butler, in an annual report to the Trustees of Columbia University, four years ago, said:

"There are signs on every hand that a larger conception of what is meant by the study of the law is making its way in the legal profession as well as among the judges, teachers and scholars of the law. The wide and distressing gap between membership in the bar and a knowledge of the law must be closed. Some acquaintance with the statutes and decisions of any jurisdiction and some familiarity with legal procedure are a sorry substitute for genuine legal knowledge and training."

Former Chief Justice William Howard Taft made the statement about four years ago:

"The law is a learned profession. The study of the law is that of a science and an art, and its association with a university of the classics, the sciences and the arts saves it from a perversion of what should be its real purpose and use. * * * * * It is the higher and purer atmosphere of a university in which young men shall acquire the right to become members of the bar that will keep them constant in the knowledge that the practice of the law is a profession which must exist for the benefit of society, embraces the study of a science and an art. * * * Adequate preparation for the law needs a thorough general education, so that young men may come to it with a substantial foundation."

So important has it appeared to the leaders of the legal profession, that advances should be made in the requirements of those who apply for admission to the practice of law, that immediately prior to the 1929 meeting of the American Bar Association in Memphis, it was recognized that this subject constituted one of the two principal themes for the attention of the Association at that annual meeting. Daily news items announced this fact which was affirmed by President Newlin in his out-going address, in the following words:

"We are brought together mainly for a common desire, first and foremost, to raise the ethical standards of the Bar and qualifications for admission * * *."

Comparison With Trade Union Requirements

A comparison of the qualifications required to those who enter the practice of law, with the standards set for those who wish to become artisans, is impressive. A former president of the American Bar Association, Silas H. Strawn, in an article which appeared in September, 1927, made the following statement:

"The trade unions with headquarters in Chicago promulgate a set of rules governing the time apprentices are required to serve before they can become journeymen in their respective trades. The requirements are:

"Three years of apprenticeship for: Bricklayers, Cement

Finishers, Elevator Constructors, Glaziers, Lathers, Painters, Tile Layers.

"Four years of apprenticeship for: Architectural Iron Workers, Asbestos Workers, Electric Workers, Plasterers, Sheet Metal Workers, Stone Cutters.

"Five years of apprenticeship for: Plumbers, Steam Fitters.

"It has been said that the long time apprenticeship required by the trade unions may be for the purpose of limiting the number of journeymen in the several trades and that any person of average intelligence could learn the trade in a much shorter time than that required by the unions. I would not advocate the unionizing of the bar. I appreciate that we lawyers cannot subject ourselves to the criticism made of the trade unions—that the motive for the long time apprenticeship may be ulterior.

"Obviously, the public is much more interested in the training of a lawyer who is to participate in the administration of justice and who has to do with vital questions respecting the property and liberty of our citizens than it is in the training of a mechanic. Assuming, however, that the time fixed by the trade unions represents their deliberate judgment as being necessary for the preparation of those whose life work is to be *manual*, may I direct your attention to the requirements of the several States of this country respecting the educational qualifications for admission to the bar where the activities are supposed to be chiefly *mental*."

After the foregoing statement Mr. Strawn referred to the requirements for admission to the practice of law in the various states, as of that time. However, in order to set out here the latest available data with reference to the requirements in the several states, for admission to the Bar, I have taken the facts which appear in the 1929 Annual Review of Legal Education as published by Mr. Alfred E. Reed of the Carnegie Foundation for the Advancement of Teaching. The table which Mr. Reed has published shows that the following states have no definite general educational requirements, either before a student commences his period of law study or before taking the final law examination:

Alabama
Arizona
Arkansas
California
Florida
Georgia
Indiana
Nevada
New Hampshire
North Carolina
North Dakota
Utah
Virginia

Texas and Oregon have no requirement for a student commencing the study of law and the statement is made that the requirements of those taking the final examination, as to general education, are indefinite. Missouri requires a common school education, fair knowledge of civil government, literature and history. Massachusetts requires the equivalent of two years evening high school. Nebraska requires the equivalent of three years high school. The following states require high school graduation, or its equivalent, before the applicant shall take the bar examination. District of Columbia, Iowa, Kentucky, Louisiana, Maine, Mississippi, New Mexico, Oklahoma, South Dakota and Vermont.

The following states require a high school education, or its equivalent, before a student shall have commenced the study of law:

Delaware (for others than graduates of a three year law school)

Maryland, New Jersey, Rhode Island, South Carolina, Tennessee, Washington.

The following requirements are made by other states:

Two years of college work or its equivalent, before the applicant commences the period of law study:

Idaho (increased requirement since 1928)
Colorado
Illinois
Connecticut (increased requirement since 1928)
Michigan (increased requirement since March 1, 1930)
Minnesota (after March 1, 1931)
Kansas
Ohio

Wisconsin (for law school students)
Wyoming (for those preparing entirely in a law school)

Pennsylvania requires for admission to the study of law a degree for an approved college or a College Entrance Board examination in prescribed subjects.

New York formerly required one year of pre-legal academic preparation but since October 14, 1929, it has required two years of college work or an examination conducted by a college authorized for this purpose by the State Department of Education.

With reference to the requirements relative to the duration and distribution of the period of law study, either in a law school or in an office, the following states have no regulations:

Arizona	Indiana
Arkansas	Mississippi
Florida	Missouri
Georgia	Nevada

Virginia has no rule except as to applicants aged nineteen to twenty-one at the time of the examination.

Tennessee requires one year of law study either in an office or a law school. Kentucky requires two years of law school and office work, of which at least one year must be in a school. North Carolina, South Carolina and Texas, each requires two years of study in a law school, while California, Connecticut, Delaware, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Mexico, North Dakota, Utah, Washington, (State), West Virginia, Wisconsin and Wyoming have requirements of three years or more of study. Vermont requires four years of study in a law school, or in case of applicants with two years of college training, only three years of law school study. Pennsylvania requires three years of study including at least six months of office work, six hours daily, which may be interpolated into the law school vacations; or four years of law school work if the school instruction occupies less than ten hours each week or is pursued in part time sessions. Rhode Island requires three years of law school work, or in case

of college graduates, two years, including at least six months of office work, which may be interpolated into the law school vacations; but a longer period of study is necessary in a substandard school. New Jersey requires three years of study including at least twelve months of office work which may be interpolated into the law school vacations. Colorado requires three years of school and office work of which at least two years must be in a law school. After July 15, 1932, this State will require four years of law school study if the work is pursued in an out-of-state evening law school. Oklahoma and Michigan are among the states which have raised their pre-requisites during the last year. Since June 22, 1930, Oklahoma has required three years of full-time study in a law school or four years if the work is done in part-time sessions. Since March 1, 1930, Michigan has stipulated four years if in part-time sessions and the law school must require two years of college work in the case of at least ninety-five percent of its entrants.

The statute of New York specifies that for graduates of both a college and a law school, three years of law school study followed by six months of office work, shall suffice. For graduates of a law school only, three years in school followed by either one year of office work or one year of postgraduate study and six months of office work. For others four years of school or office followed by six months of office work.

(The writer is indebted to Mr. Alfred Z. Reed of the Carnegie Foundation for the above data relative to the regulations in the various states at this time.)

One notable feature of the regulations relative to office work for the law student is that there is a growing tendency to require that the student shall register with the State Board before commencing his office work, setting out the circumstances under which he will receive his training and the Attorney who will direct his experience. In states which allow admission to the Bar upon the completion of only a certain period of work in a law office but do not require registration before the student

commences his office work, it seems that the work done is often altogether uncertain and that preceptors have the opportunity to be exceedingly lenient when making certificates to the state authorities, as to the office work of the applicant. Registration with the State Board before office work is commenced and regular reports to that Board as to its progress, are likely to aid materially in eradicating the abuses which are at least possible and perhaps too often practiced in the cases of those who apply for admission to the Bar, upon the basis of work done in a law office.

TENNESSEE HAS WISE, THOUGH PERHAPS INVALID, PROVISION

While the above data puts Tennessee in an unfavorable light, comparatively, were our statute which regulates admission to the Bar, unquestionably valid, this State would have one of the wisest provisions, in this regard, to be found anywhere in the nation, for by Chapter 154, Acts of 1919 it is stipulated:

> "The Supreme Court shall prescribe rules to regulate the admission of persons to practice law and provide for a uniform system of examinations, which shall govern and control admission to practice law, and such Board in the performance of its duties."

However, when in June, 1923, the Supreme Court considered the recommendation of the Bar Association that the requirement regarding law study be increased to two years, the Court doubted whether it had jurisdiction to prescribe such a requirement, because of the Act of 1903. As set out in his report to the Bar Association in 1927 (page 154 et seq), Judge Malone, who sat with the regular members of the Court when the above question came before it, is of the opinion that the Supreme Court likely has the power to raise the requirements, if Chapter 154 of the Acts of 1919 is valid but there is some doubt as to the constitutionality of this statute which gives the Supreme Court the power to prescribe rules for admission to the Bar.

So that in the future, there may be no question as to the validity of this section and that the Supreme Court may be un-

fettered when it considers changes in the requirements, to be expedient, the possible defect in Chapter 154 of the Acts of 1919 has been called to the attention of the present Code Commission by the Chairman of the Committee on Legal Education and Admission to the Bar, of the Bar Association of Tennessee, so that the Code Commission may take appropriate action to put the validity of this enactment beyond question.

It is needless to say that no wiser provision could be in force in the State than that the Supreme Court should make such provisions, rules and regulations as it may deem proper regarding the admission of persons to the practice of law, for aside from other and perhaps more potent considerations, this body is best fitted for such a duty by virtue of its observation of the Bar throughout the State, and its personnel.

Returning to the consideration of the Bar requirements in the United States as a whole, several comparisons are hereinafter set out which indicate needed changes.

Comparison With Requirements In Canada

Of the ten provinces in Canada we find that one requires a college entrance examination before the candidate may enter upon the study of law; that Alberta, Manitoba, New Brunswick, Novo Scotia, Ontario and Saskatchewan require two years of college work before the candidate commences the study of law; that Newfoundland requires one year of work in a college prior to registration for law study, while Quebec and British Columbia demand graduation from a college, subject to certain exceptions, before the candidate enters a law school. As will be gathered from an examination of the requirements in the United States twenty-nine states in the Union and the District of Columbia fall far short of the minimum pre-legal requirements in the provinces of Canada. Practically the same comparison is found between the law study requirements in the Canadian provinces as compared with those of the States, in spite of the fact that it would appear that this country should have the highest academic, moral, cultural and legal regulations in the

Western Hemisphere in view of the situation of the largest centers of population, and the centralization of the most extensive business operations of the world, in the United States.

BAR REQUIREMENTS COMPARED WITH MEDICAL REQUIREMENTS

In Mr. Strawn's article which was published in September, 1927, the following comparison was made between legal and medical license requirements in the forty-eight states and the District of Columbia, in 1925:

	Medicine	Law
"Number of Jurisdictions requiring graduation from a professional school	48	1
At least 2 years of preliminary college education	38	5
At least a preliminary high school education	44	20
At least 5 years of professional training	11	0
At least 4 years of professional training	49	0
At least 3 years of professional training	49	31
Examination of all applicants by public authority	49	35"

THE CLERGY

Opportunity has not permitted the writer to make an exhaustive study of the requirements by the several denominations of those who desire to enter the ministry. However, I believe it is correct that while some of the religious bodies permit pastors to go into the active work who have not completed both the college and theological courses, there is a strong tendency to have all applicants for the ministry take full training in both academic and theological institutions. However, in reading the cases decided by the United States Supreme Court the following statement was found by the writer in 74 Law Edition, page 10, some time ago, which indicates that at least the Roman Catholic Church has certain specific regulations along this line:

"The new Codex Juris Canonici, which was adopted in Rome in 1917 and was promulgated by the Church to become effective in 1918, provides that no one shall be appoint-

ed to a collative chaplaincy who is not a cleric. Can. 1442. It requires students for the priesthood to attend a seminary; and prescribes their studies. Can. 1354, 1364. It provides that in order to be a cleric one must have had 'prima tonsura' (Can. 108-1); that in order to have 'prima tonsura' one must have begun the study of theology (Can. 976-1); and that in order to study theology one must be a 'bachiller'; that is, must have obtained the first degree in the sciences and liberal arts (Can. 1365). It also provides that no one may validly receive ordination unless, in the opinion of the ordinary, he has the necessary qualifications (Can. 968-1, 1464)."

SHALL LEGAL REQUIREMENTS BE INCREASED IN THE UNITED STATES?

As we contemplate the advances which have been made in the requirements of those entering other professions and the trades; the increasingly complicated demands which are being made upon lawyers for the highest type of legal training and the broadest knowledge of affairs; the legal standards which have been set by Canada, a country without businesses of the gigantic proportions which we find in the United States; the solicitude which exists in the minds of at least some, if not all of the leaders of the Bar in this country; and we realize that a number of states in our nation still do not have appreciable prerequisites mandatory for admission to the Bar; it seems conservative to observe that no state in our nation should allow one to become a licensed attorney who has not satisfied the minimum requirements which have been urged by the American Bar Association. These requirements, as adopted in 1921, in brief, are:

"1. Every candidate for admission to the Bar should give evidence of graduation from a law school complying with the following standards:

(a) It shall require as a condition of admission at least two years of study in a college.

(b) It shall require its students to pursue a course of three years' duration if they devote substantially all of their working time to their studies, and a longer course equivalent to the number of working hours, if they devote only part of their working time to their studies;

(c) It shall provide an adequate library available for the use of its students;

(d) It shall have among its teachers a sufficient number giving their entire time to the school to insure actual personal acquaintance and influence with the whole student body.

2. The American Bar Association is of the opinion that graduation from a law school should not confer the right of admission to the bar, and that every candidate should be subjected to an examination by public authority to determine his fitness."

That the American Bar Association, acting through recognized leaders in the profession, has urged the adoption of these requirements, should be a sufficient testimonial for their acceptance by every state in the nation in which these requisites have not yet been adopted. When this shall have been done the legal profession will have achieved an outstanding triumph, for as Mr. Chief Justice Charles Evans Hughes said some months ago, one of the principal aims of those constituting the Bar, should be:

"To preserve the sentiment which subordinates gain to the conception of professional duty, which makes reputation for soundness of advice, for integrity in counsel and performance, for loyalty to the client, to the court and to the law, the most highly prized reward in a career of constant toil amid temptations and incitements to laxity."

INFERENCE FROM AN INFERENCE

MALCOLM MCDERMOTT

In a recent opinion by the Court of Appeals of Tennessee[1] it was held that where a child playing near a school building which was being remodeled was struck on the head by a piece of falling brick, a verdict returned against the building contractor should be upheld, although there was no positive proof that the brick fell from the building or in any wise emanated from the control of the contractor or of his servants, nor was there any positive proof that the brick fell through any negligence of the contractor or his servants.

This holding was allowed to stand by the Supreme Court of Tennessee when at its September Term, 1929, the defendant's petition for writ of certiorari was denied without a written opinion.

The only way in which liability could have been imposed upon the defendant was by allowing the jury to draw an inference from an inference. This is contrary to well established principle,[2] and it would seem that the court erred in its decision.

In the case referred to, the only evidence as to where the brick which injured the plaintiff came from was the testimony of two school children. One child testified that she first saw the brick when it was in the air about two feet above the plaintiff's head; the other child first saw the brick when it was in the air about eight feet above the plaintiff's head. There was not a word of evidence to the effect that the brick came from inside or off the building or from under the control of the defendant or his servants. There was, however, positive testimony by de-

---

[1] Beatrice Beets by next friend v. R. N. Grant; opinion filed at Knoxville, June 15, 1929.

[2] Railroad v. Lindamood, 111 Tenn. 457, 78 S. W. 99 (1903).

fendant's servants that the brick was not thrown from the building; that there were no loose bricks on the building; and that no bricks were missing from the wall of the building after the accident. It further appeared that the plaintiff was injured while playing on the school grounds during the recess period, at which time there were several hundred children on the playground. It was entirely possible for some child to have thrown this missle into the air, or up against the building, since it consisted of only a portion of a brick. Under these facts, the trial judge charged the jury in part as follows:

"Where a material fact has been proven from which it is reasonable to infer the existence of another fact which may throw some light on the situation, it is proper for you in an effort to arrive at the truth to draw reasonable and natural inferences from the proven facts, but it is not proper and you will not be permitted to draw an inference from another inference."

It is submitted that the foregoing instruction is sound.[3] The three courts which passed on and upheld this verdict against the defendant must have done so in direct contravention to the established rule of law set forth in the foregoing instruction.

In order for the jury to impose liability upon the defendant it had to find: First, that the brick, in some way, emanated from the control of the defendant or his servants; and second, that the brick escaped through negligence. In no other way could the defendant be held liable. Clearly, the defendant would not be liable if the brick were thrown by some child or other person; nor, could the defendant be liable even if the brick emanated from him or his servants if this occurred without negligence on their part.

The plaintiff's case was predicated upon the assumption or inference that this piece of brick must have come from under the control of the defendant or his servants since it fell near the

---

[3] Railroad v. Lindawood, *supra* note 2; Manning v. John Hancock Mut. Ins. Co., 100 U.S. 639, 25 L. ed. 761 (1879); Ohio Bldg. etc. Co. v. State Industrial Board, 277 Ill. 96, 115 N. E. 149 (1917).

building where they were working. This primary fact was sought to be established by circumstantial evidence alone. From this inferential fact, the plaintiff contended the jury should be permitted next to infer that the brick escaped through the negligence of the defendant, by application of the well known rule of "res ipsa loquitur."

The Court of Appeals took the view that the fact that the brick emanated in some way from under the control of the defendant or his servants had been established by "circumstantial evidence" and hence it was not a mere inference; so that the jury might be further permitted to draw the inference of negligence from such fact thus proved. The fallacy here is that court improperly defined circumstantial evidence. The very nature of such evidence is that it proves other facts by inference. Where positive proof as to a material fact is lacking, the law, with limitations, allows a litigant to establish such fact by offering positive evidence of other facts from which the existence of such fact sought to be established may be reasonably and naturally inferred. This fact, therefore, is an inference from the proved existence of other facts. Circumstantial evidence is inferential evidence.[4]

It is clearly established in our law that before a plaintiff can invoke the doctrine of "res ipsa loquitur" he must first show by positive proof that the instrumentality by which he was injured emanated from the control of the defendant.[5] The very basis for this rule is that the finding of negligence in such a case is an inference. This inference cannot be drawn from another inference, but can only be drawn from facts positively proved.

The error of the courts which passed on the case referred to is clearly apparent. The jury was first allowed to infer, from circumstantial evidence alone, that the piece of brick which injured the plaintiff in some manner came from under the control

---

[4] 22 C. J. 65, 66, and numerous authorities there cited. 1 WIGMORE, EVIDENCE (2nd ed. 1923) §25.

[5] Cornelius Carl v. S. L. Young et al., 103 Me. 100, 68 Atl. 593 (1907).

of the defendants or his servants; the jury was next permitted to infer from this first inference that the brick escaped through some negligence of the defendant. The injustice of this imposition of liability by double-barrelled inference is obvious when it is recognized that under all the proof the plaintiff's injuries might well have resulted from the act of one of the numerous school children who might have hurled this piece of brick into the air.

The authorities do generally hold that where an object is shown to have fallen from defendant's building, the doctrine of "res ipsa loquitur" may be invoked by an injured plaintiff. But, these are cases where there is positive proof that the missile came from the defendant's edifice.[6]

It is surprising to note that in its opinion in the case here under discussion the Court of Appeals made no reference to the leading authority in Tennessee on this subject,[7] although that case was relied upon by the defendant and was referred to at length in the briefs of counsel.

In the *De Glopper* case, the plaintiff lost his left eye as a result of something being thrown into it as he was passing within a few feet of a street car with his left eye next to the car. The evidence showed that there was no one on the street to the west, east, or south of the plaintiff; on the remaining side was the street car which was entirely closed so that the missile could not possibly have come from inside or beyond the street car. No wind was blowing.

It was shown that just as the minute missile struck the plaintiff's eye, the wheels of the street car were spinning rapidly and the car was lurching forward a few inches at a time in climbing a steep grade with a heavy load.

It was the plaintiff's inference, and certainly a fair one,

---

[6] Scott v. London Dock Co., 3 Hurlst. & Co. 596 (1865). Contra: Case v. C. R. I. & P. R. R. Co., 64 Iowa 762, 21 N. W. 30 (1884).

[7] De Glopper v. Nashvivlle Ry. & Lt. Co., 123 Tenn. 633, 134 S. W. 609 (1910).

that the missible which struck him was thrown from under the grinding car wheels. It was his second inference, based on the first, that the missible was thrown out through the negligence of the defendant.

The Supreme Court of Tennessee very correctly applied the sound rule and held that the jury would not be permitted to draw the inference of negligence from a fact proved inferentially. Accordingly, a $4000 judgment for the plaintiff in the trial court was reversed and the plaintiff's action dismissed.

The language of this well considered opinion, written by Mr. Justice Lansden, is worthy of note. As to the facts tending to show what caused the plaintiff's injury, the learned justice said:

"Applying these principles to the present case, we find that plaintiff in error was passing the car mentioned when his face was about six feet from the car, with his left side to the car, when he was struck in the left eye with force by a hard substance coming from under the car, while the wheels of the car were revolving rapidly in the same place under a heavy load. The fact that the substance which struck plaintiff in error in the eye came from under the car is a fact which may reasonably be drawn from the whole circumstances of the accident by a fair inference from the situation of the parties at the time. *It is not directly proven, and is arrived at by inference only.* There is no direct, open and visible connection between this inferred fact and the rapid turning of the wheels of the car at the same place. Whatever of connection there may be between the turning of the wheels and the striking of the plaintiff in error arises only upon inference, and in order to make this connection between the operation of the car and the injury of the plaintiff in error it must be inferred that the substance which struck the plaintiff in error came from under the car; and from that fact it must be further inferred that it was thrown from under the car by the rapidly turning wheels, and there still must be super-added to these two inferences the further inference that the motorman was negligent in the operation of the car at the time, or that the wheels of the

car were defective or that the track was defective at the place of the accident, and that the defendant in error had notice of the defects or by the exercise of due care should have known of them."[8]

The next portion of the opinion is directly in point:

"If the act which caused the injury was shown by direct evidence, and all of the circumstances of the accident were shown in the proof, and if the only reasonable explanation of the accident should give rise to an inference of negligence, then the rule of 'res ipsa loquitur' would apply; *but there can be no foundation for the application of this maxim where both the act which caused the injury and the negligence of defendant in relation to the act must be inferred from the accident itself. You cannot well say that an act is negligent unless you know what it is.*"[9]

The foregoing is a sound and clear statement of the law on this vital point. Courts are sometimes led astray and permit a loose application of the doctrine of "res ipsa loquitur" so that liability is fixed upon a defendant by the merest guess work of a jury.[10] It should be constantly borne in mind and reaffirmed that before a plaintiff can invoke this doctrine he must produce direct and positive proof that he has been injured by an act of the defendant or by an instrumentality emanating from the control of the defendant.

It is to be regretted that the appellate courts of Tennessee by their decision in the *Beets* case should have seen fit to depart from sound principle and to have gone contrary to the eminent authority of the *De Glopper* case.

---

[8] Underscoring is inserted.

[9] Underscoring is inserted.

[10] Blackshear v. Trinity etc. Ry. Co., 131 S. W. 854 (Tex. Civ. App. 1910).

FEDERAL EMPLOYERS' LIABILITY ACT

W. T. KENNERLY

In the article published in the Tennessee Law Review for June, 1930, there were discussed the history and constitutionality of the Federal Employers' Liability Act, and its construction and applicability to cases which chiefly involved the movement of trains, engines and cars. There was some discussion of cases which involved these questions only incidentally, relating to the mining of coal for future consumption in locomotives, the construction of new railroads which would in the future become interstate carriers, and shop cases.

In this article there will be discussed the construction and applicability of the Act to cases involving maintenance and repair of tracks, bridges and similar structures, the repair of engines and cars, and miscellaneous cases not falling strictly under either of these classes. In a future article or articles there will be discussed assumption of risk, contributory negligence and measure of damages.

In the application of the Act it is necessary to determine where intrastate commerce ends and interstate commerce begins. In many cases this is difficult of solution. The question provides a battle ground for legal minds and requires much judicial thought and labor by our Judges.

When the statute was first held constitutional, there was considerable doubt on the part of both the bench and bar whether it applied to track repair employees and to members of construction crews engaged in the repair, maintenance or reconstruction of existing interstate lines of railroad. The general result of the decisions is that the Act applies whenever the injured employee was engaged in the repair or construction of a track, bridge or similar structure used as a part of an interstate line of railroad.

In the solution of these questions the provisions of the Act

of 1908 have necessarily been considered. The first section of the Act makes the carrier liable where the employee is injured as the result of negligence, either in whole or in part, of other employees of the carrier, "or by reason of any defect or insufficiency due to its (the carrier's) negligence in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment."[1] Thus the Act itself recognizes the track, the road-bed, bridges and similar structures as part of the equipment and physical plant of an interstate carrier by railroad.

The first reported track repair case holding liability under the Act was the *Colasurdo* case,[2] decided by the Court of Appeals for the Second Circuit. It affirmed a judgment in favor of an injured employee obtained in the District Court for the Southern District of New York.[3] Application was made to the Supreme Court for a review of this decision. The writ of error was dismissed without a formal opinion.[4]

The plaintiff was a track walker and was injured while repairing a switch in a yard at Jersey City. He was struck by a string of cars that was being "kicked" in a switching operation. The railroad contended that since he was not actually engaged in the movement of an engine, a car or an article of interstate freight, he was not within the protection of the Act. The yard in which he was working and the track upon which he was engaged in discharging his duty were used indiscriminately for the moving of both kinds of traffic. The holding of the Court is:

> "Where a railroad trackman was injured while repairing a switch in defendant's terminal yards at night over which interstate as well as intrastate commerce was continually transported, and the car by which he was struck was being

---

[1] 35 Statutes, 65.

[2] Central R. R. of New Jersey v. Colasurdo, 192 Fed. 901 (1911).

[3] 180 Fed. 832 (1910).

[4] 226 U. S. 617 (1912).

kicked into the station platform to carry passengers coming on one of defendant's ferry boats from New York City to a point in New Jersey, plaintiff was engaged in interstate commerce, and was therefore entitled to maintain an action for his injuries under Employers' Liability Act."

Since that time it has been decided by the Supreme Court that the character of commerce in which the engine, train or car is engaged, which inflicts the injury, is not controlling or to be considered, unless the injured employee is one of the crew connected with the movement. In this case the fact that the car which struck plaintiff was intended to be presently used in interstate commerce was of no importance except in establishing the fact that the track and yard in question were interstate in character.

The leading case decided by the Supreme Court in a written opinion holding the Act applicable to employees engaged in repair work is the *Pedersen* case.[5] The defendant was an interstate carrier by railroad. The injured employee was a member of a repair crew working upon a bridge, a part of the interstate line. While carrying some bolts and rivets from a tool car to the bridge where they were to be used in repair work, he was run down and injured by an *intrastate* train.

The question to be determined by the Court was whether this work was being done independently of interstate commerce in which the railroad was engaged, or was it so closely connected therewith as to be a part thereof.

In answering this question in the affirmative, the Court used this language:

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged

[5] Pedersen v. R. R., 229 U. S. 146 (1912).

with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into several elements, and the nature of each determined regardless of its relation to others is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"

The Court further held that while the plaintiff was transporting these bolts and rivets to the bride for future use thereon, he was engaged equally in interstate commerce as was the mechanic who later used these bolts and rivets in the repair of the bridge. The lower Courts had decided in favor of the defendant. The Supreme Court reversed and remanded the case.

A number of cases has been before the Supreme Court involving the question whether the Federal Act or a State Workmen's Compensation Act was applicable. In many of these cases the Courts of last resort in the States had held the injured employee engaged in intrastate commerce, and therefore within the protection of Compensation Acts—the Federal Act not being applicable. The Supreme Court has, in practically every case before it affecting track repair men, held the Federal Act applicable and exclusive.

In the *Porter* case,[6] the injured employee was a section hand who was killed while shoveling snow from railroad premises between the main line and the station platform. Interstate commerce was constantly moving over this line and through this yard. The suit was brought in the State Court, and the Court of Appeals of New York held the Federal Act not applicable.

---

[6] N. Y. Central R. R. v. Porter, 249 U. S. 168 (1918).

This decision was reversed upon the authority of the *Pedersen* case, *supra*, the holding being that a section hand, killed while engaged as above stated, was employed in interstate commerce within the meaning of the Federal Act, and no award on account of his death could be made under a State Workmen's Compensation Law.

A case which has probably reached the extreme limit of liability under the Act is that known as the *Shanty Car Cook's Case*.[7] The injured plaintiff was employed as cook for a gang of bridge carpenters engaged in the repair of defendant's bridges, a part of its interstate line. Plaintiff and other employees in this gang worked over the entire line of defendant, being moved from point to point, as repair work required. They traveled and lived in what is commonly known as camp cars furnished by the railroad, where they ate and slept. Plaintiff's principal duties were to take care of these cars, keep them clean, attend to the beds and prepare and cook meals for himself and other members of the gang. While this crew of workmen was engaged in repairing a bridge, the camp cars were placed on a side track near the place of work. When plaintiff was in one of these cars, engaged in cooking a meal for the crew, one of defendant's trains, without warning, ran upon the side track and collided with the car, injuring plaintiff.

The question of negligence was not contested, the only question being whether plaintiff at the time was engaged in interstate commerce within the meaning of the Act. The railroad sought to defeat liability under the holding in the *Behrens* case[8] and the *Welch* case[9]. The company's contention was that the true test to be used in deciding this question was the nature of the work being done by the employee at the time of his injury,

---

[7] Philadelphia R. R. Co. v. Smith, 250 U. S. 101 (1918).

[8] Behrens Case, 233 U. S. 473 (1913).

[9] Welch Case, 242 U. S. 303 (1916).

and what he had been doing before and expected to do afterwards was of no consequence.

After stating the rule laid down in the *Pedersen* case, *supra*, the Court, in holding the Act applicable, used this language:

> "He was employed in a camp car which belonged to the railroad company, and was moved about from place to place along its line according to the exigencies of the work of the bridge carpenters, no doubt with the object, and certainly with the necessary effect, of forwarding their work by permitting them to conduct it conveniently at points remote from their home and remote from towns where proper board and lodging were to be had. The circumstance that the risks of personal injury to which plaintiff was subjected were similar to those that attended the work of train employees generally and of the bridge workers themselves when off duty, while not without significance, is of little moment. The significant thing, in our opinion, is that he was employed by defendant to assist, and actually was assisting, the work of the bridge carpenters by keeping their bed and board close to their place of work, thus rendering it easier for defendant to maintain a proper organization of the bridge gang, and forwarding their work by reducing the time lost in going to and from their meals and their lodging place. If, instead, he had brought their meals to them daily at the bridge upon which they happened to be working, it hardly would be questioned that his work in so doing was a part of theirs. What he was in fact doing was the same in kind, and did not differ materially in degree. Hence he was employed, as they were, in interstate commerce."[10]

A railroad carpenter engaged in cutting cross ties intended for a crane which was used for loading and unloading both kinds of commerce was held to have been engaged in interstate commerce and within the protection of the Act.[11]

By these cases it is now conclusively settled that an employee engaged in work connected with the maintenance and repair of tracks, road-beds and structures connected therewith,

---

[10] Philadelphia R. R. v. Smith, *supra* note 7.

[11] Lehigh V. R. R. Co. v. Egyed, 249 N. Y. 589, 279 U. S. 845 (1929).

which are part of an interstate line, is within the protection of the Act, that Act applies exclusively, and State Workmen's Compensation Statutes do not apply. Hence the practitioner, when consulted about instituting a suit to recover for an injury to a track employee has the responsibility of deciding in advance whether the facts presented bring the proposed case within the Federal Liability Act or under a State Compensation Statute. In many cases this decision will be difficult and often hazardous to the rights of his client, since he may not have before him all of the facts which may develop upon the trial of the case.

We will now consider what is commonly known as shop and repair cases.

In the *Winters* case,[12] discussed in the article appearing in the June issue, it was held that a machinist engaged in making repairs in a round house upon an engine previously used in hauling both kinds of commerce was not within the protection of the Act because the engine had not been permanently devoted to the hauling of interstate traffic, nor was it at the time it was being repaired destined to be thereafter used definitely in interstate commerce. At the time it was being repaired, it was not engaged in either character of commerce.

The rule to be deduced from that case and other cases decided by the Supreme Court, where liability under the Act was declared, is whether at the time of injury the work being done by the machinist or artisan in repairing engines or cars was so closely connected with their movement in interstate commerce as to be a part thereof, or would aid, assist, or forward their use in interstate commerce.

In the case presently to be cited the employee of an interstate carrier had the double duty of acting as signal man in a tower and the operation of a pump at a water tank. While in the tower he gave and transmitted signals to trains moving both kinds of commerce, and the engines supplied with water from

---

[12] Winters v. R. R., 242 U. S. 353 (1916).

the tank which he kept filled likewise drew both kinds of commerce. While attempting to start a gasoline pump and put it in operation for pumping water, he was injured by reason of a defect in the machinery connected therewith. The Supreme Court held he was within the protection of the Act and could recover. The defense was that at the time of his injury he was not moving interstate commerce and it could not be established that the water which he was about to pump into the tank would be used by an interstate engine.

The question presented to the Supreme Court, and which it answered in the affirmative, was, "Was the work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it, or was the work so closely related to interstate commerce as to be practically a part of it?"

This question was thus answered by the Court, "Plaintiff was assigned to duty in the signal tower and in the pump house, and it was discharged in both on interstate commerce as well as on intrastate commerce, and there was no interval between the commerce that separated the duty, and it comes, therefore within the indicated test. It may be said, however, that this case is concerned exclusively with what was to be done, and was done, at the pump house. This may be true, but his duty there was performed and the instruments and facilities of it were kept in readiness for use and were used on both forms of commerce as were demanded, and the test of the cases satisfied."[13]

In the case presently to be cited the Supreme Court has probably gone to the extreme limit of holding liability in the miscellaneous class of cases, which are neither repair cases nor cases directly involving the movement of trains. The plaintiff was employed in placing sand upon locomotives engaged in both kinds of commerce at a railroad sand house in a yard. In addition to placing sand in the locomotives, he assisted in operating large stoves for drying sand. These stoves burned soft coal.

---

[13] Erie Railroad v. Collins, 253 U. S. 77 (1919).

On the night of the injury the plaintiff had assisted in sanding two engines engaged in interstate commerce. After so doing he removed the ashes from the stove and carried them in a bucket to an ash pit, as was customary. After empting the bucket, he placed it on the ground near the ash pit and went to the engine room to get a drink of water. When returning and crossing one of the tracks, he was negligently struck by a passing engine.

Applying the rule in the *Collins* case, *supra*, the Court held liability, using this language:

> "We think these facts bring the case within the *Collins* case, and the test there deduced from prior decisions. There were attempts there and there are attempts here, to separate the duty and assign it character by intervals of time, and distinctions between the acts of service. Indeed, something is attempted to be made of an omission or an asserted omission in the evidence, of the kind of commerce in which the last engine served was engaged. The distinctions are too artificial for acceptance. The acts of service were too intimately related and too necessary for the final purpose to be distinguished in legal character. The conclusion that the service of Szary was rendered in interstate commerce determines the correctness of the ruling of the District Court upon the motion to dismiss."

An examination of the facts in this case shows that when injured the plaintiff was neither actually placing sand on a locomotive nor drying nor preparing sand for that purpose. He had just performed the incidental duty of carrying a bucket of ashes and cinders from one of the sand dryers to an ash pit, where he had dumped it. He there left the bucket and went to the engine room for a drink of water. This was in the nature of a personal mission of his own. While returning to get the bucket, he was injured. The Court held this act then being performed by him so closely connected with his duty of preparing sand for and placing sand in interstate locomotives as to be a part of interstate commerce and bring him within the protection of the Act.

This decision was in line with and followed the decision in the *Zachary* case, where a fireman, after preparing his engine for an interstate run, left the engine, went to his boarding house

on a private mission, and while so engaged was injured and killed. Liability was adjudged.[14]

In the case presently to be cited suit had been instituted in a State Court, seeking compensation under a State Workmen's Compensation Act for the death of an employee. The deceased was employed as a flagman at a public street crossing, his duty being to give signals to trains and engines hauling both kinds of commerce. The evidence did not disclose whether at the time he was injured he was flagging a train engaged in interstate commerce. As held by the Court, "His employment concerned both kinds of trains, without distinction between them of character of service. He was an instrument of safety for the conduct of both. And in the course of his employment, he was killed by a train whose character is not disclosed. x x x His duty had other purpose than the prevention of a disaster to a particular train. It had purpose as well to the condition of the tracks, and their preservation from disorder and obstruction. This service and other service cannot be separated in duty and responsibility."

Having found that deceased was so engaged in interstate commerce, it was necessarily held that the Federal Act, and not the State Compensation Act, applied.[15]

Employees engaged in the loading and unloading of interstate freight are within the protection of the Act. It is held that the removal of freight at the end of an interstate journey from a car to a platform or freight depot is the moving of interstate commerce, and the Federal Act applies. It even applies to a bystander, the consignee of the shipment, who was called upon by the conductor of a freight train to assist in removing a heavy article of freight from a freight car—it being shown that it was the custom and duty of the conductor, when he needed outside

---

[14] Railroad v. Zachary, 232 U. S. 248 (1913).

[15] Philadelphia & Reading R. R. v. Di Donato, 256 U. S. 327 (1920).

help to unload a heavy article, to call upon by-standers for assistance.

The case was instituted in a State Court to recover compensation under a State Compensation Act. The defense was that the injured party was engaged in unloading interstate freight, and therefore the Federal Act applied to the exclusion of the State Statute. A recovery was allowed and affirmed by the Court of last resort of the State. That holding was reversed by the Supreme Court.

In so deciding, this language was used:

> "The train, upon arrival at Commisky, drew it upon a side track, where the cutter was unloaded and the train then proceeded on its way. It was while assisting in this work that Burtch sustained the injury sued for. It is too plain to require discussion that the loading or unloading of an interstate shipment by the employees of a carrier is so closely related to interstate transportation as to be practically a part of it, and it follows that the facts fully satisfy the test laid down in the Shanks case. (239 U. S., 558)."[16]

A late case upon liability to a mechanic engaged in repairing engines in a round house, is of interest.[17] The employee's duty was to fill grease cups and pack journal boxes of engines being serviced in a round house for future operation. He had lubricated Engine 3709 on track 8 shortly before 11 o'clock at night. He then proceeded to work on Engine 3835 on track 7. He was instructed when he had finished work on this last mentioned engine to wait for the foreman in a space between these two tracks. About 2:35 Engine 3709 was by a hostler backed out of the round house en route to the turn table. While being so moved it struck and killed the employee about thirty feet outside the round house. The question of the applicability of the statute was sharply contested, it being contended by the railroad that deceased was not killed while working upon an interstate

---

[16] B. & O. R. R. v. Burtch, 263 U. S. 540 (1923).

[17] N. Y. Central R. R. v. Marcone, 281 U. S. 345 (1929).

engine, nor while at his place of work in the round house. It was admitted that Engine No. 3835, upon which deceased had last worked, was used in hauling interstate trains, and had not been withdrawn from that service. Liability under the Act was denied by the Company because the deceased had finished his work upon this engine. In holding the Act applicable, the Court used this language:

> "The trial court submitted to the jury the question whether deceased had finished his work on this engine at the time of the accident, and there was some evidence to support a finding that he had not finished it. *But if we assume that he had completed the work a few minutes before his death, he was still on duty. His presence on the premises was so closely associated with his employment in interstate commerce as to be an incident of it and to enable him to the benefit of the Employers' Liability Act.*" (*Italics ours.*)

In the case presently to be cited, the injured employee was employed as an engine hostler at a terminal, under whose direction engines used in both kinds of commerce were cleaned, coaled and serviced, preparatory to their runs. He was killed while going from an engine being coaled under his direction to another place in the yards, this movement being not inconsistent with his duties. It was held that he was within the protection of the Act. The decision was by the Court of Appeals for the Third Circuit, and in the opinion this language was used:

> "The engine was admittedly an instrumentality of interstate commerce, and when Van Buskirk took charge of it, to have it supplied with coal, sand, and water, he was engaged in such commerce. The case turns upon whether or not, when he got down from his engine and went over toward the Brown hoist and shanty, he was still engaged in interstate commerce. If he was, as plaintiff contends, it was error to direct a verdict; if he was not, as defendant contends, the direction was without error."

The Court then discussed the *Zachary* case, *supra,* and in deciding in favor of the plaintiff, used this language:

"If going to the boarding house was not inconsistent with his (Zachary's) duty to his employer, and he continued to be employed in interstate commerce,—going from the engine toward the shanty, where he had a right to go while the engine was being prepared for further work, was also consistent with duty to his employer, and did not terminate his employment in interstate commerce. x x x x x x Going over toward the shanty was consistent with Van Buskirk's duty to his employer. While the engine was being prepared, he might stay on it, or 'he could get off and go to the shanty, or where he liked'."[18]

A consideration of the cases herein reviewed relating to repair work on tracks, bridges, engines, cars and similar instrumentalities used in interstate commerce demonstrates that in determining whether the Act applies or does not apply, the facts of each particular case must be looked to and thoroughly analyzed. Each case, like the proverbial tub, must stand upon its own bottom, and it will be decided whether it falls within or without the provisions of the Federal Act by arriving at a conclusion whether the work of the injured employee was actually a part of interstate commerce, or so closely connected therewith as to aid directly the movement and transportation of such commerce or facilitate such movement by maintaining and providing the necessary instrumentalities therefor.

---

[18] Van Buskirk v. Railroad, 279 Fed. 622 (1922).

Tennessee Law Review

Volume 9 FEBRUARY, 1931 Number 2

Published by the Students of the College of Law of the University of Tennessee in the months of December, February, April and June
T. ASBURY WRIGHT FOUNDATION

Subscription Price $1.50 Single Copies 50 Cents

CONTRIBUTORS TO THIS ISSUE

HERBERT NACE is a graduate of Vanderbilt University with the degree of LL. B. 1925. Previously he attended Emory and Henry College. Since 1925 he has been engaged in the active practice of law in Tennessee as a member of the Johnson City Bar.

MALCOLM MCDERMOTT was graduated from Princeton University in 1910 with a degree of A. B., and from Harvard Law School in 1913, with a degree of LL. B. He was Professor of Law and Dean of the Law College, University of Tennessee, 1920 to October, 1930. At present he is Professor of Law, Duke University.

W. T. KENNERLY was graduated from the University of Tennessee College of Law in 1901 with the degree of LL. B. He has practiced law as a member of the Knoxville Bar since that time. During the years 1917-21, he was United States Attorney for the Eastern District of Tennessee.

CASE NOTES

ATTORNEY AND CLIENT—NON-RESIDENT ATTORNEY'S PRIVILEGE FROM SERVICE OF CIVIL PROCESS

A recent Federal decision in Mississippi held that an attorney from Illinois was exempt from service of civil process while in Mississippi in attendance upon court as counsel.[1]

Where the attorney is attending court in a state other than that of his residence, the majority of the cases hold there is no immunity from service of civil process.[2] The cases exempting an attorney of another State from service of civil process seem to be based on the same principle which supports the privileges granted to non-resident suitors and witnesses.[3] But, on the other hand, the cases which adopt the majority rule in refusing this privilege, declare there is no valid reason for extending the doctrine exempting non-resident suitors and witnesses to include a non-resident attorney.[4] A non-resident attorney should have no greater privilege from civil process than resident attorneys.[5]

---

[1] Schmidtt v. Lamb, 43 F. (2d) 770 (D. Miss. 1930).

[2] Robbins v. Lincoln, 27 Fed. (C.C. 111, 1886); Tadge v. Byrnes, 179 Cal. 275, 176 Pac. 439 (1918); Nelson v. McNulty, 135 Minn. 317, 160 N.W. 795 (1917) (in this case the attorney went into the state to get depositions for a case to be tried in his own state, but somehow he failed to take the depositions and was served before he could leave the state); Chicago B. & Q. Ry. Co. v. Davis, 111 Neb. 737, 197 N.W. 599 (1924); Ketner v. Hodnett, 109 N.Y. Supp. 1068 (1908); Greenleaf v. People's Bank, 133 N.C. 292, 45 S.E. 638 (1903).
Contra: Central Trust Co. v. Milwaukee Street Ry. Co., 74 Fed. 442 (D. Wis. 1896); Read v. Neff, 207 Fed. 890 (D.Iowa 1913); Schmitt v. Lamb, *supra* note 1; Williams v. Hatcher, 95 S.C. 49, 78 S.E. 615 (1913); Simon v. De Gersdorff, 166 Wis. 170, 164 N.W. 818 (1917) (it seems that this case recognized the privilege by deciding that the attorney had waived the privilege).

[3] Williams v. Hatcher, *supra* note 2, at 51.

[4] Nelson v. McNulty, *supra* note 2, at 319; Chicago B. & Q. Ry. Co. v. Davis, *supra* note 2, at page 737; Greenleaf v. People's Bank, *supra* note 2, at 301.

[5] Robbins v. Lincoln, *supra* note 2, at 343.

Where the attorney is attending court in a county other than that of his residence, a few cases held that he is immune from civil process.[6] Other cases on the same point flatly refuse to recognize such a privilege.[7] It is said by one of the courts in supporting the cases that deny the privilege: "We cannot see that the mere service of summons upon an attorney while in attendance upon a court in his professional capacity would in any way infringe upon the dignity or invade the prerogatives of the court. It could not interrupt the orderly progress of trials nor tend in the least to hamper and embarrass the courts in the administration of justice. Therefore, as we view it, the public good would not be adversely affected by such a procedure, and the rule of public policy does not obtain."[8] It would seem that reasoning similar to that in the quoted case, is generally adopted by the cases which deny the privilege from service of civil process to an attorney attending court in a state other than that of his residence.[9]

It is submitted, that whether the attorney is attending court in a county or in a state other than that of his residence, the better view is the one that denies the privilege from service of civil process. A search of the Tennessee reports fails to reveal a case on the question involved in this note, though in Tennessee non-resident suitors and witnesses are immune from service of civil process while in attendance upon court.[10]

C. F. B.

---

[6] Kansas Wheat Growers Assoc. v. Moffatt, 129 Kan. 537, 283 Pac. 634 (1929); Hoffman v. Bay County Circuit Judge, 113 Mich. 109, 71 N.W. 48 (1897); Whitman v. Sheets, 20 Dhio C.C. 1, 11 Ohio C.D. 179 (1889) (this case is discussed in a note in L.R.A. 1917B 893).

[7] Paul v. Stucky, 126 Ark. 389, 189 S.W. 676 (1916); Parker Savings Bank v. McCandlas, 6 Pa. Co. Ct. 327 (1889); First National Bank v. Doty, 12 Pa. Co. Ct. 287 (1892) (the last two cases are discussed in a note to the Stucky case in L.R.A. 1917B 893).

[8] Paul v. Stucky, *supra* note 7, at 393.

[9] Nelson v. McNulty, *supra* note 2, at 319; Chicago B. & Q. Ry. Co. v. Davis, *supra* note 2, at 737; Greenleaf v. People's Bank, *supra* note 2, at 301.

[10] See Sofge v. Lowe, 131 Tenn. 626, 176 S.W. 106 (1915); Note (1928) 6 Tenn. L. Rev. 55.

HUSBAND AND WIFE—NECESSITY OF PRIVY EXAMINATION OF WIFE

For a valuable consideration, a wife, joined by her husband, executed a deed to her separate property. Complainants, creditors of the wife, sought to have the deed set aside on the ground that such conveyance did not operate to divest the wife of her title because the husband's acknowledgement to the deed was insufficient. *Held*, that the Married Woman's Act eliminates the necessity of the husband joining in a wife's conveyance and of privy examination to protect the wife from the husband's oppression.[1]

At common law the husband and wife were one and the same person,[2] that person being the husband.[3] The husband's interest in the wife's realty, whether owned by her at the time of her marriage or acquired subsequent thereto, entitled him to the usufruct of such property during the period of coverture.[4] Therefore, at common law the wife had to be joined by her husband in a deed to convey her property, real or personal.[5] In

---

[1] Jefferson County Bank v. W. T. Hale, 152 Tenn. 648, 280 S. W. 408 (1925).

[2] Gill v. McKinney, 140 Tenn. 549, 205 S. W. 416 (1918); Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Whyman v. Johnson, 62 Colo. 461, 163 Pac. 76 (1917); Harrington v. Lowe, 73 Kan. 1, 84 Pac. 570 (1906); Way v. Root, 174 Mich. 418, 140 N. W. 577 (1913); White v. Wager, 25 N. Y. 328 (1849); Keller v. James, 63 W. Va. 139, 59 S. E. 939 (1907).

[3] Johnson v. Johnson, *supra* note 2; Beasley v. State, 138 Ind. 552, 38 N. E. 35 (1894); Citizen's L. & T. Co. v. Witte, 116 Wis. 60, 92 N. W. 443 (1902). Schouler, Marriage, Divorce, Separation and Domestic Relations (6th ed. 1921) 6.

[4] Nunn v. Givham, 45 Ala. 370 (1871); Hayt v. Parks, 39 Conn. 357 (1872); Merrill v. Bullock, 105 Mass. 486 (1870); Baynton v. Finnall, 12 Miss. 193 (1845); Otto F. Stifel's Union Brewing Co. v. Saxy, 273 Mo. 159, 201 S. W. 67 (1918); Chilton v. Hannah, 107 Va. 661, 60 S. E. 87 (1908); 30 C. J. 528, and cases there cited.

[5] Reese v. Cochran, 106 Ind. 196 (1858); Kennedy v. Tem Broeck, 74 Ky. 241 (1875).

making a joint deed of this kind it became an early custom, later required by statutes,[6] in some of the colonies to make privy examination of the wife.[7]

The results from the effect of Married Wòmen's Statutes have been somewhat varied. It may be said that generally, states which have adopted statutes emancipating the married woman and declaring her capable of conveying her property, making contracts, etc., in the same manner as a *feme sole*, have dispensed with the necessity of having the husband join with the wife in the deed to her separate property, and also the statutory requirement of wife's privy examination.[8]

In the principal case, the learned judge declared: "It is no longer necessary for the husband to join the wife in her conveyance so as to supply the benefit of his advice and guidance to prevent imposition on her. Nor is it longer necessary to require privy examination to protect the wife from the oppression of the husband. The Emancipation Act so declares. The common-law disabilities of married women and the attendant safeguards once supposed necessary to the well being of society are supplanted in Tennessee by Chapter 126 of the Acts of 1919, section 1."[9] So the court in the present case followed out what seems to be the general and most logical construction to be made of such Acts as relating to the particular point under discussion.

G. W. W.

---

[6] See 1 A. L. R. 1080.

[7] Note 5, *supra*.

[8] Charanleau v. Woffenden, 1 Ariz. 243, 25 Pac. 652 (1876); Stone v. Stone, 43 Ark. 160 (1884); Simms v. Hervey, 19 Iowa 273 (1865); Watson v. Thurber, 11 Mich. 457 (1863); Yale v. Dederer, 18 N. Y. 265 (1858); see also 1 A.L.R. 1098.

[9] Jefferson County Bank v. W. T. Hale, *supra* note 1, at 653.

INTOXICATING LIQUORS—SEARCH AND SEIZURE OF INTOXICATING LIQUORS WITHOUT A SEARCH WARRANT

An automobile, the property of the defendant, was parked on a public highway. A deputy sheriff saw the parked car, and believing its driver to be in trouble, went to the car for the purpose of aiding in getting the automobile out of the supposed difficulty. Upon reaching the car, the deputy sheriff found that there was no one in it, and for the purpose of seeking to discover the identity of the car's owner, the officer opened the door and investigated the contents of the car. The results of such investigation disclosed a quantity of whiskey, and the defendant was subsequently indicted for transporting intoxicating liquor. *Held*, by the Texas Court of Criminal Appeals that the deputy sheriff did not commit a trespass by opening the door for the purpose of ascertaining the ownership of the car, and that the finding of whiskey could not be classified as an unreasonable search.[1]

It has been held that an officer, without a warrant, cannot search an automobile for intoxicants, and seize it and the intoxicants found therein;[2] the rule is otherwise if the search was made with the consent of the person operating the automobile[3] But on the other hand it has been held that, in view of the impossibility of procuring warrants for the search of automobiles suspected of transporting intoxicating liquors, the officers have a right, without a warrant, to stop and search automobiles, and the finding of liquor therein justifies the search.[4]

Tennessee has made it a crime to possess or transport in-

---

[1] Beauchamp v. State, — Tex. Cr. Rep. —, 32 S. W. (2d) 476 (1930).

[2] U. S. v. Kaplin, 286 Fed. 963 (1923); U. S. v. Myers, 287 Fed. 260 (1923); Butler v. State, 129 Miss. 778, 93 So. 3 (1922); Hoyer v. State, 180 Wis. 407, 193 N. W. 89 (1923).

[3] Maldonado v. U. S., 284 Fed. 853 (1922).

[4] U. S. v. Bateman, 278 Fed. 231 (1922); Lambert v. U. S. 282 Fed. 413 (1922); Houck v. State, 160 Ohio St. Rep. 195, 140 N. E. 112 (1922).

toxicating liquors, including wine, ale or beer.[5] Section 7 of Article 1 of the Constitution of Tennessee provides that "the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence are dangerous to liberty and ought not to be granted." The rule of the United States Supreme Court is, "if the search and seizure, without a warrant, are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid."[6]

There are four situations in Tennessee in which an officer may, without a warrant, arrest a person: (1) For a public offense committed or a breach of the peace threatened in his presence; (2) When the person has committed a felony, although not in his presence; (3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it; (4) On a charge made, upon a reasonable cause, of the commission of a felony by the person arrested.[7] This statute has been construed to mean *that an officer cannot, without a warrant, search vehicles on probable cause for belief that they have contraband liquor,*[8] differing in this respect from the United States rule. However, the Supreme Court of Tennessee interpreting this statute holds that, where the officer can see the intoxicants in the vehicle from the outside, there is a felony being committed in his presence, and he is entitled to make a

---

[5] Pub. Acts Tenn. 1917, c. 12.

[6] Carroll v. U. S., 267 U. S. 132, 45 Sup. Ct. 280 (1924).

[7] Tenn. Ann. Code (Shannon, 1917) 6997.

[8] Tenpenny v. State, 151 Tenn. 669, 270 S. W. 989 (1924).

search and arrest without a warrant.[9] But the same Court also holds that, an officer is not entitled to make a search or arrest, without a warrant, where the whiskey was concealed from the officer's sight prior to the search.[10]

It is submitted that under the facts of the principal case, the Supreme Court of Tennessee would not have found the defendant guilty of transporting intoxicating liquors, on the theory that the search was illegal and that evidence obtained from an illegal search is not admissible.[11]

H. D. E.

PERSONAL PROPERTY—GIFT OF CORPORATE STOCK INVALID FOR LACK OF DELIVERY OF CERTIFICATE

In the settlement of an estate, the widow of the intestate claims title to certain shares of corporate stock, which she alleges that her husband had given to her. The intestate had written an assignment upon the back of the stock certificate to his wife, which certificate was found by the claimant among the valuable papers of the intestate. Upon these facts, the widow

---

[9] Smith v. State, 155 Tenn. 40, 290 S. W. 4 (1927) (An inspection from the outside by police officer at night with aid of flash light, of motor car, parked in a dark alleyway, disclosing its condition and unconcealed contents, vessels containing intoxicating liquor, was not unreasonable); Suggs v. State, 156 Tenn. 303, 300 S. W. 4 (1927) (Where the officer saw a man get out of a car carrying a fruit jar, a search of the car was not unreasonable because the officer had probable cause to believe that a felony was being committed in his presence); Massa v. State, 159 Tenn. 428, 19 S. W. (2d) 248 (1928) (Fumes of whiskey in the process of manufacture, emanating from a certain building, held to warrant conclusion by officer that offense was being committed in his presence, and to justify search of such building without a warrant.

[10] Hughes v. State, 145 Tenn. 544, 238 S. W. 588, 20 A. L. R. 639 (1921); Lucarini v. State, 159 Tenn. 400, 19 S.W. (2d) 239 (1928) (Where an officer entered private premises and saw whiskey in the house by peeping through a key hole, and a subsequent search without a warrant was held to be illegal).

[11] Hughes v. State, *supra* note 10; Tenpenny v. State, *supra* note 8; Lucarini v. States, *supra* note 10.

predicates her claim of title to the stock. The Court of Appeals of Kentucky held that title did not vest in the widow for the gift was invalid because of lack of delivery and acceptance of the certificate.[1]

It is generally held that delivery to the donee of a deed of gift will pass title to personal property;[2] but apart from this the general rule as to a valid gift "inter vivos" of personal property is that the donor must deliver the property to the donee or to some one for him; and there must be an acceptance of that specific property by him.[3] The intention of the donor to make a gift is not sufficient to pass title to the intended donee.[4]

Any property to which the donor has title may be the subject of a gift, such as personal property, choses in action, and chattels.[5] Therefore, a certificate of stock may be the subject matter of a gift.[6]

The delivery of a certificate of stock, where the intent of the donor is to pass title, has been held in the majority of the states to pass equitable title; though no legal title passes for

---

[1] Cincinnati Finance Co. v. Atkinson's Adm.,—Ky.—,31 S.W. (2d) 890 (1930).

[2] Davis v. Garrett, 91 Tenn. 147, 18 S. W. 113 (1892); Tarbox v. Grant, 56 N. J. Eq. 199, 39 Atl. 378 (1897); Meyers v. Meyers, 99 N. J. Eq. 560, 134 Atl. 95 (1926); Rennie v. Washington Trust Co., 140 Wash. 472, 249 Pac. 992 (1926).

[3] Carle v. Monkhouse, 50 N. J. Eq. 537, 25 Atl. 157 (1892); Jones v. Wascott, 8 N.J. Misc.R. 512, 150 Atl. 50(1930); Beaver v. Beaver, 117 N.Y. 421, 22 N. E. 940 (1889); In re Dunne's Will, 240 N. Y. Supp. 845 (Surr. Ct. 1930).

[4] Mercantile Trust Co. v. Reay, 96 Cal. App. 381, 274 Pac. 401 (1929); Burns v. Nolette, 83 N. H. 489, 144 Atl. 848 (1929); Madison Trust Co. v. Allen, 105 N. J. Eq. 230, 147 Atl. 546 (1929); Beaver v. Beaver, *supra* note 3; Brito v. Slack, — Tex. —, 25 S.W. (2d) 881 (1930).

[5] Gibson v. Hearn, 164 La. 65, 113 So. 766 (1927); In re Dunne's Will, *supra* note 3.

[6] Denunzio v. Schaltz, 117 Ky. 182, 77 S. W. 715 (1903); Trevathan's Ex'r v. Dee's Ex'r, 221 Ky. 396, 98 S. W. 975 (1927); Miller v. Silverman, 247 N. Y. 447, 160 N. E. 910 (1928).

want of a formal endorsement or assignment of the certificate,[7] and equity may compel a transfer of the stock on the books of the corporation.[8] There is a line of cases, which constitute the minority view, that hold the delivery of the certificate a formal assignment or endorsement to be necessary in order to consummate a valid gift, and if there has been no transfer on the books of the corporation, equity will not require a transfer to the donee.[9]

The problem of delivery and the passing of title thereby does not arise in the principal case for there was no delivery by the donor to the donee, only an intent to deliver being evidenced on the part of the donor. The case of *Bowles v. Rutroff*,[10] which is almost identical on the facts to the principal case, held that, "As the bank stock was never delivered either to the infant or to anyone for him, or transferred on the books of the company, but the control and the possession thereof remained in the donor, there is no escape from the conclusion that the transfer was ineffective as a gift inter vivos."

A thorough search has failed to reveal a Tennessee case pertaining to a gift of corporate stock. It is said that stock in a corporation is evidenced by the certificate issued therefor,[11] and in popular and commercial language, when corporate stocks are spoken of, the certificate is always what is referred to, and the certificate is the universally accredited evidence of the ownership

---

[7] Reed v. Copeland, 50 Conn. 472, 47 Am. Rep. 663 (1883); Smith v. Meeker, 153 Iowa 655, 133 N. W. 1058 (1912); Gledhill v. McCoombs, 110 Me. 341, 86 Atl.247 (1913); Herbert v. Simpson, 220 Mass. 840, 108 N. E. 65 (1915); Bond v. Bean, 72 N. H. 444; 57 Atl. 340 (1904); Commonwealth v. Compton, 137 Pa. 138, 20 Atl. 417 (1890).

[8] In re 35% Auto Supply Co., 247 Fed. 377 (S. D. N. Y. 1917); Herbert v. Simpson, *supra* note 7.

[9] Thomas v. Thomas, 70 Colo. 29, 197 Pac. 243 (1921); Baltimore Brick Co. v. Mali, 65 Md. 93, 3 Atl. 286 (1886); Walsh's Appeal, 122 Pa. St. 177, 15 Atl. 470 (1888) (Refers to gift of bank book).

[10] Bowles v. Rutroff, 216 Ky. 557, 288 S. W. 312 (1926).

[11] Peters v. Neely, 84 Tenn. 282 (1886).

of the property, which has no substantial existence and therefore is incapable of manual delivery.[12] In the case of an assignment for value in Tennessee, an assignee's title to shares of stock is complete upon delivery even of an unendorsed certificate and if he is an innocent purchaser in other respects, the assignee is entitled to protection and to enforce his rights as such without and before registration of his transfer on the books of the corporation.[13] From this it would seem that Tennessee would follow the weight of authority and say that the delivery of the stock certificate even though unindorsed and without a transfer on the books of the corporation, is sufficient to pass equitable title to donee.

H. M. H.

PRINCIPAL AND AGENT — WAIVER OF CONTRACT

In a recent decision by the Supreme Court of Arkansas it was held that plaintiffs, who claimed that defendant had waived a condition of a written contract by an agreement with the defendant's agent, acting under a power of attorney, had the burden of showing that said agent had authority to waive and did an act amounting to a waiver.[1]

It is the general rule that the principal is liable on all lawful contracts made in his name by his agent acting within the scope of his actual authority.[2]

The converse of this rule follows as a necessary conse-

---

[12] Cornick v. Richards, 71 Tenn. 25 (1879).

[13] Smith v. Railroad, 91 Tenn. 221, 18 S. W. 546 (1891); Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209 (1896).

[1] Gates v. Flanagin, — Ark. —, 31 S. W. (2d) 945 (1930).

[2] Ezill v. Franklin, 34 Tenn. 236 (1854); Kuhlman v. E. J. Hart Co., 59 S. W. 455 (Tenn. Chan. App. 1900); Post v. Pearson, 108 U. S. 418, 2 Sup. Ct. 799 (1882); Montgomery and Co. v. Ark. Cold Storage Co., 93 Ark. 191, 124 S. W. 768 (1910); Caswell v. Cross, 120 Mass. 545 (1876).

quence. If the act done or contract made was not within the scope of his authority, but exceeded or disregarded it, then no liability attaches to the principal,[3] unlesss he voluntarily affirms and ratifies the agent's act.[4]

When, therefore, it is said that the act of the agent must be within the scope of his authority in order to be binding upon the principal, the statement applies alike to general and special agents. However, it is well settled and often asserted rule that the authority of the special agent must be strictly pursued. It is in its nature limited, and these limits may not be exceeded. If the limits are exceeded, the principal will not be bound.[5] A person dealing with a special agent, it is constantly said, "acts at his own peril";[6] he is "put upon inquiry";[7] he is "chargeable with notice of the extent of his authority";[8] "it is his duty to ascertain";[9] "he is bound to inquire";[10] "and

---

[3] Gordon v. Buchanan, 13 Tenn. 71 (1833); Jones v. Harris, 57 Tenn. 98 (1872); Calhoun v. McCrory Piano and Realty Co., 129 Tenn. 651, 168 S. W. 149 (1914); American Agr. and Chem. Co. v. Bond, 177 Ark. 168, 6 S. W. (2d) 2 (1928); Kory v. East Ark. Lbr. Co., 181 Ark. 478, 26 S. W. (2d) 896 (1930); Young v. Hayes, 212 Mass. 525, 99 N. E. 327 (1912); Lippincott v. East River Mill etc., 79 Misc. 559, 141 N. Y. Supp. 220 (1913).

[4] Blantin v. Whitaker, 30 Tenn. 313 (1850); Robinson v. Bank, 85 Tenn. 363, 3 S. W. 656 (1887); Baldwin Fertlizer Co. v. Thompson, 106 Ga. 480, 32 S. E. 591 (1899).

[6] Thompson v. Stewart, 3 Conn. 171, 8 Am. Dec. 168 (1819); Baxter v. Lamont, 60 Ill. 237 (1871); Campbell v. Sherman, 49 Mich. 534 (1883); Beals v. Allen, 18 Johns 363, 9 Am. Dec. 221 (N. Y. 1820); Savings Fund Society v. Savings Bank, 36 Pa. 498, 78 Am. Dec. 390 (1860); Blane v. Proudfit, 3 Call. 207, 2 Am. Dec. 546 (Va. 1802).

[8] Montgomery Furniture Co. v. Hardaway, 104 Ala. 100, 16 So. 29 (1893); Moore v. Skyles, 33 Mont. 135, 82 Pac. 799, 3 L.R.A. 9 (N. S.) 136 (1905); Schaeffer v. Mutual Ben. L. Co., 38 Mont. 459, 100 Pac. 229 (1909); Cleveland v. Pearl, 63 Vt. 127, 25 Am. St. Rep. 748, (1890).

[7] Michael v. Eley, 61 Hun. 180, 15 N. Y. Supp. 890 (N. Y. 1891).

[8] Baldwin Fertilizer Co. v. Thompson, *supra* note 4.

[9] Yates v. Yates, 24 Fla. 64, 3 So. 821 (1888); Americus Oil Co. v. Guer, 114 Ga. 624 (1902).

[10] Michael v. Eley, *supra* note 7.

if he does not, he must suffer the consequence."[11]

If the agency is known, and known to be special or limited, it is the duty of the party who deals with the agent to inquire into the nature and extent of the authority conferred by the principal, and to deal with the agent accordingly; and the same rule applies where though the agency is not known to be special or limited, yet the circumstances of the cases are such as to put a person dealing with the agent on inquiry.[12]

It naturally follows that if the agency be special, the party seeking to charge the principal with the acts of his agent must show the transaction to be within the scope of the agency.[13] Agency is always a fact to be proved; and the person who alleges it has the burden of proving it by a preponderance of evidence.[14] It is well settled in Arkansas that no presumptions will be made in respect to the agency.[15] As stated in the Georgia case of *Wise v. Mohawk Rubber Co.*:

---

[11] Young v. Harbor Point Club Ass'n., 99 Ill. App. 290, (1901).

[12] Swift v. Erwin, 104 Ark. 459, 148 S. W. 267 (1912); American Agr. and Chem. Co. v. Bond, *supra* note 3; Kory v. East Ark. Lbr. Co., *supra* note 3; Farrington v. South Boston R. Co. 150 Mass. 406, 23 N. E. 109 (1890); Mandeville v Avery, 124 N. Y. 376, 26 N. E. 951 (1891); Johnson County Sav. Bank v. Scroggin Drug Co., 152 N. C. 142, 67 S. E. 253, 136 Am. St. Rep. 821, 50 L. R. A. (N. S. 581 (1910); Green v. Hugo, 81 Tex. 452, 17 S. W. 79 (1891).

[13] St. Louis etc. Ry. Co. v. Bennett, 53 Ark. 208, 13 S. W. 742 (1890); Tappan v. Morseman, 18 Iowa 499 (1865); Dispatch Print. Co. v. Nat Bank of Com., 109 Minn. 440, 124 N. W. 236, 50 L. R. A. (N.S.) 74 (1910); Amer. Car. etc. Co. v. Alexandria Water Co., 221 Pa. 529, 70 Atl. 867, (1908).

[14] Schutz v. Jordan, 141 U. S. 213, 11 Sup C.t. 906 (1891); Bell v. State, 93 Ark. 600, 125 S. W. 1020 (1910); Jones v. Mansfield Lum. and Merc. Co. 97 Ark. 643, 132 S. W. 1004 (1915); E. R. Thomas Motorcar Co. v. Town of Seymour, 92 Conn. 412, 103 Atl. 122 (1918); Schmidt v. Shaver, 196 Ill. 108, 63 N. E. 655 (1902); Stratton v. Todd, 82 Me. 149, 19 Atl. 111 (1889); Midland Savings Ass'n. v. Sutton, 30 Okla. 448, 120 Pac. 1007 (1911); Walen v. Davis, 112 Okla. 23, 239 Pac. 59 (1925).

[15] Wales Riggs Plantation v. Grooms, 132 Ark. 155, 200 S. W. 804 (1918); Pierce v. Fioretti, 140 Ark. 306, 215 S. W. 646 (1919).

"One dealing with a special agent takes the risk as to any extension beyond his actual authority, and has the burden of showing the principal's authority for any acts reasonably necessary to the performance of the special agency."[16]

Recent authorities are sufficient to show that an agent with authority to sell or collect, has no actual or implied authority to release or compromise claims in the absence of the principal's consent.[17] It may be concluded, therefore, that the burden of showing an agent's authority to compromise his principal's claim is upon the party seeking to take advantage of such a compromise.[18] The burden of proving a waiver should follow the same rules as those of proving a compromise; so the principal case is sound.

No Tennessee case on the point of the principal case has been decided, but it would seem that Tennessee should follow the rule set forth in the principal case.

L. B. B., JR.

TORTS—CONTRIBUTION BETWEEN JOINT WRONGDOERS

The plaintiff was injured through the "active" negligence of the defendant in moving a high voltage wire near where plaintiff was working, and the "passive" negligence of plaintiff's employer in not warning plaintiff of the danger. After the plaintiff had received Workman's Compensation benefits through his employer, he sued the defendant who impleaded the employer

---

16 War Finance Corp. v. Davenport, 4 Tenn. App. 599 (1926); Wise v. Mohawk Rubber Co., 23 Ga. App. 255, 98 S.E. 100 (1919).

17 Kalevas v. Ferguson, 216 Ala. 625, 114 So. 292 (1927); Morgan v. E. A. Weil Co., 31 Ga. App. 611, 121 S.E. 703 (1924); Whitney v. Krasne, 225 N.W. 245 (Iowa 1929); Hoshor-Platt Co. v. Miller, 238 Mass. 518, 131 N.E. 310 (1921); People's State Bank for Savings v. Block, 249 Mich. 99, 227 N.W. 778 (1930); Scarritt-Comstock Furn. Co. v. Hudspeth, 19 Okla. 429, 91 Pac. 843 (1907).

18 Scarritt-Comstock Furn. Co. v. Hudspeth, *supra* note 17.

and contended that the amount which the plaintiff had already received should be deducted from any judgment rendered in the action, or that the judgment should be apportioned between the defendant and the plaintiff's employer. Judgment was rendered for the plaintiff without deduction and without apportionment on the ground that the right of contribution between join tort-feasors exists only when the one seeking the right is guilty of "passive" negligence and the one against whom the right is sought is guilty of "active" negligence.[1]

It is often stated as a general rule that no right of contribution exists between joint tort-feasors.[2] The reason for the rule, Cooley says, "may be found in the maxim that no man can make his own misconduct the ground for an action in his favor."[3] However the so-called general rule has been so modified by exceptions as to be almost unrecognizable under modern decisions. It has been said that the rule applies only to cases where both parties are guilty of conscious or intentional wrongdoing.[4] That view was taken by the United States Court for the Northern District of West Virginia in the case of *Pa. Steel Co. v. W. & B. Bridge Co.*[5] But Cooley in his work on Torts[6] criticizes

---

[1] West Texas Utilities Co. v. Renner,—Tex. Civ. App.—, 32 S.W. (2d) 264 (1930).

[2] Sparrow v. Bromage, 83 Conn. 27, 74 Atl. 1070 (1910); Wise v. Berger, 103 Conn. 29, 130 Atl. 76 (1925); Petroyeanis v. Pirola, 205 Ill. App. 310 (1917); Smith v. Graves, 59 Ind. App. 55, 108 N. E. 168 (1915); Detroit Ry. Co. v. Boomer, 194 Mich. 52, 160 N. W. 542 (1916); Fidelity Co. v. Exchange Co., 140 Minn. 229, 167 N. W. 800 (1918); Avery v. Bank, 221 Mo. 71, 119 S. W. 1106 (1909); White White v. Carolina Realty Co., 182 N. C. 536, 109 S. E. 564 (1921); Betcher v. McChesney, 225 Pa. 394, 100 Atl. 124 (1917); Mosher v. Eastland Co., 259 S.W. 253 (Tex. Civ. App. 1924); Palmer v. Showalter, 126 Va. 306, 101 S.E. 136 (1919); Seattle v. Peterson Co., 99 Wash. 533, 170 Pac. 140 (1918).

[3] 1 COOLEY, TORTS (3rd ed. 1906) 254.

[4] Chicago Ry. v. Conway Co., 219 Ill. App. 220 (1920); Furbech v. Gerutz, 72 Ore. 12, 143 Pac. 654 (1914).

[5] 194 Fed. 1011 (1912).

[6] *Supra* note 3, at 258.

that limitation, saying that the better rule is the one laid down in the English case of *Adamson v. Jarvis*,[7] where it is said: "The rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." The learned author concludes that: "If he knew the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable then he will be left by the law where his wrongful action has placed him."[8]

The Supreme Court of the United States has held that there is no right of contribution between joint tort-feasors where they are in *pari delicto*.[9] The same statement was made in the Maine case of *Hobbs v. Hurley*,[10] with the qualification that if the act was not intentional but was negligent only, the parties being wrongdoers only by legal imputation, contribution will be allowed. The Kentucky courts have laid down a rule that there can be no contribution unless the primary responsibility is upon the one from whom contribution is claimed. A few cases have held that if the act does not involve moral turpitude the one paying the damages may have his rights against the other determined.[12]

The cases in Tennessee on the point are interesting to note. In the case of *Rhea v. White*,[13] decided early in the year 1859,

---

[7] 4 Bing. 66, 73 (1827).

[8] *Supra* note 3, at 259.

[9] Mining Co. v. Bigelow, 225 U .S. 111, 32 Sup. Ct. 641 (1909).

[10] 117 Me. 449, 104 Atl. 815 (1918).

[11] City of Bowling Green v. B. G. Gaslight Co., 112 S. W. 917 (Ky. 1908); City of Louisville v. Louisville Ry., 156 Ky. 141, 160 S. W. 771 (1913); Owensboro Ry. v. Louisville Ry., 165 Ky. 683, 178 S. W. 1043 (1915); Cumberland Tel. Co. v. Mayfield Co., 166 Ky. 429, 179 S. W. 388 (1915).

[12] Horrabin v. Des Moines, 198 Iowa 549, 199 N. W. 988 (1924); Buskirk v. Sanders, 70 W. Va. 363, 73 S. E. 937 (1912); Ellis v. Chicago Ry., 167 Wis. 392, 167 N. W. 1048 (1918).

[13] 40 Tenn. 121 (1859).

the Supreme Court of Tennessee held that there can be no contribution between wrongdoers. In a later term of the same year the court affirmed its former holding in the strongest possible language, saying that no action for contribution could exist between joint tort-feasors, "whatever may have been the nature of the case, or the apparent right of the one, on principles of natural justice, to have such contribution, or to throw the entire satisfaction of the judgment on the other party."[14] In 1872 in the case of *Maxwell v. L. & N. Ry.*[15] the Chancery Court in a case later affirmed by the Supreme Court allowed a recovery by an employer from his employee, where the former had paid a judgment growing out of the negligent acts of the latter, expressing the opinion that contribution between joint tort-feasors is not inequitable. But the court pointed out that the question of contribution was not strictly the point in issue in the case presented because the employer and employee are not technically joint tort-feasors. In 1915 came the case of *Holland v. Nashville Ry. and Light Co.* There the plaintiff had injured one Talley who had sued and recovered a judgment which the plaintiff duly paid. Plaintiff then sought to recover from the defendant on the ground that defendant's negligence was a proximate cause of the injury. Defendant demurred, thereby admitting that its negligence was a proximate cause. On petition for writ of error to the trial court the Court of Appeals was of the opinion that the question had not been settled in Tennessee and granted a hearing before the full Court.[16] That body refused to depart from the holding of the Supreme Court in the case of *Rhea v. White, supra,* and reaffirmed the strict rule that no right of contribution exists between joint tort-feasors.[17] In

---

[14] Anderson v. Saylor, 40 Tenn. 551 (1859).

[15] 1 Tenn. Ch. 8 (1872) (affirmed without opinion by the Supreme Court).

[16] 5 Higgins 384 (Tenn. Ct. of Civ. App. 1915).

[17] 6 Higgins 68 (Tenn. Ct. of Civ. App. 1915) (writ of certiorari denied by Supreme Court, 1915).

1924 a case came before the Supreme Court presenting the following facts: A judgment had been entered against three defendants for the conversion of a trust note. The one who paid the judgment then brought an action in equity to recover one third of the amount of the judgment from each of the other two defendants. The Supreme Court affirmed the action of the Chancery Court in sustaining the bill saying that the equities of the case were met by allowing contribution.[18] However in the later case of *Cecil v. Jernigan*,[19] the Court of Appeals reaffirmed without qualification the general rule that contribution will not be allowed.

It would seem therefore that while the Tennessee cases tend to follow the strict rule, the principal case is in line with the trend of modern authority elsewhere.[20]

R. R. R.

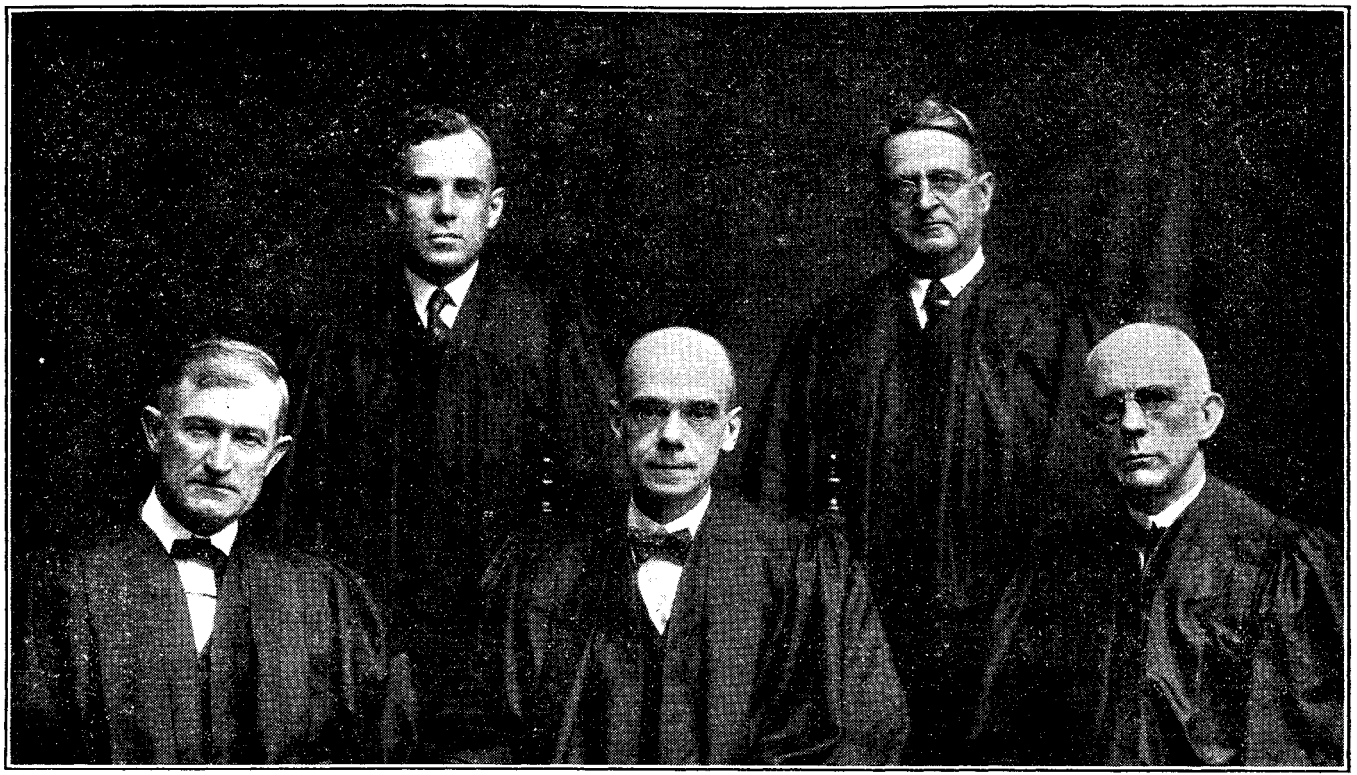
---

[18] Central Bank v. Cohn, 150 Tenn. 375, 264 S. W. 641 (1924).

[19] 4 Tenn. App. 80 (1927).

[20] Central of Ga. Ry. v. Swift & Co., 23 Ga. App. 346, 98 S. E. 256 (1919); Portland v. Citizen's Tel Co., 206 Mich. 632, 173 N.W. 382 (1919); for additional discussion of this subject see: Note (1929) 7 Tenn. L. Rev. 329.

JUDGES OF THE SUPREME COURT OF TENNESSEE



ASSOCIATE JUSTICE SWIGGART
ASSOCIATE JUSTICE COOK
CHIEF JUSTICE GREEN
ASSOCIATE JUSTICE MCKINNEY
ASSOCIATE JUSTICE CHAMBLISS

Tennessee Law Review

Volume 9 APRIL, 1931 Number 3

THE ORGANIZATION OF THE LAW OF CORPORATION FINANCE*

A. A. BERLE, JR.

Dean Pound once said that the law of torts existed for twenty years before the Harvard Law School discovered that fact and undertook to organize it. Somewhat the same situation has prevailed with respect to corporation finance. The title is perhaps questionable and, like many titles, is in part accidental. The intention was merely to differentiate that body of doctrine dealing with the large or publicly financed corporation and surrounding its financial operations, from the somewhat narrower field occupied by classic corporation law. As in many situations, the title cannot be wholly accurate; it is merely handy; an algebraic letter might perhaps do as well.[1]

The necessity for organizing this field need hardly be argued. The mushroom development of the American corporation is a matter of common knowledge. How deep it strikes into the roots of American social organization is less well known, though beyond dispute. The so-called publicly financed corporations, (meaning those which have appealed in some substantial way to the open market for capital markets), now hold title in one form or another to perhaps 40 per cent of

*Delivered as a paper before the Round Table on Business Organization of the Association of American Law Schools, held at Chicago in December, 1930.

[1] See Berle, CASES AND MATERIALS IN THE LAW OF CORPORATION FINANCE (St. Paul, 1930). The preface gives an outline of the genesis of this scheme of organization and of the title (Law of Corporation Finance).

the industrial wealth of the United States. The figure, if anything, is conservative; statistical study seems to say that the 200 largest corporations alone have approximately 30 per cent of such wealth. Of American savings somewhat over 50 per cent find their way through direct investment or through the medium of institutions, such as the savings banks and insurance companies, into the corporate system. It is demonstrable (and has in fact been demonstrated) that if savings are to become economically productive, a considerable proportion (about 50 per cent) of them must necessarily find their way into this corporate hopper. At the moment, these investment operations are no longer matter of choice. They are virtually compelled by the fundamental economic law that capital demands outlet.[2]

Manifestly, the financial machinery involved in this situation has grown apace and changed its function. Whereas formerly financial operations outside the field of short-term credit and government financing were limited to handling the accumulated savings or surplus of a relatively small group of wealthy or well-to-do individuals, and were fundamentally concerned with the bond market, today such operations involve the constant routing of capital into industry, maintaining an even pace with the industrial growth. Management of this capital has ceased to be a purely borrowing operation. It has become virtually a system of property tenure — rivaling in importance the real estate tenures which heretofore formed the base of most of our property law. In a word, we are evolving a new method of economic organization in which the corporation is the nucleus and the financial media, or securities, are the evidences of beneficial ownership. The financial operation takes in the whole range of processes and transfers of property to the new system, rearranging beneficial interests therein, dis-

---

[2] See "Corporations and the Public Investor", American Economic Review, Vol. XX, No. 1, page 54, (March, 1930). The statistical calculations were made by Mr. Gardiner C. Means.

tributing such interests, when subdivided, among large numbers of people, administering these interests continuously thereafter. Economists and jurists come to use the term "industrial feudalism" as a description of this institution; a term fully justified, I think, by the implications of the system.

Obviously, the institution has far outgrown the classic base of corporation law with which we are all familiar. Revolving about problems of corporate entity which placed the corporation in contra-distinction to the individual, and about the function of the State in dealing with it, our law for some three centuries has been struggling with the relationship of the corporation *qua* corporation to public authority and to its private creditors. These were problems of the management of an enterprise. Rights *intra* the corporation, and adjustment of the relations of various groups within the mechanism itself formed only a secondary study. Such organized doctrine as we had covering stockholders' rights, management problems and the like, developed out of the small corporation and bore little, if any, relationship to the problem of the publicly financed entity of today. It is unnecessary to labor the point. A glance at the financial page of any newspaper, or a stroll down State Street, La Salle Street, or Wall Street, will supply more than enough evidence.

We have thus fairly thrust upon us the problem of organizing the law of corporation finance — or, if you choose to put it so — of projecting the old law of corporations into the tremendous field which has been grafted upon it. As in all problems of organization, three processes are necessary. The first may be described as a process of *synthesis* — attempt to derive from isolated rules in corporation law the fundamental principles which may serve as a base in meeting new situations. The second is that of *modification* — the squaring up of the general principles and the rule previously derived or now worked out, with the economic premises to the end that we shall not be attempting to evolve or apply rules out of premises which no longer exist or should not apply. The third may

be described as that of *construction* — the frank projection of such principles as we are able to work out into fields substantially uncovered by existing rules of law, but in which the probable rule must be forecasted in order to permit business to go on, and to assist it in developing sound law.

It is here proposed to develop each of these three proccesses and in some measure to illustrate their operations.

THE PROCESS OF SYNTHESIS

In the classic corporation law, perhaps the greatest fault was the existence of a series of specific rules treated as unrelated by lawyers and jurists. All of them were worked out to meet particular cases—a process obviously sound at the time—but they appear never to have been collated so as to bring into existence the building process which has characterized other fields. We must accordingly endeavor to find out what rules are related and what unrelated; the interests they are designed to protect; and, classifying them as well as we can on the basis of the interests they are intended to subserve, we must see whether they are merely sporadic or are really outgrowths of some underlying principle.

A significant illustration of this may be taken in that field of corporation law which deals with the issue of stock. As long ago as 1807 a shrewd Massachusetts court in *Gray v. Portland Bank*[3] worked out the familiar rule, creating the so-called stockholders' preemptive right to subscribe to a rateable proportion of newly issued stock. It will be recalled that this was accomplished by a demonstration that the particular corporation involved had a surplus; that to sell new stock at par would diminish the rateable surplus per share; and that therefore a stockholder could maintain his proportionate share in that surplus only by being given an opportunity to subscribe to the new shares. Likewise, his proportionate voting strength was considered. On these two grounds, but perhaps more on

---

[3] 3Mass. 363 (1807).

the former than on the latter, the Massachusetts Court raised the specific rule of preemptive rights. The rule, somewhat broader and with various exceptions, is still good law today, though many modern corporations attempt to write it out of existence by including in the charter a stockholders' waiver of such right.

In 1925 the Superior Oil Company, whose shares had no par value, sold one block of shares at $16 and another block of shares at $8. It must be added that the eight dollar subscriber also entered into a variety of contracts which were not considered as proper consideration for the issue of shares. Suit was brought against the subscriber and against the Superior Oil Company by a stockholder, resulting in the now famous litigation of *Hodgman v. Atlantic Refining Company.*[4] The gist of the decision was that *prima facie* it was illegal to sell non-par stock at two prices, since this necessarily involved a transfer of equity from the subscriber paying the higher price. The Court was able to justify the transaction only on a specific finding of fact that the low-priced subscriber, through the contracts and other important considerations referred to above, had so contributed to the strength of the Superior Oil Company as to make the transaction fair even from the point of view of the higher priced subscribers.

Treasury stock throughout history has in general not been covered by the so-called preemptive right; and the theoretical doctrine is that the directors of a corporation are entitled to sell it at such price as they choose. In *Borg v. International Silver Company,*[5] on the application of a disgruntled stockholder it was ruled first that the directors could not use this power for the transfer of any equities from one shareholder to another; in the second place that they must so use it as to obtain the greatest amount of capital possible to the corporation; and, third, that by reason of the absence of a preemptive right

[4] 13 F. (2d.) 781 (C.C.A. 3rd, 1926).

[5] 2 F. (2d.) 910 (S.D.N.Y. 1924).

a court of equity would scrutinize the transaction with peculiar care.

Here are three rules, one of them apparently specific and relating to preemptive rights; a second equally specific, apparently relating to non-par stock; a third again apparently unrelated, relating to treasury stock. At the same time there was a fourth rule that par value stock must be issued for not less than its par value[6] — the result being in substance to exact a minimum contribution from each incoming shareholder.

At first sight it would seem as though all four rules might be considered disjunctively. Yet the mere arrangement of them in this order suggests a different point of view. Fundamentally, the law was in each case looking through the mechanism of the corporation; was recognizing that each share represented a fraction of equitable ownership; that the power to issue shares afforded also the power to deprive one shareholder of a part of his equity in favor of another; and, accordingly, was at various points developing prohibitions tending to enforce the rough and ready theory that each participation in the corporation ought to represent, if not an equal contribution, at least an equitable contribution under all the circumstances. Out of these and other similar cases arises a basis for the synthetic process. Apparently we have first, an observable economic result of a share of stock — namely, that the share when issued at least purports to give to the shareholder a given participation in assets and earnings. In the second place, we have before us the possibility that values within such participations may be shifted from one individual to another by management action — action legal enough so far as power goes, but unhappy in its results. In the third place it seems that wherever this result has appeared, courts have, on one theory or another, intervened to insist that equitable principles must apply ex-

---

[6] This rule is statutory in most states. For an example of it see Gamble v. Queens County Water Company, 123 N.Y. 1921 (1890); for a discussion of the rule and its history, see an excellent new treatise WATERED STOCK by David L. Dodd (N.Y. 1930).

pressed either in direct equitable relief, or through adoption into the law of an equitable rule. On this line it is not difficult to arrive at the rule which has been christened at Columbia "the rule of equitable contribution"[7] — the rule that an incoming stockholder is obliged to make a contribution which in equity and good conscience justifies his receiving the agreed participation in the corporate assets or earning power. And whether this be described as a rule of preemptive right, or as a rule against stock watering, or as a rule against manipulation of treasury stock, or what you will, the underlying doctrine appears as approximately the rule stated.

We may pause a moment to suggest a variety of possibilities not heretofore explored. The preemptive right on this basis is seen, not as a *right* but a *remedy*, — an automatic device to prevent dilution of surplus, control and earning power. The modern encroachment on that right occasioned by waiver in the corporate charter, so far from eliminating the principle of equitable contribution, is far more likely to induce a court of equity to act with greater speed, and more drastically. In a situation like that presented in *Hodgman v. Atlantic Refining Company*,[8] the elimination of par value and consequent abrogation of the old legal rule requiring a fixed minimum to be contributed upon the issuance of a share, if anything, heightens the principle. With par value it is at least possible to argue that all hands assented to a contribution equal to par; whereas without par value there is no presumption of any osrt.

Does not our synthetic process stop here? We should have scored some advance if it did; but it would hardly seem as though we could leave the discussion there. A glance at the papers of any modern corporation, especially taken in connection with any so-called "liberal" incorporation act — Delaware, for instance, or, even if you wish a more conservative

---

[7] See Berle: CASES AND MATERIALS IN THE LAW OF CORPORATION FINANCE (1930) 238.

[8] *Supra* note 4.

state, New York — would indicate that in this very field of stock issue, statute and charter alike confer certain powers on directors. You would find, for example, that the statute permitted the incorporators by charter to agree that non-par stock might be sold for "such consideration as may from time to time be determined by the board of directors." You would find in your charter that the incorporators had duly passed this authority on to their board in sweeping terms. You would further discover that the number of shares authorized to be issued was far greater than any amount intended for issue at the beginning of business, so that there actually were huge reserves of authorized shares on which the power could operate. You would further find this capped by a complete waiver of the preemptive right; together with other provisions looking towards completeness of the power granted to the directors. And *yet* you would find that when the directors undertook to exercise this power they at once fell under the limitations of the rule of equitable contribution.

At this point our thinking needs to be still further rearranged. Heretofore the corporation had been thought of as a creature of the state, whose every power was granted by law; and that some quality of state authorization entered into everything which was done on the basis of a share of authority like that above set out. Nevertheless, the common law appears to surround this authority with some limitation, despite the blanket authorization of the statute, the completeness of the wording of the so-called contact, and the technical regularity of the corporate action taken thereunder. Apparently then, the power, at least in the field of issue of stock, is not unlimited. It is subject to some kind of common law rule; and the question at once arises whether the rule of equitable contribution is the only such rule, or whether it may not be a part of a system of other rules. And if the latter should turn out to be the case, is the rule of equitable contribution in turn related to the other rules, and is there an underlying principle behind the law?

This paper is not the appropriate place to enter into the various illustrations of corporate powers which have been limited, despite the absoluteness of the apparent authority, through some rule of common law. Such demonstration as the writer is able to make will, it is expected, be published elsewhere.[9] Illustrations will, however, suggest themselves. Power to amend the charter changing the rights of outstanding shareholders; power to merge; power to invest money; power to declare or withhold dividends; power to rearrange capital and surplus; — all have been limited on some theory or other, despite the fact that any reader of statute and charter would have been able to find a plain and unlimited authorization to do precisely the thing done.

Were we to examine these various limitations we should discover in each case that they protected in greater or less measure some equity of the investor in the proportionate position in the corporation granted to him by his share of stock; or, where this proportionate position could not be protected intact, that they required some showing that exercise of the power was to his benefit as well as to the benefit of the corporation at large. *Prima facie*, the authority might operate, but whether on the theory of "fraud (which is to say that the court was shocked by what was done) or on the ground of "vested rights" (which is to say that the court assumed the point at issue) or on the ground that property could not be "confiscated" (which is to say that the court began by constructing an equitable right and thereupon protected it); or on some other theory, courts limited apparent power in favor of the shareholders' interest. This invited a further attempt to synthesize; and led us, at Columbia at least, to suggest the theory that *all corporate powers, however absolute in form, were in fact powers in trust, to be exercised rateably, for the benefit of all concerned as their interests might appear, some flexibility being given where exact equivalents cannot be maintained.* In

[9] Harvard Law Review, May, 1931.

this aspect, the rule of equitable contribution derived above becomes merely a subordinate rule of application of the principle of powers in trust.

Retracing the ground in summary, a corporation has various powers, all of them to be exercised for the rateable benefit of all concerned. One of these powers is that of issuance of stock. In order to exercise this power, rateably for the benefit of all concerned, a rule of equitable contribution must be applied. At last, we discover that the preemptive right with which we began is merely one of several possible remedies to insur that the ratable handling o fthe shareholders es enforced by law.

THE PROCESS OF MODIFICATION

Deriving general principles from apparently isolated rules in the manner described above has, however, involved one assumption. The rules have been taken at face value: they were correlated on the basis of the economic interests they were designed to protect. The assumption has been made that the rules actually did protect these interests. In projecting such rules into the enlarged field which corporate operations in finance mark out, a comparison of these rules with the economic results is necessarily invited. Determination is required whether their application does not need to be varied as the circumstances change. This process, impossible on the classic assumption of a series of fixed rules becomes legitimate once the rules are thrust back to underlying priciples. If our synthesis is properly done, we are at liberty to modify our rules, *provided* the modification tends toward application of the principle; conversely, if the rule no longer forwards the principle, it is not only can, but must, be elided.

Illustrations are varied: a few may be given here.

The preemptive right referred to above, will be found to have been conceived as a desire to protect (a) the proportional representation or voting right and (b) to protect the proportionate rights in the corporate surplus. The first arose out of the

fact that in 1807 most corporations were "close" and partook somewhat of the nature of partnerships, as the Massachusetts Court pointed out. Modern finance has thrown overboard the partnership idea, certainly in respect to the publicly financed corporation. A voting right might mean anything or nothing; proportional representation may or may not be protected by the right of preemption. Further study of the cases would indicate that where proportional representation really means something — as where the issue of a small block of stock may shift the controlling interest — courts go to some length in protecting stockholders against undue interference with the situation; and they do this without referenece to preemptive right. There is a recognition that problems of control must be fought out legitimately, by appeal to stockholders, rather than covertly through manipulating stock issues. The principle is recognized; but the remedy is varied. A group of contemporaneous cases involving the strict preemptive right today, accordingly indicates very little attention paid to the proportionate voting strength. But the proportionate interest in assets remains a consideration. A still further study discloses that the preemptive right is far less vigorously applied where the stockholder asserting it holds a security limited as to dividends and ultimate participation; one decision throws out the right altogether where the claimant held a non-voting first preferred stock fixed both as to dividend and participation. The reason for the rule having failed, the rule ceased to exist. But the principle continued in force. Following this line of thought, observers of preemptive rights, notably Mr. H. S. Drinker,[10] have made the deduction that wherever the corporate structure is so involved that interests in assets and surplus cannot be equitably protected by the application of preemptive right, it should be assumed to be non-existent. To the writer, Mr.

---

[10] Henry S. Drinker, Jr., *The Preemptive Right of Shareholders to Subscribe to New Shares* (1930) 43 Harv. L. Rev. 586. See also Yoakum v. Providence Biltmore Hotel Co., 34 F. (2d) 533, 538-39 (D.R.I. 1929).

Drinker's conclusions went too far in suggesting that the whole preemptive right should be abandoned; but he certainly was on safe ground in suggesting that where the complexity of the corporate securities made the application of such a right difficult or inequitable, protection of the fundamental interests must be had through some other device. As financial practice develops new situations, the underlying principle would tend to manifest itself, in modification of the old rules, where possible, and in the development of new devices, where necessary.

Financial usage today in this very field suggests the probability of a further series of modifications. Unlike the old lawyers, we no longer consider the book value of a share of stock its primary attribute. Rather, we consider it in terms of earning power.[11] Conceivably, the next modification of the rule which led to the preemptive right will be in the direction of preserving a proportionate interest in earning quality, irrespective of the asset situation. The old law did not know the situation by which one share of stock contributing $50.00 might be entitled to a less participation in earning power than another share representing the investment of perhaps $1.00. The new law has to cope with the problems of comparative contract positions. The old law contemplated that a corporation would be liquidated; the new finance contemplates the corporation as eternal; and we are manifestly on the eve of a struggle to readjust the various devices in the direction of maintaining proportionate participation without primary regard to book value.

Another illustration appears in the field of dividends. Authority to withhold earnings was implicit in the classic corporation law. Equity did impose one limitation and only one — undue accumulation might be prevented. The new finance evolved a set of devices by which withholding dividends and

---

[11] See, for instance, the report of the three accountants on the comparative valuation of Bethlehem Steel Co. and Youngstown Sheet & Tube Co., republished in Berle: *opo cit.* 793 ff.

the irregularity of their payment materially alters participating rights. The capital structure, for example, of Associated Gas & Electric Company in this regard bears a good deal of study. In the classic situation judges considered that they need only inquire whether withholding of the dividends was justified by the needs of the business, or rather, whether directors, as reasonable business men, might believe such accumulation desirable. Sound business was the only test. Under the new financial situation a second problem presents itself. Accumulation may result in robbing Peter and paying Paul. Balanced against the desire for sound business must be set the consideration of the shareholder who may be deprived of any return on his investment.

Examination of the cases discloses a number of decisions where dividends were compelled owing to the fact that directors have been motivated by considerations other than that of the business: — an arbitrary father — a director seeking to buy stock cheaply — a controlling interest anxious to make its corporation a philanthropic vehicle — and so forth. If, therefore, the motive in withholding dividends is less to forward the business than to vary participating rights, there is ground for the belief that the control of equity may be extended. But suppose it is good business to withhold earnings and *also* that this policy is profitable to the management at the expense of shareholders. Which of the two theories governs? The expansion of the corporation as an entity may be at once desirable from its impersonal collective viewpoint; and may also be the ruin of John Doe, holder of its Class A stock; and at the same time be the great enrichment of Richard Roe, holder of its Class B stock or common, and of Walter Smith, whose sole interest in the corporation (aside from his directorship) is a large block of stock purchase warrants. How are we to deal with this situation? Obviously, a rule which unduly cripples the corporation and its business activities, is, in the large aspect, unsound. Equally unsound it must be to wreck the individuals who have made the ex-

pansion possible. Following by the synthetic method into the fount of equity from whence original control sprang, it is obvious that equity acted precisely to prevent corporate management from victimizing shareholders through unreasonable withholding. Nothing appears to indicate that this principle has changed: the law still regards the shareholder as entitled to his participation. When that rule was adopted, however, the conflict between the interests of the shareholder and the interests of sound business was relatively non-existent. Today, the two interests may directly conflict, and it is no consolation to John Doe to tell him that such a conflict indicates that the financing was thus obviously unsound. The two most interesting discussions of this situation — both appearing, oddly enough, in the same case (*Barclay v. Wabash Railway*), and both by judges who agreed in the final result, (Judge Learned Hand, dissenting, below,[12] and Mr. Justice Holmes, writing for the Supreme Court,[13] above), — indicate a divergence of view. Judge Hand insisted, though without too much strength, that consideration for the shareholder had to be balanced against sound business; Mr. Justice Holmes seemed to indicate that the business consideration came first and last and ended the matter. Now the new finance would answer the question without difficulty. Instruments exist recognizing just this situation; and your financier would suggest that the class A stockholder be given a dividend in stock or scrip permitting accumulation but protecting his participation. This would seem to be the logical answer; the old rule permitting accumulation may be modified to permit its application, provided the corporation on its financial side avail itself of a device permitting protection of participation; and an injunction order could well be drawn indicating this line of solution.

If further illustrations are needed, they may be found in the related fields of adjusting merger terms, of investment by

---

[12] 30 F. (2d) 260 (C.C.A. 2nd, 1929).

[13] 280 U.S. 197 (1930).

the corporation in its own stock, of the handling of affiliated corporations; and the like. By comprehending the principles which give birth to specific rules; and by setting the rules against their financial implications, modifications may be worked out as they are needed.

This, however, calls for the application of a new technique. Economic ideas of judges are largely derived from their observation of the world. But finance is a technical subject and susceptible of scientific analysis. Statistical methods can be used; interpretation of data is a matter for expert handling. In arguing *Barclay v. Wabash Railway,* Mr. Justice Hughes, then counsel for the Wabash, included in his brief a statistical summary of railroads having non-cumulative preferred stock outstanding; and the amount of the earned and unpaid dividends accumulated thereon; and he opposed the argument that the non-cumulative shareholder should secure a return on his money, the consideration that railroads would find themselves faced with a staggering bill for arrearages before their common stockholders would receive anything. And he also made some capital out of the fact that non-cumulative stock was commonly an instrument used in reorganization to effect settlements with creditors, rather than real investment. In this phase the case was a battle of financial views, and was handled almost entirely as a matter of financial analysis. If one were arguing a similar case in connection with the Associated Gas & Electric Company, the precise variations and possibilities afforded by the complex dividend provisions would have to be checked against the use made of the accumulations; and the real dispute would ultimately appear to be whether the conceded requirements for capital in the utility field were so exigent as to require sacrifice of the rights of certain groups of shareholders. In other words, wherever questions of financial application of corporate rules are presented, the underlying principle must be invoked as a major premise rather than the rule itself. The economic result becomes the minor prem-

ise; and the rule invoked must be so modified as to represent the conclusion.

THE PROCESS OF CONSTRUCTION

It is fairly probable that if the process of synthesis and of modification had been the only problems involved, our law of corporation finance would long ago have grafted itself normally and naturally on to the classic base of corporation law. But the bewildering speed with which corporations developed was matched by the equally bewildering versability with which financial media and devices were developed. There were and are fields in which almost no precedent for the situation can be found. There have been drawn into the situation elements whose economic function is only remotely understood. Because of the tremendous interests involved, disputes are habitually settled rather than tried out; litigation, when it occurs, is more likely by way of flank attack than a major engagement on merit. Financial activity in these fields is apt not to be reflected by concomitant growth of legal precedent. Here there is no help for it: principles must of necessity be worked out *de novo* and rules evolved as one goes along. And it is important that the two processes be distinguished, lest a rule be mistaken for a principle.

Again, it becomes necessary to illustrate. Among the recent creations of the stock market is what is known as a "stock purchase warrant." In financial practice this is the extreme lower level of the corporate equity — a security offering the greatest degree of risk and the greatest possible profit. In form, it is an option to buy authorized but unissued stock. The financier recognizes the warrant holder as a security holder with an interest in the corporation. The strict constructionist would maintain that the warrant holder held no position in the corporate organism. The financial analyst would recognize the warrant holder as the owner of a potential future participation in the corporate earnings, and, at the same time, as the owner of a device entitling him to share in any appre-

ciation of market value which the stock might have. With these three concepts the lawyer has to work. Since the field is virgin to this day (despite the millions of such instruments which freely circulate in the New York and Chicago markets) the lawyer working in corporation finance has a frank function of prophecy and construction. The debate as to whether no law applies to such instruments until after a court decision has been rendered, or whether undetermined law applies which it is the lawyer's duty to discover, belongs to the realm of jurisprudence. In any case, the lawyer finds a client in his office who expects advice, and declines to be satisfied by the statement that there is no law on the subject. Our lawyer must, therefore, be able first to work out the corporate structure and know substantially the meaning of this hybrid instrument. He must have some idea as to its effect on the corporate earnings, on the market price of the stock, and on the relative position of the other corporate security holders. In a carefully drawn warrant he may find that the clauses of the instrument go some length in answering his question; but the main problems remain unsolved. Has this warrant holder any rights as against the corporation? Does anyone in the corporation owe him any duty? Can he make his position good in any way? Or, in the alternative, has the stockholder of the corporation any remedy against indefinite dilution of his ultimate participation through the issue of stock purchase warrants? Or again, has the corporation any duty to arrange its affairs so that the warrant shall be satisfied in the kind of security which contemplated on the date of its issue? I do not propose here to attempt the solution. A method of reaching one, however, may be suggested. Corporation law has fairly developed the outline of a share of stock. The stock purchase warrant is, after all, a secondary form of stock: a shadow, if you will, of the stock that goes before. Its outline should be the same as that of the stock certificate, modified, however, by the fact that the stock itself does not come into existence until the happening of a condition. So far the old law will carry us. Fi-

nancial analysis indicates that the warrant has been set afloat upon a sea of anonymous holders under a series of expectations carefully engendered by the corporation itself. Benefit from these the corporation has certainly reaped. It would follow, therefore, first, that our corporation cannot be permitted to take advantage of the warrant and at the same time be in a position to deny its implications; second, that it has, to an extent, created interests in its authorized but unissued stock entitling it to a certain protection; third, that the corporate management has placed itself in the position of being the only representative of such interests; and, fourth, that these interests constitute a class, like other classes of securities, adverse perhaps to the outstanding participating stock. From these conclusions we should derive the general principle that warrant holders already had an interest in the corporation analogous to a contingent future interest in property; and that the rules worked out be such as to protect them against mismanagement on the other hand; and to protect stockholders against undue manipulation in favor of the warrant holders; and so forth.

A second field may be briefly touched on. The practice has grown in recent years of a corporate "affiliate" whose primary business is to trade in the stock of the main corporation.[14] Now the rules regulating corporate trading in its own stock are, if not definite, at least fairly well outlined under the classic forms of corporation law. The affiliate at first blush would seem merely to interpose a separate corporate entity, raising only the problem whether the corporate fiction should be disregarded. On more mature consideration it would appear, however, that the affiliate as a rule plays a part in the scheme of things. The stock markets are now a recognized part of the financial system; they are the paying tellers' windows through which private investments under the corporate system are returned to the investor. Liquidity becomes crucial in modern in-

---

[14] Some of these problems are discussed by the author in *Liability for Market Manipulation* (Feb. 1931) Col. L. Rev.

vestment. The affiliate is a vehicle through which the corporate stock is bought and sold; and, possibly, through which the market is stabilized. In one respect it may serve a useful financial function. Conversely, it is a device by which the corporate may, if it chooses, gamble in its own stock, assuming a position constantly adverse to its own shareholders — (hence its bad odor in the New York markets just at the moment).[15] The rule permitting disregard to the corporate fiction turns in a large measure upon the legal estimate of the use made of the fiction itself. It will not be permitted to cover fraud, for instance, or criminal acts. But a subsidiary corporation may be used to add powers not granted to the parent; the entity here carries the additional authority. To which of these doctrines do we look? Again, the construction of a thesis must turn on our estimate of the financial utility of the mechanism weighed against its obvious dangers.

So in a great area of uncharted seas. The investment banker, known to us for years as a fact, has never been accurately defined in law. The institution of "paid-in surplus" suddenly becomes a feature in the modern corporate structure, and is almost without legal analysis. The interest of a preferred stockholder in having unimpaired the marginal equity represented by the common capital stock raises a set of financial problems with which the law is now attempting to resolve. Disclosures which a corporation must make to the Stock Exchange with knowledge that they will be acted upon by its shareholders opens in all its force the question how far the cannons of good accounting have become rules of law.[16] In these and many other problems, on examination it will be found that

---

[15] Speculation by the Bank of United States in its own stock through the medium of subsidiaries (City Financial Corporation, Bankus Corporation) is at present the subject of investigation in New York City.

[16] The accounting of the Gillette Razor Co., whose statements showed earnings but did not include earnings of subsidiaries which, if shown, would have converted the supposed profits of the company into a deficit, has been the subject of attention on this score within the last three months, and is now the basis of litigation in Massachusetts.

analogous interests have been recognized in the classis corporation field; the relation of the interests in the newer financial development can be traced; the principles underlying the protection of the old interests can, by sufficient examination, be observed; and these may be projected into the new field, due regard being had to the financial effects thus produced.

* * * * * * *

We have been dreaming a good deal. Dare we dream further? I think so; though this involves passing beyond the present realm of law.

We have, it seems, evolved a new form of property tenure. We have broken up the atom of property; and its expansion has dislocated our normal economic motivations. For the owner who worked with his hands upon his own property, we have substituted (1) the absentee owner who serves only the function of collecting capital; and (2) the manager whose major line of profit lies in diverting a portion of the profit which in normal systems would belong to the so-called owner. At the same time we have constructed economic organisms so vast and so strong that they may be fairly said to be sovereignties. That question is settled for good or ill: Mr. Brandeis' views as to the danger of such development evoked no response in practical result, and we have to deal with the world we live in. What, in ultimate analysis, are these principles towards which we strive? Perhaps they are only the State's rules for the regulation of business and financial activity. But perhaps — and this is the sound of the distant horn — we may be doing something far more important. We are moving out of a state which was primary *political* and into a state which is primarily *economic*. The corporation struggles today with the government as in older days political governments struggled with the Catholic Church. If power is ceasing to be a function of political sovereignty and is transferring itself to industrial principalities, we may be writing, dimly, part of the constitutional law of the economic society of tomorrow.

Even a tyro at statistics knows that the economic situation reflected in the world of corporation finance betrays, not a settled result, but transition: a society in terrific flux. Concentration of power over property has reached a point literally unknown in the world's history. In a violent continental European setting this might presage revolution. In our Anglo-Saxon thinking it is more likely to presage reordering of constitutional development. By chance, if you choose, the corporation has hapened to be the vehicle of this concentration. Consequently, its classic law becomes of first importance. But by these very tokens it becomes necessary not merely to detail it, but to analyze it to its prime factors; and more than that, to set these prime factors against the economic interests which must now appear as the raw material on which our legal rules must work. A rule governing corporate management may be anything, from a minor regulation, to an assertion of the duty of the economic prince towards his economic subject. Accordingly, it behooves us to be slow in our going, careful in our thinking, and call to aid not merely processes of logic and legal history, but processes of evolution and economic history; and in this our time to lay the basis in accurate financial as well as comparative legal method for the development of a law which may well become of paramount importance during the next century.

EXECUTIVE ENCROACHMENT UPON THE JUDICIARY*

CHAS. S. COFFEY

It is trite to say we are living in an age of change, and hardly less commonplace to remark that this is a critical time for both bench and bar. Social and economic forces are revolutionizing commerce and industry, and their necessary impact upon the legal profession and the judiciary is not unfelt. In law, as in other professions, the general practitioner is rapidly being displaced by the specialist, while the great corporations are tempting many of the brightest young lawyers away from active practice to devote their talents exclusively to the service of one client. In the interest of economy, time-saving, and efficiency, so it is said, law departments are maintained by these industrial and commercial giants where much of the non-litigated legal matters are handled. Every merger, too, tends to cut down still further the number of lawyers whose services are needed. Furthermore, many lines of work, formerly most lucrative for the profession, such as collections, conveyancing, abstracting, the handling of estates, are being absorbed by corporations, banks, and trust companies. And yet the law retains its glamor and has not lost its rewards. It continues to be recruited abundantly though its personnel is thus depleted on the one hand, and its legitimate fruits are diverted on the other.

Not only is the legal profession being thus affected, but the judicial functions of the courts are likewise being encroached upon. The evil may not yet have reached serious proportions, but the tendency is marked and it is fraught with real

*This article was originally delivered as an address to the graduating class of the Chattanooga College of Law in June, 1930. The address has been modified by its author for this publication.

danger. Delimitation of the lawyer's activities affects principally the profession itself; but any serious exclusion of the judiciary from its proper and constitutional sphere of determining the rights, private and public, of the people, is a matter for gravest concern on the part of all.

The dean of Northwestern University Law School recently announced that Blackstone's reign is over forever.

> "His day is not our day," the dean is quoted as saying, "and his law cannot be our law. What does Blackstone know of our problems? What does he know about zoning, subdivisions, or streets and assessments, or traffic signals, or prohibition?"

May we not as well ask what Sir Isaac Newton knew of airplanes, or Zeppelins, or parachutes, or the Caterpillar Club? Or what did Fulton know of the Leviathan, or the Bremen, or the turbine, or the oil-burner? Nothing, of course, but they discovered and defined the fundamental principles upon which all these operate today, just as they did yesterday and will tomorrow.

But the dean said something else nearer the point and deserving of far more attention:

> "In Blackstone's day," he says, "legal problems were settled in courts. Today most of them are settled out of courts, or in the commissions and boards which our changing government has set up arbitrarily to take the place of courts."

We may well applaud the tendency toward settling legal controversies out of court, to which he refers, but what of the commitment of judicial functions "by our changing government" to boards and commissions? The accuracy of the statement may not be questioned. The wisdom of the trend is open to serious doubt. It involves the encroachment of the executive branch of the government upon the judicial department; the substitution of administrative rules for principles of law; executive orders for judicial decrees. The rights of the people are involved, if not their liberty. And if their rights

now, may it not soon be their liberties?

Chief Justice Hughes doubtless had this in mind in a recent address when, in the course of some remarks on the growth of administrative agencies and their powers to find facts which under certain circumstances may be treated as conclusive, he indulged in an apt paraphrase. He said "An unscrupulous administrator might be tempted to say, 'Let me find the facts for the people of my country, and I care little who lays down the general principles.' "

The gradual extension of administrative power over persons and property has been most marked during recent years. Not all of such legislation by any means may be justly criticized. The reason for much of it is found in the congestion of population, the increased power and influence of great corporations, the altered social and economic conditions, as well as in the changes in the thinking of the people in those fields; and perhaps to some extent, at least, in what Dean Green terms "our changing government." Whatever the cause, however, a survey of the situation discloses an extent to which judicial functions have been committed to executive departments and to commissions and boards of various kinds which is startling indeed.

When the Interstate Commerce Commission was created in 1887 and the regulation of the railroads, telegraph and telephone, including the power to establish rates, was committed to it, the innovation was a marked one, and it caused much shaking of heads in the constitutional circles of the time. The Commission, of course, was and is a semi-judicial body of limited jurisdiction. But it is not a court though it performs many of the functions of one. More recently its powers have been extended beyond mere regulatory measures to include the granting of judgments or decrees for reparation to shippers. The New York Public Service Commission, and possibly other state utility commissions, have been granted similar powers.

The banking business has long been a subject for regulation by the executive departments of the state and national

governments. This has properly become more stringent of late, and the regulations now pertaining thereto constitute whole codes of administrative law. The same may be said of the insurance business. Other forms of such regulatory measures may be found in the administrative control through boards, commissions or executive officials of radio, transportation, airways, immigration, unfair competition, building regulations, and workmen's compensation. Specific cases arising under the latter are committed to the courts in our own state, but in most states they are handled by a board. The Workmen's Compensation Boards, and the Interstate Commerce Commission and certain utilities commissions in respect of granting reparations, are authorized not only to regulate but to grant compensatory relief, a function ordinarily peculiar to the judiciary. In all these, the rights of citizens and their property interests are daily affected by rulings made and enforced without the interventation of any judicial tribunal.

Perhaps the most aggravated form of executive encroachment is found in the administration of our tax laws. During the years 1917 to 1926 many millions of dollars in tax liability, where genuine questions existed as to whether the taxpayer was legally obligated, were acted upon and determination had of the issues involved by mere departmental clerks and auditors in the Income Tax Unit at Washington. Recourse to the courts was available, but only after paying what some over zealous departmental clerk or under-official had said was due and then bringing an action at law to try to get back, in the face of a presumption of valid collection, that which had been unjustly taken. This situation was greatly relieved in 1924 by the creation of the Board of Tax Appeals, and still further by the enlargement of the Board's powers and jurisdiction in 1926. This Board is now essentially a District Court for tax matters, and through it, and the right of appeal from its decisions to the Circuit Court of Appeals, the taxpayer may now have a judicial determination of his rights and liability in respect of Federal Income taxes without first being required to

pay under protest the tax assessed, however inequitable, or illegal. Even yet, however, certain committees, and boards of review, and so-called conferees, determine the liability of taxpayers running annually into very large sums. They constitute the lower courts, so to speak. The Board has, in effect, appellate jurisdiction only.

Not all of this is, of course, avoidable. As a practical matter, it seems essential for the adequate and effectual administration of necessary regulatory and taxing statutes. And yet it is said that in the administration of the Roman law the adjudication of private rights was reserved wholly to the judiciary, and that the same end has been accomplished almost completely in Great Britain. Only in the United States has this growth of administrative power, with its encroachment upon the functions of the judiciary, been most marked and rapid. And that, it would seem, in direct contravention of the spirit and purpose of the pertinent constitutional provisions.

Nothing was made so clear in the constitution of the United States as the purpose of the framers that the legislative, executive and judicial departments should be wholly separate, each operating within its own sphere independently and exclusively. Certain checks and balances — so-called — are, of course, provided, but none of these limit, restrict or divide the powers committed to the respective departments or the exclusive exercise thereof by the agency in which they were vested. Note the terse and emphatic language by which this division of powers is accomplished:

> "All legislative powers herein granted shall be vested in a Congress of the United States. . ." Art. I, Sec. 1.
> "The executive power shall be vested in a president of the United States." Art. II, Sec. 1.
> "The judicial power of the United States shall be vested in a Supreme Court and in such inferior courts as Congress may from time to time ordain and establish." Art. III, Sec. 1.

One will here observe that which is typical of the consti-

tution throughout, a complete absence of redundancy, circumlocution, and equivocal language. The things committed to the three separate agencies are "all legislative power", "the executive power", and "the judicial power". In each case it is the whole and not a part; no division within either class of powers is contemplated.

Most, if not all, of the states have pursued a like course. This complete separation of powers, previously unknown to history to the extent thus affected, is distinctly an American institution; and experience has clearly demonstrated its wisdom.

The whole administrative force of the government is concentrated in the President. Of necessity, he must exercise this authority through many agents and sub-agents. Neither the Congress nor the courts are so constituted as to lend themselves to the exercise of executive functions, hence the encroachment of either upon the powers of the executive has never been a matter for serious concern. In many ways, however, the issue of the delegation of legislative authority has been raised, and the courts have consistently held that it may not legally be done. The constitution vests such power in the national legislature, and there only may it be exercised. The state legislatures are similarly endowed with such exclusive power.

Plainly, however, the same rigid rule has not been maintained in respect of the delegation of judicial power to bodies other than the courts. It is difficult to comprehend why such should be the case for the constitution is no less imperative in vesting all judicial power in the courts than it is in commiting all legislative power to Congress. Yet the courts themselves have shown a marked leniency, rather than any species of jealousy, in giving effect to legislation which shifted some of their functions to the executive branch or to non-judicial bodies. We have already referred generally to a number of examples. Let us consider briefly how the courts have dealt specifically with one of them.

Most of the states have adopted workmen's compensa-

tion statutes. Many of these commit to boards or commissions the power to pass on claims and make awards. Most such statutes have been tested in the courts in respect of their constitutionality, and in many cases the point was made that there was a delegation of judicial powers which should render the acts unconstitutional. Some were sustained on the ground that there was not an "unwarranted" delegation of such functions. Manifestly this concedes some delegation, though supposedly not enough to worry about. Perhaps these courts were merely glad to be rid of that class of cases. Another line of reasoning resulted in sustaining the statutes upon the grounds that while the boards are administrative agencies, they exercise quasi-judicial powers; that they do not have final authority to decide and render enforceable judgments; that under elective statutes they are in effect boards of arbitration by agreement, and so on. A rather absurd piece of reasoning appears in a decision of the Supreme Court of Iowa on the subject:

> "It is not wholly clear that here there is a delegation of judicial power. It might, perhaps, as well be claimed that what has really been delegated is not judicial power, but power by award and resulting entry of decree to apply the measure of damages created by legislative act, a delegation of legislative rather than of judicial power."

The delegating was done, of course, by the legislature, but that which is delegated distinctly was not legislative, but judicial power. In either event, however, the violation of the constitutional provision seems manifest.

All of the Federal Revenue acts carry an administration section which in considerable detail prescribes the rules whereby the executive department shall determine the liability of the taxpayer and collect the tax from him. Furthermore, the Secretary of the Teasury is empowered to make and promulgate reasonable rules and regulations looking to this end, and the courts have held that such rules and regulations not in conflict with the statute have the force and effect of law. Similar pro-

vision is made for such rules and regulations in many state taxing acts. Under these rules provision is made for various and sundry hearings upon controverted questions which arise in the course of the assessment and collection of the tax. They go far beyond the mere matter of regulating the purely administrative functions of assessment and collection and provide for deciding grave issues of law and fact.

The committees, boards and functionaries before whom hearings on such issues may be had have been changed times innumerable since the inauguration of the income tax. Each new Commissioner of Internal Revenue and Deputy Commissioner in charge of income taxes has apparently had his own pet idea of how the job should be done, and has made revolution in departmental procedure his first, and often his principal, claim to distinction. Little of permanence has been enjoyed, therefore, but on the contrary marked instability. Just now a controversy over a deficiency assessment is first heard by a special representative out of the Nashville office. If not adjusted with him, then a hearing may be had before representatives of the Income Tax Unit in Washington. From there an appeal to the Board of Tax Appeals may be taken. Even after such appeal, however, further hearings may be had before the Special Advisory Committee on issues of fact, and before the Review Division of the General Counsel's office on questions of law. If agreements are reached the case is disposed of by the Board upon that basis. These latter hearings are more in the nature of negotiations for compromise. But the disposition of the matter by the Unit, from which action the appeal to the Board is taken, is essentially a judicial proceeding.

Many other illustrations might be presented, but this seems unnecessary. The fact of the diversion of judicial functions from the courts to executive and administrative bodies and officials is not open to question. We are more concerned with the inquiry — why is this undesirable? In what respect,

if any, is it dangerous to our institutions and hazardous to the citizen?

Where the action of the administrative body or official is purely regulatory and executive, no complaint properly lies. But when such board or official exceeds true executive functions and presumes to decide the legal rights of a citizen, or is authorized by statute to do so, then judicial functions are surely being performed. It may be, and generally is, that the ultimate judgment on the basic principles is in the courts. Too often, however, the findings of facts by the administrative agency is either final, or raises such a presumption as makes a further hearing useless. The practical result is a sample of executive, not of judicial, justice, and therein lies the danger.

The history of such ursurpation of power by the executive, whether with or without legislative authority, is the history of unmitigated evil. It may mean expedition of action, and perhaps accomplish a seeming economy; but in the end the citizen is the loser.

A number of years ago Dean Roscoe Pound said:

> "Executive justice is an evil. It always has been and it always will be crude and as variable as the personalities of officials."

The trouble is that the executive official decides each case largely upon the facts involved therein, plus the whim of the moment. No sound system of well reasoned and fundamental rules or principles is built up and followed; and with each change of officials a new and perhaps very different basis of deciding the issues is brought into effect. Dean Pound further observed:

> "Nothing but rule and principle, steadfastly adhered to, can stand between the citizen and official incompetence, caprice, or corruption."

The common law rule of *stare decisis* is frequently attacked in vigorous fashion by unthinking laymen. They seem little to understand what a bulwark it has been and is for the

protection of their personal and property rights. Government by administration in place of government by law would soon furnish them vivid reason for a change in viewpoint.

Dean Pound spoke or wrote the words quoted some twenty years ago. Since then regulation by administration has grown apace. The lawyer of today, in certain lines of practice, at least, finds himself appearing on behalf of clients before boards and commissions and executive officials almost as much as before the courts. This trend is anything but a healthy phase of "our changing government." Should it carry too far, the courts might well be rendered largely innocuous. The fact that the right of appeal to the courts from the action of the administrative bodies is still provided in most cases does not overcome the other and paramount fact that judicial power is being diverted from its proper and constitutional repository. This trend bids fair to increase rather than diminish. Later the appeal to some higher executive authority may be substituted for the present appeal to the courts. It would seem safer, and the part of better wisdom, for bench and bar alike to oppose vigorously every further move toward sapping the judiciary and dismembering its functions and powers.

This tendency in recent legislation which has been here discussed — dangerous as it seemingly is, and certainly of questionable constitutionality — may in considerable measure be accounted for by the propensity of the average American to seek direct and expeditious action. The wheels of justice as administered in our courts move slowly. They should not move too fast, for then they might easily become the wheels of injustice. But neither the bench nor the bar is wholly without fault in permitting the affairs of clients accustomed to the expedition and modern efficiency of the business world to be dragged through a long period of uncertainty while an involved and cumbersome system of procedure is followed to the final conclusion of the litigation. Some say the courts have broken down. This is not accurate, but it may be they do need help. If the legislatures, however, would remove the com-

plicated and involved rules of procedure which they have superimposed upon the courts and authorize, or rather permit, the latter to make their own rules, then hold the courts responsible for the efficient and expeditious enforcement of law and disposition of civil litigation, it is believed a marked improvement would be noted immediately in respect of the so-called delays of the law. Mr. Owen J. Roberts, now Mr. Justice Roberts of the Supreme Court, in an address before the New York State Bar Association in 1929, effectively voiced the sentiments of many distinguished members of the bar respecting this in the following words:

> "I do not know whether the better plan is to have a judicial council, as some states have now, or whether the rule-making power, and a very broad rule-making power, should be lodged in the court of highest jurisdiction in the state, or in some body drawn from the judges of the state; but this I do feel: That the time has come in this country for the lawyers to demand of the legislators that they turn over in the fullest measure to some body which has the knowledge and a body which has the flexibility to meet conditions as they arise the whole question of the rule-making power, and that instead of being regulated by statute, procedure in this country should be regulated by rules; changed from time to time and altered to meet conditions as they arise."

He then elucidated the meaning of the term "rule-making power" as follows:

> "And when I say *rule-making power* I mean, perhaps very much more than at first blush would appear. I mean this: That the question of forms of action, the question of the initiation of an action, the question of pleadings, the question of proofs, the question of trial procedure, the question of appellate procedure and the whole genus of procedural things, from the start to the end of a litigation, ought to be in the hands of those who know best about it and who,

> from time to time, can make rules to meet situations as they arise in the actual practice of law."

A reform such as he advocates would be far-reaching indeed, and many believe it would go a long way toward releasing the energies of the courts for action on the merits of controversies rather than continue to consume the greater part in struggling with the technicalities of statutory procedure. This, perhaps, should be the first, but ought not to be the last or only, antidote resorted to to combat the increasing encroachment of the executive department upon the functions of the judiciary.

STATUTORY DRAFTING

G. L. DOSLAND

A legislative body has been defined, "the body that deliberates and enacts laws, whether for the whole state (by delegation) or for minor subdivisions and municipalities, is a legislative body." Law has been defined as a rule of conduct prescribed by the sovereign demanding what is right and forbidding what is wrong. In the last decade we have seen the development of many administrative and ministerial boards and bureaus, which have been organized for the purpose of better administering the details of legislation. Many of these bodies have been given what might be termed a quasi legislative and quasi judicial capacity. Much confusion has arisen as to the particular jurisdiction of these respective administrative bodies. Our legislatures have seen fit to endow them with certain rule making powers which tend toward a delegation of legislative power in some respects, which at the same time vests them with the determination of the application of law to a particular and individual case, which is quasi judicial in its aspect. This mixed function of an administrative body is a unique creation and must be handled with extreme care, when we bear in mind that our entire system of government is based upon the division of the judicial, legislative and executive power. It is important to the draftsmen to know and to be able to readily distinguish legislative from non-legislative bodies, and to be able to arrange for correct co-ordination of these functions in a ministerial board. The distinction is found in the authority possessed by the particular body. Our legislative bodies are divided into three distinct groups, each of which derives its power from different sources. The Congress of the United States has, of course, derived all of its powers from Article One, Section One of the Constitution of the United States, which provides "all legislative powers herein granted

shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives." The various state legislatures have all of them derived their powers from their respective constitutions. The third large group consists of the various local governments and subdivisions of the Federal and State government, which, in the great majority of instances, have derived their power by legislative act, and they are created in most instances by a delegation of legislative powers. The question of the selection of the personnel of the various legislative bodies has not been accorded the importance which is due it. The personnel of the Federal and State legislative bodies is, of course, determined by the provisions of their respective constitutions, based theoretically on the ideal of representative government. In late years we have found, however, that even this system of selection of personnel of a legislative body has been subject to considerable abuse, due to the failure of the Federal and some of the State legislatures to reapportion the representation in accordance with the variations in population. There seems to be no adequate provision to take care of an exigency of this nature, as no method has been devised as yet providing for self-executing of the reapportionment provisions.

The selection of the personnel of the various administrative boards has not been developed to any satisfactory status. It is common knowledge that the various administrative boards tend, in many instances, to be subject to political pressure. The value of such administrative board is greatly lessened when it it is made the instrumentality of political expediency. Many of these smaller subdivisions of government have their personnel selected by the voters within their respective jurisdiction. This, in many instances, is highly undesirable, as the average local administrative board is too closely associated with the individuals within its territory to enable such board to be free from the influence of politics. Some attempt has been made to remedy this situation by causing the personnel of local administrative boards to be appointed by some executive officer,

and it was thought that this would tend to remove from individuals of that board the pressure of local political exigency. In practice, however, it has been found that many of the executive officers have taken advantage of their appointive power in order to develop for themselves our modern political machine. This situation is much to be regretted, as it greatly detracts from any potential value which the administrative board may have.

A very interesting experiment has been conducted in the City of Chicago with very gratifying results. As the time of the organization of the South Park District, a municipal corporation, organized for the purpose of developing certain parks and boulevards within the city and for governing the same, it was suggested that the personnel of this administrative and quasi legislative body be selected by a vote of the presiding judges of the Circuit Court of Cook County. This suggestion was adopted and the personnel of this body is selected by the presiding judges of the Circuit Court in convention. The result has been that the South Park Board has developed into a very efficient administrative body, giving to its constituents a clean, efficient and admirable administration of the affiairs of the South Park district. It would seem that more attention should be given to the selection of the personnel of administrative bodies than has heretofore been given. Any plans devised should be with a view toward divorcing the administrative body from the control of politics as far as possible.

SCOPE OF LEGISLATIVE BODIES

In order to fully understand and develop the possibilities of legislative drafting, it is necessary to realize the distinctive fields of the various legislative bodies and their limitations. Under our system, the State has by far the greatest freedom in legislative action. The various State constitutions are not grants of power to the legislature, but rather limitations or restrictions upon its power, and where their provisions are not applicable there exists no limitation upon the legislative

body. The various State legislatures have all power, not exclusively delegated to other departments of government, unless the same is expressly denied to it by the constitution. It must be borne in mind, however, that all legislative action must be general in its scope, as to any particular class and the legislative rules must apply with equality throughout the entire class. In contrast, the judicial function is applied to the rules of law to a particular circumstance or individual class. The legislative act is the prescribing of a general rule of conduct while the judicial act is the interpretation or application of that rule to any individual circumstances. The legislature is the guardian of public interest, and is the sole judge of what measures should be adopted for the advancement of the interests of the people. Our courts have universally held that if the legislature has acted within their rightful scope, the courts have no power to annul any interest. The power of making laws is a sovereign power, requiring the exercise of judgment and discretion, and has been expressly reserved to the legislatures.

The failure to recognize the important distinction between legislative action and judicial action has been the cause of much confusion, in determining the rightful scope of our administrative bodies. Recently, we have also seen the encroachment of the legislative into the judicial field, under the guise of investigation for the purposes of legislation. The right of the legislative body to investigate should be strictly construed for the protection of the constitutional separation of the legislature and judiciary. The tendency of certain bodies to disregard this distinction should be universally condemned as an unwarranted and ill-advised assumption of power. The danger of such investigations has been clearly demonstrated by the lack of the observance of well established judicial principles in the conduct of such hearings, and the encroachment of judicially recognized individual privileges.

Although the State legislative power is unlimited except as restricted by the constitution, the power of the Federal Congress is limited by the Federal constitution. The power of Con-

gress is in the nature of a grant rather than in that of a prohibition, and unless the power is expressly granted by the constitution, or implied from granted powers, Congress has no power under which to act. The local or municipal form of government has by far the smallest field. The City Counsels, Sanitary Districts, Drainage Districts and like bodies are highly restricted in their various legislative fields. They are formed for the purpose of assisting the State to carry out its legislative program. They exist to legislate and regulate such local details as would be impracticable for the State legislature to determine. The question of municipal legislative power gives rise to the much disputed question of the delegation of legislative authority. The local or municipal government has no power of civil regulation of private rights. Neither has it any power to change, alter or determine the remedial law of a state or locality. It has, however, the power of penal regulation of private rights by delegation from the State and only to the strict extent of such delegation. The question of delegation is a troublesome one. It has been held that while the legislature cannot divest itself of the power to determine the law, it may authorize in others a discretion as to the execution of that law, which authority, however, must be exercised in accordance with the general plan as established by the legislature. In other words, the general plan of legislation must be determined by the legislature. This rule, however, has been held to have no application to strictly political subdivisions created for the purpose of general local government. This delegation, however, has rarely extended beyond the penal regulation of private rights and the control of public property. The Federal government is also highly restricted as to the civil and penal regulation of private individual rights. In dealing with the drafting problem, the legislative draftsmen must first decide what legislative body is to enact the principle of legislation, and then must decide what device of legislation is to be used to most successfully express the legislative extent.

Dr. Freund has suggested what is undoubtedly the best

classification of the various types of legislative devices which may be used to effect the legislative purpose. They are divided into seven classifications, as follows:

1. Organization Provisions
2. Power Provisions
3. Management or disposal of public property
4. Taxation and eminent domain
5. Penal regulation of private rights
6. Civil regulation of private rights
7. Remedial Provisions

The use made of any particular classification will be determined by the authority of the body which is to enact the law and the particular purpose of that law. The classifications do not lend themselves to description or definition, and can only be determined by a study of the various legislative enactments, an impossible task in an article of this nature.

Forms of Legislation

The form of legislative enactments fall into a natural division, consisting of four main classes. These are: (1) Acts, (2) Ordinances and rules of municipal corporations, (3) Referendum, (4) Resolutions.

By far the greater number of legislative enactments is the simple act. It is so general as a class that the only satisfactory method of defining it is by pointing out the field governed by the various classes, namely, the simple act, amending act, repealing act and curative act. A study of the simple acts will immediately show that they consist of two distinct classes. They are either substantive acts, dealing with the enacting, regulating, expressing or forming the substantive law as distinguished from the adjective law. Both types of these acts may be either declaratory, that is, declaring the common law, or revolutionary, enacting an entirely new provision. The contents of a simple act will be taken up section by section later in this article.

AMENDING ACTS

The field of the amending act is restricted as to the subject matter of an amendment. The type of act, however, which may be amended is not restricted, as the right of amendment cannot be destroyed or legislated away. Our courts also hold that the legislature cannot deprive itself or its successors of the power to amend statutes. Neither can this power be restricted by prescribing methods, by which any particular act may be amended. The scope of the amendment is as wide as the original act and may embrace any provision that might have been inserted in the original act. Where no particular section is to be amended, it has been held that the subject matter of the amendment is limited in scope to the subject matter of the particular section proposed to be amended. In a number of states there are constitutional provisions forbidding amendments by reference to title only and requiring that the section as amended be re-enacted. This latter method of amendment seems by far the most satisfactory. The one least liable to cause confusion, and to effect the purpose of the amendment. Provisions of this kind have generally been construed as applying equally as well to acts appearing to be independent acts, which are, in fact, mandatory in nature as to those acts purporting to be amendments. Under such a provision it has been held in Illinois that an act, although apparently complete in itself, which purports to amend or revive a prior statute by reference to its title only is invalid. The amendment has the effect of repealing by implication all parts of the original act, which are, in fact, in conflict with it, but an amendatory act has been held to harmonize with the original act, insofar as it is possible to harmonize the two without destroying the effect of the amendment. There has grown up a peculiar type of legislation, which is not nominally an amendment, but which has the result of an amendment within a restricted field. This type of legislation is known as amendment by reference, and is of two distinct and widely divergent types; the first, in-

corporating certain provisions relative to the subject matter of the act, or its administrative provisions, by making applicable to it certain rules previously enacted by another act relating to a different subject matter; second, by incorporating into the act a statute, general in nature, which deals with subsidiary matters of administration or enforcement, and establishes a general rule applicable to a great number of statutory enactments. The first type of legislation by reference is as a general rule objectionable. In employing legislation by reference of this type extreme care must be taken in ascertining that the principles of the incorporated act will not tend to create confusion when applied to the terms of the act into which it is incorporated. Objection to this type of act has become very strong in several jurisdictions, under the New Jersey constitution, paragraph 2 of Section 7, Article IV, this type of legislation has been declared to be unconstitutional. In Kentucky it has been held unconstitutional to incorporate the provisions of one statute into another "so fas as applicable."

The second type of legislation by reference has much of value to recommend it. The various codes of procedure and interpretation acts are the most common of such amendments. These are of value in that they do away with much unnecessary repetition, and so tend to minimize the danger of adverse interpretation by the courts and its resulting confusion. This type of amendment by reference lends itself to standardization and its attending benefits. An example of this type of amendment by reference is found in the administrative code of Illinois. This code establishes a Board for the licensing of various professions; it provides uniform rules of applications, hearings, and a uniform method of licensing the professions. Provision is made for individual examining committees to examine applicants of the various professions, and report the result of the examinations to a central administrative body who then carry through the applications in the regular course and issue the licenses. Provision is also made for a standard method of revocation of licenses. This act is of much benefit

insofar as it standardizes the procedure throughout the professions.

It has been held that where portions of one statute are adopted by reference into another, the effect is precisely the same as though the statute or provision adopted had been incorporated bodily into the new act. The adoption by reference in a statute of law or part of another statute does not, however, include subsequent amendments of such adopted statute, unless the intent to so include them is expressed or very plainly implied. It is because of decisions of this kind that where there is an express reference to a law to be incorporated, it should be to the effect that the same should be incorporated as amended from time to time, unless there is a particular reason to fear an amendment which would be derogatory to the incorporating act. Confusion, however, has arisen where care has not been employed in the subsequent amendments of acts, the whole or portion of which have been incorporated into other acts. It is for this reason that incorporation by reference should be limited to those general acts particularly designed for such purpose.

Repealing Acts

Repealing acts are of two general types. The repeal by implication is not obtained by an express attempt to repeal, but is obtained by enactment of contrary provisions, and since the latest statute prevails, the former is of no effect, and is repealed by implication. In such a case, the former statute is repealed only insofar as it is in conflict with the provisions of the latter statute. In express repeals care must be exercised to fully determine the status of existing matters by virtue of the act to be repealed, and also as to the status of pending matters. As example: there is in existence an act which provides for licensing of physicians. If this act was to be repealed, provision should be made to determine the status of the licenses granted by virtue of this act. Provision would also have to be made to take care of applications for licenses which are pend-

ing at the time the repeal would take effect. These two results are generally taken care of by means of saving clauses, the particular characteristics of which will be taken up later. The effect of the repealing of an act is to take away from it all force and the act is totally destroyed. Several jurisdictions have enacted a statute providing that the repeal of a repealing act will not operate so as to revive the former act or any part thereof. The question then arose as to whether or not a statute of this nature would apply to repeals by implication, and the courts have held that such act did not apply to repeals by implication. This ruling was undoubtedly due to the fact that the courts recognized that our legislatures have been in the habit of indiscriminately passing acts which have the effect of repeal by implication of totally disconnected enactments, which were not considered at the time of the passage of the repealing act. It has also been held that such statutory regulation does not apply where a statute which supercedes the common law rule is repealed. It seems to have been common practice to include a general repealing clause in the acts providing that all acts or parts of acts inconsistent therewith should be repealed. Such provisions are merely surplusages and have no place in a well drafted act.

CURATIVE ACTS

The curative or validating act has been developed to serve a very useful and necessary function. The object of a curative act is not to change the law governing future action, but to waive some particular requiremtns of law as to formal matters which have been neglected to be complied with. The Test of the curative act in all cases is whether the legislative body might have, before the procedure to be validated took effect, authorized the act which it attempts to validate. It has been held that the legislature cannot validate void proceedings by means of a curative act, as where notice of a special election is not given as required by statute.

ORDINANCES

Ordinances of municipal bodies are of three main divisions and can be classified as dealing with:

(a) Police Power,
(b) Appropriations,
(c) Public Policies.

The procedure of enactment of an ordinance is not constant as it varies according to the charters of the various municipal agencies, and the statutes of the particular states. Where no mode of enactment is prescribed, the legislative body can adopt a particular procedure by rules of order, or the procedure can be in accordance with the ordinary parliamentary law. Where, however, the proceeding is prescribed by charter or statute, enactment must conform to the provisions, or else it is held void. Definite provisions should be made for the recording of all ordinances and care should be taken to provide that the same be held mandatory, as the courts have held many of such provisions merely directory, and care should be exercised in drafting such provisions, in order that it be made clear that the purpose is to require the recording of all ordinances. It is also sound policy that ordinances should not take effect until after publication has been had. As a general rule the same rules of interpretation and consideration apply to ordinances as those that apply to statutory enactment. An ordinance, to be valid, must not contravine the State or Federal constitution or statutes. It must not be oppressive or unreasonable, and must be general and impartial in its operation. It must be consistent with public policy, and cannot prohibit trade, although it may, to a limited extent, regulate trade.

ARRANGEMENT OF AN ACT

Legislation is of two types, simple or complex. In the case of simple legislation, the principal or leading motive of the act should be placed at the beginning of the act. This should be separate from and take precedence over the provisions re-

lating to administrative or procedural law. Where the legislation is complex, the principles should be arranged in different parts of the act, and each part should be treated as a simple act, and contain the principal motive in most concise form at the outset of its particular division, immediately following which should be placed the administrative or procedural provisions, particular to that principle. When all of the principles and their particular provisions have been provided for, those provisions remain which are common to all of the principal motives and these provisions are then placed at the end of the act. This arrangement would seem to be the most convenient as it would save much repetition, and thereby avoid a tendency toward confusion. The various sections should be made as short as possible and each principle or proposition that is separable from the others should be placed in a separate section.

The material in the act should be arranged as logically as possible for a clear understanding, and quick reference. The object of statutory drafting should be, first, that the act be clear, concise and unambiguous, and, second, that the various parts of the act should be clearly distinguishable, and easy of access to the general practitioner. The drafting rules and suggestions of the Committee on Uniform State Laws will be found to be very helpful. These are contained in a pamphlet, prepared by the Committee on Legislative Drafting on National Affairs of the Conference on Uniform State Laws, and was adopted on September 1, 1917. I would suggest the following outline for arrangement of the various provisions of an act:

1. Title
2. Preamble (if necessary)
3. Enacting clause
4. Principal motive of act
5. Exception provisions
6. Extent of act
   Territorial (Federal Acts)
   Reciprocity

Retalitory
7. Definition
8. Administrative provisions
9. Sanction provisions
10. Temporary provisions
11. Repealing clauses
12. Saving clauses
13. Short type of act
14. Appropriation provisions
Expense of enforcing
15. Duration of act
Taking effect provision,
Length of time act to be in force, if limited.

TITLE OF THE ACT

The use of written constitutions suggested the insertion of requirements of form, which would be enforced by the courts. Rules have gradually grown up supported by custom, and in many instances by statutory enactment. Rules as to formal arrangement of legislative enactments have found approval in both the Federal and State governments. In the Federal government, however, rules of formal construction are not strictly enforced. Many of the states have passed legislation providing for formal requirements in drafting of statutes. In order to determine the rules of any particular jurisdiction, it is necessary to study the statutory requirements. I shall endeavor in this article to set out briefly the main requirements of statutory drafting and in doing so shall follow the outline of the arrangement of the various provisions given herein. Where the law requires that titles be in a certain form, the courts, as a general rule, have held that these provisions are mandatory, and not merely directory. Where there are title requirments, it is necessary to make the title comprehensive enough to include all of the subject matter embraced in the enactment. The New Jersey Court has held that the measure of legality is whether or not the title is sufficient to give notice of the general subject matter of the proposed legislation, and of the interest likely to be effected. The title, however, must not be

so broad as to be misleading, as it may then be annulled because of generality. Where the title is too narrow, a difficult situation arises. Is the entire act invalid, or is only that portion invalid which is not embraced within the terms of the title. The decisions of the states vary, and the law of each jurisdiction must be decided by reference, to the cases of that jurisdiction. The general rule appears to be that if it is apparent that the legislature would not have passed the enactment without the offending portions, the entire law shall fall. An act concerning or relating to (naming briefly the subject matter of the statute) without any addition is probably the best form, and there seems to be only one decision that could possibly throw any doubt upon such a title by reason of its brevity. A title expressing only the object to be accomplished by the act would, undoubtedly, be considered too vague. If this were not so, every act might be entitled "An Act to Promote the General Welfare of the State." A title indicating a very wide category, while the act deals only with the specific provision of that category is also objectionable as being too vague. The most desirable title for an amending act seems to be "An Act to Amend" or "An Act to Further Amend" giving the title to the original act. However, it would seem objectionable to legislate concerning a new crime under the title "an act to amend the criminal code" for if such title were allowed, it would seem "An Act to Amend the revised statute" would be sufficient. If the statute to be amended provided a short title, an act amending such statute could properly make use of such short title. However, when using a short title, it is better practice to include the date of passage, as follows: "An act to amend the act approved December 23, 1913, known as the Federal Reserve Act."

THE PREAMBLE

The use of a preamble in legislative enactment should be discouraged as much as possible. They are not, properly speaking, parts of acts. As a general rule, they are simply excep-

tions, arguments or apologies. The main use of the preamble is found in confirming resolutions which are not of a law making character, but are merely expressions of legislative opinion, desires or condolences.

THE ENACTING CLAUSE

The enacting clause is a necessary part of all legislative enactment, due to the legislative practice of defeating an act by the carrying of a motion to strike the enacting clause. In the usual form, the enacting clause begins with "Be it enacted", followed by a description of the authority which is enacting the legislation. It is a short clause which sets forth the authority of the enacting body by statute. The Federal government has prescribed the following form for an enacting clause: "Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled". Many of the states have prescribed a definite form of an enactment clause by statute, and in such cases the prescribed form must be followed in detail. The position of the enacting clause varies in the different jurisdictions. In some jurisdictions the clause is placed as a part of and at the beginning of the first section. The better plan, however, seems to be to place the enacting clause before the body of the act directly after the title, thereby commencing the body of the act in a section No. 1. Congress still includes the enacting clause in the first section, omitting the number of the first section, and numbering the second section of the act as No. 2.

PRINCIPAL MOTIVE

The section or sections which establish the main purpose or principal motive of the act may be classified into three main types, as follows:

(a) Those sections which deal with the granting of a right or privilege and are grants.
(b) Those sections which deal with the prohibiting of a right or privilege and are prohibitions.

(c) Those sections which deal with the regulation of a right or privilege and are requirements.

This analysis is, of course, intended to apply only to simple acts. Special types of acts, such as repealing, amending or curative acts would not be subject to a classification of this type. Before drafting an act, it must be determined which of these types is to be used, and the decision will be governed by the needs of each case.

GRANTS

Grants of rights, or privilges are either generel or specific. If the right which is being granted is large, and if it is desired that a liberal interpretation be placed upon it, then the grant should be general in form. Care must be taken in such a case, however, that rights larger than intended are not granted. It is not always desirable to use exemptions in connection with grants, but are permissible where necessary, in order to allow the form of grant to be short and thus do away with the tendency toward ambiguity. If it is found necessary to employ exceptions in grants, they should be as definite and as conclusive as possible, as otherwise they will tend to confuse, and may give rise to an undesired interpretation of the grant by the courts. The restriction of the right, which is being granted, should be made specific in form. In doing this, it increases the tendency toward a strict construction of the grant. This form is ordinarily the most desirable as it tends to decrease the chance of ambiguity and is more cautious legislation. This form should always be used in revolutionary legislation, where the problem is new and untried. Where the act is declaratory of the common law, the principles have, as a general rule, been worked out by a tedious process of elimination and are generally quite clear to the draftsmen. In the case of revolutionary legislation, however, it is different, and caution must be used in the beginning of the experiment to insure its practicability, and to guide its development along correct lines.

PROHIBITIONS

Prohibitions, when used in statutory drafting, should be as definite as possible. They are based upon the theory of public interest, and unless they are bound together with some peculiar form of public interest, they are generally held to be void, as unconstitutional assumption of authority. The classifications of public interest have, as a general rule, been worked out by a process of elimination by the common law. Dr. Freund, in his lectures before the law classes of the University of Chicago has classed public interest as follows:

1. Breach of the peace
2. Physical security of persons
    (a) against violence (which is a common law notion of trespass)
    (b) comfort, health and safety (the original idea of comfort is in itself an expansion of security and has been expanded to cover:
        (1) Common law nuisance
        (2) Trade nuisance
        (3) Disfigurement of buildings
        (4) Ammentity acts, which are the basis of our present zoning acts).
3. Security of property
4. Fraud, which is economic security and which has been expanded by legislation, carrying it into
    (a) Unfair competition
    (b) Breach of trust
    (c) Unreliable business (which are those businesses which require public faith, such as banks, insurance companies and warehousing)
5. Disorder
6. Immorality
7. Restraint of trade (which has been expanded to include public utility regulation on the basis of adequate service on reasonable terms)

It will be seen that of the above outline, number 1, 2A, 3, 4, and 5 are reasonably definite concepts, while subdivisions 2B, 6 and 7 are a question of degree as to which no

definite standard can be assigned, and as such are ordinarily unsatisfactory. Several additional public interests have recently been developed, which were very vague at common law, and which are not, therefore, covered by well established common law concepts. These are the public interests of unthrift, consisting of drinking and gambling, non-conformity, consisting of sedition and unprofessional conduct, and oppression, consisting of usury and labor legislation.

Prohibitions, for the benefit of public interest will be found to be of various degrees. There are prohibitions of specific acts or practices that bear some relation to a specific and definite evil. The outstanding example of this type of prohibition is the 18th amendment. Its relation is to thrift, which is a public interest, and so the prohibition is said to be valid, because of the relation it bears to the interest of the public. Prohibitions are also found with reference to a particular category, or to a particular and general class of public interest, such as the prohibition of fraud, breach of the peace, disorder and other matters of public interest. The question of prohibition of acts which tend to injure public interest is one that is very difficult to determine and should be confined to the prohibition of specific acts, tending toward the destruction of some specific public interest. Prohibitions of a general nature of this class have been found to be unenforcable in most instances, as they ordinarily do not have the sanction of public opinion to support them. Another degree of prohibitions is the prohibition of acts detrimental to public interest, which are ordinarily unsatisfactory, as in most instances the act itself may or may not be detrimental to the public interest, depending upon the surrounding circumstances in any particular case. It has ordinarily been found better practice to deal with these acts by way of regulation rather than prohibiton. In studying the common law prohibitions, we find that the most definite prohibitions known to common law is the system of felonies. This class deals only with specific offenses. The prohibition of common law misdemeanors is found to deal with a more general

category, such as nuisance, negligence, and obscenity, and the common law conception of these prohibitions has been fairly well established. The common law prohibition of tort covers a very much larger group, and expands upon nuisance and negligence so far as to include the various types of fraud. This type of prohibition is much more elastic than the first two classes of common law prohibitions. The common law prohibition as to contracts goes even further than torts, and has been developed so as to include restraint of trade and similar concepts.

As to statutory prohibition, we find that it generally deals with the specific forms of danger, or with specific conditions leading to danger. The statutory prohibition, as such, seldom deals with the prohibition of a category or tendency. This is due, undoubtedly, to the practical unenforcibility of scuh probitions. The exception is where the common law as such has been codified. An example of this is the codification of the criminal law. In this work, the statutory prohibitions ordinarily carry over the categories of the common law. Ordinarily statutes avoid penalizing prohibitions of a matter of degree, such as outlined in Section 2B, 6 and 7 of the "Outline of Public Interests". This is due largely to the difficulty of obtaining a jury conviction where the prohibition is a matter of degree.

Legislative inactivity is also noticed in matters taken care of by private initiative. This is due, undoubtedly, to the unnecessary feature of such legislation. An example of this is in the case of automobile manufacturing, a field in which there is scarcely, if any, statutory law whatsoever. Keen competition between the automobile manufacturing trade has developed a standard of safety in the manufacture of cars which is extremely high, and so safety legislation would be of no purpose. This is not always true in the case of monopolies, and so we find laws regarding the safety of railroad construction to a greater extent than in the automobile trade, because of the fact of less competition. Here also we have the competing public interest of safety and speed, a question of economic expediency.

Although safety interest should be put above the economic expediency, or private interest, the legislatures have been slow to do so.

Prohibition of tendencies to a breach of the peace would, it seems, be going too far under our constitution, and would be carrying the idea of public interest as the basis of a prohibition to extremes. However, it appears that power to prohibit a specific act, which is tending toward a breach of the peace might be given to some official. This has been done in some degree in laws giving power to the Chief of Police of our cities to prohibit certain types of parades, which, in his opinion, would tend toward a breach of the peace.

Prohibitions in the matter of immorality are extremely difficult to form. In the case of immorality we have two competing interests, that of science and art, which compete with morality. As a general rule science is free from immorality legislation, due, undoubtedly, to the fact that science, as such, is a rather definite concept. The case of art is different, as there we find a highly relative indefinite concept. It is impractical to make a definite statute as to matters of this kind, as the statute would have to establish a standard of reasonableness as a certain freedom in art is to some extent desirable. Since the standards of art are of a different type than those of every day life, it is better practice to allow the matter to be taken care of by the common law misdemeanor. The question then is presented why not enact the common law? This has been done in many jurisdictions, and especially in those where the common law has been codified. The objection to this, however, is that statutes which are specific are more narrowly construed than the same standard would be construed under the common law.

In dealing with economic evils, great difficulty has been experienced in establishing definite prohibitions. Although restraint of trade is somewhat definite, yet we find here the special difficulty is that the indefiniteness is not only one of degree, but also as in the case of the majority of economic evils,

the indefiniteness is of one kind. There seems to be a difference between indefinite terms in power provisions and in direct penal provisions. Ordinarily a power provision can be made operative under a more indefinite prohibition than a direct penal prohibition. It is apparent that definite prohibitions should be employed wherever possible, and if necessary, as it sometimes is, to use an indefinite prohibition. It seems better practice to have it administered through an administrative body especially created for that purpose.

REQUIREMENTS

Prohibitions of a statutory nature deal with the enactment of common law prohibitions. It is different in the cases of requirements. The common law knows of no positive requirements penally supported. There are a few positive requirements at common law which are civilly supported, such as the requirement that a husband must support his wife. Requirements differ from prohibitions in that in many instances indefinite requirements are desirable as lending themselves to more individual liberty of choice and action, and so tend to better promote progress. There is some danger in too definite and specific a standard. An example of this is the brick and hollow tile case in Chicago. The building ordinance provided that fire-proof buildings should be built of brick. Since that time we have seen the development of hollow tile and its successful use as a building material. There has been waged a long and tedious fight in the City Council to obtain a change in the ordinances, which would allow the use of hollow tile in buildings. Thus, it is seen, that an indefinite requirement may be wiser than a definite requirement. However, care must be taken in using an indefinite requirement, to insure its enforcement; two methods are applicable for the enforcement of an indefinite requirement. In the first case it is possible to have an indefinite requirement in a statute made definite by an administrative board which has been given supervisory and directory power. It is also possible to have a definite statutory

requirement with an administrative board which has powers of variance. This latter method, however, is the more dangerous form of legislation. If the legislature thinks it impossible, undesirable or poor politics to prescribe ultimate regulations, they may proceed to obtain the same result through auxiliary requirements. Ordinarily, the objection to ultimate regulation is not found in auxiliary requirements. Standardization in such cases does not defeat individual progress. Publicity is not only a guaranty of standardization, but it may, of itself, be an object of the requirement as is true in the case of automobile licensing and the registration of deaths; the former in order to facilitate the identification of the car, and the latter for statistical purposes. Publicity requirements also take the form of marks, labels, registration, records, reports, etc., and are ordinarily used for the purpose of standardization, where such standardization will not affect or retard individual progress. Systematization may also be a step toward standardization. In Germany, insurance companies, in order to sell insurance policies, must first submit a plan to be approved by the authorities. This, in itself, is a certain guaranty of standardization. It is not a prescribed plan as our American system is, but is a submitted required plan. There is a vast difference; in one case we have a voluntary indirect guaranty of standardization which allows freedom of individual action and progress, while in the other case we have a definite established standard, which does not allow individual progress. Auxiliary requirements are at times obtained indirectly by further qualifications, as in the case of the practice of medicine. To practice medicine one must obtain a license and while the patricular courses of study are not expressly required, it is required that study be had in an accepted school. This, it will be seen, allows for considerable freedom of action, while at the same time guaranteeing a standard of requirement necessary for the protection of the public intrest. Requirements are ordinarily divided into three types, public policy requirements, civil acts requirements, and administrative procedural requirements. The question of the

enforcibility of requirements arises. What sanction in law have they? There are three types of sanctions known to our law; the first, penal sanction; second, nullity sanction; and third, official certification which is midway between penal and nullity sanction. The sanction of public policy requirements is of the first type. This is necessary due to the very nature of the requirement. In the case of civil acts requirements, however, nullity sanction has proven to be more effective than penal sanction, as the civil acts bear a more personal relation to the individual than the public policy requirements. The mere danger of nullity is sufficient to guarantee the enforcement of civil acts requirements. The third form of sanction is generally a licensing power used in connection with and to complete the auxiliary requirements. Its use is a matter of individual cases and economic expediency. The danger of official certification is that it tends to carry with it the stamp of official approval, which, in many cases, is undesirable. For this reason the blue sky laws avoid certification. Certification as employed in our law is of three distinct types; optional certification, compulsory licensing system, and optional but privileged certification. Under the first type, the law provides for certification of special qualifications, but does not prohibit where there is no pretense of possessing the certificate. As example of this type, we have our registered nurse act and the Certified Public Accountant acts. The advantage of this system is that it permits of a higher standard, and there is no necessity of a technical absolute definition. This system, however, tends to develop into a compulsory licensing system in process of legislation. The compulsory licensing system is where a certain practice is prohibited without certification first obtained. This type is now used generally in the professions in this country. The optional or privileged certification is a type used to a great extent in England. Under this system certification is optional, but is encouraged by carrying with it certain privileges denied in the absence of certification.

EXCEPTION PROVISIONS

Exception provisions require great care in drafting. Where the prohibition is strictly favored, the tendency is to prohibit generally and limit by exceptions, rather than by specifying and enumerating the prohibtion. Where the prohibition touches valuable rights, extreme caution must be used that the exception should not be made too narrow. Exceptions from prohibitions also raise the constitutional question of discrimination, which, if upheld, will render the prohibition, together with the exception invalid. To avoid this situation, various plans have been attempted; one is, by having it appear in the act, on its face, that the exceptions have been carefully considered and systematized, so that the danger of the court looking upon the exception as discriminatory is lessened. This can be done by appropriate placing and numbering of exemptions. Exemptions drafted in by definite terms are almost certain to be liberally construed, both by the individual against whom it is applied and also in its attempted criminal enforcement. If an administrative authority is to be used in connection with an exemption, care must be taken. If the act provides that it should not apply to any particular situation; if the administrative authority, in its discretion, approves, the act may be unconstitutional, as the courts have expressed grave doubt as to the constitutionality of such provision. If unconstitutional, the exemption would be invalid. It is better practice to establish a requirement with a provision that in certain specified cases it shall not operate, unless required by administrative authority. This provision operates in the opposite way, and if the administrative power is invalid, the exemption stands. Such unqualified dispensing power should be avoided. It is better that a qualified administrative body be used with an exception, if there is necessity for the administrative authority under such a system the act indicates the condition under which the exception is applied, and leaves to the administrative authority only the determination as to whether or not such conditions exist in a specified case. It is true also that if the conditions

established are vague, such as health, welfare, etc., the qualified dispensing power is hardly anything more than an unqualified power. The constitutionality may be saved, but the question is whether or not it will result in a practical nullification of the statute. A statute providing for a dispensing power should always indicate whether or not that power is to be exercised with reference to a class of cases by general rule, and regulation, or in individual cases. The presumption is that the dispensing power should operate by general rule and regulation.

The question of the extent of an act presents no particular difficult drafting problems, and will depend entirely upon the particular type of legislation in question. The question of definitions likewise is a question of the particular exigencies of the individual cases.

ADMINISTRATIVE PROVISIONS

We are gradually turning more and more toward allowing many functions of government to be executed by administrative bodies. They are used today to complete our statutory law and to assist in making its enforcement more effective. The administrative agency may consist of merely one person or it may consist of a group of persons acting collectively. In either case, some provision must be made for determination of the personnel of the body. The question of the appointment of the personnel of administrative bodies has been heretofore discussed in this article. The method now generally employed is that of appointment. If provision is made for the appointment of an administrative board, no definite time limit should be placed within which the board must be appointed. The question of the legal existence of the board might otherwise be placed in issue. If a board was appointed after its time for appointment had expired, provision should also be made for the filling of such vacancies as may occur. It is now quite universally provided that the terms of the members of the administrative bodies should expire alternately, in order that there

might always be an experienced group on the board. Provision should always be made that the members should serve until their successors are appointed and qualified. The power which is to be vested in the board should be expressly provided for, due to the fact that administrative powers are never inherent and are very rarely implied. It is becoming a more common practice now than formerly to give the administration body power to conduct hearings, administer oaths and compel witnesses to testify. An administrative body is not, however, given the power to punish for contempt, but provisions are generally made allowing the application to court for an order punishing contempt committed against the board. Provision for disqualification in special cases should be provided for as it is very doubtful if the common law rules which disqualify the judicial officers from acting in particular cases would be applied or expanded to administrative officials. It is desirable in enacting a general statute to provide for matters of this kind, as well as providing for a standardized method of calling and conducting hearings, entering findings of the board, and providing for appeal from the board's action.

The action of administrative boards may be either legislative, quasi-judicial or ministerial. The board's action may also be classified as determinative or non-determinative. The determinative power being either an enabling or directory power. The enabling power is that type of power found in licensing requirements, while the directory power is the type to demand compliance with a particular order of a specific character to a particular individual. The determinative powers are what might be termed quasi-judicial, as they deal with individual cases. In drafting provisions of this type, it must be kept in mind that a discretional enabling power cannot be made the vehicle or instrument of a directory power except by statute. It should also be remembered that the courts will rarely imply from a licensing power, the power of revocation, and a statutory provision for revocation should therefore be provided. The non-determinative powers consist of the supervisory and inspection

and supervision powers. The supervisory powers are those needed to make a definite statute specific. The non-determinative powers are quasi-legislative in character. Supervisory powers are of a specific character to a general class and are used to complete a statute which must of necessity be indefinite due to the natural difficulty encountered by a state legislature in legislating as to minute details. It must be remembered, however, that the general policy must be determined by the sovereign legislative authority. Courts have generally taken the view that the grant of a supervisory power will not imply the grant of prohibitory powers in enforcement of the supervisory powers. This attitude of the courts is difficult to understand, in that it is clear that a prohibition of anything that is quantitive is unmeaning unless it also sets a quantity. Because of the attitude of the courts, it is desirable to make provision for the grant of a prohibitory power, in order to insure the enforcement of the supervisory power. Under the non-determinative power, two types of orders are possible. The conformity order which allows individual choice and is desirable in order to allow and encourage development. The conformity order is ordinarily merely a warning, unless the order is made by statute prima facia evidence, in which case the order operates to shift the burden of proof. The conformity order is also of value where the statute imposes a penalty which is operative by the promulgation of the order, and also where the order is made the foundation of summary action. The courts have been slow to imply the power of specification on the theory that such a power would tend to interfere with the exercise of private rights. Orders of this type are, however, very valuable and necessary in some cases, and in such cases it is neccessary to provide that the administrative authority should have power to make specification orders. It should always be kept in mind, however, that an administrative order should be curative, and that the general standard should be determined by the legislative act.

Procedural provisions may be divided into two classes. Those that deal with the procedure before the board and those

dealing with procedure on review of the board's action. The procedure governing the board's action will differ, depending upon whether the action of the board is determinative in character or is for the purpose of enforcement. If the board's action is determinative in character, it is either legislative or quasi-judicial, depending upon whether or not the action is of individual application or general in its scope. Where a board is to act legislatively, provision should be made allowing investigation or inspection by the board, in order that it may obtain the necessary knowledge to adequately deal with the problems at hand. If the board is to act in a quasi-judicial capacity, various provisions should be made to facilitate such action. Provision for hearing is generally established, notice should be required and it should be obligatory upon the part of the board to make and preserve a record. Provision should be made giving the board authority to administer oaths and compel the attendance of witnesses. An administrative board is very rarely given the power of enforcing its own decrees. It is only in cases of distress for taxes, martial law, deportation of aliens, and abatement of nuisance where the administrative board is allowed to act summarily. Summary action must always be taken at the Board's risk, and should be done only after a hearing.

Various questions will arise regarding the procedure on review of a board's order. Statutory presumptions are of particular importance in the administrative field as in most cases the common law presumptions will not be applied. This is especially true where the action on review is based upon the regularity and authenticity of the jurisdictional foundation of a board's action which is adverse to private rights. Presumptions in this behalf should, however, be established only after careful consideration. Liberal presumptions are often ambiguous and obscure and should be discouraged. A presumption making reputation prima facia evidence of official status has been employed in the British Income Tax Law of 1918. Presumptions favoring the minutes of the proceedings of a board as being correct were inserted in the New York Public Health

Law, and are beneficial when carefully drafted. The presumption that regulations, rules and orders have been promulgated in accordance with law should be provided. The presumption as to the correctness of an administrative decision based upon a hearing was provided for in the Illinois Public Utilities Act of 1913, and has been found to be very helpful. The use of conclusive statutory presumptions should be discouraged. A conclusive presumption is either a statute of limitation, a rule of substantive law establishing liability, or a rule of law declaring an official determination to be final. Many presumptions of this kind have been declared by the courts to be invalid. It is very often desirable to establish a formal procedure for review and a general statute to this effect would save considerable repetition, would tend to minimize confusion, and would establish a uniform method of review of administrative decisions which result is extremely desirable.

It is very doubtful whether the common law rule, making the violation of a statute a misdemeanor would be applied to an administrative regulation, rule or order. A general provision allowing judicial aid in enforcing administrative requirements seems to be necessary in many cases. Lately provisions have appeared which allow the enforcement of the board's decisions through the courts of equity, such as the provision for the restraining of nuisances, which are found in many of our liquor laws and which have lately made their appearance in several medical licensing laws.

The remaining divisions of the legislative act are in the main governed by statutory provisions in individual jurisdictions and no particular purpose can be served discussing them at length in this article. It is sufficient to say that the statutory provisions of each jurisdiction must be strictly adhered to.

BIBLIOGRAPHY ON STATUTORY DRAFTING

[1] Lewis Sullivan, STATUTES. (2 Vols.).

[2] C. L. Jones, STATUTE LAW MAKING.

[3] C. Ilbert, LEGISLATIVE METHODS & FORMS.

[4] C. Ilbert, MECHANICS OF LAW *MAKING*.

[5] Ernest Freund, STANDARDS OF LEGISLATION.

[6] Articles by Freund:
LANGUAGE & ARRANGEMENT OF STATUTES. Am. Bar Assoc. Report 1914, p. 632.
INTERPRETATION OF STATUTES (1917) 65 Penn. L. Rev. 270; (1918) 13 Ill. L. Rev. 264; (1921) 30 Yale L. J. 437.

[7] Aigler, LEGISLATION IN VAGUE TERMS (1923) 21 Mich. L. Rev. 831.

[8] Jeremy Bentham's treatise on NOMOGRAPHY found in Bentham's Works (Bawring's Ed.) III.

[9] Coode's LEGISLATIVE EXPRESSION; OR, THE LANGUAGE OF THE UNWRITTEN LAW (L.L. Vol. 60).

[10] Symonds, A., MECHANICS OF LAW MAKING.

[11] Sutherland, J. G., STATUTES AND STATUTORY CONSTRUCTION (2 Ed.) (2 vols.).

[12] Bishop, J. P., WRITTEN LAWS AND THEIR INTERPRETATION.

[13] Black, H. C., CONSTRUCTION AND INTERPRETATION OF LAWS.

[14] Lefroy, A. H. T., LAW OF LEGISLATIVE POWER.

[15] Lord Thring, PRACTICAL LEGISLATION.

Tennessee Law Review

Volume 9 APRIL, 1931 Number 3

Published by the Students of the College of Law of the University of Tennessee in the months of December, February, April and June
T. ASBURY WRIGHT FOUNDATION

Subscription Price $1.50 Single Copies 50 Cents

CONTRIBUTORS

MR. A. A. BERLE, JR., was graduated from Harvard with the degrees of A.B., A.M., and LL.B. He was a member of the expert staff, American Commission to Negotiate Peace, 1918-1919. He was Lecturer on Finance, Graduate School of Business Administration (Harvard) 1926-1928. He was special counsel, Ohio State Bar Association in connection with drafting Ohio Corporation Act. He is Associate Professor of Law, Columbia University Law School, and is engaged in practice in New York. He is the author of STUDIES IN THE LAW OF CORPORATION FINANCE (1928); MATERIALS AND CASES IN THE LAW OF CORPORATION FINANCE (1930); and of various Law Review essays.

MR. CHAS. S. COFFEY was graduated from the University of Tennessee, Liberal Arts, 1905; Law, 1906. He was attorney, Department of Justice, Washington, 1917-1919. He was Special Assistant to Attorney General in Aircraft Investigation,

1918; and has been engaged in active practice of law in Chattanooga since 1910. He is now President of Chattanooga Bar Association, and member of the firm of Thomas, Thomas & Coffey.

MR. G. L. DOSLAND of Chicago, was graduated from Concordia College with the degree of A.B. in 1923; and from the University of Chicago in 1926 with the degree of J.D. He was admitted to practice in Minnesota in 1926, and in Illinois in 1927. Since 1927 he has been a member of the firm of Dosland, Conner & Mayfield in Chicago, Ill. He is now an Associate Professor of Law in the University of Loyola, in Chicago.

The College of Law will be glad to correspond with members of the Bar who have openings in their offices for recent Tennessee law graduates.

RECENT CASE NOTES

CORPORATIONS—SUBSCRIBER'S RIGHT TO RESCIND AFTER INSOLVENCY WHEN THE CREDITORS HAVE KNOWLEDGE OF THE FRAUD

The agents of a corporation fraudulently induced the plaintiff and others to subscribe to its capital stock. After the insolvency of the corporation, suit was brought against the receiver to cancel the stock subscription agreements. *Held*, that the insolvency of the corporation was not a bar to the rescission in the case where creditors had knowledge of the fraud practiced on the subscribers.[1]

Where the corporation is a going concern, a subscription to capital stock induced by fraud may be rescinded at the election of the subscriber.[2] But the courts have failed to arrive at the same conclusion in regard to rescission after insolvency of the corporation. In England corporate insolvency is an absolute bar to rescission of a stock subscription on the ground of fraud.[3] Though the American cases are lacking in harmony, it seems that the weight of authority holds that insolvency of the corporation will not of itself bar the subscriber's right to rescind his contract.[4] The presence of other circum-

---

[1] Jagels v. Cox, —Idaho—, 294 Pac. 515 (1931).

[2] Gress v. Knight, 135 Ga. 60, 68, S.E. 834 (1910); Fear v. Bartlett, 81 Md. 435, 32 Atl. 322 (1895); CLARK, PRIVATE CORPORATIONS (3rd ed. 1916) 355.

[3] Oakes v. Turquand, L.R. 2 H.L. 325 (1867) (the result of this English case may be attributed to the construction of the English Companies Act of 1862); see 6 Eng. Rul. Cases, 879 *et seq* where the court in the case cited in this note construes the act; CLARK, PRIVATE CORPORATIONS, *supra*, note 2.

[4] Lamb v. Bonesteel, 186 Iowa 927, 173 N.W. 13 (1919); Burningham v. Burke, 67 Utah 90, 245 Pac. 977; BALLANTINE, PRIVATE CORPORATIONS (1927) 150. *Contra*: Butterworth v. Ross, 238 Mass. 279, 130 N.E. 678 (1921); Commissioner of Banks v. Cosmopolitan Trust

stances is required.[5] Generally, under the majority American rule, rescission is denied on the grounds of estoppel and laches.[6] Such a denial to the subscriber results from the view that rescission is an equitable right which must be enforced with all due diligence before the claims of bona fide creditors have intervened.[7] To allow rescission after the intervention would reduce the security afforded to innocent creditors who have relied on the amount represented by the fraudulent subscriptions of stock.[8] But where the creditors have knowledge of the fraud practiced on an innocent subscriber, it is submitted that it would be a rather startling innovation to hold that the equities of the creditors are superior to those of the subscriber.

The Supreme Court of Tennessee supports the majority rule that circumstances in addition to corporate insolvency must exist before the defrauded subscriber will be denied the right to rescind.[9] In Tennessee the defrauded subscriber is required to use due diligence in discovering the fraud or in taking the necessary steps to rescind when the fraud has been discovered.[10] A thorough search of the Tennessee reports fails to reveal a case in point with the principal case.

C. F. B.

Co., 253 Mass. 205, 148 N.E. 609 (1925); Meesbrugger v. Welsh, 35 N.Y. Supp. 550 (1895); BALLANTINE, PRIVATE CORPORATIONS, *supra*, at page 149.

[5] BALLANTINE, PRIVATE CORPORATIONS, *supra* note 4.

[6] Grand Rapids Trust Co. v. Geer, 233 Mich. 577, 207 N.W. 883 (1926); Howard v. Turner, 155 Pa. 349, 26 Atl. 753 (1893); BALLANTINE, PRIVATE CORPORATIONS, *supra* note 4, at page 150, note 142; note (1926) 41 A.L.R. 689; note (1927) 46 A.L.R. 484.

[7] CLARK, PRIVATE CORPORATIONS, *supra* note 2.

[8] Gress v. Knight, *supra* note 2, at page 65.

[9] Heiskell v. Morris, 135 Tenn. 238, 186 S.W. 99 (1916).

[10] *Supra* note 9, at page 246.

EVIDENCE—CONCLUSIVENESS OF UNCONTRADICTED TESTIMONY OF A WITNESS

In a recent Texas case the defendant offered as evidence the uncontradicted testimony of a witness. It was not given credence, and a reversal was sought on the basis that the jury should have accepted the witness' testimony as true. In reviewing the case the Court of Civil Appeals held that, "the jury was not bound to accept her testimony as true, though uncontradicted."[1]

This holding seems to be in accord with the general rule, which holds that a jury is not bound to treat uncontradicted testimony as true.[2] Though the jury is not bound to accept uncontradicted testimony as true, it would seem rejection cannot be arbitrary.[3] In *Satterwhite v. State*,[4] it is said, "From the fact that a witness is unimpeached and uncontradicted it does not follow that the jury are necessarily bound to believe his evidence and take it as true. There is no such positive rule; no more than that they must reject his testimony if evidence

---

[1] Thomas Inv. Co. v. Thompson, —Tex. Civ. App.—, 32 S.W. (2d) 708 (1930).

[2] Quock Ting v. U. S., 140 U.S. 417, 11 Sup. Ct. 733, 35 L. ed. 501 (1891); Schweer v. Brown, 130 Fed. 328, (C.C.A. 8th 1904); Reiss v. Reardon, 18 F. (2d) 200 (C.C.A. 8th 1927); In re Baumhauer, 179 Fed. 966 (S.D. Ala. 1910); Howard v. Louisville Ry. Co., 32 Ky. Law Rep. 309, 105 S.W. 932 (1907); Wait v. McNeil, 7 Mass. 261 (1811); Guinan v. Famous Players-Lasky Corp., —Mass—, 167 N.E. 235 (1929); De Maet v. Fidelity Storage, etc. Co., 121 Mo. App. 92, 96 S.W. 1045 (1906); Elwood v. Western Union Tel. Co., 45 N.Y. 549, 6 Am. Rep. 140 (1871); Koehler v. Adler, 78 N.Y. 287 (1893); Hawkins v. State, 99 Tex. Cr. Rep. 569, 270 S.W. 1025 (1925).

[3] Crawford v. State, 44 Ala. 382 (1870); St. Louis-San Francisco Ry. Co. v. Harmon, 179 Ark. 238, 15 S.W. (2d) 310 (1929); St. Louis-San Francisco Ry. Co. v. Williams, 180 Ark. 413, 21 S.W. (2d) 611 (1929); Western and Atlantic Railroad Co. v. Beason, 112 Ga. 533, 37 S.E. 863 (1901); Lomer v. Meeker, 25 N.Y. 361 (1862); Koehler v. Adler, *supra* note 2.

[4] 6 Tex. App. 609 (1879).

has been offered to impeach him. The question of credibility, under all the testimony and surrounding indications, judging from mode and manner of testifying, the probability or improbability of the statements, is for the jury; though they are not to reject or disregard a witness, arbitrarily, and especially so in those cases where his testimony is sustained by corroborative evidence of circumstances and of other witnesses." Where the statements of a witness are consistent in their entirety, and no facts or circumstances are offered in evidence which substantially contradict or conflict with them, a court or jury may not arbitrarily refuse to credit his testimony.[5] The jury may, however, after considering the testimony of a witness, disbelieve it, though it be uncontradicted, where their disbelief is based on his appearance, demeanor, or manner upon the stand, or on the inherent nature of the facts testified to by him.[6] Mississippi, which slightly modifies this rule, holds that testimony, reasonable and uncontradicted, is binding on the court and jury where it is not opposed by physical facts or by facts of common knowledge.[7]

Where the uncontradicted witness is an interested party there is certainly some reason to question his credibility; and it has been said, "The court or jury has the right, in view of this interest of the witness, to disregard his evidence, as not entitled to credit."[8] In another action where an interested party testified the court said, "We are not compelled to accept his statements, if they do not bear the stamp of credibility,

---

[5] St. Louis-San Francisco Ry. Co. v. Harmon, *supra* note 3; St. Louis-San Francisco Ry. Co. v. Williams, *supra* note 3; Western and Atlantic Railroad Co. v. Beason, *supra* note 3.

[6] Haverty Furniture Co. v. Calhoun, 15 Ga. App. 620, 84 S.E. 138 (1915); Sligh v. Whitley, —Ga.—, 153 S.E. 237 (1930); Elwood v. Western Union Tel. Co., *supra* note 2; Koehler v. Adler, *supra* note 2.

[7] Stevens v. Stanley, 154 Miss. 627, 122 So. 755 (1929).

[8] Blount v. Medbery, 16 S.D. 562, 94 N.W. 428 (1903).

even though uncontradicted."[9] The accused in a criminal action is clearly an interested party and it would seem that his uncontradicted testimony need not be accepted as true, particularly where physical facts indicate that it is false.[10]

The only Tennessee case found on the point seems to adopt the minority rule, which is contra to the principal case, There the Supreme Court, in considering a case in which the plaintiff had given uncontradicted testimony in his own behalf, stated, "We must therefore accept his statement of the facts as true."[11]

P. D. G.

INSURANCE—POWER OF AN EMPLOYER TO CANCEL A GROUP POLICY AND BIND INDIVIDUAL EMPLOYEES THEREBY

On March 22, 1927, the defendant upon the written application of the City of Knoxville, signed by its City Manager, issued a policy of group life insurance, insuring the lives of members of the Police and Fire Departments of the City, each member being insured in the sum of $1,000.00. The City paid the premiums on the policy, but deducted twenty per cent of the amount paid as premiums from the wages of the employees. The contract provided that the premiums should be paid monthly in advance. The City became dissatisfied with the contract and it was mutually agreed between the City and the defendant that the policy should be canceled as of midnight June 21, 1927. The City took out a policy with the American National Insurance Company covering the same employees, this policy to commence at the expiration of the policy with the

---

[9] Keene v. Behan, 40 Wash. 505, 82 Pac. 884 (1905).

[10] Wadkins v. Commonwealth, 228 Ky. 106, 14 S.W. (2d) 390 (1929); Washington v. Comonwealth, 234 Ky. 769, 29 S.W. (2d) 13 (1930).

[11] M. D. Gleason et al. v. Prudential Life Ins. Co., 127 Tenn. 8, 151 S.W. 1030 (1912).

defendant, and a notice of this change was given to all the employees who were insured under this policy. Charles Davis, the husband of the plaintiff, was a member of the Fire Department of the City, and he died on July 21, 1927. The plaintiff recovered under the policy with the American National Company, and brought an action to recover from the defendant on the theory that she was protected by the thirty-one day grace period provided for in the policy. *Held*, that the plaintiff could not recover, and that the City could cancel a group policy taken out for employees and thus bind the individual employees holding certificates thereunder.[1]

Group life insurance is that form of life insurance covering not less than twenty-five employees with or without medical examination, written under a policy issued to the employer, the premium on which is to be paid by the employer, or by the employer and employees jointly, and insuring all of his employees, or all of any class or classes thereof determined by conditions pertaining to the employment, for amounts of insurance based upon some plan which will preclude individual selection, for the benefit of persons other than the employer; provided, however, that when the premium is to be paid by the employer and employee jointly and the benefits of the policy are offered to all eligible employees, not less than seventy-five per centum of such employees may be so insured.[2]

A contract of life insurance may be canceled by the mutual consent of the contracting parties.[3] In group life insurance policies, the contracting parties are primarily the employer and

---

[1] Davis v. Metropolitan Life Ins. Co., —Tenn....., 32 S.W. (2nd) 1034 (1930).

[2] Sec. 66 sub. sec. 1 of the insurance statute which was recently approved by the American Bar Association, and which has been adopted by the State of Kansas.

[3] Mutual Life Ins. Co. v. Phinney, 178 U.S. 327, 20 Sup.Ct. 906, 44 L. ed. 1088 (1900); Equitable Life Assur. Society v. Stough, 45 Ind. App. 414, 89 N.E. 612 (1909); Wall v. Bankers Life Co., 223 N.W. 257 (Iowa 1929).

the company.[4] Following these rules, the Supreme Court of Tennessee in the principal case said, "the policy is applied for by the employer, and the insuring company has no direct contractural relations with the several individual employees. It is the employer who pays the premiums to the company, and there is no liability therefore to the company on the part of the individual employees. The rights which the employees acquire are incidental merely." The decision of the principal case is based upon the fact that the policy in question was canceled by the mutual consent of the contracting parties before the death of the husband of the plaintiff.

The law in respect to the cancellation of group life insurance policies is somewhat limited. It is submitted that the decision of the principal case is based upon sound legal principles. The decision is supported by dicta of the few courts which have dealt with the specific question.

H. D. E.

MUNICIPAL CORPORATIONS—THE LEGISLATURE'S POWER TO LEVY A TAX FOR A NON-MUNICIPAL PURPOSE

Plaintiff prosecuted, under the Declaratory Judgment Act, a suit for the purpose of construing an act passed by the legislature.[1] The act provided for the establishment of a juvenile and domestic relations court for Hamilton County, the expenses for same to be charged jointly against the City of Chattanooga and Hamilton County. *Held*, that the act was invalid as levying a tax for a non-municipal purpose.[2]

---

[4] Gallagher v. Simmons Hardware Co., 214 Mo. App. 111, 258 S.W. 16 (1928).

[5] Stoner v. Equitable Life Ass'n Societv, 28 Dauph. Co. Rep. (Pa.) 235; Thompson v. Pacific Mills et al., 141 S.C. 303, 139 S.E. 619, 55 A.L.R. 1237 (1927).

[1] Private Acts of Tennessee, 1929, c. 675.

[2] Newton v. Hamilton Co. —Tenn.— 33 S.W. (2d) 419 (1931).

Considered as mere agencies of government, municipal corporations are undoubtedly subject to the absolute control of the legislature, except, perhaps, as to their private property rights.[3] The courts generally hold that the legislature may exercise its power of control as to the public or governmental functions of the municipality, as distinguished from the private, or local, functions.[4] It seems to be substantially agreed, therefore, in the absence of constitutional limitation, that the legislature has the power to impose a debt, or burden, in the way of taxation on a municipality without its consent, where the same is to promote a public interest.[5] Hence, in certain instances a city has been compelled to assess and collect a tax over and above the legislative limit of indebtedness, for the purpose of building and repairing bridges, canals and highways; the acts being declared valid on the basis that they concerned public, as distinguished from municipal, matters.[6]

In these cases, however, it seems that the legislature did not lose sight of the principle that "taxation is a burden to be borne for benefits conferred";[7] and they seem to turn largely on the point that the municipality, as such, was receiving a benefit. Assuming the act, in the present case, is valid on

---

[3] Note (1900) 48 L.R.A. 466.

[4] People v. Board of Supervisors of San Louis Obispo County, 50 Cal. 56 (1875); People *ex rel* LeRoy v. Hurlbut, 24 Mich. 44 (1871); People *ex rel* Park Commissioners v. Detroit, 28 Mich. 228 (1873); Darlington v. New York, 31 N.Y. 164 (1865); Simon v. Northup, 27 Ore. 487, 40 Pac. 560 (1895); City of Philadelphia v. Field, 58 Pa. 320 (1868); Jersen v. Board of Supervisors of Polk County, 47 Wis. 298, 2 N.W. 328 (1879).

[5] State v. Williams, 68 Conn. 131, 35 Atl. 24 (1896); People v. Abbott, 274 Ill. 380, 113 N.E. 696 (1916); Winters v. George, 21 Ore. 251, 27 Pac. 1041 (1891); COOLEY, MUNICIPAL CORPORATIONS, (1914) 85; DILLON, MUNICIPAL CORPORATIONS, (5th ed. 1911) 74.

[6] People v. Board of Supervisors of San Louis Obispo County, *supra* note 4 at 57; Commonwealth v. Plaisted, 148 Mass. 375, 19 N.E. 224 (1885); People v. Flagg, 46 N.Y. 401 (1871); Jersen v. Board of Supervisors of Polk County, *supra* note 4, at 299.

[7] COOLEY, MUNICIPAL CORPORATIONS, *supra* note 5, at 443.

every other ground,[8] the question remains, did the legislature have the power to assess the municipality with the tax provided for in the act? In the principal case the learned Judge declared: "For the purposes of taxation, a county purpose and a municipal purpose are distinct things." This statement would seem to follow from a reasonable construction of Article 2, section 29, of the Constitution of Tennessee which reads as follows: "The general assembly shall have power to authorize the several counties and incorporated towns in the State to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; . . . ." However, as to what is a county or municipal purpose, the cases are rather indefinite in defining; and each case turns on its own particular set of facts.[9]

A study of the cases cited in the *foot-note*[10] reveals what seems to be the apparent test which the courts adopt in determining what is a county or municipal purpose — *Does*

---

8 (The Act in the present case was also declared invalid because it violated Article 2, section 17, of the Constitution of Tennessee, which provides that the body of any act shall be no broader than its caption).

9 Nichol v. Nashville, 28 Tenn. 252 (1848); McCallie v. Chattanooga, 40 Tenn. 317 (1859); Shelby County v. Exposition Co., 96 Tenn. 653, 656, 36 S.W. 694 (1896); Shelby County v. The Six Judges, 3 Shan. Cas. 508, 512 (1875).

10 Cases indicating the courts' view as to what constitutes a *county purpose*: L. & N. R.R.Co. v. Davidson County, 33 Tenn. 637 (1854) (construction of a railroad into a county); Shelby County v. Exposition Co., *supra* note 9 (exhibit of the County's resources); Burnett v. Maloney, 97 Tenn. 697, 37 S.W. 689 (1896) (a county bridge); Ransom v. Rutherford County, 123 Tenn. 25, 130 S.W. 1057 (1909) (public schools); State *ex rel* v. Powers, 124 Tenn. 553, 137 S.W. 1110 (1911) (a drainage district); State v. Brown, 132 Tenn. 685, 179 S.W. 321 (1915) (juvenile courts). The following cases indicate the courts' view as to what constitutes a *municipal purpose*: Nichol v. Nashville, *supra* note 9, at 252 (building a railroad into or near a city); City of Memphis v. Memphis Gayoso Gas Co., 56 Tenn. 531 (1872) (subscription for lighting of city); University v. Knoxville, 65 Tenn. 166 (1873) (a public library); Newman v. Ashe, 68 Tenn. 380 (1876) (waterworks); Ballentine v. Pulaski, 83 Tenn. 644 (1885) (public schools); Imboden v. City of Bristol, 132 Tenn. 562, 179 S.W. 147 (1915) (improvement of streets of city).

the county, or the municipality, as such, receive a direct benefit from such purpose? The learned Judge in the present case declared: "The court undertaken to be established by the present act is both in name and in fact a court of and for the county. The City of Chattanooga takes no benefit from it as a municipality, or otherwise than such as may arise from the fact that its territory is within and a part of the county."

Though the courts have the final determination of what is a county or municipal purpose,[11] it is suggested that because the question is arbitrary, and for the further reason that it is not wholly impractical to conceive of a direct benefit flowing to a municipality in the establishment of a court, as provided for in the act under question, the very greatest consideration should be given the legislatures' view before declaring its act invalid — this consideration being warranted by virtue of Article 11, section 8, of the Constitution of Tennessee, which renders municipal corporations "creatures of the legislature for public purposes."

G. W. W.

STATUTE OF LIMITATIONS—TOLLING OF STATUE BY SUIT IN COURT WITHOUT JURISDICTION

Plaintiff sued defendant for trespass to land, bringing the suit in the chancery court where it was dismissed for lack of jurisdiction. Within a year after the dismissal plaintiff brought another suit on the same cause of action in the Circuit Court of Knox County, his declaration showing the facts as to the dismissal of the prior suit. Defendant demurred on the theory that the present action was brought more than three years after the injuries were inflicted, and was barred by the Statute

---

[11] The County of Shelby v. The Six Judges, *supra* note 9; The Judges' Salary Cases, 110 Tenn. 383, 75 S.W. 1061 (1903).

of Limitations;[1] and that the chancery suit, having been brought in a court without jurisdiction, did not prevent the statute from barring the action. The trial court sustained the defendant's demurrer and plaintiff appealed to the Supreme Court of Tennessee. There the judgment was reversed, the court holding that the suit in the chancery court, which was dismissed for want of jurisdiction, tolled the operation of the Statute of Limitations, and that by virtue of section 4446 of the Tennessee Code[2] plaintiff was allowed one year after the dismissal in which to sue.[3]

The Supreme Court of Tennessee, in deciding the principal case, has further clarified the law as to the construction of Section 4446 of the Code, *supra*. Through that section of our laws has been brought to the consideration of the Supreme Court of Tennessee many times, the holdings have been varied and by no means uniform. The earliest Tennessee case on the particular point raised in the principal case is *Sweet v. Electric Co.*,[4] decided in 1896, where the first suit was brought in the Federal District Court and there dismissed for want of jurisdiction of the subject-matter. On the trial of the second action, the Supreme Court of Tennessee reached a result directly *contra* to that of the principal case. It was held that the suit in the court which had no jurisdiction was not such a suit as would toll the effect of the Statute of Limitations.

---

[1] TENN. ANN. CODE (Shannon 1917) 4470: "Actions for injuries to personal or real property; within three years from the accruing of the cause of action.'

[2] TENN. ANN. CODE (Shannon 1917) 4446: "If the action is commenced within the time limited, but the judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action, or where the judgment or decree is rendered in favor of the plaintiff, and is arrested, or reversed on appeal, the plaintiff or his representatives and privies, as the case may be, may, from time to time, commence a new action within one year after the reversal or arrest."

[3] Burns v. Peoples Tel. & Tel. Co., — Tenn. —, 33 S. W. (2d) 76 (1930).

[4] 97 Tenn. 252, 36 S. W. 1090 (1896).

Thus, the benefit of section 4446 could not be invoked to allow plaintiff to sue following the dismissal. The court in the principal case in commenting on *Sweet v. Electric Co., supra,* said that the holding of the latter could be sustained only upon its particular facts and was otherwise overruled. The decision of the principal case seems consistent with the results reached and the principles announced in other Tennessee cases. In *N. C. & St. L. v. Bolton,*[5] the court said that section 4446 was remedial and should be liberally construed in furtherance of its purpose to allow plaintiff more time in which to bring suit. A *dictum* in *Coal Co. v. Minton,*[6] expressed the idea that the main question was whether the former dismissal was on a ground not concluding the plaintiff's right of action. Under that view the principal case is right, since a dismissal for want of jurisdiction does not conclude plaintiff's right of action. In 1924 in the case of *Davis v. Parks,*[7] where the first suit had been dismissed because it was brought in the wrong county, the court distinguished the *Sweet* case from the case then before it, saying that the rule of the *Sweet* case would not be extended to include a case of wrong venue. The dissatisfaction of the Supreme Court with the ruling in the *Sweet* case is apparent in the case of *Swift & Co. v. Warehouse Co.*[8] There the suit was brought in the chancery court which held that there was a remedy at law and dismissed the case. On appeal to the Supreme Court the judgment was affirmed, but to evade the result reached in the *Sweet* case, the defendant was restrained by injunction from pleading the Statute of Limitations if plaintiff should sue again within one year. It is submitted that that if the court did not have jurisdiction to try the case, it could not have jurisdiction to grant an injunction. An in-

---

[5] 134 Tenn. 447, 184 S. W. 9 (1916); Cole v. Nashville, 45 Tenn. 528 (1868) *semble.*

[6] 117 Tenn. 415, 101 S. W. 175 (1906).

[7] 151 Tenn. 321, 270 S. W. 444 (1924).

[8] 128 Tenn. 82, 158 S. W. 480 (1913).

teresting and recent case suporting, to some extent, the *Sweet* case is *Moran v. Weingarber*,[9] where the first action was brought in a magistrate's court where the jurisdiction was limited to $500 in amount. Pending defendant's appeal from an adverse judgment, plaintiff took a non-suit and within a year brought another suit in the circuit court for $10,000 on the same cause of action. On appeal the Supreme Court limited plaintiff's recovery to $500, the limit of the magistrate's jurisdiction. It would seem that if the first suit tolls the statute only to the extent of the jurisdiction of the first court, then where there is a complete lack of jurisdiction the statute should not be tolled.

However, we find that the weight of authority elsewhere seems to favor the holding of the principal case.[10] The reason behind such statutes is that the first suit gives notice to the defendant that plaintiff is going to enforce his rights; and that a dismissal, non-suit, or reversal on technical grounds should not bar the right of plaintiff to sue again.[11] And ,as was said in *Gaines v. N. Y.*,[12] "There is nothing in the reason for the rule that calls for a distinction between the consequences of error in respect of the jurisdiction of the court and the consequences of any other error in respect of a suitor's rights." However, in support of the view that the suit in a court not having jurisdiction will not toll the statute, we find the early

---

[9] 149 Tenn. 537, 260 S. W. 966 (1923).

[10] McCormick v. Elliot, 43 Fed. 469 (1890); Little Rock v. Manees, 49 Ark. 248, 4 S. W. 778 (1887); McKinney v. Springer, 3 Ind. 59, 54 Am. Dec. 470 (1851); Ball v. Biggan, 6 Kan. App. 42, 49 Pac. 678 (1897); Coffin v. Cottle, 33 Mass. 383 (1835); Hawkins v. Scottish Ins. Co., 110 Miss. 31, 69 So. 710 (1915); Bradshaw v. Citizen's Nat'l Bank, 172 N. C. 632, 90 S. E. 789 (1916); Park and Ballard Co. v. Industrial Co., 197 App. Div. 671, 189 N. Y. Supp. 866 (1921); Henever v. Hannah, 59 W. Va. 476, 53 S. E. 635 (1906); Note L. R. A. 1917C, 208; Note (1908) 11 L. R. A. (N. S.) 478.

[11] Woods v. Houghton, 67 Mass. 580 (1854).

[12] 215 N. Y. 533, 109 N. E. 594 (1915).

Virginia case of *Gray v. Berryman*.[13] But counsel in that case cite a contrary English authority,[14] which clearly supports the majority view. In Wood, LIMITATION OF ACTIONS,[15] it is said that a suit in chancery where the action should have been at law will not toll the statute, even where there is a statute allowing more time after a dismissal of the plaintiff's action. It has been held that the statute allowing additional time applies only where the first suit was a valid action, and not one brought in the wrong county.[16] The Supreme Court of the United States while reaching a decision in accord with that of the principal case, intimated that if plaintiff were grossly negligent in choosing the forum of his first suit, he will not be allowed to sue a second time.[17] Thus, it was later held by a United States Circuit Court of Appeals that where the first suit was obviously in the wrong court, the Statute of Limitations would not be tolled.[18]

It is submitted that although the holding of the principal case is supported by authority of great weight, yet there is considerable merit in the contrary rule in view of the fact that the policy of the law is to curtail litigation.[19]

R. R. R.

---

[13] 18 Va. 76 (1814); Smith v. Cinn. R. Co., 11 Fed. 284 (1882); Solomon v. Bennett, 62 App. Div. 56, 70 N. Y. Supp. 856 (1901) (two justices dissented.) *semble.*

[14] Anonymous, 1 Vern. 73. (1682). *Contra*: Gilbert v. Emerton, 2 Vern. 503 (1705).

[15] WOOD, LIMITATION OF ACTIONS (3d ed. 1901) 690.

[16] McFarland v. McFarland, 151 Ga. 9, 105 S. E. 596 (1921) [reversing 24 Ga. App. 621, 102 S.E. 37 (1920)] Donnell v. Gatchell, 38 Me. 217 (1854). *semble.*

[17] Smith v. McNeal, 109 U. S. 426, 3 Sup. Ct. 319 (1883); Bonney v. Stoughton, 122 Ill. 536, 13 N. E. 833 (1887) [affirming 18 Ill. App. 562 (1886)].

[18] Warner v. Citizen's Nat'l Bank, 267 Fed. 661 (1920).

[19] Reed v. C. N. O. & T. P. R. Co., 136 Tenn. 499, 190 S. W. 458 (1916).

TORTS—CONSENT AS A DEFENSE TO CIVIL INJURY ARISING FROM MUTUAL COMBAT IN ANGER

The Supreme Court of Washington has recently held that an administrator was not entitled to recover damages for the death of his intestate where the deceased died as the result of a blow received in a prize fight, notwithstanding that prize fighting was a criminal offense by a state statute. No facts were introduced to show anger, malicious intent seriously to injure, or excessive force. The court pursued the theory that the deceased, if he had survived, could not have recovered in a civil action and that his administrator had no greater right than he would have had.[1]

It is well settled that "consent is generally a full and perfect shield when that is complained of as a civil injury which was consented to".[2] However, when the act consented to is illegal in that it arises from mutual combat in anger the adjudicated cases, as well as the text writers, are in conflict as to the effectiveness of consent as a bar to a civil suit arising from the act. The majority view in the United States and the English view hold that "Where parties engage in mutual combat in anger, each is civilly liable to the other for any physical injury inflicted by him during the fight. The fact that the parties voluntarily engaged in the combat is no defense to an action by either of them to recover damages for personal injuries inflicted upon him by the other."[3] The min-

---

[1] Hart v. Geysel, — Wash. —, 294 Pac. 570 (1930).

[2] 1 COOLEY, TORTS (3rd ed. 1906) 282; 1 C. J. 971, n. 94, for annotation of cases.

[3] Adams v. Wagner, 33 Ind. 531, 5 Am. Rep. 230 (1870); Lund v. Tyler, 115 Iowa 236, 80 N. W. 333 (1870); McNeil v. Mullin, 70 Kan. 634, 79 Pac. 168 (1905); Grotton v. Glidden, 84 Me. 589, 24 Atl. 1008 (1892); Morris v. Miller, 83 Neb. 218, 119 N. W. 458, 20 L. R. A. (N. S.) 907 (1909); Stout v. Wren, 8 N. C. 420, 9 Am. Dec. (1887); Boulter v. Clark, Bull. N. P. 16 (1747); Bohlen, *Consent as Affecting Civil Liability for Breaches of the Peace* (1924) 24 Col. L. Rev. 819; *BOHLEN, STUDIES IN TORTS* (1926) 577.

ority view is to the effect that "Where parties engage in mutual combat in anger, the act of each is unlawful and relief will be denied them in a civil action; at least in the absence of a showing of excessive force or malicious intent to do serious injury upon the part of the defendant."[4]

The majority view rests on the importance which the law attaches to the public peace as well as to the life and person of the citizen; and since an agreement to breach the public peace is void, the maxim, *volenti non fit injuria,* does not apply.[5] The court in the principal case rejected the majority view on the ground that it violated two fundamental legal principles, namely "(a) That one who has consented to suffer a particular invasion of his private rights has no right to complain; and (b) that no one shall profit by his own wrong."[6] The *Restatement of the Law of Torts* in following the minority rule makes these same criticisms.[7] The court noted the fact that in the principal case there was no showing of anger which is an element of both rules but concluded "it is unnecessary, as we view it, in the present case to adopt either rule" and left the plaintiff wrongdoer where it found him.

Even in those jurisdictions adhering to the majority rule it has been held that consent to mutual combat can be relied upon in mitigation of damages.[8]

An exhaustive search has failed to reveal any Tennessee

---

[4] Lykins v. Hamrick, 144 Ky. 80, 137 S. W. 852 (1911); McNeil v. Choate, 197 Ky. 682, 247 S. W. 955 (1923); Galbraith v. Fleming, 60 Mich. 408, 27 N.W. 583 (1886); White v. Wittal, 113 Mich. 493, 71 N.W. 1118 (1897); Mitchell v. United R. Co., 125 Mo. App. 1, 102 S.W. 661 (1907); Wright v. Starr, 42 Nev. 41, 179 Pac. 877 (1919); 6 A.L.R. 981 (1920).

[5] Bell v. Hansley, 48 N.C. 131 (1855); Barholt v. Wright, *supra* note 3; Shay v. Thompson, 59 Wis. 540, 18 N.W. 473 (1884).

[6] Hart v. Geysel, *supra* note 1, at 572.

[7] AMERICAN *INSTITUTE* TREATISE NO. 1 (a) supporting RESTATEMENT NO. 1, TORTS, chapter V, sec. 75, beginning at p. 172 (1925).

[8] Lund v. Tyler, *supra* note 3; Chrisman v. Hunter, 3 Dana 83 (Ky. 1835); Barholt v. Wright, *supra* note 3.

decisions on the question involved in this note, but it is hoped that Tennessee will follow the holding of a Kentucky decision, which stated: "the fight being unlawful, and both being equally to blame for the fight, it is hard to see upon what principle the law should, in a civil action, make a settlement between wrongdoers. It is a wise rule of law to leave the wrongdoer where it finds him and it seems to us that the rule applies equally to violations of the law by fighting as to other violations."[9]

J. G. F.

WITNESSES — IMPEACHMENT OF ONE'S OWN WITNESS

A and *B* were indicted for possessing and operating a still. *C* was called as a witness for the state and testified that *A* had engaged him to solder a copper can, the work being paid for by two men, who said that they were *A* and *B;* but the witness denied that the defendant *A* was the person who had either hired or paid him. Upon *C's* failure to identify defendant as *A*, the state evinced surprise, and offered, as evidence to discredit the witness, testimony given by the witness before the grand jury to the effect that *A* was the one that had paid him for the work. The defendant's objection was overruled and on appeal from this decision, the Supreme Court of West Virginia held, that a party surprised by unfavorable testimony given by his own witness, may interrogate such witness as to previous inconsistent statements made by him.[1]

There are at least four methods by which a party may impeach his adversary's witness: (1) by disproving by other witnesses such of the facts stated by him as are material to the issue, (2) by proving prior inconsistent statements, (3) by offering evidence attacking his character for truth and veracity,

---

[9] Lykins v. Hamrick, *supra* note 4 (The facts of this case disclosed a situation of mutual combat in anger).

[1] State v. Wolfe, — W. Va. —, 156 S. E. 56 (1931).

(4) by showing bias, by proving near relationship, sympathy, hostility, or prejudice.[2]

The general rule is that a person cannot impeach a witness whom he has offered as his own.[3] The reason for this rule is to prevent the party offering the witness from destroying him if he testified unfavorably and preserving him if he testified favorably.[4]

Even though one may not be able directly to discredit his own witness,[5] he may call other witnesses to prove a fact that he had desired to prove by his first witness, who has testified unfavorably.[6] In case a party calling a witness is surprised by his testimony, it is a universal rule that the witness may be questioned concerning prior inconsistent statements.[7] There is a conflict of authority as to the effect to be given these questions. The apparent majority holds that questions of this nature are solely for the purpose of refreshing the memory of the witness, and that the party asking them is bound by the answers of the witness.[8] However, in case the witness denies making the

---

[2] Note, 15 Am. Dec. 99.

[3] Endicott Johnson Corp. v. Shapiro, 200 Iowa 843, 205 N. W. 511 (1925); Steel v. Sovereign Camp W. O. W., 115 Kan. 159, 222 Pac. 76 (1924); State v. Davidson, 172 N. C. 944, 90 S. E. 688 (1916); Hanner v. Bradstreet Collection Bureau, 158 N. Y. Supp. 918, 95 Misc. Rep. 211 (1916).

[4] Hall v. City of Manson, 99 Iowa 698, 68 N. W. 922 (1896); Becker v. Koch, 104 N. Y. 394, 10 N. E. 701 (1887); Cox. v. Eyres, 55 Vt. 24 (1883).

[5] *Supra* note 3.

[6] Omaha & Grant Co. v. Tabor, 13 Colo. 41 (1885); Endicott Johnson Corp v. Shapiro, *supra* note 3; Masourides v. State, 86 Neb. 105, 125 N. W. 132 (1910).

[7] Murray v. Third Nat'l Bank, 234 Fed. 481 (C.C.A. 6th., 1916); Duncan v. State, 120 Ala. App. 207, 101 So. 472 (1924); Ware v. People, 76 Colo. 38, 230 Pac. 123 (1924); People v. Johnson, 314 Ill. 486, 142 N. E. 703 (1924).

[8] People v. Michaels, 335 Ill. 590, 167 N. E. 857 (1929); Silver v. Mermelstien, 164 N. Y. Supp. 80 (1917); State v. McComb, 33 Wyo. 346, 239 Pac. (1925).

contradictory statements, the substantial minority allows the surprised party to prove them by other witnesses.[9] Some states provide statutes to regulate the introduction of such statements.[10]

In the case of a hostile witness, the party calling such witness may impeach him;[11] and one is at liberty to impeach a witness, whom he is compelled to call, by proving prior inconsistent statements.[12]

Tennessee holds generally that a party may not impeach his own witness.[13] An exhaustive search of Tennessee cases has revealed only one case relating to the problem of impeachment of one's own witness by proving prior inconsistent statements, and the rule laid down in that case is, "If the witness unexpectedly give material evidence against the party who called him, such party may, for the purpose of refreshing his memory, and awakening his conscience, ask him if he did not, on a particular occasion, make a contrary statement. If the witness admits he has made a contrary statement, there is, of course, no necessity for other evidence of it. If he denies making the imputed statement, the party cannot be allowed to prove it by other witnesses, where it would not be admissible as independent evidence, and can, therefore, have no effect but to impair the credit of the witness with the jury."[14]

H. M. H., Jr.

---

[9] People v. Reynolds, 48 Cal. App. 688, 192 Pac. 343 (1920); State v. Terry, 98 Kan. 796, 161 Pac. 905 (1916); State v. Walters, 145 La. 209, 82 So. 197 (1917); Maloney v. Public Service Ry., 92 N. J. L. 539, 106 Atl. 376 (1919); Blystone v. Walla Walla Ry Co., 97 Wash. 46, 165 Pac. 1049 (1917); Ferris v. Todd, 124 Wash. 643, 215 Pac. 54 (1923).

[10] State v. Wolfe, *supra* note 1.

[11] Commonwealth v. Reaves, 267 Pa. 361, 110 Atl. 158 (1917); State v. Laymon, 40 S. D. 381, 167 N. W. 402 (1918).

[12] Abdo v. Townsend, 282 Fed. 476 (C.C.A. 4th., 1922); Ware v. People, *supra* note 7.

[13] Jones v. Carnes, 10 Tenn. 70 (1821); McLarin v. State, 23 Tenn. 381 (1843).

[14] Record v. Chickasaw Cooperage Co., 108 Tenn. 657, 69 S. W. 334 (1902).

WORKMEN'S COMPENSATION ACT—INDEMNITY PAID TO WIDOW AS A BAR TO COMMON LAW ACTION FOR EMPLOYEE'S DEATH

A widow authorized her husband's administrator to sue for the wrongful death of her husband, and the administrator brought suit under statute, which is primarily a survival one, giving the widow the right of action which the deceased, if he had lived, would have had against the employer and third person tort-feasor. Before pleas were filed, however, the widow accepted the indemnity prescribed by the Workmen's Compensation Act. Thereafter, the employer and the third person tort-feasor pleaded the aforesaid settlement in bar of the suit at law. *Held*, that a compensation settlement of employee's widow with employer bars administrator's suit against the employer and a third person tort-feasor.[1]

It is of course well understood that at common law no civil action would lie for causing the death of a human being, and legislative enactment was therefore necessary to create the civil liability for wrongful death.[2] "Legislative enactment is the exclusive source and boundary of the liability and remedy. It may create the cause of action, define the period of its existence, and the party by whom and the method in which it shall be enforced, and prescribe the measure of damages and the beneficiaries."[3]

The New York Code gives the right of action to the executor or administrator, and provides that the damages recovered shall be for the exclusive benefit of the husband or wife of the deceased and next of kin. It empowers the depend-

---

[1] McCreary v. Nashville, C. & St. L. Ry., — Tenn. —, 34 S. W. (2d) 210 (1930).

[2] Georgia Casualty Co. v. Haygood, 210 Ala. 56, 97 So. 87 (1923); Travelers' Ins. Co. v. Padula Co., 224 N. Y. 397, 121 N. E. 348 (1918).

[3] Travelers' Ins. Co. v. Padula Co., *supra* note 2.

ents to assign such a cause of action, empowers, with a restriction, the dependents to compromise such cause of action, empowers the defendants to elect whether they will enforce or assign it, and constitutes them the sole beneficiaries of it, in case they enforce it.[4] The provisions of the Workmen's Compensation Act of that state give the right of action to the dependents of the deceased employee.[5]

The homicide statute is not repealed by the Compensation Act, but is limited to be enforced in behalf of the dependents of the deceased employee, and in such cases the right of the administrator to pursue the remedies thereunder is gone.[6] It is, however, an elementary and fundamental rule of law and of property that the owner of a cause of action has the right, which is a part of it, in the absence of a valid restriction, to prosecute it in the ordinary and legal method and manner in the courts.[7] The Workmen's Compensation Act, however, is a subsequent enactment, and it curtails the rights enforceable under a prior statute.[8]

The Supreme Court of Washington in *Peet v. Mills*[9] held that the remedies provided by the compensation law were exclusive. In rendering its decision, the court said: "For these reasons we are of the opinion that the compensation provided by the act in case of injury to any workman in any hazardous occupaiton was intended to be exclusive of every other remedy, and that all causes of action theretofore existing, ex-

---

[4] Travelers' Ins. Co. v. Padula Co., *supra* note 2.

[5] WORKMEN'S COMPENSATION LAW, (N. Y.) sec. 29, as amended by Laws 1916, c. 622 sec. 7.

[6] Georgia Casualty Co. v. Haygood, *supra* note 2.

[7] Travelers' Ins. Co. v. Padula Co., *supra* note 2.

[8] Basso v. Clark & Son, 108 Misc. Rep. 78, 177 N. Y. Supp. 484 (1919).

[9] 76 Wash. 437, 136 Pac. 685, L. R. A. 1916A 358, Ann. Cas. 1915D 154 (1913); See Northern Pac. Ry. v. Meese, 239 U. S. 614, 36 Sup. Ct. 233, 60 L. ed. 467 (1916); Turnquist v. Hannon, 219 Mass. 560, 107 N. E. 443 (1914).

cept as they are saved by the provisions of the act, are done away with."

Tennessee in *Mitchel v. Usilton*[10] held that under the Workmen's Compensation Act, an employee injured through the negligence of a third person may at his option claim compensation or proceed at law against such person to recover damages, or proceed at law against both the employer and such person, but shall not be entitled to collect from both. The injured employee, after recovering compensation from his employer, may not maintain an action to hold a third person liable for his injuries.

Tennessee, by statute, preserves to the widow and representatives the right of action for the wrongful death of the deceased. It provides that "the right of action which a person who dies from injuries received from another . . . . would have had against the wrongdoer in case death had not ensued . . . . shall pass to the widow . . . . "[11] This is primarily a survival statute. If the injured employee could not have prosecuted a suit himself, no such right continues in his widow or in his representatives.

A settlement by the widow under the compensation act, in so far as she and the dependent children are concerned, bars their action at law for the tortious injury, just as such settlement by the deceased would have barred the action at law, had he lived.[12]

L. B. B., Jr.

---

[10] 146 Tenn. 419, 242 S. W. 648 (1921) [Approved in City of Nashville v. Latham, 160 Tenn. 581, 28 S. W. (2d) 46 (1929)]; See PUBLIC ACTS OF TENN. 1919, c. 123, sec. 14.

[11] Tenn. Ann. Code (Thompson-Shannon, 1917) sec. 4025.

[12] PUBLIC ACTS OF TENN. 1919, c. 123, sec. 7.

BOOK REVIEW

GIBSON'S SUITS IN CHANCERY. *By Henry R. Gibson,* Third Edition by *John A. Chambliss.* Cleveland and Louisville; The Baldwin Law Book Company, 1929. Pp. 1320. $25.00.

Gibson's Suits in Chancery is the Bible of the Chancery lawyer of Tennessee, and now this edition looks like one. The popularity of this book is shown by the fact that there is a copy of one of the editions of it in every lawyer's library of any consequence in the State of Tennessee. This edition, prepared by the Hon. John A. Chambliss of the Chattanooga Bar, follows the two previous editions in that it is written primarily for the Tennessee lawyer, but due to its nature and comprehensive treatment of the general principles it is of much value to the profession at large.

This edition does not contain a single new chapter or section, the general index to the chapters being exactly the same. The whole body and notes of the second edition have been carried forward intact in most cases, thereby preserving the vast amount of valuable cititations contained in the previous edition. The work is brought down to date, including notes from Volume 157 of the Tennessee Reports, Higgins' Civil Appeals Reports, and Tennessee Appeals Reports. There ar proper citations from the statutes of Tennessee including citations from Public Acts of 1929. In some cases these new citations are included in the old note, in others a new note is added. The fact that the Chancery Court now has jurisdiction over cases arising under the Workmen's Compensation Act, and of proceedings under the Uniform Declaratory Judgments Act is shown in this edition.

The most striking change and improvement in this edition are in its physical characteristics. This is a Deluxe edition on Bible paper, which accounts for the fact that this volume will occupy only one-half the space necessary for the previous edi-

tion, and at the same time contains an abundance of new material. This is called the "Perpetual Revision Edition" due to the special binder which allows space for cumulative supplements to be placed in the pocket in the back of each volume as they may become necessary in the future. Due to this fact the book is "Always to Date."

The volume contains a table of parallel references showing where the various sections of the official Code of 1858 are to be found in Shannon's Annotated Code of Tennessee. This greatly facilitates the use of the book as all the editions carry citations to the official Code exclusively. The new 1929 Rules of Chancery Practice are included in this volume and will be found under section 1205. An Appendix contains the Rules of the Supreme Court of Tennessee, Rules of the Court of Appeals, and the Federal Equity Rules. The Rules, General Index, Tables, and Appendix are separately thumb-indexed in this work. This happy thought saves much valuable time for the lawyer in the location of the desired matter.

As was stated in the preface to the first edition, this book purports to contain something on any type of Chancery case which is likely to arise, but at the same time most space is devoted to those cases which experience in practices has shown to be the most frequent. This method of treatment makes this book invaluable to the average practitioner in Tennessee.

LEONARD E. LADD

University of Tennessee, College of Law
Student Editor, TENNESSEE LAW REVIEW.

CHIEF JUSTICE GREEN
TENNESSEE SUPREME COURT

Tennessee Law Review

Volume 9 June, 1931 Number 4

MAINTENANCE OF A CORPORATION'S CAPITAL

D. T. KRAUSS

Modern business, in its development, needed a form of legal organization by means of which individuals, exercising their individual initiative, could bring together vast quantities of capital beyond the possibilities of their individual accumulations, which form would permit limiting, legally, the financial obligations of the participants in any given enterprise. In the earlier forms of organization the individual's entire financial resources were pledged for the payment of debts created in carrying on the enterprise. Large scale enterprises were knocking at the door. Consequently, the state, in fulfillment of its function of promoting trade, created the modern business corporation as a solution of the problem. Considerable legal ingenuity has been exercised in the development of the modern corporation. The state is said to contract with individuals, granting them certain rights and privileges so that they, as individuals, but in the name of the legal entity, the corporation, will carry on economic activities, presumably of some social value. The recipients of such privileges usually carry somewhat lightly the social obligations assumed.

The results from the invention of the corporation to society are far reaching. The modern corporation can well be said to have created a new form of tenure of property. Property is owned by the corporation, and individuals, as shareholders, in turn, own the corporation.

It requires only a cursory examination of the evolution

of the corporation to observe that, in contrast to the earlier corporation, which was managed largely by those who contributed its capital, the more recent corporation is frequently dominated by a managerial group that has a comparatively small financial state in the enterprise. The stockholder has been called the absentee owner.

The evolution of the law of corporations has been in the direction of an increase in the powers of the corporate management, a decrease in the rights of the stockholders, and a decrease in the control which the state and the stockholders exercise over the management. These generalizations are made here, by way of an introduction, because the problem discussed in this article is a phase of a much larger problem, namely, that of the powers of the board of directors and management over the property of the corporation.

The funds of a corporation are contributed by the creditors and stockholders. This article attempts an analysis of some aspects of the law which seeks to maintain the funds and property of the corporation intact for the protection of the contributors. The interests of the creditors and the stockholders are affected by (a) the fraudulent withdrawal of the capital of the corporation, (b) the reduction of the nominal capital stock, (c) the purchase of treasury stock, accompanied in some cases, by its cancellation and (d) the reduction of the capital in the sense that the corporate assets are depleted with no corresponding decrease in the nominal capital stock of the corporation. This article purports to deal with the last phase of this subject and only incidentally with the other phases as they become involved.

There is considerable confusion in the cases and the statutes over the meanings of such terms as 'capital,' 'capital stock', and 'surplus'. To illustrate: the Minnesota court stated in a case that "capital (not the mere share certificates) means all the assets, however invested."[1] The New York stock cor-

[1] Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174, 50 N.W. 1117 (1892).

poration law in chapter 59, section 12, provides:

> "The capital of the corporation shall be at least equal to the sum of the aggregate par value of all issued shares having par value, plus the aggregate amount of consideration received by the corporation for the issuance of shares without par value, plus such amounts as, from time to time, by resolution of the board of directors, may be transferred thereto."

The New Jersey equity court in a case interpreting the statute said: "It (referring to the term capital stock) may mean either the capital subscribed, the share capital, or the capital paid, in the actual assets with which the company does business. It seems to be used in both senses in this very section."[2] In a Delaware case the court held that "the 'capital of a corporation,' broadly speaking, is the fund used by it in the conduct of its business and from which its profits, at least in a great measure, are expected to be made."[3]

It can be said that the word 'capital' may mean (1) the amount contributed by the shareholders which is divided into aliquot parts which are referred to as the 'capital stock' of the corporation, or (2) the amount represented by the net assets of the corporation. The total assets of the corporation have been called the gross capital and the net assets the net capital, assuming there is no surplus. In this article the term 'capital' will be used as meaning the net assets of the corporation. The difference between the two meanings, it seems, is largely one of viewpoint.

This article is concerned with the principles of law determining the maintenance of the capital in fact. It will be seen readily that the capital, if maintained in fact, will at all times equal the contributions of the stockholders as represented by the capital stock. Any increment of assets above the amount

---

[2] Goodnow v. American Writing Paper Co., 73 N.J. Eq. 692, 69 Atl. 1014 (1908).

[3] Sohland v. Baker, 15 Del. Ch. 431, 141 Atl. 277 (1927).

of the capital necessary to maintain its equality with the capital stock and not necessary for the payment of liabilities is surplus and, if realized in fact, is earned surplus available for the payment of dividends. To a creditor the capital represents the amount the assets may shrink in value without an impairment of his claim, and to the creditor it is of great importance that the management maintain the capital in fact.

The principles of law governing the maintenance of the capital of a corporation can be classified into groups. This classification is based on the sources from which the principles emanate. One group of principles can be found in the enactments of legislatures and the decision of the court. General enabling statutes provide for the determination of the profits of a corporation for dividend purposes and for the reduction of capital stock. A second group of principles many be found in the orders and regulations of administrative bodies, such as the Interstate Commerce Commission, Public Utility Commissions, State Insurance Departments, the Comptroller of Currency and the Collector of Internal Revenue. These bodies are concerned with the computations of capital and income as these computations affect the various functions of these bodies, i.e. rate making, income tax collecting, etc. Many of the cases, having at issue questions involving the computation of capital, income, and profits are appealed to the courts from the decisions of these administrative bodies. An administrative order resulting in a reduction of the value of the assets of a corporation raises a constitutional question under the due process clause of the constitution. This discussion will be confined to the first group. Statutory references will be made to the general corporation laws of Ohio and Delaware as types illustrating the statutory solutions of certain problems.

An examination of some of the general enabling statutes reveals that the clauses affecting the maintenance of the capital of a corporation are very general and sometimes in the form of prohibitions of what a corporation cannot do in determining an increment to capital or profits, or the reduction of its

capital stock. It seems that, with the exception of some rather general prohibitions, matters pertaining to the computation of surplus and the evaluation of the assets of the corporation rest pretty largely in the hands of the management. Thompson, in his work on corporations, states the matter in section 5273 as follows:

> "While it is left to the directors to determine whether or not earnings or profits exist out of which dividends may be paid, they will not be permitted by an erroneous determination to confer upon themselves or the corporation the power to make dividends out of capital."

How far afield may the directors go in determining profits and earned surplus and face no liability for an illegal dividend? It seems that the practical value to the stockholders and the creditors of a rule of law that dividends shall not be declared out of capital depends upon the efficiency of the legal methods for determining whether a profit exists for dividend purposes. The impact of a prohibition would seem to depend to some degree at least upon the rules, permissive in character, which the directors may follow in determining profits.

The statutory provisions providing for the reduction of the capital of a corporation are of three general types. The first type of provision is usually in the form of a prohibition against the declaration of a dividend except out of earned surplus. Exceptions have been developing to this general rule. The principle is that the capital should be maintained and not used for dividend purposes. The Delaware court stated it as follows: "Corporations cannot pay dividends except out of profits. This rule requires that invested capital be kept intact."[4] A federal court has said, "As a general rule, corporations have no right to pay dividends out of any fund except the excess remaining from the conduct of the business after paying taxes, operating

---

[4] Wittenberg et al v. Federal Mining and Smelting Co., 15 Del. Ch. 147, 133 Atl. 48 (1926).

expenses and fixed charges."[5] A surplus may, in the judgment of the directors of the corporation, be applied to dividends.[6]

A transfer of assets to the stockholders as a dividend may result in the reduction of the value of the net assets, representing the capital, below the amount of the capital stock. The aggregate amount paid into the corporation, either in cash or in property, is in the nature of a permanent or historical standard below which the capital is not to be reduced. The determination of whether or not a dividend can be declared involves a measurement, by the management, of the value of the assets to ascertain whether or not a surplus exists. Earnings depend to some degree at least upon the method used in the computation of the profit or the loss. An inaccurate or fraudulent computation may result in the declaration of a dividend out of capital rather than out of surplus. Practically, the general rule, that capital must be kept intact when a dividend is declared, affords no greater protection to the creditors and stockholders than the relative accuracy attained by the management in the measurement of the value of the assets of the corporation and the power of the creditors and stockholders to prove the measurement either erroneous or fraudulent. The cases are few in number in which the creditors have succeeded in proving that the dividend was declared out of capital. The presumption is that the dividend was declared out of earned surplus.

Coincident with the development of the theory of law that dividends cannot be declared out of capital, there developed the so-called 'trust fund' doctrine, that the capital of a corporation is a trust fund for the payment of its debts. Whatever the real significance of this doctrine is today, it offers some explanation for the doctrine that dividends cannot be declared out of capital because, granted the premise that the capital of a corporation is a trust fund, it follows that this trust fund ought not

---

[5] Corliss v. U. S., 7 F. (2d) 455 (C. C. A. 8th, 1925).

[6] Morse v. Boston & Maine R. R. Co., 263 Mass. 308, 160 N. E. 894 (1928).

be dissipated by a distribution to the stockholders.

Theoretically at least, any attempt at any given time to measure quantitatively the value of the capital of a corporation as represented by land, inventories, choses in action, and other properties only results in a guess. From the economic viewpoint, no adequate formula or principle for the determination of the value of the capital in terms of money exists. The principles that do exist are very difficult of application. Adminstrative commissions, set up by legislative enactment, have for years attempted to evaluate the public utilities for rate making purposes. The theory enunciated in 1898 by the United States Supreme Court in the famous case of *Smyth v. Ames*[7] that "the basis of all calculation as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of all property being used by it for the convenience of the public" has been the guiding principle of the rate making bodies. The proper interpretation of this principle has given rise to much discussion by the administrative bodies, courts, and utilities concerned.

The same problem presents itself to the private business corporation when it attempts to determine its profits for dividend purposes. It may be of lesser magnitude. There are reasons enough why a management might find it expedient to overestimate the value of its capital. Larger profits enhance the market price of the capital shares; enable the corporation to maintain its dividend policies; and might qualify the bonds outstanding for the investment of saving banks.

In the case of private business corporations, accountants have set up arbitrary rules for the measurement, of the assets of corporations. Courts and statutes seem to have simply adopted the rules of the accountants. Accountants do not agree among themselves on these rules, but such rules do afford rules of thumb for the courts and legislatures.

Our next step will be to analyze the statutory provisions

---

[7] Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. ed. 819 (1898).

for the measurement of the corporate assets. The purpose of the statutes is to maintain the capital and not reduce it by dividend payments. Section 8623-38 of the Ohio General Corporation Act provides for the computation of a surplus as follows:

> "(a) a corporation may declare dividends payable in cash, shares, or other property out of the excess of the aggregate of its assets less the deductions herein after required over the aggregate of its liabilities plus stated capital.
>
> (b) In computing the excess of the assets, deduction shall be made for depletion, depreciation, losses and bad debts. In computing the excess of assets for the purpose of determining the fund available for a dividend payable otherwise than in shares of a corporation deduction shall be made for the unrealized depreciation, if any appearing on its books unless the amount thereof shall have been transferred to or included in stated capital. If its articles so provide, a corporation whose business consists substantially of the exploitation of wasting assets, may pay dividends without deduction for the depletion of such assets resulting from lapse of time or from the consumption or sale of such assets incidental to their exploitation."

Section 34 of the General Corporation law of Delaware, effective March 22, 1929, provides that:

> "The directors * * * * subject to any restrictions contained in its certificate of incorporation, shall have power to declare and pay dividends upon the shares of its capital stock either (a) out of its net assets in excess of its capital as computed in accordance with provisions of sections 14, 26, 27 and 28 of this chapter or (b) in case there shall be no such excess, out of its net profits for the fiscal year then current and or the preceding year: provided, however, that if the capital of the corporation computes as aforesaid shall have been diminished by depreciation in the value of its property, or by losses, or otherwise to an amount less than the aggregate amount of the capital represented by the issued and outstanding stock of all classes * * * the directors * * * shall not declare and pay out of such net profits any dividends upon any classes of its capital stock until the deficiency * * *

shall have been repaired."

Under section 14 of the Delaware law part of the consideration paid in for capital stock may, under certain conditions, be set aside as surplus. This surplus is available for dividend purposes. The effect of this provision is to make a paid-in surplus as well as an earned surplus, available for dividends.

Section 58, Chapter 60, of Cahill's Consolidated Laws of New York provides as follows:

> "No stock corporation shall declare or pay any dividend which shall impair its capital or capital stock, nor while its capital or capital stock is impaired, nor shall any such corporation declare or pay any dividend or make any distribution of assets to any stockholder, whether upon a reduction of the number of its shares or of its capital or capital stock, unless the value of its remaining * * * * shall be at least equal to the aggregate amount of its debts and liabilities, including capital or capital stock as the case may be."

An analysis of these provisions will reveal that these statutes adopt, in general, the accountant's method of measurement of corporate profits available for dividends. The accountant's yardstick for the maintenance of the capital of a corporation is used. No effort is made to preserve intact capital values, as economic values, rather than the values arbitrarily created by the fiat of the accountant. The statutes are very general. No effort is made to indicate a detailed interpretation. It remains for the courts to say in a given case whether the capital has been maintained. Buildings wear out or become obsolete; most equipment is on its way to the scrap heap; losses may result from the uncollectibility of choses in action and a drop in commodity prices. The statutes provide generally that deductions must be made for such losses, but the management does the figuring.

The Ohio code provides the more exact standards. From total assets, deductions must be made for depletion, depreciation, losses, and bad debts. If after the liabilities are deducted,

an excess appears over the amount of the capital stock, a surplus exists for dividend purposes. The clause providing for the deductions is mandatory. There can be a very considerable margin between the real adequacy of such deductions and deductions only sufficient in amount to satisfy the statute. Creditors would certainly do well to discover the facts for themselves. The prospect of a smaller income tax does offer an inducement to the management to make the statutory deductions as large as will be approved by the Collector of Internal Revenue.

Unrealized appreciation must not be measured in computing the earned surplus. If land costing $10,000 appears on the books at $10,000, but has a present market value of $50,000 the difference of $40,000 is an unrealized appreciation and cannot be added to the capital in order to increase the surplus. Under section 8623-38 of the Ohio Law such unrealized appreciation can be made the basis of a stock dividend.

The computation of an earned surplus is further complicated by the difficulty of computing net earnings. The United States Supreme Court has stated that "dividends can be rightfully paid out profits, the term 'profits' denotes what remains after defraying every expense' 'and "shareholders are entitled only to dividends out of the net earnings derived from the operations of the company (The Mobile and Ohio R. R. Co. vs. The State of Tennessee, 153 U. S. 486)." There is little certainty in the 'defraying of every expense'. A management can by the payment of large salaries to themselves deplete not only the earned surplus, but the capital of the corporation as well.

The Delaware law provides a less exact standard of measurement of the value of the capital of a concern. The law seems to infer that no deductions for depreciation, bad debts or losses need be made necessarily, but only in case the capital shall have been diminished by depreciation in the value of its property, or by losses or otherwise. The inference is that there may be no reasons for such deductions .The management must decide (1) that deductions should be made and (2) the amount of

such deductions. This opens the door to the argument, indulged in by the public utilities, of whether or not depreciation is an existent thing in the case of a corporation that makes constant repairs to its equipment, and the management is permitted to select the side it wishes to take in the argument.

The New York law simply lays down the principle that the surplus available for dividend is determined by deducting from the total assets the sum of the liabilities and the amount of of the capital stock.

Under both the Ohio law and the Delaware law the directors of any corporation engaged in the exploitation of wasting assets need not set aside a reserve for the depletion of the capital resulting from the exploitation of the assets. Mining companies and other companies that deplete their tangible property in their operations, have generally provided an exception to the rule that a dividend cannot be paid out of capital. In Delaware, before the general corporation law was amended in 1927 and 1929, the principle that mining companies need not set aside a reserve for the depletion of their assets was in doubt because of an injunction granted to preferred stockholders by the court restraining the payment of a dividend to the common stock holders until a deficiency in the capital resulting from the depletion of the ore bodies owned by the corporation had been repaired by a proper reserve for such depletion.[8]

The management is supposed to make deductions for losses. To what extent must it consider fluctations in the market prices of its inventories and investments in the computation of the earned surplus? The North Carolina court has held that under the statute of that state "in determining the amount of accumulated profits to be paid as dividend * * * the true value of assets in cash and not mere book value should be ascertained."[9] A wholesale grocery concern which had earned and

---

[8] Wittenberg et al v. Federal Mining and Smelting Co., *supra* note 4.

[9] Carmon et al v. Wiscassett Mills Co. et al, 195 N.C. 119, 141 S.E. 344 (1928).

paid dividends for a number of years, suffered a loss of $1,-000,000 because of a drop in the prices of sugar and other articles. Dividends paid on the basis of a cost price valuation of these commodities were held to be illegal by the court of Pennsylvania because the capital of the concern was decreased in value by the drastic drop in the market prices of some of the inventories of the company.[10] Deductions should be made for losses resulting from a downward fluctation of commodity prices altho the lower price may be of brief duration.

Under both the Ohio code (Section 8623-123 b) and the Delaware law (Section 34) a director is protected and is deemed non-negligent if he has relied and acted in good faith upon the books of the company. But supose the directors are negligent in the employment of competent accountants or the installation of an adequate accounting system?

The purpose of the law seems to be to provide some standards for the measurement of a corporation's capital in order that the equality between the amount of the capital and the amount of the capital stock be maintained. Supose the board of directors of a corporation and the shareholders lower the historical standard for the measurement of the assets of the corporation by a reduction in the amount of the capital stock This presents our second problem. Preferred stock may be called and redeemed by the corporation. Our concern is with a reduction in capital stock resulting from a loss of assets. The capital stock may also be reduced in order to increase the surplus of the corporation. If this surplus is used for the payment of dividends the result is, in its effect upon existing creditors, a payment of dividend out of capital.

This method of reducing the capital of a corporation is illustrated in a New York case. The defendant corporation had a capital of $300,000, which had become impaired to the extent of $90,861.85. Defendant reduced its capital stock from $300,000 to $200,000. This reduction resulted in a surplus

---

[10] Branch v. Kaiser, 291 Pa. 543, 140 Atl. 498 (1928).

of $9,138.15. The dividends on the cumulative preferred stock were in arrears. The court held the reduction in the capital stock did not affect the amount of preferred stock dividends in arrears up to the time of the reduction.[11] The surplus created was not an earned surplus applicable to the payment of the cumulative preferred stock dividends in arrears.

A corporation is the creature of the statute, and in the reduction of its capital stock it must follow the statutory method. Statutes specify the procedure to be followed. An analysis of such procedure is not within the scope of this article. This article is concerned with the effect of a reduction of the capital stock upon the interests of the creditors and stockholders in the maintenance of the capital.

Suppose the capital stock is reduced and the surplus is increased. If this surplus is distributed to the stockholders as a dividend, the result may be a reduction of the capital to the point where the capital will not be sufficient to pay the creditors of the corporation. Statutes cover this situation by providing that surplus created by a reduction of the capital stock of a corporation is not available for distribution as a dividend to the common stockholders, if there is reasonable ground to believe that the corporation is unable or by such distribution is made unable to satisfy its creditors. (See Section 8623-40 of the Ohio Code and Section 28 of the Delaware law). Under the Ohio law if the dividend is paid out of surplus other than earned surplus the stockholder receiving such a dividend must be notified as to its source (Section 8623-38d). The California law is the Commissioner of Corporations must give his permission to a payment of dividends out of a surplus resulting from a reduction of the capital stock. In one case the par value of $100 a share had been reduced to $50 a share.[12]

Stockholders contribute funds to a corporation which are

---

[11] Roberts v. Roberts-Wick Co., 184 N.Y. 257, 77 N.E. 13 (1906).

[12] Dominguez Land Corporation v. Daugherty. 196 Cal. 453, 238 Pac. 697 (1925).

used in carrying on the business of the corporation and in return expect a dividend from the gain resulting from the use of the capital. The United States Supreme Court has stated in dictum "that the stockholder has the right to have the assets employed in the enterprise."[13] The creditor extends credit relying, in part at least, on the amount of the capital. If the corporation uses the assets of the corporation for the purpose of purchasing the corporation's own stock, the result is a partial liquidation and in effect decreases the capital and reduces the capital stock.

This type of reduction of the capital can be illustrated as follows: assume a corporation with gross assets of $200,000, liabilities of $100,000, and capital stock of the value of $100,000. The management then buys treasury stock at a price of $20,000, its book value. This effects a decrease in the gross assets of the concern and reduces the capital stock. The stock purchased, as treasury stock, may be listed as an asset and the capital stock not reduced, but this is a mere bookkeeping device, which does not prevent the thinning of the equities pledged to pay the corporation's debts. In this case the capital is not maintained by the management. In theory at least some protection is afforded the creditors by a provision such as is found in section 8623-41 of the Ohio code, to the effect that the 'purchase of treasury shares cannot be made if there is reasonable ground for believing that the corporation is unable, or by such purchase may be rendered unable to satisfy its obligations and liabilities.'

Let us summarize. The capital of a corporation is not maintained when dividends are paid out of capital, or out of an earned surplus not properly computed with a resultant overestimation, or out of a surplus created by a reduction in the capital, or when partial liquidation results from a purchase of treasury stock. Cases are few in which either the creditors or the stockholders succeed in forcing the management to main-

---

[13] Eisner v. Macomber, 252 U.S. 189 (1920).

tain the capital. Profits in law depend to a high degree upon the computations of accountants, and such computations rarely accord with economic fact. Stockholders and creditors in relying upon an equality in value between capital and capital stock may well heed the old rule of 'caveat emptor.'

COMITY WITH REVERSE ENGLISH

REX HARDY

Since this is in truth the mechanical age and the law of automobiles and of their financing has taken a place of its own in our jurisprudence, the lawyer who handles finance company work runs into a great many interesting questions. Practically every state has its own regulations touching upon the registration of automobiles, and of course, as a rule, the general chattel mortgage laws extend over automobiles in the absence of specific statutes to the contrary.

Automobiles are a species of property which are rapidly removable from one jurisdiction to another and of course, from a criminal standpoint we have what is commonly known as the Dyer Act, which covers unlawful interstate transportation of automobiles. More frequently, however, the matter is of civil aspect and in practically all of the states of the Union a motor car dealer or a broker loaning against automobiles, believing he is protected under the laws of his own state has found to his sorrow that the automobile had been brought into his state plastered with liens or obligations created in another state.

Practically all of the states provide in their chattel mortgage laws that unless the mortgagee is on the job sufficiently to follow the mortgaged property from one county to another in his state and re-record his mortgage in the county to which the mortgaged property is removed within thirty days after such removal, the lien of the mortgage is lost at least so far as innocent purchasers or encumbrances are concerned. It is difficult to believe that the laws of one's own state would grant to a citizen of a sister state a more advantageous position than granted to its own residents, nevertheless this seems in fact to be the case — created by the magic of "comity" — but comity with reverse English.

Comity has been defined as "courtesy between equals" or

"reciprocity" or "the granting of a privilege, not of right, but of good will," and many years ago the Supreme Court of the state of Michigan in the case of *McEwan v. Zimmer*[1] said:

> "True comity is equality; we should demand nothing more and concede nothing less."

The subject of comity is an old one and in the early days of the law was regarded as a part of international law only. Holland and Belgium have long ago recognized the bankruptcy laws of England, because their laws upon the subject have been recognized by England, but France has failed to give effect to judgments rendered in the United States, and because of this fact, the United States has failed to enforce a judgment rendered in France. The Supreme Court of the United States, speaking through the case of *Hilton v. Guyot*,[2] said in part:

> "In holding such a judgment, (rendered in France) for want of reciprocity, not to be conclusive evidence of the merits of the claim, we do not proceed upon any theory of retaliation upon one person by reason of any injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that, by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive."

Most of the states in this Union have made similar declarations granting full faith and credence to the laws and decrees of their sister states — *but* only when a like comity has been observed or granted by the sister state.

In the automobile and automobile financing business it is not at all uncommon for *AB* to secure a registration in a given state, of an automobile in his name and with such registration, and purportedly the owner of the automobile, deal with

---

[1] 38 Mich. 765 (1878).

[2] 159 U. S. 113 (1894).

the same as though it were his own, and the innocent purchaser or encumbrancer thereafter wakes up to find that the automobile had been surreptitiously removed from another state; that *AB's* title was not good; that the automobile had been lawfully encumbered in another state, etc.

Thus arises a most substantial field of law as to what are the rights of the foreign creditor or owner who may follow the automobile into your state and seek to take it away from you, who in all innocence and good faith had dealt with *AB* who purportedly was the owner thereof in possession — as opposed to your rights as such innocent purchaser or encumbrancer.

If it might be said that the effect of laws covering an intrastate movement of an automobile which would tend to deprive a mortgagee of his mortgage lien upon the removal of the automobile from one county to another, would be followed in the case of an interstate movement of the automobile, then our problem would be simple, but the doctrine of comity between states steps in and forces a different rule, and it is that the concensus of authority throughout the United States that the true owner or encumbrancer of an automobile in one state may follow that automobile into another state and preserve his rights or equities as against an innocent purchaser or encumbrancer in the state to which the automobile was removed. A most exhaustive monograph upon that subject appears in 50 A.L.R. commencing on page 30.

But this does not end all of our troubles because of a search into the situation develops the fact that the states of Michigan, Texas, Louisiana and Pennsylvania have failed to recognize the mortgages lawfully entered into in their sister states and by the reverse English of the rule of comity, most of the other states have therefore failed to recognize the chattel mortgages lawfully entered into in the states of Michigan, Texas, Louisiana and Pennsylvania. Within my practice a complete search of the ownership and movements of an automobile has demonstrated a clever course of chicanery and it indeed behooves the automobile dealers and lenders of money on auto-

mobils in the various states to regard automobiles which are tendered to them for purchase and/or financing with a cautious eye, and it may generally be stated that if it develops that the title and/or encumbrancing of an automobile arose originally within the states of Michigan, Texas, Louisiana or Pennsylvania, then an innocent purchaser or encumbrancer would be held protected because of the lack of comity recognized by those states. However, the states mentioned are but four of all of the states of the Union and there does not seem to be any doubt but that a lawful purchaser and/or encumbrancer of an automobile originating in any of the states of the Union other than the four above mentioned can follow his property and/or interests in the automobile into the new state and have his rights held superior to the rights created in the new state even though the dealings with the automobile in the new state have been thoroughly open and above board.

In the case of *Union Securities Company v. Adams*,[3] decided by the Wyoming Supreme Court, it develops that Adams purchased a Dodge automobile in Texas, paying some cash, and executing a chattel mortgage for the balance of the purchase price. This chattel mortgage was executed and recorded in compliance with the laws of the state of California, and in Texas, the mortgage would be held to be a valid and subsisting lien upon the automobile. Adams defaulted in his mortgage obligations and removed the automobile to the State of Wyoming where he sold it to one Evans who in turn sold it to one Fisch. The chattel mortgage provided that the Texas mortgagee might take possession of the automobile at any time, etc., but the mortgage was never filed for record in the state of Wyoming. When the Texas mortgagee finally located the automobile in Wyoming it brought an action to recover the possession thereof and obtained judgment in the lower court, from which an appeal was perfected. The Wyoming Supreme Court held that:

---

[3] 33 Wyo. 45, 256 Pac. 513 (1925).

> "The only question involved in this case is as to whether or not the rights of Fisch are subject to the rights of respondents, (the Texas mortgage company) under said mortgage; and that, in turn, depends upon the ultimate point whether the lien which respondents had under the laws of Texas must be upheld in Wyoming after the property covered by said mortgage was sold to an innocent purchaser, a citizen of this state."

Thereupon appears a discussion upon the subject of comity and a declaration that —

> "It appears, however, that the courts of the state of Texas, including the highest court of that state, give no effect to the registration laws of other states, and hold that, where mortgaged property is removed to the State of Texas from other states and purchased by an innocent purchaser in that state, the owner of the mortgage lien is not protected, though the mortgage was duly filed for record where it was given, and though the lien thereunder is valid and protected in the state of its origin."

The Wyoming Supreme Court stated that it was fundamental, of course, that the laws of Texas had *ipso proprio vigore* no extra-territorial force and that so far as their effect is concerned, every other state must be regarded as a separate sovereignty to the same extent as though it were a foreign nation with the laws of one state binding only its own subjects and others who may be within its jurisdictional limits and whatever extra territorial force the laws of one state may have, is the result, not of any original power to extend them abroad, but of that mutual respect called comity, which from motives of public policy other nations or states are disposed to yield to them, giving them effect with a wise and liberal regard to enlightened self interest, common convenience, and mutual benefits and necessities. The Wyoming Supreme Court then stated that inasmuch as it appeared from the repeated decisions of the courts of Texas that the lien of a Wyoming mortgage duly filed for record and lawful in the State of Wyoming would not be protected if the property covered thereby should be re-

moved to Texas and sold to an innocent purchaser in that state, and inasmuch as comity should at least in substance be reciprocal, Wyoming would not recognize a Texas mortgage sought to be enforced in the courts of Wyoming.

The Supreme Court of Arizona in the case of *Forgan v. Bainbridge,*[4] followed the holding in the Wyoming case, *supra,* wherein a Cadillac covered by a chattel mortgage lawfully executed in the State of Illinois and removed to Texas where it was acquired by a Texas citizen, who thereafter encumbered the automobile with a chattel mortgage lawful in Texas, and thereafter removed the automobile (now subject to the Illinois and Texas mortgages) to the State of Arizona, where it was sold to an Arizona citizen in good faith and without notice. The Illinois mortgagee finally located the car in Arizona and brought an action to take it from the possession of the Arizona citizen who had purchased it, into which action the Texas mortgagee intervened and the Arizona Supreme Court wrote a very interesting decision touching upon the conflict of laws between the three states involved and discussed the effect of comity as between states recognizing the mortgages of their sister states and those not so recognizing.

The body of law is replete with similar instances and it will doubtless suffice the needs of the average person to restate the general proposition as being:—

A purchaser and/or encumbrancer in good faith in any state of the Union, other than Michigan, Texas, Louisiana and Pennsylvania, can follow the property into any other state and preserve his title and/or lien, whereas a title or lien created in any of the four states above mentioned would not be so preserved.

---

[4] 34 Ariz. 408, 274 Pac. 155 (1928).

Tennessee Law Review

Volume 9 June, 1931 Number 4

Published by the Students of the College of Law of the University of Tennessee in the months of December, February, April and June
T. ASBURY WRIGHT FOUNDATION

Subscription Price $1.50 Single Copies 50 Cents

CONTRIBUTORS

D. T. KRAUSS, J. D. is a graduate of Knox College, Galesburg, Illinois and of the University of Chicago Law School. He is Associate Professor of Business Administration and Instructor in Law in the Extension Department, Wittenberg College, Springfield, Illinois. He is a member of the Bar of Illinois and Ohio.

REX HARDY was graduated from the University of Southern California with the degree of LL. B. He was admitted to the California Bar in 1911. He is now engaged in the practice of law in Los Angeles, California.

The College of Law will be glad to correspond with members of the Bar who have openings in their offices for recent Tennessee law graduates.

EDITORIAL BOARD ANNOUNCEMENT

This issue completes this volume of the Review, and is the last number to be published by the present Board. The present Board takes pleasure in announcing the officers for the next scholastic year: Mr. J. G. Farrar will be Editor, Mr. H. M. Harton, Jr., will be Business Manager, and Mr. Paul Goddard will be Case Note Editor.

The Editorial Board is pleased to announce the election to the Board of Messrs. E. B. Foster, C. R. Moore, C. H. Smith, Jr., and H. E. Wright, Jr. to fill the vacancies which will be caused by the graduation of Messrs. C. F. Baughman, H. D. Erwin, Warren W. Kennerly, Leonard E. Ladd, R. R. Russell, Chas. D. Snepp, and G. W. Woodlee. Other members will be elected next year.

RECENT CASE NOTES

ALIMONY—DIVORCED HUSBAND'S RIGHT TO MODIFICATION UPON HIS SECOND MARRIAGE

The plaintiff and the defendant were married in Iowa. Subsequently, the plaintiff obtained an absolute divorce with permanent alimony of one hundred dollars per month. By the law of Iowa, where the divorce was obtained, the defendant was prohibited from remarrying within one year after the granting of the divorce decree. Within a few days after the divorce decree was entered, the defendant went into Missouri and remarried, returning to Iowa to live. The defendant filed a supplemental petition to modify the original decree of divorce as to the amount of alimony, alleging that his income had been materially reduced since the granting of the divorce decree. *Held*, that the defendant had not shown equitable reasons why the amount of alimony should be reduced.[1]

It is quite generally held that the court has power to modify an alimony decree, where the conditions of the parties are sufficiently changed.[2] But the principal case is in line with the general rule that the remarriage of a divorced husband is not, in itself, sufficient ground for a modification or termination of a decree for alimony.[3] The rule is based on the theory that his remarriage is his own voluntary act; and as he is his own judge as to the obligations he is able to carry, his remarriage

---

[1] Stone v. Stone, —Iowa—, 235 N.W. 492 (1931).

[2] KEEZER, MARRIAGE AND DIVORCE (2nd ed. 1923) § 767 and cases cited.

[3] Aiken v. Aiken, 221 Ala. 67, 127 So. 819 (1930); Newburn v. Newburn, 231 N.W. 389 (Iowa 1930); Staton v. Staton, 164 Ky. 688, 176 S.W. 21 (1915); Smith v. Smith, 139 Mich. 133, 102 N.W. 631 (1905); Winter v. Winter, 95 Neb. 335, 145 N.W. 709 (1914).

[4] *Supra* note 2, § 772, and cases cited.

should not affect the alimony decree. And this is especially true where the remarriage was in contempt of the decree.[5]

However, where the husband has children by his second wife, it was held in *Shuttuck v. Shuttuck*[6] that the decree should be modified to reduce the alimony. Bridges, J., in that case points out that the younger children of the husband have greater need of his aid than his older ones (by his first wife), and that his income should be divided according to the respective needs of the children. Some courts go further, and hold that where the husband has children by his second wife, and where the conditions of the parties have been changed, that the husband should be entirely relieved from the payment of alimony.[7] It should be noted, however, that the remarriage in the last mentioned case was not in contempt of the decree.

The majority of courts hold that the wife's remarriage is grounds for a modification of the decree for alimony;[8] but these same courts hold that the remarriage, itself, does not as a matter of law terminate the former husband's obligation to pay alimony, a judicial decree of modification being required.

While there are no Tennessee cases deciding the point involved in the principal case, the famous case of *Toncray v. Toncray*[9] might indicate the probable holding of our courts, if the question should arise. There the husband deserted the wife, and after obtaining an absolute divorce in Virginia, remarried there and had one child. On his return to Tennessee the form-

---

[5] Park v. Park, 80 N.Y. 156 (1880); Levy v. Levy, 149 App. Div. 561, 133 N.Y. Supp. 1084 (1912).

[6] 141 Wash. 600, 251 Pac. 851 (1927).

[7] Aldrich v. Aldrich, 232 Mich. 695, 206 N.W. 482 (1926).

[8] Morgan v. Morgan, 203 Ala. 516, 84 So. 754 (1919); Erwin v. Erwin, 179 Ark. 192, 14 S.W. (2d) 1100 (1929); Southworth v. Southworth, 168 Mass. 511, 47 N.E. 93 (1897); Hartigan v. Hartigan, 145 Minn. 27, 176 N.W. 180 (1920); Wetmore v. Wetmore, 162 N.Y. 503, 56 N.E. 997 (1900).

[9] 123 Tenn. 476, 131 S.W. 977 (1910).

er wife sued for divorce and alimony. The Supreme Court of Tennessee in modifying the decree of the lower court, stated by dicta that the second wife and child deserve consideration and that if the amount of alimony exceeds a reasonable sum in view of the husband's income, it will be reduced.

H. E. W., JR.

AUTOMOBILES — THE DANGEROUS INSTRUMENTALITY DOCTRINE

A, aged 9, who resided in the State of New York, visited his father who resided in the State of Florida. While *A* was driving his father's car, with the latter's knowledge and consent, he negligently injured the plaintiff. *Held*, that an automobile was a dangerous instrumentality, and that where one operated an automobile with the owner's knowledge and consent, and negligently injured a third party in the use thereof, the owner was liable in damages to the injured party on the doctrine of respondeat superior.[1]

The facts of the principal case do not constitute a relation to which the doctrine of respondent superior is applicable, and the court speaks only in terms of a legal fiction in so holding, as is shown by the vast majority of cases, which hold that the relationship here created is one of bailment.[2]

The principal case also adopts a minority view in holding that an automobile is a dangerous instrumentality, as the state courts have almost unanimously held that an automobile is not such an instrumentality, but that the dangerous potentialities of the automobile only increase the degree of pre-

---

[1] Herr v. Butler, —Fla.—, 132 So. 815 (1931).

[2] Hogan v. Hellman, 7 F. (2d) 949 (S. D. Cal. 1925); Slater v. Freedman, 62 Cal. App. 668, 217 Pac. 795 (1923); Johnson v. Bullard, 95 Conn. 251, 111 Atl. 70 (1920); Tobin v. Safrit, 32 Del. 274, 122 Atl. 244 (1923).

caution to be taken in the use thereof.[3] The general rule is that the chauffeur in charge is bound to exercise care commensurate with the risk of injury to other vehicles and to pedestrians on the road.[4]

Where an adult member of the family of the owner of the family automobile does not reside with the owner, but is only a guest, and in using the automobile with the owner's consent, some cases extend the "family automobile doctrine" to include the guest, and thus hold the owner liable.[5] The court in the principal case entirely ignored the "family automobile doctrine", altho it might have justified its holding on that ground.

The state legislature, through the exercise of its police power, had regulated very extensively the use of the automobile on the highways, and from that the court in the present case thought that it was justified in holding the automobile to be so dangerous in its use as to be classed as a dangerous instrumentality. In a number of cases involving the constitutionality of certain statutes that had been passed in several of the states regulating the use of automobiles, the courts have referred to them as "dangerous machines" and as "dangerous instruments."[6] While these cases deal with a somewhat different question than the one involved in the principal case, they do show that other courts have taken notice of the danger in the use of auto-

---

[3] Fielder v. Davidson, 139 Ga. 509, 77 S. E. 618 (1913); Martin v. Lilly, 188 Ind. 139, 121 N. E. 443 (1919); Daily v. Maxwell, 152 Mo. App. 415, 133 S. W. 351 (1911); Vicent v. Crandall & Godley Co., 115 N. Y. Supp. 600 (1909); Cohen v. Meador, 119 Va. 429, 89 S. E. 876 (1916).

[4] Weil v. Krentzer, 134 Ky. 563, 121 S. W. 47 (1909); Patterson v. Wagner, 204 Mich. 593, 171 N. W. 356 (1919); McFern v. Gardner, 121 Mo. App. 1, 97 S. W. 972 (1906); McGregor v. Weinstein, 70 Mont. 340, 225 Pac. 615 (1924); Ingraham v. Stockomore 118 N. Y. Supp. 399, (1909).

[5] Oldberg v. Croehler, 1 F. (2d) 140 (C. C. A. 8th, 1924).

[6] Hester v. Hall, 17 Ala. App. 25, 81 So. 361 (1919); McIntyre v. Orner, 166 Ind. 57, 76 N. E. 750 (1906).

mobiles, and that the Florida court does not advancce a wholly new doctrine as to this type of vehicle. An attempt to justify the broad holding of the court in the principal case, as to the owner's liability for injury caused by another in the use of his automobile with his knowledge and consent, is made on the ground that it is his obligation to have a vehicle which is peculiarly dangerous in its use, and which possesses such dangerous potentialities, properly operated when it is on the public highway by his consent. It seems that such ends can be attained without so greatly restricting the use of this widely used mode of conveyance and without such pronounced judicial legislation; "and that when carefully handled it is not dangerous either to its passenger or to other persons using the public highways, who are themselves in the exercise of reasonable care."[7] New York reached the holding of the principal case by virtue of a statute.[8]

The Tennessee Supreme Court has held that an automobile is not a dangerous instrumentality, and that where another uses the owner's automobile with his knowledge and consent, the owner is not liable,[9] except where the master and servant relation exists,[10] or the facts of the case justify the aplication of the "family purpose" rule.[11]

C. R. M.

---

[7] Daily v. Maxwell, *supra* note 3, at 415.

[8] Cited in (1925) 38 HARV. L. REV. 514, nl. 1.

[9] Goodman v. Wilson, 129 Tenn. 464, 166 S. W. 752 (1913); Leach v. Asmon, 130 Tenn. 510, 172 S.W. 303 (1914).

[10] King v. Smythe, 140 Tenn. 217, 204 S. W. 296 (1918).

[11] Schwartz v. Johnson, 152 Tenn. 586, 280 S. W. 32 (1925).

BAILMENTS—CONTRIBUTORY NEGLIGENCE OF BAILEE NOT IMPUTABLE TO BAILOR

The owner of a garage ordered his servant to ride home with a car owner for the express purpose of returning the car to the garage for repairs. The car owner relinquished control of his automobile to the garage-man's servant; and on the return trip, due to negligence of the servant, there was an accident which caused damage to the plaintiff's car. In a suit to recover damages, the plaintiff joined the owner of the car and the owner of the garage as defendants to determine which party was liable. The Supreme Court of Tennessee held that the garage owner was liable on the ground that neither the negligence nor the contributory negligence of the bailee or his servants is imputable to the bailor.[1]

A bailment has been defined as "a contract relation resulting from the delivery of personal chattels by the owner, called the bailor, to a second person, called the bailee, for a specific purpose, upon the accomplishment of which the chattels are to be dealt with according to the owner's direction."[2]

In the progress of the law, bailments have been generally classified as (1) bailments for the benefit of the bailor, (2) bailments for mutual benefit, and (3) bailments for the benefit of the bailee.[3] In accordance with this classification, it is agreed that the degree of care to be exercised by the bailee in the care of the chattel is different in each situation;[4] in case of a bailment for the benefit of the bailor, the bailee is liable only for gross negligence; where the bailment is for mutual benefit, the bailee owes the bailor the duty of due care in regards to the

---

[1] Siegrist Bakery Co. v. Smith, et al, —Tenn.—, 36 S.W. (2d) 80 (1931).

[2] GODDARD, OUTLINE BAILMENTS AND CARRIERS, (2d ed. 1918) 1.

[3] First Nat'l Bank of Carlisle v. Graham, 79 Pa. 106, 21 Am. Rep. 49 (1875).

[4] Jenkins v. Motlow, 33 Tenn. 248, 60 Am. Dec. 154 (1853).

chattel; and when the bailment is for the sole benefit of the bailee, slight negligence is sufficient to charge the bailee with liability.[5]

It is a well settled rule that the bailor of a chattel is not liable to third persons for the negligent use of the bailed article by the bailee or his servants.[6] For such liability to attach, the relation of master and servant, or principal and agent would have to be shown; and by the bailment such relation is negatived.[7]

In the principal case, it was argued that no bailment had arisen between the car owner and the garageman; therefore that the person driving the car was the servant of the car owner. Th Court cited cases which established a bailment in similar situations.[8]

As to the bailor's right to sue a third party for damages, the early rule was that the bailor stood upon the same ground as the bailee, and if the bailee were guilty of contributory negligence, such negligence was imputable to the bailor and precluded a recovery.[9] The modern tendency however, is that such

---

[5] Dodge v. Nashville, C. & St. L. R. Co., 142 Tenn. 20, 215 S.W. 274 (1919); Pennington v. Farmers Merchant Bank, 144 Tenn. 188, 231 S.W. 545 (1921); Strange v. Planters Gin Co., 142 Ark. 100, 218 S.W. 188 (1920); Renfroe v. Fouchee, 26 Ga. App. 340, 106 S.E. 303 (1921); Parker v. Dietz, 203 Ill. App. 120 (1916); Sullivan v. Williams, 107 Misc. Rep. 511, 176 N.Y. Supp. 710 (1919).

[6] Jones v. Strickland, 201 Ala. 138, 77 So. 562 (1917); Gardner v. Farmer, 230 Mass. 193, 119 N.E. 666 (1918); Bloodgood v. Whitney, 200 App. Div. 56, 192 N.Y. Supp. 583 (1922); Kennedy v. Knott, 264 Pa. 26, 107 Atl. 390 (1919); Bursch v. Greenough Bros. Co., 79 Wash. 109, 139 Pac. 870 (1914).

[7] Sea Ins. Co. England v. Vicksburg S. & P. Ry. Co., 159 Fed. 676 (C.C. A. 5th. 1908); New York Co. v. New Jersey Elec. Co., 60 N.J.L. 338, 38 Atl. 828 (1927).

[8] *Supra* note 1.

[9] Welty v. Indianapolis Co., 105 Ind. 55, 4 N.E. 410 (1886); Dunn v. Old Colony Ry .Co., 186 Mass. 316, 71 N.E. 557 (1904); I. C. R. R. Co. v. Sims, 77 Miss. 325, 27 So. 527 (1899); Johnson v. Atchison, T. & S. F. Ry., 117 Mo. App. 308, 93 S.W. 866 (1906); Forks Township v. King, 84 Pa. 230 (1877).

contributory negligence is not imputable to the bailor, and that he can recover from a third party, although that party would have a good defense against the bailee.[10] This modern view seems to be supported by the great majority of cases except in contracts for carriage, which are governed by the peculiar characteristics of the relations between carriers, consignors, and consignees.[11]

Tennessee is in line with the majority in holding that the bailor may recover from third parties, even though the bailee or his servant are charged with contributory negligence.[12] In following this rule, the Supreme Court of Tennessee adopts the language verbatim of Ruling Case Law.[13]

H. M. H., Jr.

COMMERCE—THE RIGHT OF A STATE TO TAX MOTOR BUSSES ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE

The Legislature of the State of Tennessee passed an Act placing a privilege tax upon all automobile busses operating upon state highways and running into other states.[1] The Act

---

[10] Morgan County v. Payne, 207 Ala. 674, 93 So. 628 (1922); Mo. Pac. Ry. Co. v. Boyce, 168 Ark. 440, 270 S.W. 519 (1925); U-Drive-It Co. v. Texas Pipe Line Co., 14 La. App. 524, 129 So. 565 (1930); Campbell v. Chicago, B. & Q. Ry., 211 Mo. App. 331, 245 S.W. 58 (1922); Cain v. Wilkens, 81 N.H. 99, 122 Alt. 800 (1923); Fischer v. Int. Ry. Co., 112 Misc. Rep. 212, 182 N.Y. Supp. 313 (1920); Lloyd v. Northern Pac. R. R. Co., 107 Wash. 57, 181 Pac. 29 (1919).

[11] Atl. Coast Line R. R. v. Enterprise Cotton Oil Co., 199 Ala. 57, 74 So. 232 (1917); Mo. Pac. R. R. Co. v. Am. Fruit Growers, 163 Ark. 429, 260 S.W. 39 (1924); Hinchliffe v. Weiry Teaming Co., 274 Ill. 417, 113 N.E. 707 (1916); DeVita v. Payne, 149 Minn. 405, 184 N.W. 184 (1921); Morris v. Am. Ry. Express Co., 183 N.C. 144, 110 S.E. 855 (1922).

[12] Hunt Berlin Coal Co. v. McDonald Coal Co., 148 Tenn. 507, 256 S.W. 248 (1923).

[13] 3 R.C.L. 147.

[1] Pub. Acts Tenn. 1927, c. 89.

also provided that the revenue from such tax should go exclusively into the general funds of the state. The Interstate Transit Company, Inc., a foreign corporation operating a line of motor busses doing an interstate business exclusively, brought an action against the County Court Clerk of Davidson County to recover the amount of taxes paid under the Act on the theory that a state did not have the right to impose such a tax in order to obtain revenue for the general fund of such state. The Tennessee Supreme Court held that the tax was levied as compensation for the use of its highways, and was not a violation of the "commerce clause" of the Federal Constitution.[2] The plaintiff company carried the case to the United States Supreme Court where the decision of the State Supreme Court was reversed. The tax was held to have been levied as a privilege for the use of the state highways in order to carry on interstate business and as such the tax was a violation of the "commerce clause" of the Federal Constitution.[3]

While a state may not lay a tax upon the privilege of engaging in interstate commerce,[4] it may impose upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of its public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon.[5] Consequently, a state tax upon busses using its highways exclusively in interstate transactions cannot be sustained unless it appears affirmatively, in some way, that it is levied as compensation for

---

[2] Interstate Transit Co. v. Lindsey, 161 Tenn. 56, 29 S.W. (2d) 257 (1930) Pub. Acts Tenn. 1915, c. 100. See (1930) 9 Tenn. L. Rev. 47.

[3] Interstate Transit Co. v. Lindsey, 51 Sup. Ct. 380 (1931).

[4] Sprout v. South Bend, 277 U.S. 163, 48 Sup. Ct. 502, 72 L. ed. 837 (1928).

[5] Kane v. New Jersey, 242 U.S. 160, 37 Sup. Ct. 30, 61 L. ed. 222 (1916); Clark v. Poor, 274 U.S. 554, 47 Sup. Ct. 702, 71 L. ed. 1200 (1927); Sprout v. South Bend, *supra*, note 4.

the use of the highways or to defray the expenses of regulating motor traffic.[6]

In the principal case, the corporation admits that a fee can be lawfully exacted by the state from a motor bus company that is using the highways of the state although such company is engaged exclusively in interstate commerce; but it contends that the revenue derived therefrom must go for the maintenance of the highways and not into the general funds of such state, and as a consequence thereof, that this portion of the Tennessee Revenue Act of 1927 is unconstitutional. In regard to this question, the State Supreme Court said: "The right of the state to tax for the use of its highways is not defeated by a failure to designate in the Act by restrictive terms the fund into which the proceeds are primarily to go. *This is hardly more than a matter of bookkeeping.* Once in the general funds of the state as provided by this Act, it is subject to distribution and allocation in any direction where it may be found to be most needed. ***It is a contribution to the upkeep of the state's government as a whole, and a large part of this upkeep cost is the item of highways."[7]

In those situations wherein a state is allowed to place a license tax upon busses engaged in interstate commerce as compensation for the use of its highways, the revenue obtained from such a tax must be used to defray the cost of constructing and maintaining the highways of such state.[8] Tennessee in 1915 created a Board of Highway Commissioners and a special "highway fund" separate and distinct from the other departments of the state government.[9] The construction and maintenance of highways and bridges in Tennessee have been generally paid for by the highway commissioners and out of this special "high-

---

[6] Interstate Busses Corp. v. Blodgett, 276 U.S. 245, 72 L. ed. 551 (1928).

[7] Interstate Transit Co. v. Lindsey, *supra* note 2. (Italics are ours).

[8] Hendrick v. Maryland, 235 U.S. 610, 35 Sup. Ct. 140, 59 L. ed. 385 (1914); Clark v. Poor, *supra* note 5; Sprout v. South Bend, *supra* note 4.

way fund;" the money for such not being taken out of the general fund of the state.[10] In the principal case, the United States Supreme Court affirmed its earlier decisions and held, that a state may impose a license fee, as compensation for the use of its highways, upon motor bus companies engaged exclusively in interstate commerce, but that, a state could not levy a tax upon the privilege of engaging in interstate commerce. It further held, that since Tennessee had a special highway fund to be used for the construction and maintenance of highways and bridges, the fact that the revenue from the Act in question was placed in the general funds of the state showed that the tax was intended to be imposed upon the privilege of engaging in interstate commerce and as such was a violation of the "commerce clause."

H. D. E.

CONTRACTS — RELINQUISHING CUSTODY OF CHILD BY FATHER INVALID

Plaintiff's father contracted with defendant's deceased husband whereby plaintiff, then a minor child, should become the legally adopted child of defendant and her husband. Plaintiff was to become a member of the family with the understanding and agreement that upon the death of the survivor of defendant and deceased, plaintiff should become entitled to one-half of the deceased's property. *Held,* that the contract was void as being against public policy.[1]

The principal case is in line with the prior Texas case of *Hooks v. Bridgewater,*[2] where the court held, under similar circumstances, that the contract was unenforcible as against public policy. The general rule seems to be in accord with these

---

[10] Interstate Transit Co. v. Lindsey, *supra* note 3.

[1] Mulkey v. Allen, —Tex. Com. App.—, 36 S.W. (2d) 198 (1931).

[2] 111 Tex. 122, 229 S.W. 1114 (1921).

two holdings.[3] The reasons for this holding are that a parent has no property interest in his child and should not be permitted to deal with his child as property. It would tend to the destruction of one of the finest relations of human life, to the subversion of the family tie, and to the reversal of a relationship of nature which is essential to human happiness and the security of society.[4] To allow the relinquishment by parents of their children, and the renunciation of a sacred relation, imposed by nature merely for the children's enrichment, would be in effect bartering one's child for a property return. To uphold such contracts would reduce parental duty and the child's welfare to the sordid level of financial profits. The custody of a child is not a subject matter of contract, and therefore, can constitute no consideration for a contract.[5]

Such agreements are not binding if they are contrary to the child's interest, for a parent cannot bind himself conclusively by contract to exercise, in all events, in a particular way, rights which the law gives him for the benefit of his children and not for his own personal benefit. While most jurisdictions are in accord with this holding, others support such agreements, provided they are clearly for the benefit and for the best interests of the child.[6] One state goes so far as to say that the parents' right to the custody of the child may be transferred or abandoned regardless of the parents' purpose in so doing.[7]

The general American rule is that agreements by parents,

---

[3] Harper v. Tipple, 21 Ariz. 41, 184 Pac. 1005 (1919); Dunham v. Dunham, 97 Conn. 440, 117 Atl. 504 (1922); State v. Bollinger, 88 Fla. 123, 101 So. 282 (1924).

[4] Hooks v. Bridgewater, *supra* note 2, at 131.

[5] Hooks v. Bridgewater, *supra* note 2, at 122.

[6] Hussey v. Whiting, 145 Ind. 580, 44 N.E. 639 (1896); Bonnett v. Bonnett, 61 Iowa 199, 16 N.W. 91 (1883); Clark v. Clark, 122 Md. 114, 89 Atl. 405 (1913); Van Dyne v. Vreeland, 11 N.J. Eq. 370 (1857); Enders v. Enders, 164 Pa. 266, 30 Atl. 129 (1894).

[7] Ex parte Kirschner, 111 Atl. 737 (N.J. 1920).

for the transfer to others of the custody of their children are against public policy and are not binding on the parties.[8] Incorporated within this general rule is the principle that our law recognizes no general authority in a father to dispose of his children except for some specific and temporary purpose; such as apprenticeship during the father's life, or guardianship after his death.[9]

Although there is no case directly on this point in Tennessee, the Supreme Court of this state has held that the right to the custody of the child is not a property right such as may not be taken away without due process of law.[10] Consequently, following this reasoning to its logical conclusion, it seems that Tennesse would follow the general rule.

C. H. S., Jr.

DAMAGES—CONTINUANCE OF PERFORMANCE BY PLAINTIFF AFTER NOTICE OF BREACH OF CONTRACT BY DEFENDANT

Plaintiff, a correspondence school, contracted to furnish defendant a course of instruction, for which defendant contracted to pay $75.00, in payments of $10.00 at the time the contract was executed, and $5.00 each month thereafter until the entire consideration was paid. Defendant, after making the cash payment of $10.00 and two monthly payments of $5.00 each, notified plaintiff that he did not have time to do the work and that he would make no further payments. Although the justice of the peace gave plaintiff a judgment for $55.00, the circuit court, upon appeal ,dismissed the suit. The Court of Appeals entered judgment in favor of plaintiff for $20.00,

---

[8] 1 SCHOULER, MARRIAGE DIVORCE, SEPARATION AND DOMESTIC RELATIONS, (6th ed. 1921) § 748, and cases there cited.

[9] Barry v. Mercein, 3 Hill 399 (N.Y. 1843).

[10] Kenner v. Kenner, 139 Tenn. 700, 202 S.W. 723 (1918).

the amount due under contract when the suit was begun. Defendant filed a petition for a writ of certiorari; contending that since plaintiff introduced no evidence as to the extent of the damages, the Court of Appeals should have affirmed the judgment of the circuit court. The Supreme Court of Tennessee denied the writ of certiorari, holding that there was no error in the decision of the Court of Appeals[1]

There is a question in the writer's mind as to whether the correct rule of damages was applied in allowing plaintiff to recover $20.00, *"the amount due under the contract when the suit was begun."*[2] As is stated in the leading case of *U. S. v. Behan*:[3] "The prima facie measure of damages for the breach of contract is the amount of the loss which the injured party has sustained thereby. If the breach consists of preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended toward performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract." But, as is pointed out in Sedgwick on Damages,[4] the second item, profits, cannot be recovered unless actually proved by the plaintiff. And, where they are not proved, "the party is confined to his loss of actual outlay and expense."[5]

It would seem therefore that at the time of the breach of the contract by defendant, a cause of action arose in favor of the plaintiff for the actual outlay and expense, and the prospective profits, unless a different rule prevails in regard to the

---

[1] International Correspondence School v. Crabtree, —Tenn.—, 36 S.W. (2d) 447 (1931).

[2] Italics are ours.

[3] 110 U.S. 338, 4 Sup. Ct. 81 (1884).

[4] 2 SEDGWICK, DAMAGES (9th ed. 1912) 1201.

[5] *Ibid.* 1202.

principal case. Here plaintiff did not prove any prospective profits, and at the time of the repudiation defendant owed plaintiff nothing. It appears, however, that in spite of notice of repudiation, plaintiff insisted on performing for four months before bringing suit. So that the sum of $20.00 was due at the time the action was begun, if we consider the contract still in force. But as Sedgwich states the rule, "If any further expenditure in performance of the contract after the reception of the notice of repudiation would be a mere waste, the plaintiff cannot incur such an expense but must cease performance upon reception of the notice or repudiation."[6] The principle was first established in the famous case of *Clark v. Marsiglia*,[7] where the plaintiff insisted on completing his performance, after repudiation by defendant, with considerable added expense. The court there held that while the defendant became liable for breach of contract, yet, "the plaintiff had no right, by obstinately persisting in the work, to make the penalty upon the defendant greater than it would have otherwise been". Bauer, in his work on Damages, states the rule as follows: "Where the plaintiff has partly performed the contract, and has been wrongfully prevented from performing it in full, the plaintiff may elect to recover either the net value of the contract, or the value of the service rendered or thing transferred to the defendant, or the amount of money expended under the contract."[8]

The principal case referred to three cases presenting similar facts, but each stating a different rule. In *International Text-Book Co. v. Martin*,[9] the court gave plaintiff full relief, upon the theory that the promise to furnish instruction and the promise to pay therefor were independent covenants. However, the court in the principal case rightly rejected this

---

[6] *Ibid.* 1246.

[7] 1 Denio 317 (N.Y. 1845).

[8] BAUER, DAMAGES (1919) 204.

[9] 221 Mass. 1, 108 N.E. 469 (1915).

theory, due mainly to the fact that the tendency of modern judicial opinion is to depart from the technical distinction between dependent and independent covenants.[10] The second case referred to was *International Text-Book Co. v. Martin.* There the court said that the contract was entire, and that since it would be difficult to arrive at the actual damage suffered by a school with a large corps of teachers and a considerable fixed overhead expense, the plaintiff should recover the agreed consideration unless the defendant could show facts in mitigation of damages. Although the court in the principal case followed the rule last stated, it is submitted that the proper rule is that set out in the case of *International Text-Book Co. v. Jones*:[12] "It is the rule . . . . that a party to an executory contract may always stop performance by the other party by an explicit direction or renunciation of the contract, and refusal to perform further on his part, and that he is thereafter liable only upon the breach of contract. The contract price is recoverable only upon the theory of performance, never upon the theory of inability to perform." That court rightly put the burden upon the plaintiff to prove his damage; while the principal case would compel defendant to prove that plaintiff was not damaged to the extent of the agreed consideration, even after notice of repudiation.

The court in the principal case referred to several Tennessee cases which hold that in situations like the present one, plaintiff may recover on a *quantum meruit.*[13] It is difficult to see how such holdings are material to the principal case, since

---

[10] Officer v. Sims, 49 Tenn. 501 (1871); Allemong v. Augusta Bank, 108 Va. 243, 48 S.E. 897 (1904).

[11] 82 Neb. 405, 117 N.W. 994 (1908) (the whole amount was due before notice of breach was given).

[12] 166 Mich. 86, 131 N.W. 98 (1911).

[13] Abernathy v. Black, 42 Tenn. 313 (1865); Banker v. Reagan, 51 Tenn. 590 (1871); Parker v. Steed, 69 Tenn. 206 (1878); Gibson v. Carlin, 81 Tenn. 440 (1884).

the recovery allowed was for services rendered after defendant had expressly repudiated the contract. While it is true that the defendant has the burden of establishing matters asserted by him in mitigation of damages;[14] yet under the ruling of the principal case, plaintiff could have waited until the whole of the consideration was due, and recovered the entire sum ($55.00) even though at the time defendant breached the contract no money was due. In the Tennessee case of *Ault v. Dustin*,[15] the court states that the principle is universal that while a contract is executory a party has the power to stop performance on the other side of an explicit direction to that effect, subjecting himself to such damages as will be compensation to the other party for being stopped in the performance of his work. The party thus forbidden cannot afterwards go on and thereby increase the damages, and then recover such damages.[16] Later, the same court held, in the case of *Gardner v. Deeds*,[17] that the measure of plaintiff's damages is the contract price, less the cost of manufacture; or the profits he would have made had the contract been performed.

Applying the foregoing rules to the principal case, it is submitted that the court should not have allowed a recovery of the amount due at the time of suit; but only succh damages as would recompense the plaintiff for his losses up to the time of the breach by defendant.

R. R. R.

---

[14] Jones v. Jones, 32 Tenn. 610 (1853); 17 C.J. 1025.

[15] 100 Tenn. 366, 45 S.W. 981 (1897).

[16] Railway v. Staub, 75 Tenn. 398 (1881); Hickley v. Pittsburgh Co., 121 U.S. 264 (1887); Collins v. Delaporte, 115 Mass. 159 (1874); 2 BEACH, CONTRACTS § 1716.

[17] 116 Tenn. 128, 72 S.W. 518 (1905).

EMINENT DOMAIN — THE NECESSITY REQUISITE TO CONDEMN NEED NOT BE EXCLUSIVE

Recently, in a proceeding by the state to condemn private property to be given over to the Federal Government for the establishment of a national park, a Tennessee judge dismissed the proceedings, seemingly on the basis of the propositions laid down in *People v. Humphrey*,[1] that the sovereign can exercise the power of eminent domain only for its own public uses and not for the public uses of another sovereign and that, beyond the public uses of the sovereign exercising the power, there exists no necessity, which is the foundation of the right. On appeal the Supreme Court rendered a decision in favor of the state and said: "We do not think it indispensable that such a public necessity, justifying the exercise of the power of eminent domain, be exclusively the necessity of the particular sovereignty seeking to condemn."[2]

The older view and what has been considered to be the majority rule seems to be to the effect that the right of eminent domain is a right belonging to a sovereign to take private property for its own public uses and not for those of another, and beyond this there is no necessity.[3] The rule seems to be well expressed in Nichols' EMINENT DOMAIN:[4] "It is now, however, generally considered to be the sounder rule that a state cannot authorize the exercise of eminent domain except for the use of its own people, and that consequently a state cannot authorize the taking of property within its jurisdiction for the use of the United States in carrying out the public and governmental func-

---

[1] 23 Mich. 471, 9 Am. Rep. 94 (1871).

[2] State v. Oliver, —Tenn.—, 35 S.W. (2d) 396 (1931).

[3] Kohl v. United States, 91 U.S. 367, 23 L. ed. 449 (1875); People v. Humphrey, *supra* note 1; Darlington v. United States, 82 Pa. 382, 22 Am. Rep. 766 (1877).

[4] NICHOLS' EMINENT DOMAIN (1917) sec. 34.

tions assigned exclusively to the United States by the Constitution."

The Tennessee court, in reaching its decision, followed the well settled rule that the public use must be that of the sovereign exercising the power of eminent domain; but the court failed to follow the rule in its narrow sense by requiring that the use must be exclusive.[5] It has, however, adopted the broader and more modern view as set forth by one or two older cases and followed by more recent decisions to the effect that the use may be common to one or more sovereigns.[6] These cases have allowed condemnation of property which the state was to turn over to the United States for various governmental functions such as lighthouses, post offices, and coast fortifications.

While the former rule seems to be considered the majority holding and is supported by the older decisions, it would seem that the rule followed by the Tennessee court is finding favor in more recent decisions with a possibility that it may in time become the weight of authority.

The principal case is the first one to be decided upon this question in Tennessee, but it seems to have been well considered by the court and will probably be followed in the future.

P. D. G.

---

[5] Kohl v. United States,; People v. Humphrey; Darlington v. United States, all *supra* note 3.

[6] Rockaway Pacific Corp. v. Stotesbury, 255 Fed. 345 (N.D. Cal. 1918); Gilmer v. Lime Point, 18 Cal. 229 (1861); Burt v. Merchants' Insurance Co., 106 Mass. 356 (1871); Lancey v. King County, 15 Wash. 9, 45 Pac. 645, 34 L.R.A. 817 (1896); State v. City of Milwaukee, 156 Wis. 549, 146 N.W. 775 (1914); Grover Irrigation and Land Co. v. Lovella Ditch, Reservoir and Irrigation Co., 21 Wyo. 204, 131 Pac. 43, L.R.A. 1916 C 1275, Ann. Ca. 1915 D 1207 (1913).

EVIDENCE—REVIEW OF EVIDENCE NOT INTRODUCED, BUT BELONGING TO A CLASS REPEATEDLY EXCLUDED

The Supreme Court of Kansas recently held that when, in the trial of a case, the court has repeatedly ruled against the admission of a certain class of evidence, and the same is properly brought on the records of the court, the party against whom the ruling is made may have the same reviewed without having offered all of the evidence of that class which he has available.[1]

Unless a party reserves a question for review by exception in the trial court, he cannot raise the question on appeal. In most jurisdictions the appellate court cannot in any event notice questions not properly raised below.[2] But the Federal appellate courts may notice a plain error, though it was not assigned.[3] A few jurisdictions have a similar rule in criminal cases.[4] Others restrict the application of the rule to capital cases.[5] The divergence of such procedure from orthodox common law principles is evidence.

The actual offer of evidence upon an issue is not necessary to preserve a question for the appellate court if the trial court rules that no proof upon that issue will be received, to which an exception is reserved. An offer to prove an issue which the

---

[1] State v. Miller, — Kan. —, 296 Pac. 714 (1931).

[2] Marion Mfg. Co. v. Buchanan, 118 Tenn. 238, 99 S. W. 984, 12 Ann. Cas. 107, 8 L. R. A. (N.S.) 590 (1906); Hobbs v. State, 121 Tenn. 413, 118 S. W. 262, 17 Ann. Cas. 177 (1908); Holmgren v. U. S., 217 U. S. 509, 30 Sup. Ct. 588, 54 L. ed. 861, 19 Ann. Cas. 778 (1910); Holloway v. White-Dunham Shoe Co., 80 C. C. A. 568, 151 Fed. 216, 10 L. R. A. (N.S.) 704 (1906); J. R. Crowe Coal & Min. Co. v. Atkinson, 85 Kan. 357, 116 Pac. 499, Ann. Cas. 1912D 1196 (1911); Kirshishian v. Johnson, 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N.S.) 402 (1911); Dahlstrom v. Gemunder, 198 N. Y. 449, 92 N. E. 106, 19 Ann Cas. 771 (1910).

[3] Oppenheim v. U.S., 241 Fed. 625 (C. C. A. 2nd., 1917).

[4] People v. Weiss, 129 App. Div. 671, 114 N. Y. Supp. 236 (1908).

[5] People v. Brott, 163 Mich. 150, 128 N. W. 236 (1910).

court has excluded is a practice that should not be encouraged. However guarded the offer may be, it tends to prejudice and influence the jury and to get before the jury indirectly the evidence which the court, under whose theory the case must be tried, has held to be incompetent.[6]

In New York it is held that the appellate division of the supreme court, since it has jurisdiction to review questions of law or fact with or without exception, has the power to reverse on points not raised in the lower court. Such power, however, will be sparingly exercised, and only in extreme cases.[7]

Error in admitting or excluding evidence in which no objection was taken or exception made at the time, or where no motion was subsequently made to exclude it, is generally not reviewable on appeal.[8] Where, however, an objection has been duly taken to the admission of a certain line of testimony, and an exception to the ruling of the court thereon properly preserved, the party objecting is not required, in order to save the question for review, to object to each question thereafter asked the witness concerning the same matter covered by the objection already made.[9]

In Tennessee it is held that when it is necessary to meet the ends of justice, the appellate court has the right to notice and will notice errors of the lower court, though not raised below, and when the error is very plain, will correct it of its own motion.[10] But it is understood that this is extremely ex-

---

[6] Palmer v. La Rault, 51 Wash. 664, 99 Pac. 1036, 21 L. R. A. (N.S.) 354 (1909).

[7] Raible v. Hygienic Ice etc. Co., 134 App. Div. 705, 119 N. Y. Supp. 138 (1909).

[8] Reyes v. State, 49 Fla. 17, 38 So. 257 (1905); Branson v. Commonwealth, 92 Ky. 330, 17 S. W. 1019, (1891).

[9] McCormick v. State, 135 Tenn. 218, 186 S. W. 95 (1916); Pedro v. L. A. and S. L. R. Co., 37 Utah 475, 109 Pac. 10, Ann Cas. 1912C 307 (1910).

[10] Elgin First Nat. Bank v. Russell, 124 Tenn. 618, 139 S. W. 734, Ann. Cas. 1913A 203 (1911).

ceptional, and indulged in only to prevent serious injustice.

In the Tennessee case of *L. & N. Ry. Co. v. Gowes*[11] a witness was permitted to give the same testimony without exception as the first witness. Held that the defendant having excepted to it when the first witness was examined, and having had his exception overruled, it was neither necessary nor proper for him to repeat the exception. The Court said: "One ruling on one question is enough, and a repetition of similar exceptions is not to be required, if indeed to be tolerated."

L. B. B., Jr.

HOMICIDE—WHEN JUSTIFIED TO PREVENT A FELONY

Two persons entered defendant's barn and were engaged in removing chickens when defendant shot into the shed. Despite the pleas of the two thieves he fired four more shots. Stealing chickens of a value of more than two dollars was a statutory felony. Defendant was tried for murder and a mistrial resulted. The commonwealth appealed and asked for a certification of the law. In certifying in accord with instructions of the lower court the court was of the opinion that, "it appears to be the sound rule that one who is without fault may shoot and kill another if it be necessary, or apparently necessary, to prevent the commission of a felony on the person or habitation, or any other felony involving violence or the element of potential danger to the person — however, the law does not justify the taking of human life to prevent a mere trespass without felonious intention, nor to prevent a felony not involving the security of the person or home or in which violence is not a constituent part."[1]

Clark states "that it is not only every person's right, but it is his legal duty, to prevent a felony, even though he must go

---

[11] 85 Tenn. 471, 3 S. W. 824 (1887).

[1] Commonwealth v. Beverly, —Ky.—, 34 S.W. (2d) 941 (1931).

to the extreme of taking the life of the person attempting to commit it. If, therefore, it is necessary to take the life of a person attempting to commit a felony in order to prevent him from consummating his design, the homicide is justifiable, not excusable merely."[2] It is submitted in the light of the discussion which follows that this statement should be qualified.

A homicide that is committed for the prevention of any forcible and atrocious crime has been considered as justifiable from the earliest days of the common law.[3] The rule is not confined to felonies against the person but may be applicable to felonies against property.[4] The homocide is justified because it is necessary to prevent the felony; but if it can be prevented by less violent methods, the homicide is not even excusable.[5]

However, the necessity need not be actual. It is enough that the circumstances were such as to induce a reasonable man to believe actual necessity existed.[6] To be such the danger must not be problematical or remote, but evident and immediate to the defendant.[7] In other words, defendant must have killed in

---

[2] CLARK, CRIMINAL LAW (3rd Ed. 1915) 178.

[3] Carpenter v. State, 62 Ark. 286, 36 S. W. 900 (1891); State v. Moo-e, 31 Conn. 479, 83 Am. Dec. 159 (1863); Mitchell v. State, 22 Ga. 211, 68 Am. Dec. 493 (1857); State v. Thompson, 9 Iowa 188, 74 Am. Dec. 342 (1859); Pond v. People, 8 Mich. 150 (1860).

[4] U. S. v. Wiltberger, 3 Wash. C. C. 515, Fed. Cas. No. 16738 (1819); U.S. v. Outerbridge, 5 Sawy. 620, Fed. Cas. No. 15978 (1868); People v. Hecker, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403 (1895); People v. Dann, 53 Mich. 490, 19 N. W. 159 (1884); Moore v. State, 237 S. W. 931 (Tex. Cr. App. 1922).

[5] Carpenter v. State, *supra* note 3; Mitchell v. State, *supra* note 3.

[6] Thompson v. State, 55 Ga. 47 (1875); Lyens v. State, 133 Ga. 587, 66 S. E. 792 (1909).

[7] U.S. v. Wiltberger, *supra* note 4; U.S. v. Outerbridge, *supra* note 4; Watson v. State, 150 Ga. 627, 104 S. E. 572 (1920); State v. Kennedy, 20 Iowa 569 (1866); Dyson v. State, 26 Miss. 362 (1853); Commonwealth v. Paese, 220 Pa. 371, 69 Atl. 891, 13 Ann. Cas. 1081, 17 L. R. A. (N.S.) 795 (1908); Weaver v. State, 19 Tex. App. 547, 53 Am. Rep. 389 (1885).

good faith and under an honest and reasonable belief that a felony was about to be committed and that the killing was necessary in order to prevent its accomplishment.[8]

The crimes in the prevention of which life may be taken are limited to those committed by means of force or surprise.[9] While most felonies are of this nature a killing is not justified if the felony is a secret one or one unaccompanied by force.[10]

In applying these rules no distinction is made between common law and statutory felonies, as was the offense in the principal case.[11]

The instant case seems thoroughly sound and well reasoned in accord with the principles outlined, and wisely distinguishes killing to prevent secret and non-forceful felonies from those perpetrated with surprise or force.

Marks v. Borum[12] is a Tennessee case quite similar on facts to the principal case. The deceased was attempting to steal defendant's chickens when the latter killed him. Attempted larceny like this was not a felony by Sec. 4630 of the Code but only a misdemeanor. In a civil action for wrongful death, defendant plead justifiable homicide to prevent commission of larceny. The court merely briefly quoted a few text writers on the subject of homicide in the prevention of felonies and then concluded that this was a mere misdemeanor and to prevent such, killing was not justified.

---

[8] U.S. v. Wiltberger, *supra* note 4; Harris v. State, 96 Ala. 24, 11 So. 255 (1892); People v. Angeles, 61 Cal. 188 (1882); Horton v. State, 110 Ga. 739, 35 S. E. 659 (1900); Burton v. Commonwealth, 23 Ky. 1915, 66 S. W. 516 (1902).

[9] State v. Moore, *supra* note 3; People v. Cook, 39 Mich. 263, 33 Am. Rep. 380 (1878); Weaver v. State, *supra* note 7; State v. Marfaudille, 48 Wash. 117, 92 Pac. 939, 15 Ann. Cas. 584, 14 L. R. A. (N.S.) 369 (1907).

[10] Crawford v. State, 90 Ga. 701, 17 S. E. 628, (1893); State v. Marfaudille, *supra* note 9; Note (1903) 67 L. R. A. 529, at 534.

[11] Storey v. State, 71 Ala. 329 (1882); Pond v. People, *supra* note 3; State v. Taylor, 143 Mo. 150, 44 S. W. 785 (1898).

[12] 1 Baxt. (Tenn.) 87, 25 Am. Rep. 764 (1873).

As to the actual matter of the prevention of felonies Tennessee law is very limited. The best case that a careful search has revealed is that of *Smith v. State*[13] which lays down the principle that a homicide is excusable, which is committed by a private person, in a *bona fide* effort to prevent a violent felony, under the belief, honestly entertained, without negligence, that there is no other way to avert such a felony.

J. G. F.

HOMICIDE—WORDS AS A SUFFICIENT PROVOCATION TO REDUCE THE CRIME OF MURDER TO THAT OF MANSLAUGHTER

The defendant was the proprietor of a soft drink stand. While a number of guests were present the deceased, apparently intoxicated, appeared in the shop and directed vile epithets to some of the women customers. The defendant ordered the deceased out of his place of business, but the deceased invited the defendant "to come around and put me out," whereupon the defendant pulled a gun and shot the deceased to death. The defendant was indicted for murder, and the trial court charged the jury that, if the defendant killed the deceased in a heat of passion caused by the acts and conduct of the deceased, it would reduce the crime of the defendant from that of murder to that of manslaughter. The jury found the defendant guilty of manslaughter, and the defendant appealed. *Held,* that the charge of the trial court was proper, and its decision was affirmed.[1]

It is the general common law rule that mere words will not be sufficient to reduce the crime of murder to that of

---

[13] 105 Tenn. 305, 60 S. W. 145 (1900).

[1] State v. Davis, — Mo. —, 34 S. W. (2d) 133 (1930).

manslaughter.[2] Neither will provoking gestures be a sufficient provocation even though coupled with vile words.[3] However, it is held that mere words will be a sufficient provocation to reduce murder in the first degree to that of murder in the second degree.[4]

Under the old common law, in order to reduce the crime of murder to that of manslaughter, it was generally required that there be some assault or personal violence.[5] However, the modern tendency of the law is to allow words alone to be a sufficient provocation to reduce the crime of murder to that of manslaughter in situations in which the words are such as would excite a reasonably prudent man to commit the act without realizing the consequences of it. A typical example of this class of cases is a situation where a father kills a man who has admitted the act of holding intercourse with his daughter.[7]

In Tennessee, the general common law rule prevails, and it has been held that mere words regardless of their abusive nature will not be a sufficient provocation to reduce an act which amounts to murder to the crime of manslaughter.[8] However, the Supreme Court of Tennessee has also held, that where the

---

[2] Freddo v. State, 127 Tenn. 376, 155 S. W. 70 (1912); Gilmore v. State, 141 Ala. 51, 37 So. 359 (1904); Allison v. State, 94 Ark. 444, 86 S. W. 409 (1904); People v. Murlback, 64 Cal. 369, 30 Pac. 608 (1883); Mixon v. State, 7 Ga. App. 805, 68 S. E. 315 (1910); Freidrick v. State, 147 Ill. 310, 35 N. E. 472 (1893); State v. Gordon, 191 Mo. 114, 89 S. W. 1025 (1905).

[3] Lofton v. State, 30 Ga. App. 105, 117 S. E. 471 (1923).

[4] Watson v. State, 82 Ala. 10, 2 So. 455 (1886); Smith v. State, 103 Ala. 4, 15 So. 843 (1894).

[5] State v. Ellis, 11 Mo. App. 587 (1881); State v. Bulling, 105 Mo. 204, 15 S. W. 367 (1897).

[6] Commonwealth v. Hourigan, 89 Ky. 305, 12 S. W. 550 (1889); State v. Grugin, 147 Mo. 39, 47 S. W. 1058 (1898).

[7] Stott v. Commonwealth, 17 Ky. Law Rep. 308, 29 S. W. 141 (1895) (a husband killed the deceased upon obtaining reliable information of the deceased having committed intercourse with his wife); State v. Grugin, *supra*, note 6.

[8] Freddo v. State, *supra* note 2.

obscene words or vexations are such as would provoke an ordinary man to commit the act without thought as to the results and consequences of such act, then such a crime will be reduced from murder in the second degree to that of manslaughter.[9] Thus, from these decisions it would seem that the Supreme Court of Tennessee tends toward the modern theory, and applies the "reasonable man" test to determine whether or not the words have amounted to such a provocation as would reduce the crime of murder to that of manslaughter. If the principal case had arisen in Tennessee, in all probability the Tennessee Courts would have left the question to the jury to determine whether or not the words amounted to such a provocation as would induce a "reasonable man" to act in the same manner as that of the defendant in the principal case.[10]

It is submitted that the decision of the principal case represents the correct view, and that where words have acted as a provocation to cause one person to kill another, then the question as to whether such words were sufficient to cause a "reasonable man" to commit the act should be left to the jury. It is further submitted that if the jury finds that the defendant acted as a "reasonable man" then the crime should be manslaughter and not murder.

E. B. F.

TAXATION — INVALIDITY OF A SUCCESSION TAX UPON THE TRANSFER OF A DEBT DUE A DECEDENT DOMICILED IN ANOTHER STATE

The deceased died testate while domiciled and residing in Illinois. At the time of the testator's death a corporation, organized and doing business in South Carolina, was indebted to the testator in large sums of money for advances and for stock dividends previously declared. The testator's will was probated

---

[9] Seals v. State, 62 Tenn. 459 (1874).

[10] Seals v. State, *supra* note 9.

in Illinois, and the total amount of indebtedness for the advances and dividends was included in determining the value of the testator's estate for inheritance tax purposes in that state. But South Carolina levied an inheritance tax upon these items of indebtedness. The Supreme Court of the United States held that the South Carolina tax was invalid as in conflict with the due process clause of the Fourteenth Amendment.[1]

The holding of the principal case is based on a newly adopted rule established in recent decision by the Supreme Court.[2] That rule, following the maxim *mobilia sequuntur personam,* seems to be that certain intangible property is subject to inheritance taxation only in the state of the decedent's domicile.[3] This new rule, prohibiting double taxation of certain intangibles, was adopted by the invocation of the due process clause of the Fourteenth Amendment. Before the Supreme Court of the United States discovered this additional power hidden in the Fourteenth Amendment, prior decisions seem to hold that intangible property was subject to assessment of inheritance taxes in more than one state.[4] The Court had upheld such a tax at the domicile of the creditor,[5] the dom-

---

[1] Beidler v. South Carolina Tax Commission, — U. S. —, 51 Sup. Ct. 54, 75 L. ed. 69 (1930).

[2] Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 190 (1930); Baldwin v. Missouri, 281 U.S. 586, 50 Sup. Ct. 436, 74 L. ed. 1056 (1930).

[3] *Supra* note 2 (In the Minnesota case the intangibles sought to be taxed by the state of the debtor's domicile were state and municipal bonds of Minnesota, owned and kept in the state of the decedent's domicile. In the Baldwin case Missouri attempted to tax because there were bank deposits, coupon bonds and promissory notes in the state belonging to a non-resident decedent. In both cases the domicile of the debtor was not allowed to tax the transfer.)

[4] Coe v. Errol, 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715 (1886); Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. ed. 439 (1903).

[5] Blodgett v. Silberman, 277 U.S. 1, 48 Sup. Ct. 410, 72 L. ed. 794 (1928).

icile of the debtor,[6] and the jurisdiction in which the paper was physically present.[7] If more than one state were allowed to levy an inheritance tax, the possibility of evasion was prevented, for the intangible would be taxed at least once. However, in a recent decision the Supreme Court did not give effect to the argument that there would be a possibility of evasion if only the state of the decedent's domicile were allowed to tax.[8]

When one reads the sweeping language used by the Supreme Court, it is apparent that the Court is averse to the imposition of the same kind of tax by different states on the same property, i. e. double taxation. The Court said: "*Blackstone v. Miller, supra* and certain approving opinions, lend support to the doctrine that ordinarily choses in action are subject to taxation both at the debtor's domicile and at the domicile of the creditor; that two states may tax on different and more or less inconsistent principles the same testamentary transfer of such property without conflict with the

---

[6] Blackstone v .Miller, *supra* note 4.

[7] Wheeler v. Sohmer, 233 U. S. 434, 34 Sup. Ct. 607, 58 L. ed. 1030 (1914) (apparently this case has been overruled by Baldwin v. Missouri, *supra* note 2).

[8] Baldwin v. Missouri, *supra* note 2. In this case the Court said (at pages 593 and 594): "It has been suggested that should the state of the domicile be unable to enforce collection of the tax laid by it upon the transfer, then in practice all taxation thereon might be evaded. The inference seems to be that double taxation — by two states on the same transfer — should be sustained in order to prevent escape of liability in exceptional cases. We cannot assent. In *Schlesinger v. Wisconsin*, 270 U. S. 230, 240, a similar motion was rejected.

"If the possibility of evasion be considered from a practical standpoint, then the federal estate tax law, under which credit is only allowed where a tax is paid to the state, Sec. 1093, Title 26, U.S.C., must be given due weight. Also the significance of the adoption of reciprocal exemption laws by most states, *Farmers Loan & Trust Co. v. Minnesota, supra*, cannot be disregarded.

"Normally, as in the present instance, the state of the domicile enforces its own tax and we need not consider the possibility of establishing a situs in another state by one who should undertake to arrange for succession there and thus defeat collection of the death duties prescribed at his domicile."

Fourteenth Amendment. The inevitable tendency of that view is to disturb good relations among the states and produce the kind of discontent expected to subside after establishment of the Union. * * * * * The practical effect of it has been bad; perhaps two-thirds of the states have endeavored to avoid the evil by resort to reciprocal exemption laws. It has been stoutly assailed on principle. Having reconsidered the suporting arguments in the light of our more recent opinions, we are compelled to declare it untenable. *Blackstone v. Miller* no longer can be regarded as a correct exposition of existing law; and to prevent misunderstanding it is definitely overruled. * * * * *

"In this court the presently approved doctrine is that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment. [Citing cases[9]] Also, no state can tax the testamentary transfer of property wholly beyond her power (*Rhode Island Trust Co. v. Doughton*, 270 U. S. 69, 70 L. ed. 475, 43 A.L.R. 1374, 46 Sup. Ct. Rep. 256), or impose death duties reckoned upon the value of tangibles permanently located outside her limits (*Frick v. Pennsylvania*, 268 U.S. 473, 69 L. ed. 1058, 42 A.L.R. 316, 45 Sup. Ct. Rep. 603). These principles became definitely settled subsequent to *Blackstone v. Miller*, and are out of harmony with the reasoning advanced to support the conclusion there announced."[10]

The Supreme Court's recently decided cases do not attempt to cover the entire field of intangible property.[11] Those intangibles which have been ruled upon are: state and muni-

---

[9] The cases cited: State Tax on Foreign Held Bonds, 15 Wall. 300 (U. S. 1872); United Refrig. Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36 (1905); Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 Sup. Ct. 59 (1929).

[10] Farmers Loan & Trust Co. v. Minnesota, *supra* note 2, at pages 209-210.

[11] See Lowndes, *Tendencies in Taxation of Intangibles*, 17 Va. L. Rev., 146 162-163 (1930).

cipal bonds,[12] coupon bonds, bank deposits, promissory notes,[13] and debts in the form of stock dividends and advances to a corporation.[14] But in view of what has gone before, it is submitted that it would not be startling if this doctrine of the Supreme Court were extended to other intangibles. The right of a state to tax the transfer of a non-resident mortgagee's interest at his death remains to be decided.[15] Also it is a question of much concern whether or not this new doctrine will finally extend so as to deny a state the right to impose inheritance taxes on stock of a domestic corporation owned by a non-resident decedent.[16]

In several cases the Supreme Court has enunciated a doctrine that intangibles under some circumstances acquire a "business situs" for taxation purposes in a state other than that of the owner's domicile, if these intangibles become integral parts of some localized business.[17] In the principal case it was contended by the State of South Carolina that the items of indebtedness had a "business situs" in that State so that an inheritance tax could be imposed on the transfer. But the Court ruled there was not sufficient evidence to suport such a contention. The Court said: "In the present case, beyond the mere fact of stock ownership and the existence of indebtedness, there

---

12 Farmers Loan & Trust Co. v. Minnesota, *supra* note 2.

13 Baldwin v. Missouri *supra* note 2 (Most of the promissory notes in this case were secured by liens on lands within the state of the debtor's domicile).

14 Beidler v. South Carolina Tax Commission, *supra* note 1.

15 In the Baldwin case, *supra* note 2 the Court said the case involved in no way "the right of a state to tax either the interest which the mortgagee as such may have in lands lying therein, or the transfer of that interest."

16 See Mason, *Jurisdiction For the Purposes of Imposing Inheritance Taxes*, 29 Mich. L. Rev. 324, 336-337 (1930).

17 New Orleans v. Stemple, 175 U. S. 309, 20 Sup. Ct. 110, 44 L. ed. 174 (1899); Bristol v. Washington County, 177 U. S. 133, 20 Sup. Ct. 585, 44 L. ed. 701 (1900); Liverpool etc. Co. v. Board of Assessors For the Parish of New Orleans, 221 U. S. 346, 21 Sup. Ct. 550, 55 L. ed. 762 (1911).

is no evidence whatever, having any bearing upon the question, save a copy of the decedent's account with the corporation, taken from his books which were kept in his office in Chicago. The various items of debit and credit in this account, in absence of any further evidence, add nothing of substance to the fact of the indebtedness as set forth in the agreed statement and afford no adequate basis for a finding that the indebtedness had a business situs in South Carolina."[18]

From the foregoing statement it would seem that the Court will not presume that intangible property, under some circumstances, has acquired a "business situs" for taxation purposes. The question remains undecided whether or not a state, in which intangibles have acquired a "business situs," will be denied the right to impose an inheritance tax on the transfer at the death of the non-resident owner. Whenever the above question is presented to the Court, it is submitted that if the sweeping language used by the Court in the *Farmers Loan & Trust Co.*[19] case is followed, the ancient mixim *mobila sequntuur personam* will grant no exception, and the intangibles will be subject to an inheritance tax only at the domicile of the non-resident decedent.

In Tennessee it seems that the evils of double taxation of intangibles have been recognized for some time. The new inheritance tax law does not include inheritance or transfer taxes on intangible property owned by non-resident decedents.[20] The old law expressly exempted such intangibles.[21]

C. F. .B

---

[18] Beidler v. South Carolina Tax Commission, *supra* note 1, at page 70-71.

[19] Farmers Loan & Trust Co. v. Minnesota, *supra* note 2, at page 209-210.

[20] Pub. Acts (Extra Session) 1929 c. 29.

[21] Tenn. Ann. Code (Supp. 1926) 756 a1.

WILLS—SET-OFF, AGAINST LEGATEE'S INTEREST, OF DEBT BARRED BY STATUTE OF LIMITATIONS

T made his will, the terms of which provided that his nine children should take "share and share alike." After a settlement of the real estate there remained to be distributed $1,230.60 in cash. The question in the case was whether a legatee took his distributive share free from a right of set-off by the estate as against his note to the amount of $185, recovery on which was barred by the Statute of Limitations. *Held*, that the debt of the legatee, as evidenced by the note, should be deducted from the distributive share due him from the estate of the decedent, although the debt was barred by the Statute of Limitations.[1]

The present case adopts the rule that a debt owed from the legatee to the testator's estate, although barred by the Statute of Limitations, is deductible from the legatee's distributive share under the will. This rule has been adopted by the English courts,[2] and is supported by a strong line of authority in the United States,[3] but *quaere* if such is the majority United States rule as the present case suggests. Some states, by statute, have adopted the rule which the present case follows.[4] On the other hand, there is a strong line of authority, which some courts claim is the weight of authority and based on the better reasoning,[5] that a debt due from a legatee in a will to the testator's

---

[1] In re Lindmeyer's Estate, —Minn.—, 235 N.W. 377 (1931).

[2] Courtney v. Williams, 3 Hare 539 (1844); Rose v. Gould, 15 Beav. 509 (1852); Coates v. Coates, 33 Beav. 363 (1864).

[3] Noble v. Tait, 140 Ala. 469, 37 So. 278 (1904); Merrut v. Jenkins, 17 Fla. 591 (1880); Garrett v. Pierson, 29 Iowa 304 (1870); Holden v. Spier, 65 Kan. 412, 70 Pac. 348 (1902); Wilson v. Channell, 102 Kan. 793, 175 Pac. 95 (1918); Winkler v. Lietman, 149 Mo. 112, 50 S.W. 307 (1899); Ex parte Wilson, 84 S.C. 444, 66 S.E. 675 (1910); Tinkham v. Smith, 56 Vt. 187 (1884).

[4] Holmes v. McPheeters, 149 Ind. 587, 49 N.E. 452 (1898).

[5] Kimball v. Scribner, 161 N.Y. Supp. 511, 512 (1916).

estate, an action on which is barred by the Statute of Limitations at the time of the testator's death, cannot be set off against the amount due the legatee under the will.[6] In the case of *Light's Estate,*[7] the court said: "If the statute can be pleaded with effect when the decedent's estate is a debtor, we can see no good reason why it may not be pleaded also with like effect when the estate is a creditor; if the running of the estate should be stopped by the death in one case, why not in the other? There is no necessity arising out of the administration of the law, or the practice in equity, which calls for any such distinction; the legatees were as much entitled to the protection of the statute as any other creditors. Admitting the right of an executor or of the heirs, in the distribution of decedent's estate, to set off the debts of the legatees against their legacies, the debts, to constitute a valid set-off, should be valid, subsisting debts, not barred by the statute." The Court in *Holt v. Libby*[8] declared: "The estate is just as much of a debtor to the indebted legatee, as the indebted legatee is to the estate. Each has a legal right and remedy, and the statute barred debt is no more recoverable by the estate than by any other creditor. To our mind this is the better doctrine."

The present case refers to *Irvine v. Palmer,*[9] a Tennessee case, as sustaining the right of the estate to deduct the legatee's indebtedness from his proportionate share of the legacy, but this case, while it recognizes this rule, nowhere intimates that such is the rule where the debt of the legatee is barred by the

---

[6] Barnett v. Schaeffer, 200 Pac. 508 (Cal. 1921); Luscher v. Security Trust Co., 178 Ky. 593, 199 S.W. 613 (1918); Allen v. Edwards, 136 Mass. 138 (1883); Holt v. Libby, 80 Me. 329, 14 Atl. 201 (1888); Boden v. Mier, 71 Neb. 191, 98 N.W. 701 (1904); Kimball v. Scribner, *supra* note 5; In re Light's Estate, 136 Pa. 211, 20 Atl. 536 (1890); Note (1922) 16 A.L.R. 342, annotation of cases; 18 C.J. 884.

[7] 136 Pa. 211, 20 Atl. 536 (1890).

[8] 80 Me. 329, 14 Atl. 201 (1888).

[9] 91 Tenn. 463, 19 S.W. 326 (1892).

Statute of Limitations. On the contrary, in the light of the reasoning as set forth in the earlier Tennessee case of *Richardson v. Keel*[10] (a case of intestacy) wherein the Court said: "We do not perceive the principle upon which it can be held that while suit upon the claim is barred by the statute, so that there can be no judgment or recovery upon it, yet the administrator may appropriate the effects of the defendant, which he holds intrust for him, to the payment of the barred debt," it would seem to follow that Tennessee would not adopt the rule of the present case, but would adopt the one directly contrary to it and supported by a strong line of authority.

G. W. W.

BOOK REVIEWS

SIZER'S PRITCHARD LAW OF WILLS AND EXECUTORS. *By Robert Pritchard. Second Edition by J. B. Sizer.* Cincinnati: The W. H. Anderson Co. pp. ccl, 1121. $20.00

The first edition of this work was published in 1894 in response to a demand and need for a book which could be considered as an authority in the state of Tennessee. The book was well received, but the supply of the first edition had become exhausted, and a new edition was in demand. J. B. Sizer of the Chattanooga Bar was pursuaded by many of the leaders of the Bar to prepare this edition. He was urged to do this work because of his ability, and also due to the fact that he was the law partner of Robert Pritchard during the preparation and publication of the first edition. This work is the result of his labor, and Mr. Sizer is to be commended on this splendid work. The object of the work as stated in the preface to the first edition is "to present the law as it is received and practiced in

---

[10] 77 Tenn. 74 (1882).

Statute of Limitations. On the contrary, in the light of the reasoning as set forth in the earlier Tennessee case of *Richardson v. Keel*[10] (a case of intestacy) wherein the Court said: "We do not perceive the principle upon which it can be held that while suit upon the claim is barred by the statute, so that there can be no judgment or recovery upon it, yet the administrator may appropriate the effects of the defendant, which he holds intrust for him, to the payment of the barred debt," it would seem to follow that Tennessee would not adopt the rule of the present case, but would adopt the one directly contrary to it and supported by a strong line of authority.

G. W. W.

BOOK REVIEWS

SIZER'S PRITCHARD LAW OF WILLS AND EXECUTORS. *By Robert Pritchard. Second Edition by J. B. Sizer.* Cincinnati: The W. H. Anderson Co. pp. ccl, 1121. $20.00

The first edition of this work was published in 1894 in response to a demand and need for a book which could be considered as an authority in the state of Tennessee. The book was well received, but the supply of the first edition had become exhausted, and a new edition was in demand. J. B. Sizer of the Chattanooga Bar was pursuaded by many of the leaders of the Bar to prepare this edition. He was urged to do this work because of his ability, and also due to the fact that he was the law partner of Robert Pritchard during the preparation and publication of the first edition. This work is the result of his labor, and Mr. Sizer is to be commended on this splendid work. The object of the work as stated in the preface to the first edition is "to present the law as it is received and practiced in

---

[10] 77 Tenn. 74 (1882).

Tennessee today." While the book is of especial value to the Tennessee lawyer there are citations to many standard texts as well as to a great number of cases of other jurisdictions so that it is not a book which is limited in its application.

This edition carries forward the body of the text of the previous one. The Table of Contents is exactly the same. The General Index is practically the same. The headings and number of sections are the same. A table of cases has been added which covers 128 pages. The cases are double indexed. The name of the case, the citation to the reporter, and the place where found in the text are all given in this table of cases. This work carries citations to Shannon's Annotated Code, 1917, instead of to the Code of 1858. The work is brought down to date, in some instances the recent cases are referred to in the text, but they are generally in a new foot-note. The citations are all in modern form.

The important changes in the law have been noted in the text. This work shows that where a will provides for the sale of property, but does not nominate the executor, the administrator with the will annexed has no power to make the designated sale but it must be made through the Chancery Court.[1] It is stated that a will executed by one who is *non compos mentis,* or procured by undue influence is absolutely void and not merely voidable.[2]

The few mistakes in the old edition have been eliminated so far as the writer is able to determine. The case of *Clark v. Fisher* in section 113 note 81 is now cited correctly instead of *Clark v. Clark* as in the first edition.

The following statement was made recently by a leading member of the Tennessee Bar: "All you need to know about the Law of Wills, and the Administration of Estates in Tennessee is to be found in Sizer's Pritchard Law of Wills and Executors."

LEONARD E. LADD
University of Tennessee College of Law
Student Editor TENNESSEE LAW REVIEW

PROGRESS OF THE LAW IN THE U. S. SUPREME COURT, 1929-1930. By *Gregory Hankin and Charlotte A. Hankin.* Washington, D. C., Legal Research Service, 1930, pp xiii, 483. $5.00.

This book is the second of the annual reviews of the work of the United States Supreme Court. The object of the second review is similar to that of the first review,[1] i. e. "to give the reader a bird's eye view of the work of the Court as an institution of government in a highly complex society." However, as additional features, the second annual review contains the author's greater stress on the socio-economic problems, and the authors' comments interspersed here and there throughout the book. Although everyone may not agree with the authors' comments, nevertheless these criticisms should stimulate the reader's interest as he reads the story of the Court's 1929 term.

The changes in the personnel of the Court during the 1929 term are dealt with in the first chapter. Also in the first chapter will be found an account of the procedural improvements of the Court, which were accomplished through the untiring efforts of the late Chief Justice Taft.

The remaining fifteen chapters are concerned with the important cases considered by the Court during the term. These cases are grouped under the following consecutive heads: Railroad Problems, Public Utilities, Insurance, Banks and Banking, Federal Taxation, State Taxation, Trade Regulation, Labor Problems (including the Federal Employers' Liability Act), Prohibition, Criminal Cases, Political Problems, International Race and Related Problems, and Judicial Veto.

The chapter on State Taxation was of special interest to the writer. However, with reference to this chapter, the writer begs to submit a correction. In this chapter, under the section

---

[1] The first annual review is reviewed in 8 Tenn. L. Rev. 149 (1930).

on property taxes, the authors discuss the case of *Safe Deposit & Trust Co. v. Virginia.*[2] It is stated in this chapter that the majority opinion of the Court was delivered by Mr. Justice Holmes. If one will examine this case he will find that the opinion of the Court was prepared by Mr. Justice McReynolds and read by the Chief Justice. Therefore, it is misleading for the authors to state that the subsequent case of *Farmers Loan & Trust Co. v. Minnesota*[3] "proved to be a boomerang" to Mr. Justice Holmes' opinion in the *Safe Deposit* case. Mr. Justice Holmes has been consistent in both cases, because in each case he has delivered a dissenting opinion.[4]

The book is readable and interesting. It should be valuable to the lawyer as a comprehensive view of all the important cases considered by the Court during the 1929 term. Thus by reading this book, the busy practitioner will be relieved from the task of reading all the reported cases for the same term. From this book the layman will readily be informed of the important social and economic problems which were brought before the highest court of the land. The law school student, who desires to know more about the work of the Courts, will find this book a source of valuable information.

FRED BAUGHMAN

University of Tennessee College of Law
Student Member of Editorial Board
TENNESSEE LAW REVIEW

---

[2] 280 U.S. 83 (1930).

[3] 280 U.S. 208 (1930).

[4] Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 208, at 216 (1930); Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83, at 96 (1930).

FEDERAL JURISDICTION AND PROCEDURE. Fourth Edition. *By John C. Rose.* Published by Matthew Bender & Co., Albany, N. Y., 1931. Price $15.00.

The first edition of this work was published in 1915, the second in 1922, the third in 1926, and now the present fourth edition is presented after revision and enlargement by Byron F. Babbitt of the St. Louis, Mo., Bar. Mr. Babbitt is also the author of the revised edition of Thayer's Jurisdiction of Federal Courts; and is lecturer on "Federal Jurisdiction and Procedure" at Washington University in St. Louis.

Those who are interested in the practice and procedure in our Federal Courts are fortunate in having a one-volume work which is of as great practical value as Judge Rose's. Indeed, quoting John C. Knox, Judge of the United States Court for the Southern District of New York, who wrote an interesting foreword for the fourth edition, "It is seldom that a book is based on such wide experience and breadth of learning as buttresses the text of this volume. Truly, indeed, his work lives after him, and it is worthy of a place in the library of every practitioner in the Federal Courts."

The volume has a total of 1138 pages, of which aproximately 600 pages consist of text material which is divided into 23 chapters. There is a logically arranged Table of Contents and a valuable table showing the distribution of sections of the Judicial Code in the United States Code.

As is pointed out by the publishers, the chapters on Appellate Procedure and Appellate Jurisdiction have been revised to meet the changes occurring by reason of the Acts of January 31 and April 26, 1926, abolishing Writs of Error and substituting Appeals. New cases as late as 280 U.S. and 42 F. (2d) have been cited.

The appendix contains provisions of the Constitution relative to the Judicial Power of the United States; the Original Judiciary Act; the Judicial Code, with valuable notes; the Federal Equity Rules, which are revised to include the amend-

ments effective in 1930, and which are well annotated; the Supreme Court Rules, annotated, as promulgated in 1928. The latter rules are indexed separately from the general index for the entire work. Not the least valuable are the forms, many of which are those approved by the Supreme Court under the act of January 31, 1928.

The author's clear, concise literary style is only surpassed by the unusually interesting manner in which he uses the facts and holdings of actual cases to drive home each principle laid down. As a matter of fact his use of cases in the text creates rather an impression of many short stories, logically grouped toward a scheme of instructive reading, than of an ordinary text book. Truly Rose's Federal Jurisdiction and Procedure is not an ordinary text book.

R. R. RUSSELL.

University of Tennessee College of Law
Student Member of Editorial Board
TENNESSEE LAW REVIEW

TENNESSEE LAW REVIEW

Volume 9

December, 1930

Through

June, 1931

TENNESSEE LAW REVIEW ASSOCIATION
UNIVERSITY OF TENNESSEE
COLLEGE OF LAW
Knoxville, Tennessee
1931

INDEX AND TITLE PAGES TO VOL. 9

LEADING ARTICLES

CASE NOTES

INDEX AND TITLE PAGES TO VOL. 9

LEADING ARTICLES

CASE NOTES

BOOK REVIEWS

BOOK REVIEWS