YALE LAW JOURNAL

VOLUME XXVII

1917-1918

PUBLISHED BY
YALE LAW JOURNAL COMPANY INC.
NEW HAVEN, CONN.

PRESS OF THE TUTTLE, MOREHOUSE & TAYLOR COMPANY
NEW HAVEN, CONNECTICUT

INDEX

ARTICLES

ADVANCING FREIGHT RATES TO INCREASE REVENUES: *George W. Rightmire* 179
ALIEN ENEMY PERSONS, FIRMS AND CORPORATIONS IN ENGLISH LAW: *Cyril M. Picciotto* 167
BUDGETARY PROCEDURE IN ITS RELATION TO REPRESENTATIVE GOVERNMENT: *W. W. Willoughby* 741
COLLECTIVE ACTS AS DISTINGUISHED FROM CONTRACTS: *Léon Duguit* 753
COMMON LAW AND COMMON SENSE: *William Renwick Riddell* 993
CONFLICT OF LAWS IN LATIN-AMERICAN COUNTRIES: *T. Esquivel Obregón* 1030
CONTINGENT REMAINDERS AND OTHER POSSIBILITIES: *Charles Sweet* 977
CONTRACTS FOR THE BENEFIT OF THIRD PERSONS: *Arthur L. Corbin* 1008
DEFEASANCE OF ESTATES ON CONDITION, THE: *Harold M. Bowman* 619
DELEGATION OF LEGISLATIVE FUNCTIONS, THE: *John B. Cheadle* 892
DEVELOPMENT OF PRINCIPLE IN TRESPASS, THE: *George F. Deiser* 220
DOES A PRE-EXISTING DUTY DEFEAT CONSIDERATION?—RECENT NOTEWORTHY DECISIONS: *Arthur L. Corbin* 362
DUAL ALLEGIANCE IN THE GERMAN LAW OF NATIONALITY AND AMERICAN CITIZENSHIP: *Theo. H. Thiesing* 479
DUTY OF A DIRECTOR PURCHASING SHARES OF STOCK, THE: *Clarence D. Laylin* 731
FAULTY ANALYSIS IN EASEMENT AND LICENSE CASES: *Wesley Newcomb Hohfeld* 66
GENERAL ASSIGNMENTS AND THE BANKRUPTCY LAW: *Marshall S. Hagar*.. 210
GIFTS OF CHOSES IN ACTION: *Oliver S. Rundell* 643
HINDU LAW AND ITS INFLUENCE: *Albert Swindlehurst* 857
INDEXING OF LEGISLATION, THE: *Walter H. McClenon* 448
INTER-CITIZENSHIP: A BASIS FOR WORLD PEACE: *Orrin Kip McMurray* .. 299
INTERNATIONAL COPYRIGHT RELATIONS OF THE UNITED STATES: *Herbert A. Howell* 348
JUDICIAL REGULATION OF INDUSTRIAL CONDITIONS, THE: *W. Jethro Brown* 427
LAW AS AN EXPRESSION OF COMMUNITY IDEALS AND THE LAWMAKING FUNCTIONS OF COURTS: *John E. Young* 1
LEASES AND THE RULE AGAINST PERPETUITIES: *Edwin H. Abbot, Jr.* 878
LEGAL POSITION OF THE BRITISH ARMY IN FRANCE, THE: *P. G. E. Gide* 237
MATRIMONIAL DOMICILE: *Herbert F. Goodrich* 49
NEW TRIAL IN PRESENT PRACTICE: *William Renwick Riddell* 353
PRIVILEGES OF LABOR UNIONS IN THE STRUGGLE FOR LIFE: *Walter W. Cook* 779
RENVOI DOCTRINE IN THE CONFLICT OF LAWS, THE: *Ernest G. Lorenzen* ... 509
SCOTTISH PRIZE DECISIONS OF THE SEVENTEENTH AND EIGHTEENTH CENTURIES: *Thomas Baty* 453
SIR WILLIAM BLACKSTONE: *William Blake Odgers* 599
SPANISH COURTS: *Layton B. Register* 769
STANDARDIZING OF CONTRACTS, THE: *Nathan Isaacs* 34
SURVIVING FICTIONS: *Jeremiah Smith* 147, 317
TORTS AND DELICTS: *R. W. Lee* 721
UNIFORM INTERSTATE ENFORCEMENT OF VESTED RIGHTS: *John K. Beach* .. 656
VALIDITY OF THE THEORY OF COMPENSATORY DAMAGES: *René Demogue*.. 585
WHAT IS GIVING AID AND COMFORT TO THE ENEMY?: *Charles Warren* ... 331

Abbot, Edwin H., Jr.: Leases and the Rule Against Perpetuities ... 878
Baty, Thomas: Scottish Prize Decisions of the Seventeenth and Eighteenth Centuries 453
Beach, John K.: Uniform Interstate Enforcement of Vested Rights.. 656
Bowman, Harold M.: The Defeasance of Estates on Condition 619
Brown, W. Jethro: The Judicial Regulation of Industrial Conditions 427
Cheadle, John B.: The Delegation of Legislative Functions 892
Cook, Walter W.: Privileges of Labor Unions in the Struggle for Life 779
Corbin, Arthur L.: Contracts for the Benefit of Third Persons 1008
Corbin, Arthur L.: Does a Pre-existing Duty Defeat Consideration?—Recent Noteworthy Decisions 362
Deiser, George F.: The Development of Principle in Trespass 220
Demogue, René: Validity of the Theory of Compensatory Damages.. 585
Duguit, Léon: Collective Acts as Distinguished from Contracts 753
Gide, P. G. E.: The Legal Position of the British Army in France.. 237
Goodrich, Herbert F.: Matrimonial Domicile 49
Hagar, Marshall S.: General Assignments and the Bankruptcy Law 210
Hohfeld, Wesley Newcomb: Faulty Analysis in Easement and License Cases 66
Howell, Herbert A.: International Copyright Relations of the United States 348
Isaacs, Nathan: The Standardizing of Contracts 34
Laylin, Clarence D.: The Duty of a Director Purchasing Shares of Stock 731
Lee, R. W.: Torts and Delicts 721
Lorenzen, Ernest G.: The Renvoi Doctrine in the Conflict of Laws—Meaning of "The Law of a Country" 509
McClenon, Walter H.: The Indexing of Legislation 448
McMurray, Orrin Kip: Inter-Citizenship: A Basis for World Peace 299
Obregón, T. Esquivel: Conflict of Laws in Latin-American Countries 1030
Odgers, William Blake: Sir William Blackstone 599
Picciotto, Cyril M.: Alien Enemy Persons, Firms and Corporations in English Law 167
Register, Layton B.: Spanish Courts 769
Riddell, William Renwick: Common Law and Common Sense 993
Riddell, William Renwick: New Trial in Present Practice 353
Rightmire, George W.: Advancing Freight Rates to Increase Revenues 179
Rundell, Oliver S.: Gifts of Choses in Action 643
Smith, Jeremiah: Surviving Fictions 147, 317
Sweet, Charles: Contingent Remainders and Other Possibilities 977
Swindlehurst, Albert: Hindu Law and Its Influence 857
Thiesing, Theo. H.: Dual Allegiance in the German Law of Nationality and American Citizenship 479
Warren, Charles: What is Giving Aid and Comfort to the Enemy?.. 331
Willoughby, W. W.: Budgetary Procedure in Its Relation to Representative Government 741
Young, John E.: Law as an Expression of Community Ideals and the Lawmaking Functions of Courts 1

INDEX—DIGEST

References in italics refer to Leading Articles; in heavy-faced type, to Comments; in Roman, to Recent Case Notes; with an asterisk, to Current Decisions.

Abortion
See *Torts*
Absentees
See *Judgments; Presumptions*
Accident
See *Insurance; Workmen's Compensation Acts*
Accommodation Paper
See *Bills and Notes; Suretyship*
Acknowledgments
Validity when taken by telephone *420
Administration of Estates
See *Descent; Set-Off; Taxation; Wills*
Administrative Law
Judicial review: of action of Draft Board 683, 695
Of orders of Postmaster General under Espionage Act 550, 557
Order of county surveyor as justification for trespass .. 570
Admiralty
See *Prize*
Public vessel of foreign state cannot be libelled *423
Seamen's wages: advances in foreign port by foreign vessel *849
Workmen's Compensation Acts invalid as applied to maritime injuries 255, 269, 924, 952
Adoption
See *Naturalization*
Agency
See *Bills and Notes*
Creation of relation by statute *850
Execution of lease under void power of attorney: no reformation 557
Liability of agent on contract made for foreign principal *289
Termination of agency by war 846
Alienation
See *Assignments; Evidence; Fraudulent Conveyances; Gifts*
Aliens
See *Expatriation; Naturalization*
Alien enemy: right to sue or defend ...104, 128, *171*, *420, *574
One partner an enemy, suspension of suit by firm .. *574
Alien enemy corporations: right to sue or defend ...108, 128 *173*, 557
Alien enemies in English law *167–178*
Citizenship: history of, in Rome, England and U. S. .. *299*
Commercial domicile of corporations 108, 128, *175*
Dual allegiance in German law *479–504*
Exemption of aliens from compulsory military service 683, 695
Jus sanguinis and jus soli *309*, *483*
Marriage status of aliens *849
Alimony
See *Taxation*
Amendments
See *Limitation of Action; Criminal Procedure*
Antenuptial Agreements
See *Taxation*
Arbitration and Award
Industrial arbitration: in Australia *427–445*
Bibliography of subject ... *446*
Army
See *Courts-Martial*
British army in France, its legal position *237–241*
Compulsory military service: Draft Act 133, *575, 683, 695
Inducing resistance to Draft Act 955
Moratory legislation 802
Soldier's will 806, 848
Assault and Battery
See *Criminal Law; Husband and Wife; Workmen's Compensation Acts*
Assignments
For creditors, see *Bankruptcy*
Of Property *Bills and Notes; Contracts; Gifts; Insurance*
Attorneys
Disbarment: no immunity from, because of incriminating testimony in court .. *286
Practice of law: bank furnishing attorney to draft customer's will *711
Suspension: practice during, as contempt *286
Avulsion
See *Boundaries*

Bailments
Contract of bailment distinguished from sale 561
Banking
Bank furnishing attorney to draft customer's will *711
Relation of bank and depositor 242, 269

Bankruptcy
General assignments under Act of 1898 ..... *210–218*
Assignee accounts in what court *216*
Duties, liabilities and compensation of assignee ... *218*
Jurisdiction of federal court: trustee's suit on stock subscription 403
Preferences: recording chattel mortgage within four months *710
Reviving barred debt as fraudulent incumbrance ..126, 129
Trustee's title: life insurance policy reserving power to change beneficiary 403
Bills and Notes
Accommodated party's authority to fill in incomplete instrument 951
Alteration of check in space left by drawer: liability of bank to drawer 242, 269
Assignment as gift by separate instrument 269
Holder in due course: payee is not 558
Corporation's check used in interest of officer drawing it 129
What law determines 246, 271
Negotiability: applicability of renvoi doctrine 1046, 1078
Effect of reference to outside agreement 559
Notes signed in representative capacity: effect of N. I. L. provisions 686, 695
Bills of Lading
See *Carriers; Pledges; Sales*
Blackstone
Life of Sir William Blackstone *599–616*
Biographical incidents *600–611*
His works *605, 607, 612*
Bonds
See *Bills and Notes; Material-Men*
Boundaries
Interstate river: boundary unaffected by avulsion 836
Boycotts
See *Torts*
Bribery
See *Criminal Law*
Budget System
Budgetary procedure in its relation to representative government *741–752*

Carriers
See *Constitutional Law; Public Utilities; Railroads; Restraint of Trade*
Carmack Amendment: bill of lading issued by connecting carrier is void 130
Does not supercede presumption against terminal carrier 130
Limitation of liability for negligence void *1092
Hours of Service Act: computing telegrapher's time .. *286
Liability of carrier in possession to nominal carrier 1076
Non-delivery: restraint of princes as excuse 130
Passengers: ejection for non-compliance with regulations 695
Relation continuing after passenger alights 559
Recovery of excessive freight charges paid by shipper and collected from customers .. *575
Regulation of commutation rates valid 404
Regulations: "ladies first" a reasonable rule 695
Charitable Corporations
Election of officers at meeting in foreign state 1079
Expulsion of students for disloyalty *422
Liability for torts: injury to elevator passenger in building operated for profit 951
Choses in Action
See *Gifts*
Assignment of future book accounts *272*
Gifts of choses in action *643–656*
Is consideration necessary? .. *643*
Modern law of *655*
Originally unassignable *643*
Parol choses *655*
Power coupled with interest *645*
Citizenship
See *Aliens; Expatriation; Naturalization*
Civil Rights Law
What is place of "public amusement" *1092
Common Law
See *Jurisprudence*
"Common Law and Common Sense" *993–1008*
"The Dead Hand of the Common Law" 668
Comparative Law
See *Aliens; Copyright; International Law*
Australia: judicial regulation of industrial conditions ...*427–445*
Canada: new trial *353–361*
Germany: dual allegiance and American citizenship *479–508*
India: Hindu law and its influence *857–877*
Latin-America: conflict of laws in *1030–1045*
Scotland: Scottish prize decisions *453–478*
Citizenship: inter-citizenship and peace *299–316, 504*

Collective acts distinguished from contracts *753–768*
Compensatory damages, theory of *593–596*
Renvoi doctrine *509–534*
Torts and delicts *721–730*
Condemnation
See *Eminent Domain*
Conflict of Laws
See *Bills and Notes; Constitutional Law; Judgments*
Capacity: contracts of married women *420, 816, 836
Comity *656, 659*
Contracts: retroactive moratorium denying interest ... 271
Decree affecting foreign realty 946, 952
Divorce: jurisdiction to decree *710, *849, 967
Effect of foreign statute of limitation 1078
Ex parte decree of separation: extraterritorial effect 117, 131
Extraterritorial operation of foreign law *661*
Foreign marriage within time prohibited after divorce held void 131
Jurisdiction over non-resident certificate holders of domestic insurance co. 406, 547
Latin-America, conflict of laws in *1030–1045*
Matrimonial domicile *49–65*
Renvoi doctrine *509–534*, 1046, 1078
Practical consequences *524*
Rückverweisung and *Weiterverweisung* *518*
Uniform interstate enforcement of vested rights *656–667*
War emergency legislation: recognition in neutral country *271*, *574
Workmen's compensation: what law governs in case of foreign contract of employment 113, 132, 707
Consideration
See *Fraudulent Conveyances*
Actual forbearance ...535, 562, 568
Arguments based on public policy *372*
Benefit to promisor *368*
Detriment to promisee *370*
Effect of pre-existing duty *362–381*, 407
In bilateral and unilateral contracts *374*
Promise as consideration *379*
Seal as consideration *376*
Constitutional Law
See *Evidence*
Commerce clause: Federal Child Labor Law invalid .. *1092
Federal Employers' Liability Act excludes state legislation 135
Forbidding cigarette advertisements in newspapers 696
Constitutional convention: legislature's power to call.. 132
Delegation of legislative powers *892–923*
Commission form of city government valid 560
Due process: absentee's plea in abatement gives jurisdiction to try merits 121, 134
Decree affecting rights in foreign realty 946, 952
Denied by error of state court 121, 134
Employment agencies forbidden to take fees from workers 134
Error of federal trial court not a denial of *711
Legislation prohibiting trading stamps *850
Lien of judgment against tenant under Dram Shop Act *850
Minimum wage law for women *421
Ordinance forbidding advertisements on walls ... *287
Proceedings quasi in rem; service on non-residents by publication 252, 270, 405, 406, 547
Prohibiting personal use of liquor *286, *575
Regulating size of baker's loaves 1079
Requiring unprofitable extension of gas mains *715
Segregation ordinance invalid 393, 407
Taxation for municipal fuel yard valid 824, 836
Unreasonable regulation of railroads 121, 135
Equal protection of the laws: compensation act exempting certain employers from taking state insurance *421
Full faith and credit: foreign corporate charter entitled to 406, 550
Impairment of contract by judicial decision 270
Powers of the states to make treaty-like agreements 406
Qualifications of voters: women suffrage in Ohio city elections *421
War powers: constitutionality of Selective Service Act 133, *575
Prohibiting brothel near cantonments *967
Regulation of food prices .. *967
Workmen's compensation acts sustained 136, *421

Contempt
See *Attorneys*
Direct contempts: letter mailed to judge *849
Refusal by Draft Board to give up court room *850
Contingent Remainders
See *Vested, Contingent and Future Interests*
Contraband
See *Prize*
Contracts
See *Agency; Conflict of Laws; Consideration; Constitutional Law; Material-Men; Restraint of Trade; Sales; Specific Performance*
Anticipatory breach 273, 697
Assignability: future book accounts 272
By purchaser on credit 136
Breach of promise to marry 279, 281
Collective acts distinguished from contracts *753–768*
Construction: American waters as "war region" *968
Causes beyond seller's control; war clause 408, *711
Contracts to bequeath and devise 542, 562, 568, *1093
Illegality: exchange of "off line" telegraph service for railroad service *577
Maintenance, when maintained action is successful 842
Vitiating collateral contract 273
Impossibility: supervening government order 953
Installment contracts: what constitutes entire breach 273, 697
Offer and acceptance: acts constituting acceptance as matter of law 272, 561
Acts necessary to form unilateral contract 382, 407
Mistake in telegraphic offer 932, 954, 1091
Revocability after partial acceptance *575
Personal service: ground for dismissal 954
Publisher's contract: implied condition as to competing books 837
Repudiation in ignorance of existing justification 954
Standardizing of contracts .. *34–48*
Third party beneficiaries ..*1008–1029*
Character of third person's right *1020*
Creditor beneficiaries *1013*
Defenses of promisor against beneficiary *1024*
Donee beneficiaries *365*, 563, *968, *1011*
Mortgagee beneficiaries ... *1014*
Rights and powers of promisee *1022*
Trust beneficiaries *1008*
Water companies' liability *1018*
Unilateral contract: performance of existing duty as consideration *362–381*, 407
Contributory Negligence
See *Death by Wrongful Act; Negligence*
Copyright
Berne Convention *351*
International copyright relations of U. S. *348–352*
Publisher's contract: implied condition in respect to competing books 837
Relations with: Canada *349*
Latin-America *350*
Trading with Enemy Act excepts copyrights *348*
Corporations
See *Aliens; Charitable Corporations; Foreign Corporations; International Law; Municipal Corporations; Officers; Restraint of Trade; Taxation*
Compared with Mass. business trust 677, 704
Directors: duty of director purchasing shares *731–740*
Fiduciary relation to stockholders *738*
Enemy character: how determined 108, 128, 557
Illegal acts: bank furnishing attorney to draft customer's will *711
Stockholders: meetings in foreign state 1079
Powers of majority, to renew charter *422
Stock issued for less than par is void *1093
Unpaid subscriptions collected by trustee in bankruptcy 403
County
See *Eminent Domain*
Courts
See *Bankruptcy; Courts-Martial; Removal of Causes*
Error of court as denial of due process 121, 134, *711
Finality of judgment of federal C. C. A. *576
Jurisdiction to take view in foreign state *287
Spanish courts *769–778*
Courts-Martial
Jurisdiction: preference over federal court in trial of soldier for murder 837
Persons subject to military law: passenger on army transport *968
Criminal Law
See *Courts-Martial; Evidence; Extradition; New Trial; Procedure; Restraint of Trade*
Assault: disease communicated by husband to wife .. 409

Upon mistaken person 410
Bribery in elections: no liability under federal statutes 137, *851
Conspiracy: inducing resistance to Draft Act 955
To commit frauds in congressional elections 137
False pretenses: professional services as "valuable thing" 138
Game laws: serving game to hotel guests as "sale" 140
Insanity: effect of insanity at trial 698
Larceny: taking water from city mains 409
Murder: title to realty acquired by 964
Specific intent: assault upon mistaken person 410
Threat to kill President 138

Criminal Procedure
Effect of clerical error in indictment *969

Damages
See *Death by Wrongful Act; Workmen's Compensation Acts*
Compensatory damages, theory of 585–598
Exemplary damages 593
Failure to deliver telegram containing offer of employment 1091
Loss of expected inheritance 263
Mitigation: excessive freight charge paid by shipper and already collected from customers *575
Punitive damages in libel and slander 701
Resulting from death of wife by breach of contract and by tort 698
Uncertainty, as ground for specific performance 845

Death by Wrongful Act
Contributory negligence of beneficiary 413
Damages: from death of wife by breach of contract as well as tort 698
Loss by adult children of prospective gifts no legal injury *422
Death caused by nuisance ... 280
Death statutes distinguished from survival acts 275
Effect of release by decedent 275
State statutes applied in admiralty 258

Deceit
See *Rescission*
False statements leading to loss of expected inheritance 263
Statements of value as fraudulent representation 838

Declaratory Judgments
See *Practice*

Descent
Title to realty acquired by murder 964

Diplomatic Officers
See *International Law*

Divorce
See *Alimony; Conflict of Laws; Marriage*

Domicile
See *Aliens; Conflict of Laws; Marriage*

Easements
Analysis of easement and license cases 66–101
By prescription 87
Light and air: implied grant in lease for years 563

Ejectment
Remedy for encroaching window and eaves 265, 275

Elections
See *Constitutional Law; Criminal Law*

Eminent Domain
Abandoning proceedings after award *851
Compensation to county for flooding road by U. S. dam 1080

Employer's Liability
See *Workmen's Compensation Acts*

Encroachments
See *Ejectment; Injunctions*

Equity
See *Agency; Injunctions; Judgments; Laches; Specific Performance; Trusts*
Decree affecting: foreign realty 946, 952
Internal affairs of foreign corporation 276

Escrow
See *Statute of Frauds*

Estates
See *Rule against Perpetuities; Vested, Contingent and Future Interests; Wills*
By entireties: limitation over to heirs of one tenant 839
Murder of tenant by cotenant; inheritance 964
Life estate: power of life tenant to convey fee *970
Remainders accelerated by widow's election to take against will 284

Evidence
See *Wills; Witnesses*
Admissions: of liability as conclusion of law or fact .. 277
Transfer of property as admission *712
Dying declarations: "murdered" 700, *852
Exclusion of evidence as denial of due process 121, 134, *711

Insanity: when question of evidence for court 698
Presumptions: character of defendant 838
Of death from absence ..943, 959
Self-incrimination: fingerprints 412
View by court in foreign state *287

Expatriation
Of American citizens 1081
Of Frenchmen still in reserve army *710
Right of *308*
Statelessness 840

Extradition
Fugitives: criminal whose prosecution is barred by limitation *422

Fictions
Surviving factions ..*147–166, 317–330*

Foreign Corporations
See *Aliens; Constitutional Law; International Law; Taxation*
"Doing business": installing machinery is *1094
Failure to qualify: liability of officers 248, 278
Jurisdiction of equity over internal affairs 276
Service upon, by notice to secretary of state 413

Foreign Law
See *Comparative Law; Conflict of Laws*

Fraud
See *Criminal Law; Deceit; Insurance; Rescission; Statute of Frauds*

Fraudulent Conveyance
See *Bankruptcy*
Consideration: agreement to support grantor 414
Sales in bulk: effect of omitting creditor from vendor's list 138

Future Interests
See *Rule against Perpetuities; Vested, Contingent and Future Interests*

Game
See *Criminal Law*

Gifts
Assignment of note by separate instrument 269
Delivery of unendorsed certificate of stock 956
Distinction between gifts *inter vivos* and *causa mortis* *646*
Gifts of choses in action *643–655*
Recovery of engagement ring after breach 281

Government
See *Constitutional Law*
Budgetary procedure in relation to representative government *741–752*
Delegation of legislative functions *892–923*
Functions of government ... *898*

Hindu Law
Hindu law and its influence *857–877*

History of Law
See *Choses in Action; Common Law; International Law; Jurisprudence; New Trial; Prize; Trespass; War*

Husband and Wife
See *Criminal Law; Divorce; Estates; Judgments; Marriage; Trusts*
Agreement pending divorce to resume marital relations *287
Damages resulting from death of wife 698
Husband's liability for wife's torts 564
Wife's right to sue husband for assault 1081

Income Taxes
See *Taxation*

Industrial Arbitration
Judicial regulation of industrial conditions in Australia *427–447*

Infants
See *Constitutional Law; Naturalization; Negligence; Wills*

Inheritance
See *Descent; Taxation; Torts; Trusts*

Injunctions
See *Administrative Law; Torts*
Against attempting to unionize mine *578, 779
Against encroachment of wall 265, 277
To enjoin payment to nonresident creditor 405
To enjoin public garage in residence district *288
To enjoin foreign tort 946, 952
To require affirmative action on foreign realty 946, 952

Insanity
See *Criminal Law; Workmen's Compensation Acts*

Insurance
See *Bankruptcy*
Accident insurance: death caused by submarine *852
Includes tuberculosis *576
Assignee's enforcement of loan provisions 1083
Burglary insurance: damage by moths as loss 1087
Cancellation as against unserved non-resident not due process 252, 270
Fire insurance: avoidance by fraudulent proof of loss ... *576
Mortgagee's right to insurance money for security 282

Life insurance: change of beneficiary, insured dying before action by insurer ... 957
Marine insurance: American waters as "war region" ... *968
Effect of abandoning voyage *969
Policy-holders bound by court proceeding at corporate domicile 406, 547
Interpleader
See *International Law*
International Law
See *Aliens; Copyright; Expatriation; Naturalization; Prize; Trading with the Enemy*
Acts of State doctrine: acts of Mexican revolutionists before recognition 812, 840
Cession of territory: effect on nationality of inhabitants *577
Diplomatic officers: immunities of 392, 415
Inter-citizenship: a basis for world peace *299–316*
Military occupation: substitution of authority of occupant *577
Nature of international law.. *21*
Property of corporation organized by Yucatan not immune from attachment .. 1082
Public vessel of foreign state cannot be libelled *423
Suit by sovereign waives immunity from interpleader .. 278
Treaties: discriminatory tax against foreign legatee, does not violate treaty 845
Interstate Commerce
See *Carriers; Constitutional Law; Foreign Corporations; Public Utilities; Railroads*
Crossing flagman is engaged in *423
Interstate Commerce Commission: attitude toward rate advances *204*
Jurisdiction *182*
Transportation for personal use is 808, 842

Joint Tenants
See *Taxation*
Judgments
See *Conflict of Laws; Constitutional Law; Courts; Courts-Martial; Injunctions*
Absentees: judgments based on presumption of death 943, 959
Cancelling insurance of non-resident beneficiary served by publication 252, 270
Equitable relief: where defendant failed to receive summons 958
Ex parte decree of separation: extraterritorial effect 117, 131
Policy holders concluded by proceedings at domicile of insurance company 406, 547
Proceedings quasi in rem ..252, 270, 405, 406, 547
Res judicata: successive actions for seduction and breach of promise to marry 279
Applied to trademarks 962
Jurisprudence
See *Common Law; Comparative Law; History of Law*
Collective acts distinguished from contracts *753–768*
Faulty analysis in easement cases *66–101*
Inter-citizenship *299–316*
Law as an expression of community ideals *1–33*
Standardizing of contracts .. *34–48*
Surviving fictions ..*147–166, 317–330*
Torts and delicts *721–730*
Jury
Challenge to array after challenge to polls 565
Grand jury: women ineligible *423
Misconduct: juror's statement of facts not in evidence 417

Labor
See *Arbitration and Award; Torts*
Laches
See *Trade-Marks*
Pursuing mistaken remedy for twenty-five years is not 276
Landlord and Tenant
See *Constitutional Law; Easements; Rule against Perpetuities; Statute of Frauds; Vested, Contingent and Future Interests*
Larceny
See *Criminal Law*
Leases
See *Landlord and Tenant*
Leases and the rule against perpetuities *878–891*
Legacies
See *Wills*
Legislation
See *Constitutional Law*
Indexing of legislation *448–452*
Libel and Slander
See *Damages*
License
See *Easements*
Limitation of Action
See *Bankruptcy; Extradition; Laches; Naturalization; Set-off*
Contract to devise 568
Effect in foreign jurisdiction 1078

Effect on amendments: changing from equitable to legal remedy 1053, 1084
Tender of part payment 280

Maintenance
Defenses: successful prosecution of maintained action .. 842

Marriage
See *Contracts; Conflict of Laws; Husband and Wife; Judgments*
Capacity to marry and the law of domicile 131
Common law marriage resulting from removal of impediment 702
Matrimonial domicile *49–65*

Master and Servant
See *Admiralty; Charitable Corporations; Contracts; Workmen's Compensation Acts*

Material-men
Bond construed to benefit obligee only 274
Bond of government contractor protects grocer supplying contractor's laborers *851

Military Law
See *Courts-Martial*

Misrepresentation
See *Deceit; Rescission*

Mistake
See *Contracts; Criminal Law; Rescission; Specific Performance; Wills*

Money
Power of thief to pass title to foreign money 844

Monopoly
See *Restraint of Trade*

Moratorium
Moratory legislation: by Congress 802
In foreign countries 271, *574

Mortgages
See *Bankruptcy; Insurance*
After-acquired chattels *272*
Foreclosure of mortgages on separate parts of railway system *270*
Mortgagee as third party beneficiary of contract *1014*
Rights of mortgagee under assignment of rents 1085

Municipal Corporations
See *Constitutional Law*

Naturalization
See *Expatriation; International Law*
Adoption: effect on nationality of child *970
"Application": what constitutes 128
Dual allegiance in German law *312, 479–504*
History of naturalization in England and U. S. *307*
Limitation of time for filing petition *574
Mother's naturalization by marriage as affecting nationality of child *970
Nationality: a question of municipal law *482*
Effect of cession of territory on nationality of inhabitants *577
Woman's nationality retained after marriage ... *967
Statutory provisions of various countries *504–508*

Negligence
See *Carriers*
Acting in emergency 959
As applied to alteration of checks 242, 269
Contributory negligence: statute imputing negligence to child *1095
Imputed negligence: partner in joint enterprise 565
Statute imputing negligence to child *1095
Liability of manufacturer for negligent defects: bridge contractor 961
Purveyor of food 281, *713, 1068, 1088
Proximate cause: intervening wrongdoer 1087
Intervening volunteer *713
Volunteers: injury to fireman 415
One in whose presence defendant has an interest .. 1086
One removing wire from street 960

New Trial
New trial in present practice *353-361*
In England *353–355*
In Upper Canada (Ontario) *356–359*
In United States *360*

Nuisance
Liability for impairing health 280
Public garage in residence district *288

Officers
See *Bills and Notes; Foreign Corporations; International Law; Workmen's Compensation Acts*

Partnership
See *Aliens*
Compared with Mass. business trust 677, 704
Partnership liability of officers of unlicensed foreign corporation 248, 278
Sovereign becoming partner in business venture loses immunity 278

Patents
See *Restraint of Trade*

Peace
Inter-citizenship: a basis for world peace *299–316*
Pledge
Loss of lien: surrender of bill of lading on acceptance of draft *714
Police Powers
See *Constitutional Law*
Powers of Appointment
See *Wills*
Practice
See *Amendments; Jury*
Declaratory judgments without affirmative relief ...*714, 1077
Presumptions
See *Carriers*
Of death from absence 943, 959
Of good character of defendant 838
Prize
Enemy character of goods determined by ownership ... 1076
Neutral vessel carrying contraband 841
Scottish prize decisions *453–478*
Procedure
See *Criminal Procedure; New Trial; Practice*
Process
See *International Law; Judgments*
Immunity of non-resident trustee in bankruptcy attending bankrupt sale *424
Insufficient to serve Secretary of State in suit against foreign corporation 413
Profits
Profit à prendre analyzed ... *97*
Property
See *Real Property*
Professional services as property 138
Property rights respecting a corpse 416
When flowing water becomes personal property 409
Proximate cause
See *Negligence*
Public Utilities
Duty of telegraph office to furnish customer change .. 289
Exchange of telegraph and railroad service as discrimination *577
Rate regulation: "going value" as element of 386, 416, 1095
Regulation of railroad commutation rates 404
Unprofitable service: requirement of, does not violate due process *715
Water company: regulation of rates after franchise expired 1095
Liability of *1018*
Publishers
See *Copyright*
Purchase for Value
See *Fraudulent Conveyances; Money*

Quasi Contract
Right to return of ring on breach of engagement 281
Value of services performed under contract within Statute of Frauds 568

Railroads
See *Carriers; Interstate Commerce; Public Utilities*
Railway credit *196*
Regulation of rates: advancing freight rates to increase revenues *179–209*
Regulation of rates: essential factors *186*
Statute imputing negligence to child *1095
Unreasonable regulation by railroad commission a denial of due process 121, 135
Real Property
See *Easements; Estates; Profits; Rule against Perpetuities; Vested, Contingent and Future Interests; Vendor and Purchaser*
Removal of Causes
From court of state of which neither party is inhabitant 567
Plaintiff resident of state but not of district 935, 960
Rescission
For fraud: effect of vendor's refusal to accept tender of goods *970
For innocent misrepresentation 929, 956
Misrepresentation: as to independent contract 283
By silence 691, 701
Res Judicata
See *Judgments*
Restraint of Trade
Combination of non-competing products: "tying clauses" in shoe machinery leases 1060, 1084
Concerted action by ocean carriers as to freight rates 139
Price fixing by Board of Trade during certain hours *1094
Price restrictions on resale of patented articles *288, 397, 409, *714
Stockholder's suit to set aside corporation's deed to monopolistic purchaser 843
Rule against Perpetuities
See *Vested, Contingent and Future Interests*
Covenants which may not be performed within period of the rule *889*

Future leasehold estates:
creation *878*
Renewal *883*
Termination *881*
Leases and rule against perpetuities *878–891*
Option to purchase fee inserted in leases *885*
Reversionary lease to begin more than 21 years in future *880*, 970

Sales
See *Contracts; Deceit; Fraudulent Conveyances; Rescission; Specific Performance; Vendor and Purchaser*
Implied warranty: wholesomeness of food 281, 1068, 1088
Serving game to hotel guest as sale 140
Title: passes on loading cargo despite bill of lading 1076
Passes on tender of contract price though less than draft attached to bill of lading 961
Uniform Sales Act: breach of installment contract 697
Warranty: statement goods had been shipped is not ... 703

Seals
See *Consideration*
Deed by simple writing where statute has abolished seals 269

Seduction
See *Judgments*

Set-Off
Barred debt set off against distributive share of estate *713
Of claim against plaintiff sovereign 278

Soldiers
See *Army; Courts-Martial; Wills*

Specific Performance
See *Statute of Frauds*
Contracts: to devise ..542, 562, 568
To lend money on insurance policy 1083
To sell stock of uncertain value 845
Defenses: inequitable because of defendant's mistake concerning other land 283
Mutuality 261, 277

Statute of Frauds
See *Quasi Contracts*
Application to escrow 699
Part performance: contract to devise 568
Contract regarding water rights *1096
Payment of rent before possession taken *577
Tenant holding over under oral contract repudiated by landlord *1095

Stock and Stockholders
See *Corporations; Gifts; Restraint of Trade; Specific Performance; Taxation*

Subrogation
See *Workmen's Compensation Acts*

Suretyship
Accommodation co-maker of note: suretyship defenses under N. I. L. 558
Fraud on principal no defense to surety: criticism of rule 566

Taxation
Discrimination against foreign legatee no violation of treaty 845
Exemptions: corporation receiving "state aid" 140
Foreign corporation: tax on total capitalization invalid 1074, 1088
Income taxes: alimony not income *289
Profits from export business taxable *1096
Stock dividend not income 553, 569
Inheritance taxes; deductions: estimated commissions of trustee 142
Federal estate tax 1055, 1088
Other state inheritance taxes. 1055, 1088
Inheritance taxes; interests taxable: interest of surviving joint owner 141
Option under will to take securities in payment of antenuptial agreement .. *288
Shares in Mass. business trust owning foreign realty 677, 704
Municipal fuel yard: tax for, is valid 824, 836

Telegraphs and Telephones
See *Contracts; Damages; Public Utilities; Torts; Trespass*

Tender
See *Limitation of Action*

Torts
See *Assault; Carriers; Charitable Corporations; Damages; Death by Wrongful Act; Deceit; Husband and Wife; Negligence; Nuisance; Waters and Watercourses*
Abortion: consent as barring action for 1090
Boycott of non-union goods 539, 569
Destroying goods accidentally cast on defendant's land 569
False representation causing plaintiff loss of inheritance 263
Inducing breach of promise to marry 704

Inducing termination of employment at will 794, 961
Injunction against union rule fixing minimum number of employees for theater 1088
Marketing defective goods: liability to subvendees..281, *713, 1068, 1088
Peaceful persuasion to join union *578, 779
Privileges of labor unions ..779–801
Right of burial: failure to notify parent of child's death 416
Telegraph company: failure to deliver message containing offer of employment .. 1091
Torts and delicts 721–730

Trade Marks
Application to different goods of same class 962
Laches of prior appropriator 962

Trading with the Enemy
See *Aliens; Prize; War*
Agency terminated by war .. 846
Contracts conferring advantages on citizens 963
Copyright excepted from the Act 348
Statutes forbidding it 108, 471, *712

Treason
See *War*

Treaty
See *Constitutional Law; Taxation*

Trespass
Development of principle in trespass 220–236
Justification: county engineer's order as to setting telephone poles 570

Trusts
Constructive trust: absolute devise on oral trust not a constructive trust 389, 417
Title to property acquired by murder of owner 964
Disposition of property on dissolution of association .. 418
Massachusetts business trusts: nature of 677, 704
Resulting trust: indirect partial payment by wife for land conveyed to husband.. 705

Vendor and Purchaser
Proceeds of insurance: retained by vendor as security 282
Sale of two lots by separate contracts: effect of misrepresentation as to one lot ... 283

Vested, Contingent and Future Interests
See *Rule against Perpetuities*
Assignability 621
Contingent remainders and other possibilities 977–992
Defeasance and tenure 627
Defeasance of estates on condition 619–642
Effect of defeasance on the estate line 630
Enforcement of forfeiture ... 622
Entry for breach 629
Error and confusion as to contingent remainders and other possibilities 990
Escheat and entry 626
Independent limitations 639
Nature of defeasance 619
Nature of estate on condition 621
Remainders 632

War
See *Agency; Constitutional Law; Contracts; Peace; Prize*
Aid and comfort: intent 343
Aid and comfort: meaning of in other statutes ..... 347 a
Aid and comfort: overt act.. 343
British army in France: legal position of 237–241
Levying of war: what constitutes 338
Peace: inter-citizenship a basis for world 299
Trading with the enemy act: copyright provision 348
Trading with the enemy an element of "aid and comfort" 335
Treason: history of 331
Treason: recent United States statutes on ..... 347 b
Treason: success of treasonable act 345
What is giving aid and comfort to the enemy? 331–347

Warranties
See *Sales*

Waters and Water Courses
See *Boundaries*
Injunction against misuse of water rights in foreign state 946, 952
Obstructing stream: extraordinary rain as act of God .. 965
Failure to remove obstruction and preventing its removal by plaintiff 571
Percolating waters: damages for draining plaintiff's wells *424

Wills
See *Descent; Taxation; Trusts*
Attestation: witnesses must see testator's signature 847
Conclusiveness of probate.. 263
Construction: legacies conditioned on not contesting .. 705
Power of life tenant to sell estate in fee *970
Contracts to devise ..542, 562, 568, *1093

Expectation of inheritance: how far protected 263
Holographic: typewriting not permitted 142
Incorporation by reference 673, 705
Legacies and devises: acceleration of remainder by election of widow to take against will 284
Conditioned on not contesting will 705
Waiver of forfeiture 705
Mistake: devise by mistaken description 411
Erroneous belief of son's death 418
Power of appointment: preventing lapse 673, 705
Republication: effect on lapsed legacy *852
Revocability: effect of contract to devise 542, 572
Testamentary capacity: will of soldier under age 806, 848
Witnesses
See *Evidence; Wills*
Competency: previous conviction of felony 572
Workmen's Compensation Acts
Admiralty jurisdiction excludes state compensation 255, 269, 924, 952
Compensable and non-compensable injuries: assault by fellow worker 142, 965
Bomb from enemy aircraft *1097
Disease aggravated by injury *578
Disease from impure water *579
Disease from working posture 144
Facial disfigurement *1097
Falling of adjacent walls .. 143
Horseplay of fellow worker 142
Injuries suffered while asleep *578
Slipping on stick in yard .. *424
Compensation: based on "tips" 419
Not forfeited by subsequent insanity *289
Constitutionality of compulsory compensation acts 136, *421
Employee: "good Samaritan" is 571
Officer of corporation is ... *853
President is not 284
Federal employers' liability act excludes state acts 135
Crossing flagman is outside state act *423
Foreign contract of employment, what law applies ..113, 132, 707
Subrogation of employer to employee's rights against third person 708, *971
Theory of, compared with theory of compensatory damages *593–596*

Yale Law Journal
Broadened policy 102
Yale School of Law
New appointments to the faculty for year 1916-1917.. 104

ERRATUM

The citation for the case of *State v. United States Fidelity etc. Co.*, noted on page 421, is (1917, Oh.) 117 N. E. 232.

TABLE OF CASES

Numerals in italics refer to Leading Articles; in heavy-faced type, to Comments; in Roman, to Recent Case Notes; with an asterisk, to Current Decisions.

Abrams: Rieger *v.* 279
Adams *v.* Tanner 134
Advance Oil Co. *v.* Hunt *et al.* 261, 277
Ahlers: Rex *v.* *355*
Albert D. Howlett Co.: Banks *v.* 707
Alford *v.* Bennett 411
All Americas Merc. Corp.: Helburn Thompson Co. *v.* *714
Allcock *v.* Rogers *1097
Allion *v.* Toledo 1079
Ambrosia Milk Corp.: Rosenbusch *v.* *713
American Graph. Co.: Boston Store *v.* *714
American Metal Co.: Ricaud *v.* 812, 840
Anaconda Copper M. Co.: Geddes *v.* 843
Anderson *v.* Bloomheart 563
Anderson *v.* Shackelford *287
Angelus *v.* Sullivan 683, 695
Angus: Dalton *v.* *88*
Angus *v.* Dalton *328*
Arden: Commercial Bank *v.* .. 245
Arkansas *v.* Tennessee 836
Arras Bros.: Gibbs *v.* *1092
Artcraft Pictures Corp.: Triangle Film Corp. *v.* 961
Arver *v.* U. S. *575
Aspegren: DeHoff *v.* 703
Assal: State *v.* 846
Atherton *v.* Atherton *62*
Atlantic Coast Lumber Corp.: Owens *v.* 698
Attorney General: Kornfeld *v.* 840
Attorney General of Natal: De Jager *v.* *304*
Auburn & S. El. R. Co.: Johnson *v.* *1092
Awtrey *v.* Norfolk & Western Ry. Co. 416

B. & M. R. R.: Clark *v.* 415
Badger Machinery Co. *v.* Columbia, etc., Co. 246, 271
Baker *v.* Rushford 282
Baldwin: Corbin *v.* 140
Ball: State *v.* 138
Bank of Commerce: Quirk *v.* 543, 568
Banks *v.* Albert D. Howlett Co. 707
Banzai Mfg. Co. *217*
Barber: Hartford Life Insurance Co. *v.* 406, 547
Barre Granite & Quarry Co.: Corry *v.* *276*
Barto *v.* Himrod 560
Barton *v.* Barton *970
Barton-Childs Co.: Taylor *v.* .. *272*
Bates etc., Ltd.: Fearnley *v.* .. *424
Bathgate: United States *v.* *851
Batterson: Fisk *v.* *362*
Bausman: Kelley *v.* 405
Beck, *Ex parte* 683, 695
Becker, Gray & Co. *v.* London Ass. Corp. *969
Belgier, The *849
Benner Line: Pendleton *v.* 1077
Bennett: Alford *v.* 411
Bennett *v.* Jackson 132
Bessett: State Mut. Life Ass. Co. *v.* 957
Beutner: Eastern Kansas Oil Co. *v.* *424
Biddinger *v.* Commissioner of Police *422
Biermann: *In re* Cie. Nationale *v.* *574
Blair: Braniff *v.* *575
Bloomheart: Anderson *v.* 563
Bloomquist *v.* Farson 929, 956
Board of Trade *v.* U. S. *1094
Bogert *v.* Southern Pacific Co. 276
Borgsted *v.* Shults Bread Co. .. *578
Boston & M. R. R. Co. *v.* Piper *1092
Boston Store *v.* American Graph. Co. *714
Bossert *v.* Dhuy 539, 569
Bowden *v.* Bowden *287
Bowerman *v.* Burris 418
Bowne *v.* S. W. Bowne Co. ..284, *853
Brackenbury *v.* Hodgkin 382, 407
Brady: McHenry County *v.* ... 406
Brammer *v.* Iowa Telephone Co. 570
Braniff *v.* Blair *575
Brewster: Post Printing & Pub. Co. *v.* 696
Brogan *v.* National Surety Co. *851
Bronson: McDivitt *v.* 265, 275
Brower *v.* N. Y. C. & H. R. R. Co. 1087
Brown: Duus *v.* 845
Brown *v.* Kausche 389, 417
Brown *v.* Perera 844
Bruce: Meier & Frank Co. *v.* .. *420
Buchanan *v.* Tilden *365*
Buchanan *v.* Warley 393, 407
Buffalo Co.: Stilley *v.* *78*
Buffalo Creek, etc. Co.: Jones *v.* *711
Bullock Tractor Co.: Knapp *v.* 413
Burgard *v.* Mair *577
Burkett *v.* Doty 269, *655*
Burris: Bowerman *v.* 418
Burvett: Farey *v.* *967
Buschman Co. *v.* Garfield Realty Co. *1095

C. H. Little Co. *v.* Cadwell Transit Co. 136

Cadwell Transit Co.: C. H. Little Co. *v.* 136
Caledonian Railway Co.: Corporation of Greenock *v.* 965
Callaghan & Co.: Foster *v.* ... 837
Cameron: Lee *v.* *1093
Campbell: Crane *v.* *575
Caplin *v.* Penn, M. L. Ins. Co. 1083
Card: York Shore Water Co. *v.* *851
Carpenter *v.* Carpenter *287
Casement: Rex *v.* *305*, *334*
Casey: U. S. *v.* *967
Cayser: Thomsen *v.* 139
Central Leather Co.: Oetjen *v.* 812, 840
Chadwick: Pere Marquette R. Co. *v.* 280
Champlin: Douthwright *v.* ..113, 132
Chaprione *v.* Lambert *577
Chaufty *v.* DeVries *712
Cherry: Chicago Life Ins. Co. *v.* 121, 134
Chicago B. & Q. R. Co.: Erisman *v.* 130
Chicago B. & Q. R. R. Co.: J. L. Price Brokerage Co. *v.* 932, 954, 961
Chicago G. W. R. R. Co. *v.* Postal Tel. Co. *577
Chicago Life Ins. Co. *v.* Cherry 121, 134
Chicago M. & St. P. Ry. Co.: Crevelli *v.* 413
Chicago Washed Coal Co. *v.* Whitsett *273*
Childs Co.: Jacobs *v.* 281
Christie's Estate, *In re* 142
Cie. Nationale *v.* Biermann, *In re* *574
City of Ann Arbor: Schenk *v.* *424
City of Portland: Jones *v.* ...824, 836
City of Watertown: Cleveland *v.* 560
Clair: People *v.* 140
Clark *v.* B. & M. R. R. 415
Clark *v.* State 409
Clarke *v.* Morey 108
Claxton *v.* Pool 564
Cleveland *v.* City of Watertown 560
Claudius *v.* Davie 133
Clifford: Farnham *v.* 277
Clinton, etc. Church: Wilson *v.* 686, 695
Cohen *v.* Samuels 403
Cole *v.* De Trafford 564
Colley: York Mfg. Co. *v.* *1094
Colonial Fur Ranching Co. *v.* First Nat. Bank 129
Columbia, etc. Co.: Badger Machinery Co. *v.* 246, 271
Comision etc. de Henequen: Molina *v.* 1082
Commercial Bank *v.* Arden 245
Commercial Nat. Bank: Martin *v.* *710
Commissioner of Police: Biddinger *v.* *422
Conn. Valley L. Co. *v.* Maine C. R. R. Co. 1078
Continental Bank & Trust Co. *v.* Times Pub. Co. 559
Continental Ins. Co.: Robinson & Co. *v.* *173*
Continental Tyre & R. Co.: Daimler Co. *v.* *175*
Corbin *v.* Baldwin 140
Corbin *v.* Townshend 1055, 1088
Corey: Sargent *v.* 542, 562
Corporation of Greenock *v.* Caledonian Railway Co. 965
Corry *v.* Barre Granite & Quarry Co. 276
Coutarel, *In re* *710
Crane *v.* Campbell *575
Craney *v.* Donovan 701
Crevelli *v.* Chicago, M. & St. P. Ry. Co. 413
Crimmins Const. Co.: Sabatino *v.* 708
Cristilly *v.* Warner *663*
Crowe: State *v.* *421
Customs & Excise Officers' Fund, *In re* 418

D. & E. Dress Co., Inc., *In re* .. *216*
Dagenhart: Hammer *v.* *1093
Daimler Co. *v.* Continental T. & R. Co. *175*
Dale *v.* Western Tel. Co. *289
Dalton *v.* Angus *88*
Dalton: Angus *v.* *328*
Dana *v.* Treasurer 677, 704
Darnell-Tanzer L. Co.: So. Pac. Co. *v.* *575
Davie: Claudius *v.* 133
Davis: Jacobs *v.* 281
Dawson *v.* National Life Ins. Co. *732*
De Cicco *v.* Schweizer *362*, 407
DeHoff *v.* Aspegren 703
De Jager *v.* Atty. General of Natal *304*
Del., L. & W. R. R. Co.: Kirwin *v.* *78*
Denver *v.* Denver Union Water Co. *1095
Derrick *v.* Salt Lake Ry. Co. .. 565
D'Espard: Posselt *v.* 104, 128
De Trafford: Cole *v.* 564
DeVries: Chaufty *v.* *712
Dhuy: Bossert *v.* 539, 569
Dick, Kerr & Co.: Metropolitan Water Board *v.* 953
Direction der Disconto Gesell-Schaft: Leader *v.* *174*
Disston's Estate, *In re* 284
District Court: State *v.* 571
District Court: State *v.* *579
Dominion Coal Co. *v.* Maskinonge S. S. Co. *968
Donnell: Lembo *v.* 1090
Donnelly *v.* Piercy Contracting Co. *713
Donovan: Craney *v.* 701
Dossett *v.* First Nat. Fire Ins. Co. *576
Doty: Burkett *v.* 269, *655*

Doughty Sons *v.* Phosphates Tunisiens *711
Douthwright *v.* Champlin 113, 132
Downs *v.* N. J. Fidelity etc. Ins. Co. 1087
Dreyfus' Estate, *In re* 142
Dreyfus: Yulzari *v.* 963
Driefontein Cons. Mines, Ltd.: Janson *v.* *168*
Durnherr *v.* Rau *365*
Duus *v.* Brown 845
Duval: Hamacher *v.* *710
Dyson: Rex *v.* *355*

Eady-Baker Grocery Co.: McKemie *v.* *422
Eagle Glass & Mfg. Co. *v.* Rowe *779*
Earley *v.* Pacific El. R. Co. *275*
Eastern Kansas Oil Co. *v.* Beutner *424
Edison: Ostrom *v.* 567
Edmundson's Estate, *In re* *968
Eiger *v.* Garrity *850
Eisenlohr's Estate, *In re* 542, 562
Eisner: Towne *v.* 553, 569
Elkan, *In re* *712
Erickson *v.* Preuss *1097
Erie R. R. Co. *v.* Hilt *1095
Erisman *v.* Chicago B. & Q. R. Co. 130
Ettlinger *v.* National Surety Co. 566
Evans Piano Co. *v.* Tully 561

Fabbri: State *v.* *286
Farey *v.* Burvett *967
Farmer *v.* First Trust Co. 954
Farnham *v.* Clifford *277*
Farson: Bloomquist *v.* 929, 956
Fearnley *v.* Bates, etc., Ltd. ... *424
Federal Mail & Express Co. ... *215*
Ferrara *v.* Russo 542, 562
Fidelity & Cas. Co. *v.* Mitchell *576
Fink-Sibler: Mayer *v.* *169*
Finley: U. S. *v.* 683, 695
First Nat. Bank: Colonial Fur Ranching Co. *v.* 129
First Nat. Bank *v.* Wood 951
First Nat. Fire Ins. Co.: Dossett *v.* *576
First Trust Company: Farmer *v.* 954
Fisher *et al.*: Medoff *v.* *273*
Fisk *v.* Batterson *362*
Flusser: Hirschberg *v.* 265, *277*
Flynn *v.* New York, S. & W. R. R. Co. *423
Ford Motor Co. *v.* Union Motor Sales Co. *288
Fortier: Hay *v.* 535, 562
Foster *v.* Callaghan & Co. 837
Fowles' Will, *In re* 673, 705
Francisco: Roach *v.* *420
French: State *v.* *421
Freudenberg: Porter *v.* *170*, *304*
Fried Krupp Aktien-Gesellschaft, *Re* *271*
Friederichsen *v.* Renard ...1053, 1084
Fritz Schultz, Jr., Co. *v.* Raimes & Co. 108, 128

Gaines & Co.: Rock Spring Distilling Co. *v.* *962*
Gamble *v.* Vanderbilt University 951
Gardiner: Glantz *v.* 138
Gardner *v.* State 698
Garfield Realty Co.: Buschman Co. *v.* *1095
Garricott *v.* New York State Rys. 695
Garrity: Eiger *v.* *850
Geddes *v.* Anaconda Copper M. Co. 843
George: Hubbard *v.* 845
Gerlach, *Ex parte* *968
Gibbs *v.* Arras Bros. *1092
Gifford *v.* T. G. Patterson, Inc. *578
Gill: Kelley *v.* 403
Gillon: Haverhill Strand Theater *v.* *797*, 1088
Glantz *v.* Gardiner 138
Goldman *v.* U. S. 955
Gould *v.* Gould *289
Gradwell: U. S. *v.* 137, *851
Graff Furnace Co. *v.* Scranton Coal Co. *79*
Grand Trunk Western Ry. Co.: Ormsbee *v.* *422
Grant: People *v.* 1079
Great Western Railway Co.: Helps *v.* 419
Greer *v.* U. S. 838
Grosman: Union Trust Co. *v.* 816, 836
Guaranty Trust Co. *v.* Hannay & Co. 1046, 1078
Guaranty Trust Co.: Kingdom of Roumania *v.* 278
Guernsey *v.* Imperial Bank of Canada *509*

Haas, *In re* 128, *479*
Haddock *v.* Haddock *62*
Hahne & Co.: Robt. H. Ingersoll & Bro. *v.* 397, 409
Hakan, The 841
Hall *v.* Hall 263
Hall: Homan *v.* 704
Hall *v.* Industrial Commission 131
Hall: U. S. *v.* 955
Halsey *v.* Lowenfeld *173*
Hamacher *v.* Duval *710
Hammer *v.* Dagenhart *1093
Hanks: Vermont Box Co. *v.* .. 565
Hannay & Co.: Guaranty Trust Co. *v.* 1046, 1078
Hartford Life Ins. Co. *v.* Barber 406, 547
Hasselstrom: Kennedy *v.* *970
Haverhill Strand Theater *v.* Gillon *797*, 1088
Hay *v.* Fortier 535, 562
Hays, *In re* *218*, *219*
Hayward *v.* Moss Empires 1086
Healy: McLain *v.* 699
Helburn Thompson Co. *v.* All Americas Merc. Corp. *714
Helgar Corp. *v.* Warner's Features, Inc. 697

Helps *v.* Great Western Railway Co. 419
Herzfeld: Rothbart *v.* *420
Heyburn: U. S. *v.* 686
Heyer *v.* Sullivan 956
Hill *v.* Treasurer *288
Hilt: Erie R. R. Co. *v.* *1095
Hinshaw *v.* Russell 705
Hirschberg *v.* Flusser 265, 277
Hitchman Coal & Coke Co. *v.* Mitchell *578, 779
Hodgkin: Brackenbury *v.* .. 382, 407
Hohenberg & Co. *v.* Mobile Liners, Inc. 567, 935, 960
Hollaender and Donnet, *In re* .. *970
Holliday *v.* Lockwood 283
Homan *v.* Hall 704, 790
Horswill: Salmonson *v.* 691, 701
Hubbard *v.* George 845
Hudson Nav. Co.: Sullivan *v.* 924, 952
Hunt *et al.*: Advance Oil Co. *v.* 261, 277
Hurst *v.* Picture Theaters, Ltd. 98
Hutflis, *Ex parte* 683, 695

Imperial Bank of Canada: Guernsey *v.* 509
Indianapolis Abattoir Co.: Richards *v.* *578
Industrial Commission: Hall *v.* 131
International Paper Co. *v.* Mass. 1074, 1088
Iowa: Peterson *et al. v.* 845
Iowa Telephone Co.: Brammer *v.* 570

J. L. Price Brokerage Co. *v.* B. & Q. R. R. Co. 932, 954, 961
Jackson: Bennett *v.* 132
Jacobs *v.* Childs Co. 281
Jacobs *v.* Davis 281
Jacquemin *v.* Turner & Seymour Mfg. Co. 965
Janson *v.* Driefontein Cons. Mines 168
Jeffersonian Publishing Co. *v.* West 550, 557
Jeffery: Marshall-Jackson Co. *v.* *971
Jensen: Southern Pacific Co. *v.* 255, 269, 924
Johnson *v.* Auburn & S. El. R. Co. *1092
Johnson *v.* Johnson 1081
Jones *v.* Buffalo Creek, etc. Co. *711
Jones *v.* City of Portland 824, 836
Jones: Penman *v.* 66
Joullian: Louisville & N. R. R. Co. *v.* 569

Karp, *In re* 219
Kausche: Brown *v.* 389, 417
Keating *v.* Pennsylvania Co. .. 567
Kelch's Adm'r *v.* National Contract Co. 959
Kellert *v.* Rochester & Pittsburgh Co. 76
Kelley *v.* Gill 403
Kelley *v.* Bausman 405
Kennedy *v.* Hasselstrom *970
Kimble *v.* Mayor, etc., of Newark 839
King, *Ex parte* 837
Kingdom of Roumania *v.* Guaranty Trust Co. 278
Kirkpatrick: Tucker *v.* *1096
Kirwin *v.* Del., L. & W. R. R. Co. 78
Knapp *v.* Bullock Tractor Co. 413
Knight: Ludlow Savings Bank *v.* 414
Kornfeld *v.* Attorney General .. 840
Krestovnikow: Schaffer *v.* 702
Krum: Race *v.* 1068, 1088

Lambert: Chaprione *v.* *577
Lando *v.* Lando 509
Lankford: State *v.* 409
Lawrence *v.* Prosser 542, 562
Leader *v.* Direction der Disconto Gesellschaft 174
Lee *v.* Cameron *1093
Lee: Ostman *v.* 272
Lee's Will, *In re* 1082
Lembo *v.* Donnell 1090
Lensen: People *v.* *423
Liebmann, *Ex parte* 168
Lincoln Tel. & Tel. Co.: Workman *v.* 960
Lithograph Bldg. Co. *v.* Watt .. 557
Lockwood: Holliday *v.* 283
London & N. Estates Co. *v.* Schlesinger 173
London Ass. Corp.: Becker, Gray & Co. *v.* *969
London County Council: Rex *v.* 176
London Express Newspaper Ltd.: Neville *v.* 842
London Joint Stock Bank: Macmillan *v.* 242, 269
Loper, *In re* 142
Lord Ashburton: Nocton *v.* ... 320
Louis Neuburger, Inc. 217
Louisville & N. R. R. Co. *v.* Joullian 569
Lowe: Peck & Co. *v.* *1096
Lowenfeld: Halsey *v.* 173
Lucas: Southern Trust Co. *v.* .. 838
Ludlow Savings Bank *v.* Knight 414
Luscher *v.* Security Trust Co. .. *713

Macmillan *v.* London Joint Stock Bank 242, 269
Maggelet, *In re* 144
Maine C. R. R. Co.: Conn. Valley L. Co. *v.* 1078
Mair: Burgard *v.* *577
Maley *v.* Pennsylvania R. R. Co. 943, 959
Mann, Crossman & Paulin, Ltd. *v.* Registrar *970
Maniatakis' Estate, *In re* 280
Mannheim Ins. Co.: W. L. Ingle, Ltd., *v.* 174
Marshall-Jackson Co. *v.* Jeffery *971

Marron: State *v.* *286
Martin *v.* Commercial Nat. Bank *710
Maskinonge S. S. Co.: Dominion Coal Co. *v.* *968
Mass.: International Paper Co. *v.* 1074, 1088
Masses Publishing Co. *v.* Patten 550, 557
Mathews' Estate, *In re* *852
Mayer *v.* Fink-Sibler *169*
Mayor, etc., of Newark: Kimble *v.* 839
McCall: People *v.* *715
McDevitt *v.* Stokes *369*, 407
McDivitt *v.* Bronson 265, *275*
McHenry County *v.* Brady 406
McKelway's Estate, *In re* 141
McKemie *v.* Eady-Baker Grocery Co. *422
McLain *v.* Healy 699
McNeal *v.* State *852
Meade *v.* Poppenberg *362*
Medoff *v.* Fisher *et al.* *273*
Meier & Frank Co. *v.* Bruce ... *420
Merrill, *In re* *849
Metropolitan Water Board *v.* Dick, Kerr & Co. 953
Miller, Gibb & Co. *v.* Smith & Tyrer *289
Milne & Co. *v.* Phosphates Tunisiens *711
Mines de Barbary *v.* Reymond 557
Mississippi R. R. Com. *v.* Mobile & Ohio R. R. 121, 135
Missouri K. & T. Ry. Co. *v.* Ward 130
Missouri Pac. Ry. Co.: U. S. *v.* *286
Mitchell: Fidelity & Cas. Co. *v.* *576
Mitchell: Hitchman Coal & Coke Co. *v.* *578, *779*
Mitchell: U. S. *v.* 808, 842
Mitsui & Co. Ltd. *v.* Mumford *304*
Mitsui & Co. Ltd.: Watts & Co. Ltd. *v.* 130
Mobile Liners, Inc.: Hohenberg & Co. *v.* 567, 935, 960
Mobile & Ohio R. R.: Mississippi R. R. Com. *v.* 121, 135
Moffitt: Princess Thurn and Taxis *v.* *168*
Molina *v.* Comision etc. de Henequen 1082
Montmorency *v.* Montmorency *63*
Morena: U. S. *v.* *574
Moss Empires: Hayward *v.* 1086
Mumford: Mitsui & Co., Ltd. *v.* *304*
Myton: Schuler *v.* *374*

National Council, etc. *v.* Scheiber 252, 270
National Contract Co.: Kelch's Adm'r *v.* 959
National Life Ins. Co.: Dawson *v.* *732*
National Surety Co.: Brogan *v.* *851
National Surety Co.: Ettlinger *v.* 566
Naturalization of Subjects of Germany, *In re* 128
Neal: Paine Lumber Co. *v.* 541
Neville *v.* London Express 842
New England Cas. Co.: Standard Gas Power Corp. *v.* *274*
New Jersey Fidelity etc. Ins. Co.: Downs *v.* 1087
New York Central & H. R. R. Co.: Brower *v.* 1087
New York Central R. R. Co. *v.* Winfield .....135, 256 n
New York State Rys.: Garricott *v.* 695
New York, S. & W. R. R. Co.: Flynn *v.* *423
Nocton *v.* Lord Ashburton *320*
Norfolk & Western Ry. Co.: Awtrey *v.* 416
North Carolina P. S. Co.: Woods *v.* 559
Northumberland, etc. Co.: Phila. Trust Co. *v.* 270

Oakland Lumber Co., *In re* *213*
Oetjen *v.* Central Leather Co. 812, 840
Ormsbee *v.* Grand Trunk Western Ry. Co. *422
Ostman *v.* Lee *272*
Ostrom *v.* Edison 567
Owens *v.* Atlantic Coast Lumber Corp. 698

Pacific El. R. Co.: Earley *v.* ... *275*
Paine Lumber Co. *v.* Neal 541
Pampa, The *423
Parchim, The 1076
Parker *v.* Parker *63*
Parrish *v.* Parrish 571
Patten: Masses Publishing Co. *v.* 550, 557
Peck & Co. *v.* Lowe *1096
Pendleton *v.* Benner Line 1077
Penman *v.* Jones *66*
Pennsylvania Co.: Keating *v.* .. 567
Pennsylvania M. L. Ins. Co.: Caplin *v.* 1083
Pennsylvania R. R. Co.: Maley *v.* 943, 959
Pennsylvania R. R. Co. *v.* Towers 404
People *v.* Clair 140
— *v.* Grant 1079
— *v.* Lensen *423
— *v.* McCall *715
— *v.* People's Trust Co. *711
— *v.* Sallow 412
— *v.* Stoyan 410
— *v.* Van Every *969
People's Bank: Southern Nat., etc. Corp. *v.* 558
People's Trust Co.: People *v.* *711
Pere Marquette R. Co. *v.* Chadwick 280
Perera: Brown *v.* 844
Perkins: Story *v.* 133
Peterson *et al. v.* Iowa 845
Pettis *v.* Pettis 117, 131

Pfiester *v.* Western Un. Tel. Co. 1091
Phila. Trust Co. *v.* Northumberland, etc. Co. 270
Phosphates Tunisiens: Doughty Sons *v.* *711
Phosphates Tunisiens: Milne & Co. *v.* 711
Picture Theaters, Ltd.: Hurst *v.* *98*
Piercy Contracting Co.: Donnelly *v.* *713
Pilcher *v.* State 700
Piper: Boston & M. R. R. Co. *v.* *1092
Polzeath, The *176*
Pool: Claxton *v.* 564
Poona, The *176*
Pope *v.* Rogers 847
Poppenberg: Meade *v.* *362*
Porter *v.* Freudenberg *170, 304*
Portuguese-American Bank *v.* Welles *655*
Posselt *v.* D'Espard 104, 128
Post Printing & Pub. Co. *v.* Brewster 696
Postal Tel. Cable Co.: Chicago G. W. R. R. Co. *v.* *577
Premier Oil & Pipe Line Co., Ltd.: Robson *v.* *176*
Prendergast *v.* Walls *288
Preuss: Erickson *v.* *1097
Princess Thurn and Taxis *v.* Moffitt *168*
Prosser: Lawrence *v.* 542, 562

Quirk *v.* Bank of Commerce..543, 568

Race *v.* Krum 1068, 1088
Railroad Commission: San Joaquin L. & P. Corp. *v.* 386, 416
Raimes & Co.: Fritz Schultz, Jr., Co. *v.* 108, 128
Ransom: Seaver *v.* 563
Rau: Durnherr *v.* *365*
Raynes, *In re* *853
Registrar: Mann, Crossman & Paulin, Ltd. *v.* *970
Reilly & Ryan Co.: Solvuca *v.* 136
Renard: Friederichsen *v.* ..1053, 1084
Resnek, *In re* *219*
Rex *v.* Ahlers *355*
— *v.* Casement *305, 334*
— *v.* Dyson *355*
— *v.* London County Council.. *176*
— *v.* Supt. of Vine St. Police Sta. *169*
Reymond: Mines de Barbary *v.* 557
Ricaud *v.* American Metal Co. 812, 840
Richards *v.* Indianapolis Abattoir Co. *578
Rieger *v.* Abrams *279*
Riordan & Co. *v.* Thornsbury 686, 695
Roach *v.* Francisco *420
Robt. H. Ingersoll & Bro. *v.* Hahne & Co. 397, 409
Robinson & Co. *v.* Continental Ins. Co. *173*
Robson *v.* Premier Oil and Pipe Line Co., Ltd. *176*
Rochester Bridge Co.: Travis *v.* 961
Rochester & Pittsburgh Co.: Kellert *v.* *76*
Rocholl *v.* Rocholl *967
Rock Spring Distilling Co. *v.* Gaines & Co. 962
Rodriguez: Speyer Bros. *v.* ... *574
Roessler & Hasslacher Chemical Co.: Standard, etc. Co. *v.* 408
Rogers: Allcock *v.* *1097
Rogers: Pope *v.* 847
Roll Stickley & Sons: Yung *v.* 958
Rosen *v.* United States 572, 669
Rosenbusch *v.* Ambrosia Milk Corp. *713
Rosson: Sullivan *v.* 1085
Rothbart *v.* Herzfeld *420
Rouss, *In re* *286
Rowe: Eagle Glass & Mfg. Co. *v.* *779
Rushford: Baker *v.* 282
Russell: Hinshaw *v.* 705
Russo: Ferrara *v.* 542, 562
Ryerson & Son *v.* Shaw 248, 278

S. W. Bowne Co.: Bowne *v.* 284, *853
Sabatino *v.* Crimmins Const. Co. 708
St. John: South Norwalk Trust Co. *v.* 705
Sallow: People *v.* 412
Salmer: State *v.* 417
Salmon, *In re* 126, 129
Salmonson *v.* Horswill 691, 701
Salt Lake Ry. Co.: Derrick *v.* 565
Samson *v.* Trustees of Columbia Univ. *422
Samuels: Cohen *v.* 403
San Joaquin L. & P. Corp. *v.* R. R. Com. 386, 416
Sargent *v.* Corey 542, 562
Sassoon *v.* Sassoon *849
Saunders *v.* Shaw 121, 134
Schaffer *v.* Krestovnikow 702
Scheiber: National Council of Knights, etc. *v.* 252, 270
Schenk *v.* City of Ann Arbor .. *424
Schlesinger: London & N. Estates Co. *v.* *173*
Schmidt, *In re* *850
Schuler *v.* Myton *374*
Schweizer: DeCicco *v.* 362, 407
Scranton Coal Co.: Graff Furnace Co. *v.* *79*
Seaver *v.* Ransom 563
Security Trust Co.: Luscher *v.* *713
Shackelford: Anderson *v.* *287
Shadwell *v.* Shadwell *362*
Shaw: Ryerson & Son *v.* 248, 278
Shaw: Saunders *v.* 121, 134
Shults Bread Co.: Borgsted *v.* *578
Simons, Matter of *1093
Sinclair: Thom *v.* 143
Smith & Tyrer: Miller, Gibb & Co. *v.* *289
Sobol, *In re* *219*
Solvuca *v.* Reilly & Ryan Co. .. 136
South Norwalk Trust Co. *v.* St. John 705

Southern Nat., etc. Corp. *v.* People's Bank 558
Southern Pacific Co.: Bogert *v.* 276
Southern Pacific Co. *v.* Darnell-Tanzer Lumber Co. *575
Southern Pac. Co. *v.* Jensen 255, 269, 924
Southern Pacific Co. *v.* Stewart *576
Southern Trust Co. *v.* Lucas .. 838
Sperry & Hutchinson Co. *v.* Weigle *850
Speyer Bros. *v.* Rodriguez *574
Standard Acc. Ins. Co.: Woods *v.* *852
Standard Gas Power Corp. *v.* N. E. Casualty Co. 274
Standard Silk Dyeing Co. *v.* Roessler, etc. Co. 408
Stankiewicz *v.* Stankiewicz *849
State Mut. Life Ass. Co. *v.* Bessett 957
State *v.* Assal 846
— *v.* Ball 138
— Clark *v.* 409
— *v.* Crowe *421
— *v.* District Court 571
— *v.* District Court *579
— *v.* Fabbri *286
— *v.* French *421
— Gardner *v.* 698
— *v.* Lankford 409
— *v.* Marron *286
— McNeal *v.* *852
— Pilcher *v.* 700
— *v.* Salmer 417
— *v.* U. S. Fidelity, etc., Co. .. *421
Steinberger *v.* Young 543, 568
Stewart: Southern Pacific Co. *v.* *576
Stickrath: U. S. *v.* 138
Stilley *v.* Buffalo Co. *78*
Stokes: McDevitt *v.* *369*, 407
Story *v.* Perkins 133
Stoyan: People *v.* 410
Suarez, *Re* 392, 415
Sugar: United States *v.* 133
Sugarman: United States *v.* ... 955
Sullivan: Angelus *v.* 683, 695
Sullivan: Heyer *v.* 956
Sullivan *v.* Hudson Nav. Co. 924, 952
Sullivan *v.* Rosson 1085
Sullivan: Union Bank *v.* *368*
Supt. of Vine St. Police Sta.: Rex *v.* *169*

T. G. Patterson, Inc.: Gifford *v.* *578
Tanner: Adams *v.* 134
Taylor *v.* Barton-Childs Co. ... *272*
Tennessee: Arkansas *v.* 836
Thom *v.* Sinclair 143
Thomsen *v.* Cayser 139
Thompson *v.* Thompson *62*
Thornsbury: Riordan & Co. *v.* 686, 695
Tilden: Buchanan *v.* *365*
Times Publishing Co.: Continental Bank & Trust Co. *v.* .. 559
Toledo: Allion *v.* 1079
Tommi, The *176*
Towers: Pennsylvania R. R. Co. *v.* 404
Towne *v.* Eisner 553, 569
Townshend: Corbin *v.* 1055, 1088
Travis *v.* Rochester Bridge Co. 961
Treasurer: Hill *v.* *288
Treasurer: Dana *v.* 677, 704
Triangle Film Corp. *v.* Artcraft Pictures Corp. 961
Trustees of Columbia Univ: Samson *v.* *422
Tucker *v.* Kirkpatrick *1096
Tuffy: Van Alstyne *v.* 964
Tully: Evans Piano Co. *v.* 561
Turner & Seymour Mfg. Co.: Jacquemin *v.* 965
Twin Falls, etc. Co.: Vineyard Land, etc. Co. *v.* 946, 952

Ungaro's Will, *In re* *714
Union Bank *v.* Sullivan *368*
Union Motor Sales Co.: Ford Motor Co. *v.* *288
Union Trust Co. *v.* Grosman..816, 836
United Shoe Mach. Co.: U. S. *v.* 1060, 1085
United States: Arver *v.* *575
— *v.* Bathgate *851
— Board of Trade *v.* *1094
— *v.* Casey *967
— *v.* Finley 683, 695
— Goldman *v.* 955
— *v.* Gradwell 137, *851
— Greer *v.* 838
— *v.* Hall 955
— *v.* Heyburn 686
— *v.* Missouri Pac. Ry. Co. ... *286
— *v.* Mitchell 808, 842
— *v.* Morena *574
— Rosen *v.* 572, 669
— *v.* Scott *967
— *v.* Stickrath 138
— *v.* Sugar 133
— *v.* Sugarman 955
— *v.* United Shoe Mach. Co. 1060, 1085
— Wayne County *v.*..... 1080
— *v.* Wong Kim Ark *310*
— Fidelity, etc., Co.: State *v.* *421

Van Alstyne *v.* Tuffy 964
Van Every: People *v.* *969
Vanderbilt University: Gamble *v.* 951
Veasey *v.* Peters 924, 952
Vermont Box Co. *v.* Hanks 565
Vineyard Land, etc. Co. *v.* Twin Falls, etc. Co. 946, 952

W. L. Ingle, Ltd. *v.* Mannheim Ins. Co. *174*
Walker *v.* Yarbrough 542, 572
Walls: Prendergast *v.* *288
Walsh, *In re* *289
Ward: Missouri K. & T. Ry. Co. *v.* 130

Warley: Buchanan *v.* 393, 407
Warner: Cristilly *v.* *663*
Warner's Features, Inc.: Helgar Corp. *v.* 697
Watt: Lithograph Bldg. Co. *v.* 557
Watts & Co., Ltd. *v.* Mitsui & Co., Ltd. 130
Wayne County *v.* U. S. 1080
Weigle: Sperry & Hutchinson Co. *v.* *850
Wells: Portuguese-American Bank *v.* *655
Wernher, *Re* 806, 848
West: Jeffersonian Publishing Co. *v.* 550, 557
Western Tel. Co.: Dale *v.* *289
Western Un. Tel. Co.: Pfiester *v.* 1091
Whitsett: Chicago Washed Coal Co. *v.* 273
Wilson *v.* Clinton, etc. Church 686, 695
Winfield: New York Central R. R. Co. *v.* .....135, 256 n
Wong Kim Ark: United States *v.* *310*
Wood: First Nat. Bank *v.* 951
Woods *v.* North Carolina P. S. Co. 559
Woods *v.* Standard Acc. Ins. Co. *852
Workman *v.* Lincoln Tel. & Tel. Co. 960

Yarbrough: Walker *v.* 542, 572
York Mfg. Co. *v.* Colley *1094
York Shore Water Co. *v.* Card *851
Young: Steinberger *v.* 568
Yulzari *v.* Dreyfus 963
Yung *v.* Roll Stickley & Sons .. 958

BOOK REVIEWS

The name of the reviewer is given in parenthesis.

Adams: *An Outline Sketch of English Constitutional History.* (*R. L. Schuyler*) 1102
Babbitt: *The Law Applied to Motor Vehicles.* (*Oswald Prentiss Backus, Jr.*) 297
Bigelow: *Cases on the Law of Property. Volume I. Personal Property.* (*M. F. Dee*) 425
Billson: *Equity in its Relations to Common Law.* (*Walter Wheeler Cook*) 290
Borchard: *Guide to the Law and Legal Literature of Argentina, Brazil and Chile.* (*John Bassett Moore*) 972
Bowers: *The Law of Conversion.* (*Karl N. Llewellyn*) 716
Clark: *Handbook of Criminal Procedure.* (*William G. Hale*) 975
Collins: *The National Budget System and American Finance.* (*Frederick N. Judson*) 974
Freund: *Standards of American Legislation.* (*W. F. Dodd*) 580
Gleason and Otis: *A Treatise on the Law of Inheritance Taxation.* (*W. H. McClenon*) 716
Healy: *Mental Conflicts and Misconduct.* (*Richard M. Elliott*) 425
Huberich: *The Law Relating to Trading with the Enemy, together with a Consideration of the Civil Rights and Disabilities of Alien Enemies and of the Effect of War on Contracts with Alien Enemies.* (*Edwin M. Borchard*) 854
Joannini: *The Argentine Civil Code, together with the Constitution and Law of Civil Registry.* (*Edwin M. Borchard*) 295
Judson: *A Treatise on the Power of Taxation, State and Federal, in the United States.* (*Charles Wallace Collins*) 856
Malagarrig: *La Unificacion International de La Letra de Cambio.* (*Guillermo A. Sherwell*) 1098
McBain: *American City Progress and the Law.* (*F. W. Coker*) 1098
Schouler: *A Treatise on the Law of Personal Property* 855
Sherman: *Roman Law in the Modern World.* (*Thomas R. Robinson*) ... 973
Stetson: *Some Legal Phases of Corporate Financing, Reorganization and Regulation.* (*A. E. Howard, Jr.*) 145
Stevens: *Unfair Competition.* (*A. E. Howard, Jr.*) 298
Strong: *Joseph H. Choate: New Englander, New Yorker, Lawyer, Ambassador.* (*Roger Foster*) 717
Williams: *Jurisdiction and Practice of Federal Courts.* (*George W. Rightmire*) 583

YALE
LAW JOURNAL

Vol. XXVII NOVEMBER, 1917 No. 1

THE LAW AS AN EXPRESSION OF COMMUNITY IDEALS AND THE LAWMAKING FUNCTIONS OF COURTS

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If we are to study law intelligently, we must not only understand what it is and its office in the social scheme, but also the forces which both immediately and mediately dominate its development. I shall assume for the purposes of this paper that each of the autonomic groups into which the human race is divided is an entity with a mind of its own which evolves ideals and makes laws to effectuate them, and creates the corporation known as the state to enforce its laws. In other words, I shall attempt to show that community ideals are emergent facts incident to the development of every community; that laws are the tools a community makes to effectuate its ideals, and the state, a corporation it creates to use these tools; or that laws and the state are the means a community employs to effectuate its ideals.

The term community has several meanings, but is sometimes used as synonymous with autonomic group; that is the sense in which I shall use it. The term state also has several meanings, but as I shall use it, it is synonymous with the governing entity of an autonomic group. In other words, as I use the term community, one of the autonomic groups into which the race is divided is intended; and as I use the term state, the governing entity of such a group is intended. By individual ideals, as I shall use that term, the opinions an individual forms as to what

he should do or omit to promote his own welfare and that of the human race is intended; and by community ideals, the opinions a community forms as to what it should do to promote its welfare and that of the individuals of whom it is composed. In other words, by community ideals, as I use that term, are intended the concepts that go to make up public opinion.

Notwithstanding it will be necessary to consider the evolution of the human race in order to understand how ideals are evolved, and why laws are made to effectuate them, I shall not consider the force which dominates its evolution, except in so far as may be necessary to show that that force, whatever it may be, is not the one which immediately dominates the making of laws.

There is a difference of opinion as to whether laws affect persons and property, or persons only; but I shall assume that they are made, and that while they affect property, they affect it through individuals; or that all laws are commands delimiting what those subject to them must do to avoid civil or criminal liability.

The term law has no technical meaning; consequently it will be necessary to define that term before I attempt to show what law is, or its office in the social scheme.

A definition, to be of any practical value, must be broad enough to include every feature common to all the rules of all the laws and systems of law that have been, are, or ever will be in force, and narrow enough to exclude all features peculiar to particular laws and systems of law. It is common knowledge that there are innumerable laws and systems of law, and that the rules of no two are identical. In fact, every system commands acts to be done that the other systems forbid. It is also common knowledge that we have the laws of grammar, of baseball, of billiards, etc., in addition to juridical law; also, that some of the rules of all the various systems are continually breaking down, and new rules being substituted for them.

The question, therefore, that naturally arises when these things are considered, is whether there are any features common to all the rules of all these various systems—in other words, whether there are any earmarks by which a law may always be known; or whether there is anything common to a rule which makes it a felony punishable with death to teach a servant to read, and one which makes it a misdemeanor to employ a servant who cannot read.

Many definitions of law can be found in the books—nearly as many, in fact, as persons who have considered the question.

One reason for this is because the term law has no technical meaning. We speak of the laws of nature, of juridical law, and of the laws of grammar, etc. This discussion, however, is limited to a consideration of juridical law; and while that narrows its scope, it is still true that the term law has no accepted meaning. As that term is sometimes used, its makers are intended, as when we speak of the end, purpose or problem of law.

If laws are made, that is, if they are not facts in the sense in which the so-called laws of nature are facts, what must be intended when we speak of the purpose of a law is the end its makers had in view when it was enacted.[1]

By law, as that term is sometimes used, the standard of justice, or the yardstick to determine right from wrong, is intended; and an attempt to define it resolves itself into an attempt to define the standard of justice.

I think that that standard is subjective, or to be found in the mind of the lawmakers; but many, perhaps the majority, think that it is objective, or to be found outside of the consciousness of the lawmaker. In other words, I think the yardstick to determine right from wrong for each of the communities into which the race is divided is to be found in its consciousness. If this view is sound, the time will come when the standard of justice will be found in the consciousness of the race; for the time is coming when all the different communities will be fused into one community, and when that time comes, community ideals will be the ideals of the human race. In short, in my view of the matter, the standard that is in fact applied to determine right from wrong is to be found in public opinion, whether the community that evolves it is a savage tribe or the race as a whole. While public opinion is the practical standard of justice, the ideal standard is the concept that those acts and those only that tend to promote the welfare of the race as distinguished from the welfare of particular communities are right, just and equitable.[2] While this is my view of both the ideal and the practical yardstick to determine right from wrong, the majority believe that the standard is objective, or that it is to be found somewhere in space rather than in the consciousness of the individual, of the community or of the human race. If we are to understand what law is and its office in the social scheme, it

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[1] Professor Roscoe Pound, *The End of Law* (1914) 27 HARV. L. REV. 195.
[2] Small, *General Sociology* (1905) 657-683.

will be necessary to determine which of these views is sound; that is, whether the standard is objective or subjective; but in order to save repetition, I shall consider that question when I am considering whether there are any features common either to the source or to the content of all laws and systems of law.

When law is used in the sense of the standard of justice, it is said that it "is the standard of conduct which in consequence of the inner impulse that urges men toward a reasonable form of life, emanates from the whole, and is forced upon the individual";[3] or that it is "the objective co-ordination of possible acts among men, according to an ethical principle which determines them and prevents their interference."[4]

Some of those who believe the standard of justice is objective think that it is to be found in individual liberty, or that only those laws are just which tend to promote the liberty of the individual at the expense of the community; in other words, that law is intended to effectuate individualism. Others think law is intended to hold society together; that the end of law is to find a place for everyone and to keep him in his place, and that those laws and those only that have that effect are just. Others think the standard is to be found in equality, and that those laws and those only that tend to make everyone equal before the law are just.[5] Others think the test to determine whether an act is just is to inquire whether it will promote the welfare of the race as distinguished from the welfare of particular individuals, or classes of individuals.[6] There are those who find the standard of justice in what the Germans know as "Kultur," and they think that those laws only are just that tend "to secure and increase the progress of culture by so moulding rights and the universal cultural values which it protects that the hampering elements are removed and the improved tendencies supported and strengthened."[7] In short, there are as many objective standards of justice as persons who believe in such a standard.

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[3] Orrin N. Carter, Introd. to Kohler, *Philosophy of Law* (1914) xxxvii.

[4] Del Vecchio, *The Formal Bases of Law* (1914) 218.

[5] Demogue, *Analysis of Fundamental Notions, Modern French Legal Philosophy* (1916) 371.

[6] Small, *op. cit.* 680-685.

[7] Kohler, *Philosophy of Law* (1914) 60.

As the term law is commonly used, the system of rules in force in a particular country delimiting what its citizens must do to avoid civil and criminal liability is intended. When used in this sense, law is said to be the "body of rules and principles in accordance with which justice is administered by the authority of the state";[8] and a definition of law usually assumes the form of a definition of one of these rules. They are said to be rules for the delimitation of interests;[9] of wills; and sometimes of both interests and wills; sometimes rules for the protection of interests; and when we come to the cases, they are said to be rules of civil conduct that the state will enforce;[10] or more generally, rules the state may enforce.[11] To some, these rules are as unchangeable as the laws of the Medes and Persians. Others recognize that they change to keep pace with the changes in their makers' ideals. Still running through much that is to be found in the books is the idea that there is something in law, "a core" or "inner nerve," as it is sometimes called, that causes it to develop in a way to promote the well-being of the race. As will be shown more fully later, this is putting the cart before the horse, or putting the thing that is made in the place of its makers. There is a force either in or outside of humanity that dominates its evolution or causes it to develop in such a way that the number of those who share in the good things of life is constantly increasing, while law is merely one of the things communities employ to bring this about.

If all the definitions of law to be found in the books are accurate from their authors' point of view, they afford but little help in our search for earmarks common to all rules of law. There are no features common to the definitions of law when it is used in the sense of the standard of justice, and when it is used in the sense of a system of rules the state will enforce; and the only feature common to the definitions of the second class is that a rule of law is a rule of civil conduct; intending by that a rule delimiting what those subject to it must do to avoid liability.

To say that a law is a rule of civil conduct is but little more helpful to one in search for the earmarks by which a law may

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[8] Pound, *loc. cit.*

[9] Korkunov, *General Theory of Law* (1909) 79.

[10] 1 Blackstone, *Comm.* *44.

[11] 25 Cyc. 163, 18 A. & E. Ency. Law 569, 5 Words & Phrases 4014.

always be known, than to say iron is hard to one who is trying to learn how iron may be known. In other words, such a definition merely changes the question from what features are common to all rules of law, to what features are common to all rules of civil conduct. While most persons will agree that law is intended to promote justice, there is, as has already appeared, no consensus of opinion as to the test to determine when a law is just, or as to the yardstick to determine right from wrong. While I think the test is to be found in the opinion of the majority, many think it is to be found outside of human experience. I shall attempt, however, to show that this standard is subjective, or to be found in the consciousness of the lawmakers, and that those laws and those only that tend to promote the welfare of the community as distinguished from that of particular individuals are just. If this view is sound, there are as many standards and sources of justice as systems of law; for in this view of the matter, each community evolves its own ideals and makes laws to effectuate them. As each community evolves its own ideals, each must have its own standard of right and wrong; for that standard, in so far as any particular community is concerned, is equal to the sum of its ideals. If, however, the standard were objective, every community would have the same standard of right and wrong; for if it were objective it would be a fact, in the same way gravity is a fact, that could be found, and the results it would produce in a given situation could be discovered and stated in the same way the effects that heat, light or sound will produce have been discovered and stated. In short, if the standard of justice is objective, it can be discovered, and the effects it will produce in any given situation can be stated with approximate accuracy, not only by judges, but by anyone who possesses the necessary skill and will take the trouble to make the necessary investigation. All fair-minded men will, I think, agree that that cannot be done, for if it could, public ideals would not change, and each generation would think the same thoughts as all those which preceded it. And it would be true that law is intended to find a place for everyone and to keep him in it; or rather, that it is intended to hold society together in the same way gravity holds the universe together. In short, unless mind is as inert as matter, there can be no objective standard of justice. Since this is so, a definition of law cannot include any features peculiar to the content of all rules of law; for if laws are made to effectuate their makers'

ideals, they are simply a means to an end, or tools invented to effectuate their makers' ideals. Since no two communities have, or for that matter can have, the same ideals, no two can have the same standard of justice or the same yardstick to determine right from wrong; for as we have seen, such a yardstick is composed of its makers' ideals; and it necessarily follows that no two systems of law can have the same content. The question, therefore, of whether there are any features common to all rules of law, or any earmarks by which such rules may always be known, resolves itself into one of whether there are any features common to the form or to the purpose of all rules of law. If the standard of justice is subjective, it necessarily follows that laws are made. And if they are made, it requires no argument to show that they are made to effectuate their makers' purpose. This would be true if the standard of justice were objective; but in that case, the force which dominates the making of law would be the same as the one which dominates the evolution of the race, and consequently the purpose of law would be the purpose of the Creator. It is true that laws are intended to effectuate their makers' purpose, whether they are of divine origin, or made by a community or an individual; for the mind of a community is so far like the mind of an individual that the only force which can induce it to give the command necessary to put itself in motion is a desire to satisfy one of its needs; and as will appear more fully later, such a desire is the only force that can induce an individual to give the command necessary to put his muscles in motion.

In short, the standard of justice is subjective, and all laws are not only made, but are made to effectuate their makers' ideals; that is, they are simply a means to an end.[12]

As has already appeared, all laws, in the final analysis, are commands; and it is obvious that they must assume that form if they are to effectuate their makers' ideals, for the only way in which that can be done is for the lawmakers to delimit just what those subject to the law shall do in a given situation. In other words, the only way in which a community can effectuate its ideals is by limiting individual freedom of action.

There are, therefore, three features common to all laws: they are rules that are made; they are made to effectuate their

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[12] Von Ihering, *Law as a Means to an End* (1913) liv.

makers' purpose—that is, they are the tools he invents to effectuate his purpose; and they limit individual freedom of action. As it seems to me, these features are common to all rules of law, and are the only features common to all laws and systems of law; that is, to the laws of grammar, of baseball, of billiards, etc., to say nothing of moral and of juridical law. You cannot think of a law that was not made; nor of one that is not a tool; that is, of one that was not made to effectuate its makers' ideals; nor of one that does not attempt to do that by limiting individual freedom of action, or by delimiting what those subject to it shall do in a given situation.

It is probably true that in the beginning these were all the features common to the rules of juridical law, but for countless centuries all such rules have had another common feature: that is, they have been rules the state may enforce. If laws are made either by individuals or by communities, it is obvious that they cannot effectuate their makers' purpose in and of themselves; for if they are made, they are not a force like gravity, but simply tools, and do not differ from other tools—for example, a blacksmith's hammer—in so far as the capacity to effectuate their makers' purpose is concerned. The hammer, in and of itself, is an inert mass, but the smith uses it to shape iron, or to effectuate his ideals. Force, however, is necessary to effectuate them, and as there is no force in the hammer, the smith applies force to it.

In the same way, there must be force behind laws if they are to effectuate their makers' ideals. The making of laws, therefore, is but one step in the process of effectuating ideals. To do that, laws must be both made and enforced. In other words, if a community is to effectuate its ideals, it must both delimit what its members shall do or omit in a given situation, and create an entity that will punish those who fail to do or omit the things the law commands; or it must compel them to compensate one who is injured or damaged for all the loss he sustains because of their illegal acts. By this is not intended that force enters into the composition of a rule of law.[13] What is intended is that force is one of the things necessary to effectuate ideals. Since this is so, when the entity which evolves ideals is a community, it must both make the laws and give some individual or corporation the power to enforce them, if it is to effectuate its ideals.

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[13] Korkunov, *op. cit.* 96.

All the rules of juridical law have, therefore, four common features: (1) they are made by a community; (2) to effectuate their makers' ideals; that is, they are the tools it invents to effectuate its ideals; (3) they limit individual freedom of action; that is, they delimit what those subject to them shall do in a given situation; and (4) they are rules that the state may enforce. The test, therefore, to determine whether a rule is a law in a particular community is to ask (1) if the community made it. (2) If it did, why it made it. (3) If it was made to effectuate one of the makers' ideals, how it attempts to accomplish that purpose; and (4) whether it is a rule the state may enforce, intending by that to punish those who neglect or refuse to do or omit the things it commands, or else compel them to compensate one who is injured or damaged by this failure to obey the law for all the loss he sustains because of their illegal acts.

If, however, the standard is objective, a law is a rule limiting individual freedom of action that the state may enforce. In other words, if there is such a standard, Blackstone's definition of law as a rule of civil conduct the state will enforce is both concise and accurate; for while it is true that laws are intended to effectuate their makers' purpose even if they are parts of creation, no definition of law that includes a statement of that purpose can be made that will be accepted by any considerable number of people; for while there are many who believe there is an objective standard of justice, there are no two who can agree as to just what that standard is.

This brings us to the question of the force which dominates the making of laws, and I shall attempt to show that it is the needs of a community as distinguished from the needs of the individuals who compose it. If the standard of justice is subjective; that is, if laws are made by either individuals or communities, we must begin the study of law with a study of the evolution of the human race. While it was once thought that the individual was the unit into which the race was originally divided, almost everyone now concedes that the unit was the social group. In short, it is now the orthodox view that there never has been a time when men either could or did live independently of their fellows,[14] or when each individual either could or did live by his own unaided efforts. In fact, there is something innate in every normal human being which compels him

[14] Berolzheimer, *The World's Legal Philosophies* (1912) 216.

to become a member of some social group. The elements which make up that something consist in part, at least, of sentiment, passions, physical and psychical wants, and a desire for the society of others, as well as for help and protection. Although that something is composed of these elements, the combination of them is not the same in any two individuals; still, some one or some combination of them dominates every normal human being and compels him to become a member of a social group. This was as true when time began as it is to-day. In fact, there never was and never will be a time when social groups were not and will not be absolutely essential, not only to the mental evolution, but to the very existence of the human race.

Since such groups are composed of individuals each with a mind and purpose of his own, it is obvious that law is essential to the existence of such groups. In other words, it is self-evident that a group cannot exist without law, intending by law, limitations on individual freedom of action; for if every one were to do just as he pleased, if no one respected the rights of others, we should not have groups of men associated together for mutual help and protection, but a situation in which each man was acting for himself, or a situation in which every man was against every other man.

In other words, if it were not for law we should have "a war of all against all," or a situation in which each man was constantly trying to overreach all the others. Law, therefore, is absolutely essential to the existence of a community, and communities are equally essential to the existence of the race. Since individuals cannot exist without communities, and communities cannot exist without law, it follows that both law and the social group are as old as the race. This shows that the needs of a community are the forces which dominate the making of laws, and the needs of individuals are the forces which dominate the forming of communities. We can get a fairly accurate view of a social group in the first throes of evolving ideals and inventing laws to effectuate them by studying young children. Such a study will show that when a child is born he is helpless, and that as he develops, he looks on those who care for him in something the same way the ordinary man looks on God. Experience, however, teaches him that his protectors can and do make mistakes, and that he must decide for himself what he ought to do or leave undone in a given situation; and there comes a time in the life of all normal children when they seek the society of

others of the same mental development, and form more or less compact groups. When such a group is first formed, none of the children have the slightest idea of law; but gradually the group evolves ideals and customs to effectuate them, and the dullest child soon learns that he must comply with these customs if he wishes to remain a member of the group. This shows us both how and why laws are made, as well as who makes them. The child study is also useful when we are considering the evolution of the state and its purpose in the social scheme. A group of children always develops around a leader who dominates its activities to a greater or less extent. Although the group begins to evolve ideals and customs to effectuate them as soon as it is formed, none of the children at that time understand the purpose of customs or why they should obey them. All they know is that they must obey them if they wish to remain members of the group. In time, however, they realize that the office of customs is to effectuate group ideals, and that customs are a delusion and a snare, or that they benefit principally those who intend to disobey them, unless the group enforces them. When the group finally grasps that idea, the leader is usually able to make use of it to increase his power. In other words, the leader is able to exercise authority over the group when it is first formed because of his real or fancied superiority; but when group consciousness develops, the idea that he represents the group and should be obeyed for that reason also develops and has a tendency to put him above the law. Since the mind of a child passes through about the same phases in the course of its evolution that the human mind has passed through, it is probable that the state developed in something the same way, or that each of the groups into which the race was divided developed around a leader who exercised more or less authority over it. As group consciousness developed, the leader made use of it to increase his power, which in time became autocratic.

It is impossible, however, to say that the analogy holds; all that can be said is that we have no traditions—much less any record—of a community with laws but without a state to enforce them. It is possible, however, to form a fairly definite idea of the predicament of such a community, for we have a complete system of international law in so far as familiar situations are concerned, but no machinery to enforce its rules; so, when a state commits any serious breach of international law, the community or communities that are aggrieved fight, as they say,

to enforce the law. In other words, in such cases, that usually happens which happened long, long ago when one member of a social group was injured by another's breach of a group custom.

Although we have no record of a time when there were communities with laws but without a state to enforce them, there was a time not so very long ago when the machinery for enforcing laws was woefully inefficient in so far as the communities from which we are descended are concerned. The earliest traditions relate to a time when the family was the autonomic group, and at that time, the head of the family exercised more or less authority over its members; but after tribes were evolved from the family, the tribe usually administered its affairs in an assembly composed of the whole body of free men. This is true in so far as the Germans from whom we are descended are concerned, and is probably true of the whole Aryan race. Each of these tribes had a chief who presided over its assembly and exercised more or less authority over tribal affairs. At first the office seems to have been personal; but gradually the chief was able to increase his power, and in time the office became hereditary and he became a king resting his right to rule on the will of God—not on the will of his people. When absolutism had done its work, the people tired of their kings and put them under the law; and in that way the modern constitutional state was evolved to do some of the things kings had done, and such other things as the community which made it thought would promote the community's well-being. In other words, a modern constitutional state is a corporation created by a community to administer its affairs. This is true notwithstanding most European states were evolved from the original group through the family, tribe and kingdom; for, while the community has the right to limit individual freedom of action in so far as that is necessary to effectuate its well-being, no man has or can have that right, if men are equal, except in so far as he acts for the community.

All states, therefore, no matter when or how they were formed, are corporations with such powers and such powers only as their creators gave them. To illustrate my meaning, the people who created the British monarchy vested the supreme legislative power in Parliament; but those who created the United States of America retained that power in their own hands.

If, therefore, we are to understand what a state can and cannot do, we must remember that while the community is

omnipotent, the state created by it can only make such laws as the community has authorized the state to make, and that the state cannot enact laws to effectuate a public ideal unless the community has authorized it to make them. The failure to realize this fact lies at the root of most of the honest criticism to which the courts have been subjected for holding statutes unconstitutional. It is true that in some cases these statutes were calculated to promote the well-being of the human race, and to promote it in the way the community approved; but in most cases it is also true that these statutes were in conflict with some one or more of the provisions of the constitution. In other words, while some one was to blame for the failure of some of these statutes, in most cases that some one was the community. In short, it is the community and not the state in which the power to make laws is vested. Since this is so, the common saying that if the state were destroyed, the law would perish, is in no sense true. The history of Europe since the sixth century makes this clear; for at that time the Roman Empire of the West was overthrown, but the civil law is still the common law in all or nearly all parts of Europe where those who evolved the ideals it was made to effectuate resided.

The history of the United States tends to the same conclusion, for the state perished when the thirteen colonies separated from Great Britain; but the only noticeable effect its destruction had, in so far as law was concerned, was that there was no machinery to enforce it until the colonies created new corporations for that purpose. The law and the state, therefore, are at one and the same time the tools the community makes to effectuate its ideals, and the things without which it cannot exist.

In short, as will appear more fully later, public ideals are emergent facts incident to the evolution of every community, while the law and the state are the means it employs to effectuate them. While law is made by a community and not by individuals, it is in a sense true that it is something a man carries with him wherever he goes. What he carries, however, are the ideals the law is intended to effectuate; and that explains why a colony always adopts the laws of the fatherland as its laws; for they are intended not only to effectuate the colony's ideals, but to effectuate them in the way it approves. That is all that is intended when it is said that our Anglo-Saxon ancestors brought their law with them to Britain, or that our British ancestors brought their law with them to America.

Massachusetts furnishes a good illustration of what I have in mind. The early settlers hated English law and everything that had to do with it with a hate that was both deep and cordial; but they were Englishmen with English ideals, and notwithstanding they adopted the law of Moses as their law, the form it assumed in their hands was that of the law of England, except in so far as religious matters were concerned. The reason for this is obvious: English law was, and the divine law was not, adapted to the industrial conditions that prevailed in Massachusetts. In other words, English law was adapted to their needs, and it was as natural for them to adopt it as their law as it was for them to use the English language.

Since a law is made by a community to effectuate its ideals, the problem for every community is, always has been and always will be to determine just what limitations it should impose on individual freedom of action to promote its well-being; and it may be useful to see how our Celtic-Anglo-Saxon ancestors solved that problem. History shows that they were accustomed to administer all their public affairs in local assemblies in many ways like a New England town meeting except that these assemblies exercised judicial as well as legislative and administrative functions.[15] When such an assembly was exercising its judicial functions, the test it employed to determine the legality of the act complained of was to inquire whether it was customary. That, as I shall attempt to show, was but another way of inquiring whether it was reasonable, or one of which they approved; for the issue of its legality was not decided by written rules, but by a vote of a majority of the suitors—or as we should say, those qualified to vote in that precinct—present and voting.

It is common knowledge that we are apt to think of the things we approve as customary. In short, with most men, inquiring whether an act is customary is but another way of inquiring whether it meets with their approval, and that was more nearly true a thousand years ago than it is to-day.

The test, therefore, that our ancestors in fact applied to determine the legality of an act was to inquire whether it was reasonable. In other words, about the only limitation our Celtic-Anglo-Saxon ancestors imposed on individual freedom of action was that of not doing anything that would injure or

[15] Thayer, *Evidence* (1898) 8.

damage others unreasonably; or stated positively, that of doing those things and those only of which the majority approve. The test, therefore, that our ancestors in fact applied to determine whether one who was injured by the acts of others could recover, was to inquire whether the act which injured him was reasonable or one of which they approved; and the verdict depended on how the majority answered that question. It is clear that, if laws are intended to effectuate public ideals, that is the test which should be applied to determine the legality of an act, for public ideals are the ideals of the majority. In other words, all acts the majority approve either are or should be legal, if the needs of the community are the forces that dominate the making of laws; and, that they are, is the foundation on which government by the people rests. Any act of which a majority approves is, therefore, customary, reasonable, right, just and equitable regardless of the effect it may have on individuals; and it follows that any rule the majority approves is just and reasonable regardless of the limitations it imposes on individual freedom of action. The law of every community, therefore, should consist of the general rule that it is everyone's duty to do those things, and those only, which the majority approve, and of a more or less complete body of special rules intended to apply the general rule to familiar situations.

The questions of how the needs of the community produce statutes, and how the rules of the common law are evolved, remain to be considered. I shall, however, consider them separately; for the agency the community employs to make statutes is not the same as the one which formulates the rules of the common law, and the knowledge of how statutes are made is apt to be misleading when we are studying the evolution of the common law. Since statutes are made by communities to effectuate their ideals, we must begin our study of how they are made with the study of the evolution of public ideals. That necessitates a study of the evolution of individual ideals, for the evolution of such an ideal is the first step in the evolution of all public ideals. In considering this question, it will be helpful to remember that while a community is an entity with a mind of its own,[16] it is composed of entities each of whom has a mind separate and distinct from the general mind, and more or less well-developed reasoning faculties; and each of these entities

[16] Small, *op. cit.* 133.

not only can, but is accustomed to, form opinions of his own as to the things he should do and as to how he should do them to promote his well-being and that of the community. It is as natural for men to form such opinions as it is to breathe, and all normal human beings at some time in their lives form more or less definite opinions in respect to such matters. In fact, so far as familiar situations are concerned, most men form very definite opinions as to what they should do or omit if they are to prosper. Most persons not only have their own opinions as to such matters, but also impose such limitations on themselves as they think are necessary to make their lives square with their ideals. The term ideals, as commonly used, includes a part only of the opinions a person forms as to what he should do or omit to promote his welfare and that of the community; but as I use that term, it includes all the opinions he forms as to such matters; that is, the opinions he forms as to economic and political as well as ethical questions. It follows that moral law, as I use the term, includes all the limitations an individual imposes on himself; that is, rules to determine how to vote and what to eat, as well as ethical rules. To understand how ideals are evolved, we must remember that the mind of an individual is so constituted that any want, either physical or psychical, that he may feel excites in him a desire to satisfy it; it follows that a person's desires increase as his wants increase. In other words, every normal human being possesses or is possessed by a constantly changing number of wants, some physical, others psychical; some selfish, others altruistic; each with the power to excite a desire to satisfy it. Such a desire is said to be a natural force, or a force that acts on mind in something the same way gravity acts on matter. In fact, it is said that such a desire is the only force that can produce mental activity, or the only force that can induce a man to give the command necessary to put his muscles in motion.

Since it is impossible for a man to satisfy all his wants at the same time, each of them is continually struggling to control his mind, and the opinions he forms as the net result of this struggle are what I have called individual ideals.

It is common knowledge that a person's ideals change not only with a change in his environment, but from various other causes, the trend of this change, so far as any particular ideal is concerned, depending largely on the relative strength of his desires. As no two persons have exactly the same environment,

or place exactly the same value on any given want, so no two have exactly the same ideals. By that is not intended that no two persons have any common ideals. The exact opposite is the truth, for there are no two men but have some ideals in common, and the great majority of the community entertain most of the ideals that make up public opinion. Notwithstanding everyone shares most of his ideals with a majority of the community, still every normal human being has some ideals peculiar to himself, and others that he shares with various groups each of which consists of less than a majority of the community. While individual ideals are evolved in this way, no individual evolves all his ideals for himself. In fact, the average man absorbs most of his ideals ready-made; that is, he selects such of the ideals of others as appeal to him, and adopts them as his own.

As has already appeared, all public ideals are evolved from individual ideals; but when we are studying the evolution of public ideals it is necessary to remember that the community is an entity with a mind separate and distinct from the minds of the individuals who compose it. It is impossible for me to say just what this entity is,[17] but I think that whenever two or more persons associate themselves together for any purpose, their minds interpenetrate in such a way as to form a common mind or a community mind in so far as the common purpose is concerned.[18]

In other words, while I cannot show just what the community mind is, or for that matter, just what the human mind is, I shall assume for the purpose of this discussion that there is such an entity, or that, while the individuals who compose a community are constantly changing, the minds of the members for the time being constitute an entity in something the same way the cells—the living organisms of which the body is composed—constitute the entity we know as the body; that is, each cell is at one and the same time a separate organism and a constituent part of the organism we know as the body; in the same way, the mind of an individual is at one and the same time a distinct entity, and a constituent part of the entity that I have called the community mind.[19]

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[17] Small, *op. cit.* 133.
[18] Korkunov, *op. cit.* 276.
[19] Miraglia, *Comparative Legal Philosophy* (1912) 370, 428.

The fact that this entity cannot be apprehended by our senses has no more and no less tendency to prove that there is no such thing, than the fact that the human mind cannot be apprehended in that way has to prove that it does not exist. Everyone will, I think, agree that there is such a thing as the human mind, and that it dominates the activities of every normal individual; and I think that it is as certain that the community mind, the common mind, the general mind or public opinion—call it what you will—dominates the activities of the community and is the final arbiter of right and wrong.

It will be enough for our purpose, however, to say that every community has a mind of its own, and that it is capable of evolving ideals. Although community ideals are the ideals of a majority of its members, they do not equal the sum of the ideals of all its members; for while the community mind does not contain any ideals not to be found in the mind of a majority of its members, the mind of every normal human being contains ideals not to be found in the community mind.

In fact, the community mind is in some ways like a composite photograph of the minds of all its members, for it reflects the ideals common to a majority, and not those peculiar to a minority of its members.

It helps but little, however, to say that the ideals the community mind reflects are those common to a majority of the community, for the struggle from which public ideals emerge is more complex and more difficult to understand than the one from which individual ideals emerge. While it is true that the desire which the needs of a community excite is the force which dominates the making of law, this desire is excited in individuals in many different ways. In some it is excited by selfishness, in others by altruism; in some by prejudice, in others by knowledge; in some by hate, in others by love; in some by passion, in others by experience; in some by one thing and in others by another. In fact, no one can say, so far as a given public ideal is concerned, which of these things moved the minds of the different members of the community. All that can be said is that one of these things or some combination of them dominated the minds of the majority. As we have seen, both individual and community ideals emerge from a struggle; but in one case, the struggle is carried on in the minds of a community, and in the other, in the mind of an individual. In one case the contestants are the wants, and in the other, the

ideals of individuals. In one, the emergent facts are community, and in the other, individual ideals. As has already appeared, community ideals make up the content of the community mind, or constitute the concepts that make up public opinion; and it will help us to understand what that is to remember that the struggle from which these concepts emerge began at the time the first social group was formed; that only a few of these concepts were evolved by the community as it existed at any given time; and that while some of them are as old as humanity, others were evolved but yesterday, and still others will be evolved to-morrow.

In other words, it will help us to understand what public opinion is to remember that while an individual is mortal, a community is immortal; or that, while the opinions of an individual begin and end with him, except in so far as he is able to impose them on others, public opinion had no beginning and will have no ending.[20] Although the community is immortal, its ideals change; and while this change may seem slow when measured by the changes that take place in individual ideals, it never ceases.

By this is not intended that the concepts of which it is composed do not continue as public ideals for an appreciable length of time; what is intended is that there is never a time when an ideal is not breaking down and new ideals being evolved from so much of the old ideal as is vital. The direction of this change, so far as any particular ideal is concerned, depends in part on the same facts that control the change in individual ideals, and in part on the relative strength of those who entertain the conflicting ideals.

Although this accounts in a general way for the change that is continually taking place in public ideals, it will, perhaps, be useful to consider this change a little more in detail. Something either physical or psychical in a person's environment reacts on him and causes him to re-examine the foundations on which one of his ideals rests. The usual result of such a re-examination is a new ideal. If this ideal appeals to others, there may at first be as many opinions in respect to it as persons who consider it; but in the end, the view of some individual or group of individuals prevails and transmutes what had been the ideal of

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[20] Small, *op. cit.* 139.

individuals into one of the concepts that go to make up public opinion.

It will be helpful to keep in mind what moral law is, and the part it plays in the development of law. As has already appeared, moral law is the law of the individual, or the means he employs to effectuate his ideals, while juridical law is the law of the community, or the means it employs to effectuate its ideals. It is necessary, in order to get an accurate idea of the similarities and the dissimilarities in the process by which the two classes of ideals are evolved, and of the forces which immediately dominate their evolution, together with the parts moral and juridical laws play in the social scheme, to keep constantly in mind the fact that a community is made up of a constantly changing number of individuals each of whom has a mind of his own and is constantly trying to satisfy his wants or to improve his condition; while an individual's mentality is made up of a constantly changing number of wants each of which is continually struggling to induce him to satisfy it. The community cannot permit one of its members to act in a given way without limiting to some extent the freedom of action of all its other members, and an individual cannot permit one of his wants to dominate his activities without limiting to some extent his capacity to satisfy his other wants. The problem for both the community and the individual is to regulate the activities of the entities of which they are composed in such a way that each shall have the greatest possible freedom of action consistent with the well-being of all the entities of which it, or he is composed.

Both attempt to solve this problem by imposing limitations on freedom of action. The community imposes them on its members, while the individual imposes them on his wants. To determine what limitation should be imposed, the yardstick employed by both is composed of what I have called ideals.

In other words, the community attempts to solve this problem by delimiting what it thinks each of its members should do or omit in all the different situations in which they may find themselves in the pursuit of business or pleasure, while the individual attempts to solve it by delimiting what he should do or omit under all circumstances. In short, juridical law plays the same part in the life of a community that moral law plays in the life of an individual; that is, public opinion does for a community what conscience does for an individual.

With these facts in mind, there is no difficulty in understanding how statutes are made. When a particular ideal becomes a public ideal, it excites a desire on the part of the community to effectuate it, and when this desire becomes strong enough, the community elects legislators who make the necessary laws.

While this shows how and why statutes are made, it also shows that the rules of international law are not so much laws as customs; intending by that, rules the majority think everyone should obey; or perhaps it is more accurate to say of these rules that they are emergent facts incident to the evolution of the race as a whole, for the only way in which they can be enforced is for each community to enforce them for itself. These rules will never be laws, except in the sense in which the laws of grammar, of baseball, etc., are laws, until a majority of the race realize that their first duty is to the race rather than to the particular community to which they owe allegiance, as for example to England, France, Germany or Russia; but if and when they finally realize that fact, they will have no difficulty in finding a way to make the laws necessary to effectuate their ideals and to create a state to enforce them. In other words, while the rules of international law are laws in the sense in which the rules of grammar are laws, they are powerless to effectuate the purpose for which they were made except in so far as the different communities wish to obey them. In fact, they are laws in the sense in which the rules of moral law are laws, but not in the sense in which the rules of juridical law are laws; for the community which makes them has not created an entity with power to enforce them, and such an entity cannot be created until a majority of the race realize that they are *men*—not Chinamen, Englishmen, Frenchmen, Russians, Turks or Germans; that nothing is really for the advantage of China, etc., that is not calculated to promote the welfare of the race as a whole; and that those laws and those only are right, just and equitable which are intended to promote the welfare of humanity as distinguished from the welfare of particular communities.

While the knowledge that public ideals are emergent facts incident to the evolution of all communities, and that law is simply a means to effectuate them, enables us to understand how and why statutes are made, it is of little or no help in enabling us to understand how the rules of the common law are made. In fact, this knowledge is positively misleading when we are trying to solve that problem; for after all is said, but a part

of these rules are true laws—that is, rules intended to effectuate public ideals, and to effectuate them in the way the public approve. In some cases the ideals they are intended to effectuate never were, and in others they have ceased to be, public ideals.

It will help us to understand what the rules of the common law are and how they were evolved to keep in mind the fact that the term law has no technical meaning. As it is sometimes used, natural law, or what was commonly supposed in the eighteenth and nineteenth centuries to be natural law, is intended. That is the sense in which it is used when it is said that it is an "unwritten" law, or what the court has in mind when it says that a case "must be decided on principle," or that it "found" the rule it applied to determine the rights of the parties. As has already appeared, this theory of law depends for its validity on the proposition that the standard of justice is objective.

By the common law is sometimes intended those rules that can be deduced from cases decided in the king's courts. While this, as will appear more fully later, is the original meaning of that term, its use in that sense is unusual at the present time.

As commonly used, that term includes both of these meanings and something more; that something more comprehends all rules that can be deduced from acts of Parliament and of the provincial legislature enacted before 1776. When used in this sense, the common law includes not only all rules that can be deduced from cases decided and statutes enacted before 1776, but also the doctrine that it is the duty of the court to "find" a new rule whenever a situation arises in which no statute and no formulated rule of the common law is applicable.

While it is often said that the common law is an unwritten law, by that is not intended that its rules have not been reduced to writing; what is intended is that they were not formulated by Parliament or by the provincial legislature. In other words, to say that the common law is an unwritten law is literally true only so far as new rules are concerned.

One very real difficulty to those charged with the duty of administering it results from the fact there are more versions of it than of the civil law—as many, in fact, as there are writers engaged in elaborating it, and courts in administering it. The fact that all these courts and writers are constantly limiting some of their rules, or in some way qualifying or modifying them, or in overruling old and substituting new rules, accentuates this difficulty.

It will be necessary to show what natural law is, or rather what it was supposed to be, in order to show that whatever the rules of the common law may be, they are not rules of natural law. By that term, as it is ordinarily used, something that delimits what everyone should do or omit in all places and under all circumstances is intended.

In other words, by natural law, as that term is ordinarily used, is intended a system of rules very like the laws of nature; or rules that are not so much commands which everyone subject to them should obey, as statements of the result that should follow in a given situation from the operation of natural forces.

That must have been the theory of those who elaborated the common law; that is, they must have thought of the rules they formulated as facts, for they say they "found" them, and it is obvious that neither a judge nor anyone else can "find" a rule that does not exist.

The court, therefore, must have thought of these rules as facts; and it is certain that if they are facts, anyone, whether a judge or not, who has the necessary skill and exercises sufficient diligence can "find" them and state them with approximate accuracy.

It is also clear that if they are facts, or if they can be "found," they are not laws in the sense in which statutes are laws, but rather laws in the sense in which the laws of heat, light and sound are laws. If the rules of the common law are laws in this sense, they control the development of the race. That seems to have been the belief of our fathers, for law was looked on by them not as a means to an end, but as an end that shaped the destiny of the race in the same way gravity shapes the course of a river. In other words, in the sixteenth, seventeenth, eighteenth and nineteenth centuries most persons thought of law as a system of rules of civil conduct that would work exact justice between man and man, not only in every situation in which a person had found himself, but in every situation in which he might find himself while time endured.[21] This would be true not only for your experience and for my experience, but for every possible experience. These rules were thought of not as made by man—that is, as the result of human experience—but as something that existed before time began and would exist after time ceased to be. In short, these rules were thought of as parts of creation

[21] Korkunov, *op. cit.* 130.

and as something that would endure without change as long as the universe endured.[22] Almost every one at that time seems to have believed in such a system, and what is more surprising, to have believed that the court and only the court could "find" those rules; and the court seems to have been of that opinion.[23]

In other words, there was a time when the court seems to have thought it was inspired, or that the rules it formulated were revealed to it. At that time, therefore, the common law was not thought of as consisting of rules that were made, and that sometimes did and sometimes did not work justice; but as a system as old as creation, composed of rules that not only always had, but that always would work exact justice between man and man; that is, as a system of specific rules as applicable to the needs of the men of the twentieth as to those of the sixteenth century. The fact these rules were often found to work injustice does not appear to have shaken men's faith in this theory of law. They seem to have thought this trouble was rather with the court than with the theory itself. As long as this view obtained, it did not seem quite as absurd to say the court "found" the rules of the common law as it does to-day,[24] when many think that the only sense in which the standard of justice can be said to be objective is that it is to be found in the consciousness of the community, or that the test to determine whether a rule is right, just and equitable is to inquire whether it will promote the welfare of humanity as distinguished from the welfare of particular individuals.

It is true that many, possibly a majority, either believe in natural law, or else believe that an abstract concept of justice can be "found" in the rules of written law by induction, and that law can be deduced from such concepts; but whatever view they entertain as to what law is, its purpose, and the force which dominates its development, all concede that the rules of the common law, in so far as they have been reduced to writing, were formulated by the court. Consequently, the study of the history of the court will show how these rules were in fact formulated, and will, as I think, demonstrate that they were made by the court in the same way statutes are made by the legislature, or that whatever they may be, they are not rules of natural law.

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[22] Del Vecchio, *op. cit.* 14-20.
[23] Preface 9 Coke xiv.
[24] Kohler, *op. cit.* 5.

At the beginning of the eleventh century there was no man or body of men either in or out of Britain that was making laws, or even pretending to make laws, for the whole kingdom. While it is true the Church was legislating, it was legislating for the world and not for Britain. At that time all of the courts in England made their own laws. Part of those courts were local assemblies of some or all of the freemen who lived in a particular hundred or shire, township or county, while the others were composed of some or all of the men who lived on a particular estate; but both classes of courts were alike in that they made their own laws. In other words, at the beginning of the eleventh century every court in England—there were hundreds of them—made its own laws. Each court not only made its own laws, but made them, as has already appeared, by vote of the suitors present and voting. There were, therefore, at that time hundreds of laws in force in Britain—so many, in fact, that it is nearly true to say not only that every county, borough and township had its own laws, but that all the large estates had their own laws; and that was literally true in the twelfth century. In fact, the test all courts applied at that time to determine the legality of an act was to inquire whether it was customary, and that, as has already appeared, was but another way of inquiring whether it was one of which the suitors approved. After the kingdoms into which Britain was originally divided had been fused into a single kingdom, and land had become valuable and an object of commerce, this system of local courts was found to be ill-adapted to the needs of the people; and William the Conqueror created a court which in time was to make laws affecting the property rights of every freeholder in Britain, and, for that matter, everyone who lives under the common law.

This court, soon after it was created, aspired to universal jurisdiction; and to bring that about, it made the same use of the doctrine that all land is held of the king that Congress is making of the "commerce clause" of the federal Constitution. The public need that enabled the king's court to accomplish its purpose was that of a uniform system of land-laws, while the public need that is enabling Congress to accomplish its purpose is that of uniform laws in respect to manufacturing and transportation. It is impossible to say just what part feudal ideas played in the evolution of this court, and just what part the ideas of the Roman jurists. It is, perhaps, enough for our purpose

to say that it was feudal in so far as jurisdiction was concerned, and Roman in so far as the making of laws was concerned. In other words, it differed from all the courts in the kingdom, except the courts of the Church, in the way it made its laws. In all the other courts, as we have seen, the laws were made by the suitors of the court, or as we should say, by those qualified to vote in that precinct. In the king's court, however, the judges made laws in much the same way the Roman emperors made them, or in much the same way the popes were making them at that time. In short, while the king's courts were in some ways like the communal and feudal courts, they differed from them in the way they made laws. They were, however, like all courts of that day in that they were business institutions in the sense that while they did "right and justice," they did it for a price.

Their justice, however, was better than that of most of the local courts, and as they were stronger and better able to enforce their decrees, they naturally attracted, and in the end monopolized, the business. In fact, their business increased so fast that by the end of the twelfth century, their law began to be known as the common law, or as the law common to all freeholders in Britain, to distinguish it from the laws of all the local courts in the kingdom, as well as from the canon and the civil law.

The king's court for a century after its law began to be known as the common law was the only temporal body making laws affecting private rights in all parts of England; but in the last quarter of the thirteenth century, Parliament assumed something like its present form, and engaged in the lawmaking business. In other words, toward the end of the thirteenth century Parliament as we know it was evolved from the king's *Wittan,* or assembly of wise men, to do for the people of England what the king's courts were doing for the king; but it did not arrogate to itself the sole power to make laws for several centuries after it assumed its present form, as witness the fate of several famous statutes. In fact, that is true to-day; for while the court is accustomed to say that it has no power to make laws, it says in the same breath that it "finds" the rules of the common law; but it is obvious, as it seems to me, that the judges made the rules they formulated in the same way Parliament made statutes; that is, whether or not the judges realized what they were doing, they made the rules of the common law to effectuate the ideals of their royal master in the same way the members of Parliament made statutes to effectuate the will of the people.

As the power of the people waxed, the power of the king waned, and Parliament gradually took over more and more of the lawmaking business; but it had not assumed exclusive jurisdiction when Britain lost her American colonies. In other words, while the court's power to make laws had been somewhat curtailed in 1776, it had not been taken away; and at that time, the King's Bench, the Common Pleas and the Exchequer, as well as all the local courts in the kingdom, were making laws as well as enforcing them.

If anyone has any doubts on this point so far as the king's courts are concerned, he should study their history for the middle of the eighteenth century. Such a study will show that the king's courts,—or rather, that Lord Mansfield was elaborating the law of contracts as applied to the transactions of merchants at the time the American states ceased to be British colonies, and just prior to that time. When the people of America separated from Great Britain, they created states to administer their public affairs, and courts to administer their laws. They gave these courts the same powers as the English courts, in so far as their powers were not limited by the Constitution.

The English courts, as we have seen, were legislative bodies and were making laws at that time in the same way they had been making laws ever since they were created in the latter half of the eleventh century; and it would be fair to assume that those who adopted the Constitution intended for the courts they created to legislate in the same way and to the same extent the king's courts were legislating at that time, if it were not for the provisions of the Constitution; for the king's courts had been doing business for nearly seven hundred years, and no one up to that time had even suggested that they should not "find" a rule when no statute or specific rule of the common law was applicable, to determine the rights of the parties in a case they were considering. The constitution of New Hampshire—and this is substantially true of all the states—provides that the law shall consist "of all the laws which have heretofore been adopted, used, and approved in the province, colony or state,"[25] together with such laws "not repugnant or contrary to this constitution"[26] as the legislature may from time to time enact. All rules, therefore, that can be deduced from acts of Parliament and of the pro-

[25] *Const.*, Part 2, Art. 89 (90).
[26] *Ibid.*, Art. 5.

vincial legislature enacted before 1776, or from the reports of cases decided before that time, are in force as laws by virtue of this provision of the constitution. Such rules, however, constitute but a very small part of the rules of the common law, as that term is understood and applied by the courts. In other words, most of the rules which are applied by the courts to determine the rights of the parties cannot be deduced from this provision of the constitution or from the acts of the legislature, but have either been made by or revealed to the court.

It is idle to say that the court does not legislate, that the constitution forbids it; for even a casual reading of the reports will show that it makes rules and applies them to determine the rights of the parties in the same way, if not to the same extent, as the courts of Henry II.

In short, such an examination will show that the court does legislate, if making laws is legislation; and this in the face of its declaration that the constitution forbids it to legislate. As it seems to me, such a course is impolitic and calculated to discredit the court. If it must legislate, it should change front in so far at least as to hold that it is its duty under the constitution to legislate in the same way and to the same extent the English courts were legislating in 1776; but whatever it does, it should not attempt to look in both directions at the same time. It should either cease to legislate, or cease to declare that the constitution forbids it to legislate; for it is not true to-day, as it was when Glanvil, Bracton, Coke and Blackstone were elaborating the law, that most people think laws are parts of creation, or that the court can "find" specific rules which will work exact justice between man and man not only in the case it is considering, but in any case that may hereafter arise in which a person is injured or damaged by a similar act. It can neither find such rules in the literature of the common or the civil law, nor evolve them from its inner consciousness, if laws are intended to effectuate public ideals; for such ideals are emergent facts incident to the evolution of every community, and everyone will, I think, agree that that is not a logical process.[27] Although it may be true that even fifty years ago almost everyone believed that the court "found" the rules of the common law, that is not true to-day. In fact, the number of those who refuse to take the

[27] *Cavanaugh v. Boston & M. R. R.* (1911) 76 N. H. 68, 72, 79 Atl. 694, 696.

court seriously when it speaks of "deciding a case on principle," or of "finding" a rule of law, is constantly increasing. In fact, there are many who think that the rules courts formulate are the result of reactions on the minds of the judges in the same way statutes are the results of reactions on the minds of the legislators. While it is true that the court makes the rules it formulates, or that they are the result of reactions on the minds of the judges, it is not true that the force which reacts is the same as the one that reacts to produce statutes. The latter force is the needs of the community as evidenced by public opinion, while the one which reacts on the minds of the judges to produce the rules of the common law is composed of public opinion and various superstitions that have come down to them from the days of Coke and Blackstone. One of these is the theory that what the court says in a given case is not so much the reason it gives for deciding as it does in that case, as rules to be followed in all cases; another superstition that contributes is the court's belief that it is powerless to change one of its rules even when it works manifest injustice. Another is the tradition that the rules it formulates are not products of human experience, but exist separate and apart from experience and are revealed to it; or that what it does when it formulates a rule is not to make but to "find" it; in other words, the court's belief that when it formulates a new rule it is doing what Newton did when he formulated the law of gravity. However irrational this theory may be, it has contributed in the past, and to a degree continues to contribute, to the difficulty in understanding what the rules of the common law are. It may be and probably is true that this belief is gradually fading away, for the court will now permit the legislature to make any reasonable changes in the law,[28] while only a few years ago it would not hesitate to override a statute[29] or even a provision of the constitution which conflicted with its views of what the law should be.[30]

The court's change of heart has not, however, proceeded far enough to remedy all the evils peculiar to judicial legislation; for at the present time when a new question arises, it is governed more in framing a rule to decide it by what Glanvil,

[28] *Carter v. Craig* (1914) 77 N. H. 200, 90 Atl. 598; *State v. Prince* (1915) 77 N. H. 581, 94 Atl. 966.

[29] *Phillips Exeter Academy v. Exeter* (1878) 58 N. H. 306, 42 Am. Rep. 589.

[30] *State v. U. S. & Canada Express Co.* (1880) 60 N. H. 219.

Bracton, Coke, or Blackstone may have said in respect to a somewhat similar matter, than by a consideration of the results it will produce; that is, by a consideration of whether these results will probably be just as the ordinary man understands justice; while it is too plain for argument that that is the test which should be applied to determine whether a law is just, if laws are intended to effectuate public ideals.[31]

Just what part public opinion plays in formulating the rules of the common law is very difficult to say. It is the final test with many judges, or what a judge has in mind when he says that a particular rule does not apply because of the results it would produce. It is obvious that it dominates the minds of all judges to a greater or less extent; for whenever the results a rule produces are usually unjust as the ordinary man understands justice, the court will find a way of distinguishing the case it is considering from the one it was considering when the rule was announced. In other words, the court will overrule the rule while professing to follow it.[32]

It is, therefore, in a sense true that public opinion is the final arbiter of right and wrong in so far as the rules of the common law are concerned, as well as in the case of statutes. The practical objection to judicial legislation, therefore, is not so much the fact the constitution forbids it, as that the public opinion the judge-made rules reflect is that of yesterday rather than that of to-day.

The court's failure to realize these facts not only has excited, but must necessarily continue to excite, criticism; for public opinion is not only constantly changing, but the changes take place more quickly and at more different points with each succeeding century. In other words, the number of ideals that break down, as well as the number of new ideals that are evolved in a given time, are constantly increasing to keep pace with the changes that take place in education, industrial conditions and humanitarian ideals. The study of history is all that is necessary to realize these facts. That will show that for several centuries after our Anglo-Saxon ancestors came to Britain, their ordinary occupations were piracy, driving their neighbors' cattle and killing those who disagreed with them or had anything they wanted.

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[31] *Cavanaugh v. Boston & M. R. R.* (1911) 76 N. H. 68, 72, 79 Atl. 694, 696.

[32] *Frye v. Hubbell* (1907) 74 N. H. 358, 68 Atl. 325.

If piracy was not recognized as a perfectly legitimate business, it was at least tolerated until long after the middle of the sixteenth century.

In fact, that was essentially true until after the middle of the nineteenth century, for it was 1856 when England and France, and 1898 when the United States, finally refused to recognize the right of a nation to license individuals to make war on the commerce of its enemies. Driving their neighbors' cattle and murder are still the ordinary occupation of those inhabiting a large part of Mexico, and that was true but a few years ago of the Panhandle, New Mexico, Arizona and the Indian Territory. In fact, it is nearly true to say that in the past there was a time when many, perhaps most, of the things we consider as right and just, if not looked on as wrong, were not thought of as essential, and when most of the things we think of with horror were considered as right and just—many of them, in fact, as absolutely essential to the salvation of the race. For example, civilized Rome crucified Christians for nearly two centuries. Christian Rome burned heretics for a much longer period, and our ancestors in the sixteenth, seventeenth and eighteenth centuries were accustomed to hang Catholics, Quakers, and witches. To come down to more modern times, it was a crime in at least one state as late as the middle of the nineteenth century to teach a servant to read, while now it is a crime in some states to employ one who cannot read.

Since natural law is a will-o'-the-wisp, or since there is no objective standard of justice other than public opinion, and since that is constantly changing, the question that must be decided is what the court should do when a new question arises; for history teaches, if it teaches anything, that courts are to do justice as well when there are no specific rules applicable as when there are such rules. In other words, history shows that there were judgments, not before public ideals were evolved, but long before specific rules intended to effectuate them were formulated. The question, therefore, is not whether the court shall do justice in all cases, but how it shall settle disputes when no specific rule is applicable. In short, the question is whether the court shall legislate in such cases as our Norman ancestors were accustomed to do, or whether it shall decide them as questions of fact as our Celtic-Anglo-Saxon ancestors were accustomed to do; that is, by inquiring whether the average man would have done the act complained of. As a practical proposi-

tion, it probably makes little if any difference which of these courses the court pursues, if it remembers that an act which was right and just yesterday may not be reasonable to-day, and that if it is right to-day, it may not be to-morrow; in other words, if the court remembers that it is not true that the law of yesterday was, and that the law of to-morrow will be, the same as that of to-day, except in the sense a person's body is the same to-day that it was yesterday and will be to-morrow. The cells, the organism of which the body is composed, are never twice the same. When one has served its purpose another is substituted for it, and in time nothing is left of the original body. Notwithstanding these changes, the body, in so far as it is considered as a whole, is always the same, for the new cells perform substantially the same office as those for which they were substituted. So with the law; the special rules intended to apply the general rule to specific situations are constantly changing, but notwithstanding these changes, the law as a whole always consists of the general rule and a more or less complete body of special rules intended to apply the general rule to specific situations; and in this sense, it is true that the law never has changed and never will change; but it is equally true that the law is constantly changing. The ideal of an individual gradually develops into a public ideal, and then as gradually looses its hold on the public; and when that happens, rules intended to effectuate it cease to have any office to perform even though they remain as parts of the law. Their position is like that of a dead limb. The limb remains a part of the tree until it drops to the ground or some one takes the trouble to remove it; so a dead rule remains a part of the law until the legislature repeals or the court overrules it.

The truth of the matter seems to be that the rule, it is everyone's duty to do those things and those only the majority approve, never has changed and never will change, but some of the special rules intended to apply this general rule to specific situations are continually changing. When an ideal has served its purpose, rules made to effectuate it have no office to perform. A new ideal is evolved from so much of the old ideal as is vital, and new rules are made to effectuate it. This process of decomposition and recomposition of public ideals and the making of rules to effectuate them is always going on;[33] and while the new

[33] Kohler, *op. cit.* 345.

rules, like the old, are intended to effectuate public ideals, they always differ from them. In other words, the rules of every system of law are continually changing to keep pace with the changes in public ideals, but all that can be said of this change is that it is dominated immediately by the needs of humanity; but who can say who or what dominates the evolution of humanity?

THE STANDARDIZING OF CONTRACTS

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THE STATUS-TO-CONTRACT THEORY QUESTIONED

Ever since Sir Henry Maine wrote his *Ancient Law* (1861) it has been a commonplace among jurists—and some who are not jurists—that "the movement of progressive societies has hitherto been a movement from status to contract." The formula has generally been gratefully accepted as a very useful summary of many phenomena encountered in legal history. Usually, its original meaning is extended so as to embrace within the concept of "status" the immediate or the remote results of agreement. Now and then the formula has been modified or limited,[1] or exceptions to it have been noted;[2] then the universality of the doctrines began to be questioned;[3] and finally its applicability to Anglo-American law has been categorically denied. In Dean Roscoe Pound's latest contribution to his forthcoming *Sociological Jurisprudence* we read:

> "But Maine's generalization as it is commonly understood shows only the course of evolution of Roman law. It has no basis in Anglo-American legal history, and the whole course of English and American law to-day is belying it unless, indeed, we are progressing backward."[4]

The issue framed by this flat contradiction is one of fact. Viewed as an event in the history of Anglo-American juristic thought, this rejection of a fundamental concept in current jurisprudence is no mere academic quibble. The position taken by Dean Pound seems an essential part of the groundwork of his sociological jurisprudence. Thus, he remarks upon the significance of

> "the legislative development whereby duties and liabilities are imposed on the employer in the relation of

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[1] Thus, Edward Jenks in *Law and Politics in the Middle Ages* (1897) speaks of "Caste and Contract." See Chapter VII.

[2] *E. g.* by William G. Miller, *Lectures on the Philosophy of Law* (1884) 73, quoted in 30 HARV. L. REV. 219.

[3] Sir Frederick Pollock's Note L to Chapter V of Maine's *Ancient Law* (1906).

[4] Roscoe Pound, *The End of Law as Developed in Juristic Thought* (1917) 30 HARV. L. REV. 219.

> employer and employee, not because he has so willed, not because he is at fault, but because the nature of the relation is deemed to call for it."[5]

It is not only "significant"; it represents "the settled tendency of the present." For such statutes the new jurisprudence bespeaks "the sympathetic judicial development which all statutes require in order to be effective." The new school denies the soundness of the historical views of those courts that have been talking of freedom of contract in such matters.

THE DOCTRINE APPLICABLE UNTIL MAINE'S DAY

Now what is the fact? Is there indeed "no basis in Anglo-American legal history" for the status-to-contract theory as generally understood? Its original application was to personal relations derived from or colored by the powers and privileges anciently residing in the family. Is it not true that the relation of master and servant was originally—and still is nominally—a domestic relation? And whether the nineteenth century was out of line with the common law or not, is it not a fact that it has made of this relation a contractual one? "Employer" and "employee" (words having reference to the contract) now seem more appropriate terms than the older "master" and "servant" (words having reference to status).[6] What of the relation of principal and agent? Historically, the making of this relation has not depended on contract. Hence, persons incapable of making contracts are still competent to become agents. But in the living law of the last century this relation, too, has veered from status to contract. The naïve statement in many text books and judicial opinions that "agency is a contract" is evidence of the tendency, if not of the law.[7] Perhaps even the marriage relation has been made somewhat subject to contract law, at least on the property side; though, of course, here we should expect

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[5] *Ibid.* Cf. Roscoe Pound, *Liberty of Contract* (1909) 18 YALE LAW JOURNAL 454.

[6] Thus, 26 Cyc. 968: "The relation of master and servant arises only out of contract."

[7] 2 C. J. 432, Agency as a Contract, quotes *Cullinan v. Garfinkle* (1906) 114 App. Div. 509, 512, 99 N. Y. S. 1119, 1121: "Agency is a contract, and like other contracts, it is essential that the minds of the parties should meet in making it." *Cf.* the outline and treatment of the subject in Evans. *Agency* (1878) Chap. II, being entitled "The Parties to the Contract."

more conservatism, and marriage must still be considered a status.[8] But when we leave the family circle and turn from the original application of the formula to its possible applications "as it is commonly understood," it becomes difficult to comprehend what is meant when we are told that the generalization has no basis in Anglo-American legal history. Holmes has shown the fact, whatever the reason, that the law of bailments was originally a law of status, and that the nineteenth century has stretched contract law so as to make a contract even of a gratuitous bailment.[9] Perhaps here the change is in the theory of the law rather than in the law itself; but what shall we say of the law of landlord and tenant? Beginning in status as indicated by the terms still used—though "lessor" and "lessee" are displacing them—it has progressed to the point where every letting is an *agreement* of lease. A lease was formerly a conveyance of property, an instrument of status.[10] We can even localize the point where *assumpsit* was allowed alongside of debt in the collection of rents.[11] Turn to the history of *assumpsit*.[12] The early tradesman was there sued as tradesman and not as a contracting party. We may lament this progress and blame all our ills upon it,[13] if we will, but the fact remains that most business relations have become contractual relations,[14] and—at least until Maine's day—all business relations had shown a tendency in that direction. In the law of negotiable instruments, the peculiar rights and liabilities of the parties were connected with the status of being a trader until Lord Holt declared that the "gen-

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[8] A score or more of our states have statutes declaring marriage "a civil contract," having reference rather to the inception of the relation than to its incidents. *Cf.* Sheldon Amos, *The Science of Law* (1880) 217: "It is obvious from this investigation, as has been already indicated, that marriage has a tendency to glide into a mere contract." Even in guardianship, the element of consent now plays an important part.

[9] O. W. Holmes, *The Common Law* (1881) Lecture V.

[10] The current definitions of a lease shift between the ideas of a conveyance and of a contract. For a collection of them see 24 Cyc. 894.

[11] For the Elizabethan cases showing the transition, see 2 Gray's *Cases on Property* (2d ed.) 571 ff.

[12] *Cf.* James Barr Ames, *The History of Assumpsit* (1888) 2 HARV. L. REV. 1, 53, reprinted in 3 *Select Essays in Anglo-American Legal History* (1909) 259-303.

[13] *Cf.* Edward A. Adler, *Business Jurisprudence* (1914) 28 HARV. L. REV. 135, 147 ff. See my note in 23 JOURN. POL. ECON. 553, 554.

[14] *Ibid.* 555.

tleman" who signed a negotiable document became *ad hoc* a trader.[15] The basis thereafter was agreement. But more significant, because deeper, than the changes in particular branches of the law, has been the development of the general theory of implied contract. This is illustrated in the history of possessory liens. The presence or absence of a lien has come imperceptibly to depend on the implied contract. Of course, the terms of the implied contract are to be sought in usage; but there was a time when usage merely dictated a list of bailees whose status entitled them to liens of one kind or another without the mediation of any theory of implied contract.[16]

Maine was, of course, no prophet. He could not foresee the twentieth century tendency of our law to go back to the *Year Books,* but as a shrewd observer of the tendencies about him, he was unsurpassed. At least, with reference to his status-to-contract generalization, whatever limitations we shall have to insert, whatever exceptions we shall be forced to engraft on the rule, we must—however reluctantly—dissent from the view that it was a mere Romanism with "no basis in Anglo-American legal history." Here is poetic justice, indeed. Maine, who falsely accused Bratton of foisting Roman law on his unsuspecting countrymen, is now charged with having foisted Roman jurisprudence on his still unsuspecting countrymen!

THE PRESENT TENDENCY A REACTION

Still, if Maine's observations of the past were correct, the present tendency is clearly a reaction in the opposite direction. Dean Pound enumerates, besides the instance of the workmen's

[15] *Witherly v. Sarsfeild* (1687) 1 Shower 127, *sub nom. Sarsfield v. Witherly,* Carthew 82.

[16] As Ames explains *Chapman v. Allen* (1632) Cro. Car. 271, the existence of the lien depended on the absence of a contract. In 1794 Lord Kenyon said that liens were either by common law, usage, or agreement. *Naylor v. Mangles,* 1 Esp. 109. A few years later (1806) in *Rushforth v. Hadfield,* 7 East *224, *230, one of the judges said *arguendo,* "And it is admitted that the question . . . was properly left to the jury, . . . if the usage for the carriers . . . were so general as that they must conclude that these parties contracted with the knowledge and adoption of such usage." Usage is brought under the head of agreement. It is only one more step to say (as is done *e. g.* in 25 Cyc. 663) that liens can be created only by a contract express or implied, and to look upon the lien given to an innkeeper by a wrongdoer as an exception based on public policy.

compensation acts, those of public service companies, insurance, and surety companies. We may add many other cases, not only those in which the statute book says "any contract to the contrary notwithstanding," but also those in which it prescribes the terms of a relation only in the absence of a specific agreement to the contrary. In fact, because of the constitutional limitations which we inherit from the days of freedom of contract,[17] the second class of provisions is still the more important check on the tendency that seemed to be making every contract a law unto itself. In ordinary transactions, people cannot or will not stop to make special agreements "to the contrary." Therefore, they find themselves governed by the statute with its prescribed insurance policy, its prescribed bill of lading, warehouse receipt, stock-transfer, negotiable instrument, articles of partnership, its prescribed type of sale. When the question arises whether title has passed to a buyer, they will find the answer in the mechanical

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[17] Some of the greatest legal battles of the day are being fought over statutory collisions with the principle of freedom of contract. The issue was clearly put by one of the more conservative judges: "In the privilege of pursuing an ordinary calling or trade, and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto." Yet "this right to contract in relation to persons or property or to do business within the jurisdiction of the state may be regulated and sometimes prohibited when the contracts or business conflict with the policy of the state as contained in its statutes." Peckham, J., in *Allgeyer v. Louisiana* (1897) 165 U. S. 578, 591, 17 Sup. Ct. 427, 432, 41 L. Ed. 832, 836. Just how far courts will go in their respect for such public policy is a question of degree, depending in the final analysis on the trend of the times towards status or contract. The recent tendency to extend the police power in defiance of the idea of liberty of contract is well illustrated in Professor Felix Frankfurter's paper on *Hours of Labor and Realism in Constitutional Law* (1916) 29 HARV. L. REV. 353. To the decisions there enumerated should be added, perhaps as a climax, *Bunting v. Oregon* (April 9, 1917) 37 Sup. Ct. 435, which he succeeded in saving from a reversal in a divided Supreme Court. Other interesting contributions to the literature of the "apologetics of the police power" in this connection are: Ernst Freund, *Limitation of Hours of Labor and the Federal Supreme Court* (1905) 17 GREEN BAG, 411; *Constitutional Limitations and Labor Legislation* (1910) 4 ILL. L. REV. 609, 622; Learned Hand, *Due Process of Law and the Eight-Hour Day* (1908) 21 HARV. L. REV. 495; Roscoe Pound, *Liberty of Contract* (1909) 18 YALE LAW JOURNAL 454; Edward S. Corwin, *Social Insurance and Constitutional Limitations* (1917) 26 YALE LAW JOURNAL 431. Several interesting papers in the recent periodicals touch on the subject in connection with the Adamson law and the Supreme Court's decision upholding it.

rules of the code for the ascertainment of their "intention," a constructive intention. The effect is a making of contracts in wholesale lots, just as we now make corporations in wholesale lots. A practical check on the individuality of contracts, if not a theoretical limitation on the freedom of contract, and a standardization of legal relations, are the net results.

DEGREES OF STANDARDIZING OF RELATIONS

After all, the question is not so much one of status and contract as it is of a broader classification that embraces these concepts: standardized relations and individualized relations.[18] In what Maine calls status, that is, the ancient family relations, or caste, the rights, privileges, powers and immunities (and the correlative duties, limitations, liabilities, and disabilities)[19] were thoroughly standardized. In ascertaining them, the peculiarities of the individual agreement of individual members of society were irrelevant. But so are many of the peculiarities of an agreement ignored in later stages of society where a formal contract of this or that type results in a more or less standardized relation. Here, we include not only the early Roman forms of sale and the old English conveyances of land, but marriage, the taking up of the feudal relation at other stages in the law, and the purchase of a standard insurance policy to-day. The point of likeness is that a relation results in which the details of legal rights and duties are determined not by reference to the particular intentions of the parties, but by reference to some standard set of rules made for them. In origin, these relations are, of course, contractual; in their workings, they recall the *régime* of status. Maine's original statement has reference to a classification on the basis of origins. His argument applies—and is generally applied—to a classification of relations on the basis of their workings. In this sense, the difference between status

[18] This formula includes more than status and contract relations. Relations arising *ex delicto* are more or less "standardized" too. In periods of strict law, the individual fault plays a smaller part in the creation of liability than it does in periods of equity—but this is another, though a parallel, story.

[19] I am gratefully adopting Professor Wesley N. Hohfeld's eight fundamental legal conceptions. See *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL 16, and (1917) 26 YALE LAW JOURNAL 710. I have made but one verbal change: "limitation" instead of "no-right."

and contract is not one of kind, but one of degree; and in this sense there has clearly been a long-enduring tendency in English law from status to contract, and—in the last two generations—an equally distinct veering back to status. I now quote Dean Pound, perhaps with an unintended stressing:

> "It is significant that progress in our law of public service companies has taken the form of abandonment of nineteenth century conceptions for doctrines which may be found in the *Year Books.*"[20]

It is, indeed, significant, not "that the nineteenth century was out of line with the common law"—for we cannot indict a century to save the reputation of a theory—but that the twentieth century is witnessing a reaction back to status. And this is not the first time that the seismograph of history has made such a record, nor the first time that it has been ignored as an exception. That medieval hardening of relations known as feudalism was also, in its beginnings, a progress from contract to status. And those whose philosophy of history is a belief in the gradual development of liberty through the principle of contract have been forced to regard feudalism as a pause in human progress, an armistice in the war between two opposite ideas, status and contract—at best, a compromise, an exceptional, disturbing element in their whole scheme.[21] Perhaps if we were able to go back to what we accept as standard family relations, we should find their basis, too, in the hardening of individual practices into rules. Perhaps even back of caste there was a progress from the individual non-standardized conduct to the standardized. In other words, legal history has room not merely for one single line of progress in one direction or the other, but for a kind of pendulum movement back and forth between periods of standardization and periods of individualization.

THE CYCLES OF LEGAL HISTORY

I have elsewhere attempted to develop another of Maine's generalizations—that of Fictions, Equity and Legislation—by tracing not only their occurrence, but their recurrence in cycles.[22]

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[20] 30 HARV. L. REV. 219.

[21] *Cf.* Edward Jenks, *Law and Politics in the Middle Ages,* 310.

[22] *"The Law" and the Law of Change* (1917) 65 U. OF PA. L. REV. 659, 748.

It seems that once every millennium or so the laws of a people tend to become hardened, its ways standardized. Between successive crystallizations or codifications, the instrumentalities of change enumerated by Maine are resorted to in the order named. This order is by no means the result of chance. Each instrumentality is connected with a particular point of view: fictions with word-study, the first treatment to which a code is naturally subjected; equity with the study of principles, a kind of revolt that comes with the realization that life has progressed too far since the last codification to permit us to find in the words of the code an adequate expression of the law of the times; legislation, with a desire for conscious amendment in which the pretense that the new rule is in the code, either explicitly or implicitly, is given up. When the code becomes overburdened with new material, the time is at hand for a new code, and another cycle begins. Within historic times Roman-continental law has gone through two cycles and part of a third;[23] Jewish law has completed four cycles and part of a fifth;[24] Anglo-American law has gone through two cycles. A brief survey of the cycles in Anglo-American history may help us determine the connection, if any, existing between the recurring of the formal instrumentalities of change and the recurring of periods of the relative emphasis of status.

THE CYCLES OF ANGLO-AMERICAN LEGAL HISTORY

The dividing line between the two cycles in Anglo-American legal history falls about 1290. Though no code in the modern sense is compiled, codification is in the air.[25] Edward I, the English Justinian, has brought back from the home of his father-in-law, Alphonso the Wise, the compiler of *Las Siete Partidas,* a plan which his lawyers try hard to execute. A deluge of revisions of Bratton is the result. Besides the books called Britton and *Fet Assever* which pretend to speak in the king's name, there are the *Summae* of Hengham, the *Fleta,* and the

[23] *Ibid.* 670.

[24] *Ibid.* 674.

[25] John Selden, *Dissertatio ad Fletam,* and Francis Morgan Nichols' *Introduction* to Britton (1865) have not yet been superseded for their accounts of this period. F. W. Maitland's Introduction to the Selden Society's edition of *The Mirror of Justices* (1895) and Dr. George E. Woodbine's account of Bratton MSS. throw considerable light on the activities of the period.

long-lost (apparently rediscovered) book that Gilbert of Thornton was ordered to make. There appeared even a parody on such books, *The Mirror of Justices*. But the true crystallization of English law was in the series of writs that was being closed.

Tracing these writs backward to their source, we find a generation of legislators giving them their final touch in the first part of Edward's reign. There are the two Statutes of Westminster, the Statute of Bigamy, the Statute of Gloucester, the Statute of Mortmain, the Statute of Merchants, the Statute of Winchester, the Statute of *Quo Warranto* and the Statute of *Quia Emptores*. The purpose of these statutes, to fill in the gaps of English law, is best illustrated in that section of the second Statute of Westminster, which urges the chancellor to make new writs in new cases resembling the old ones. It is quite apparent from this statute and from the fact that so little use was made of it, that the ability of English law to develop on the basis of magisterial application of general principles had been exhausted. The barons had objected to new writs in 1258, and by 1272 the last of the important writs had been made.

The period of writ-making, the beginnings of which we see in Glanvil and the highest point of which we find in Bratton, though not generally called a period of equity, bears, as Jenks has pointed out,[26] a greater resemblance to the praetor's edict of ancient Rome with its lists of formulae, than do the vague processes of the early days of our generally recognized equity. We can literally see law growing when we pick up a writ of the year 1205 and find in the margin *"Hoc breve de cetero erit de cursu"* scrawled in a contemporary hand.

What preceded the growth of law by the making of new writs? It was an era of legal fictions. The great Norman kings with all their power had to stoop to this indirect method of tampering with the people's law. The Conqueror himself pretended to be the King of England by virtue of that law. He promised the people of London the advantages of all the laws that they had enjoyed in King Edward's day. His followers in their charters likewise promised *"leges Edwardi reddere"*—to give back the laws of King Edward the Confessor, an unwritten but still a tough code. The fictions by which the king's court extended its jurisdiction are well known. The king's peace became all important, and on the theory that this king's peace was involved, the

[26] *English Civil Law* (1916) 30 HARV. L. REV. 1, 16.

king gradually took jurisdiction, not only over the criminal law, but also over possession in civil law. It was not so easy to extend the fiction to cases involving questions of ownership as distinguished from possession. Consequently, possession has always been nine points of the law, the triumphant royal law, of England. So completely was the work of transformation done in the comparatively short cycle between William I and Edward I that the English lawyer of to-day who ventures beyond Domesday Book finds himself in a strange land indeed.

From Edward's day forward, on the other hand, we have no difficulty in discerning the continuity of English law. Beginning at our turning point, we have the *Year Books,* those notes of the happenings in court from term to term that gradually acquired a position of dignity and authority in the eyes of the profession. The *Year Books* have a crystallized law to deal with. They are, in the main, technical expositions of the words and letters of this law. We no longer hear "no wrong without a remedy"; we are more apt to find *"damnum absque injuria"*—harm inflicted without the violation of any technical legal rule. The only instrumentality at hand for the improvement of law is the legal fiction. It is used to give the court jurisdiction in many cases not originally contemplated in writs, especially cases involving title to property.

From the fourteenth century to the end of the eighteenth, but particularly in the middle of this period, the second of Maine's instrumentalities is at work—equity. The chancellor's office at the beginning of the period is concerned rather with petitions of grace and the bestowing of boons on loyal subjects of the king than with the improvement of the law; and at the end of the period, in the days of Hardwicke and Thurlow, it is collecting precedents and formulating doctrines. The middle of the period is the time when with "conscience" as a key-word, equity is most potent in supplementing the law. And the spirit of equity is not confined to the chancellor's chambers; for even in the courts of law, the formulation and application of general principles is going on apace, and commentators begin to work out the principles that underlie the godless jumble. Littleton—even if he did not write the most perfect book that mankind has ever produced, as Coke would have us believe—did bring order out of chaos. Coke spawned maxims, but he did it in an unconscious endeavor to make principles out of rules. Holt and Mansfield borrow from the general understandings of men to enlarge the

law. Blackstone, the greatest of commentators, states the sum total of this law so satisfactorily that even the mighty wrath of Bentham seems impotent to awaken his countrymen to the need of further change in the law. Then comes an end to the possibility of extensive growth by the administration of general principles. Equity is entrusted to the keeping of the most deliberate of conservatives, the Earl of Eldon. To him equity is a system as rigid as the law itself.

In the 1800's, both in England and in America, the ordinary means for the improvement of law and for keeping it abreast the times has been legislation. Of course, legislation had been used sparingly throughout the equity period. But prior to the nineteenth century it was looked upon as something exceptional, called forth either by a great upheaval to sweep away accumulated evils, as under Henry VIII and in the Commonwealth, or by a desire to check evil practices discovered from time to time, as in the days of the Restoration. In the last hundred years, on the other hand, legislation has come to be a normal, continuing, part of the government's business. To-day our legislators are pouring it forth in greater quantities than ever before.

There are signs that we are reaching the end of this legislative activity. Not only do we hear persistent outcries against "too many laws," but we are already making rapid progress in the work of codification. What has been done here and in England in the law of partnership, negotiable instruments, sales, warehouse receipts, bills of lading, criminal law, pleading and various other branches suggests that we may expect more and more of the authority of the digest to be transferred to the code. Whether with the code before us we shall lose our habit of tampering with private law at every session of the legislature and turn again to literalism and to fictions as they have done in Germany remains to be seen. In one branch of law which, for political reasons, was codified a century or more before the period of general codification into which we are passing, we have already followed this very course. Constitutional law in this country has heretofore been almost exclusively word-study. It has brought with it its crop of fictions.[27] We may to-day be ready for equity so far as the interpretation of the Constitution is concerned. May not the broader view of principles that Professor Frankfurter calls "realism" and Dean Pound "sociolog-

[27] 65 U. of Pa. L. Rev. 672.

ical jurisprudence" be the appeal from the text to common sense, from the letter to the spirit, from *jus strictum* to equity? "If," says Professor Frankfurter, "the point of view laid down in this case[28] be sedulously observed in the argument and disposition of constitutional cases, it is safe to say that no statute which has any claim to life will be stricken down by the courts."[29]

STATUS LAW ACCOMPANIES CODIFICATION

If, now, we glance over these periods of Anglo-American legal history with standardized and unstandardized relations in mind, three places stand out as centers of standardizing, of status, we may say. They are the period of Domesday Book, the period of King Edward's *Quo Warranto* inquests,[30] and, so far as we can foresee, the period we are entering upon. Our "franchises" are not being catalogued, but our land titles are being registered, our business relations defined, our contracts made for us, our right to engage in ever so many kinds of business made the subject of a state license. Our partnerships, more or less contractual, are being displaced by uniform corporations organized under general laws: and corporate powers are purely affairs of status, though there was a time when even these looked more like matters of contract between the state and the incorporators. Our rights are rapidly being converted into types of rights, just as in the day of Edward I the remedies of Englishmen were types of remedies. The remedies seemed the more important then, though we naturally speak of the situation in terms of rights. But rights and remedies are obverse and reverse of the same coin; the standardizing of relations and the crystallization of law are aspects of the same movement. There is nothing surprising, then, in the fact that the periods of the codification or

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[28] *People v. Schweindler Press* (1915) 214 N. Y. 395, decided under the influence of *Muller v. Oregon* (1908) 208 U. S. 412.

[29] (1916) 29 HARV. L. REV. 366. *Cf.* the conclusion of Edward S. Corwin's paper on *Social Insurance and Constitutional Limitations* (1917) 26 YALE LAW JOURNAL 443: "In other words, constitutional 'rigorism' is at an end."

[30] I have purposely avoided the convenient word "feudalism" here to cover the status law of the middle ages. It is true that its typical product, the manor, placed every man in some kind of status. But this did not spring into existence spontaneously, nor was it uniform throughout Europe when it did appear, save in this, that it represented a high degree of standardizing of relations.

crystallization of the law coincide with the extreme points reached by the pendulum in the direction of standardizing. The pendulum swings across the diameter of the cycle.

INDIVIDUALITY OF CONTRACTS FOSTERED BY EQUITY

Conversely, the periods of greatest individual liberty in the shaping of contracts and of relations in general lie somewhere between these periods of standardizing. The nineteenth century witnessed the end of a long period of this kind. For its beginnings, we must go back at least to the 1600's, to the days when even one's relations with the government were sought to be reduced to contract rather than status; to the creation of *indebitatus assumpsit;* to the days when the chancellors invented specific performance to take the place of cut and dried remedies, and when they sought in the actual meeting of free minds rather than in the form of the contract the basis of their adjudications.[31] This ignoring of forms is the triumph of the contract principle within the history of contracts.[32] Where the few types of relations that the law can conceive of are found inadequate, equity permits of endless variety through its creature, the trust. We reach the end of the swing away from status when we find equity dealing with each case on its own merits, refusing even to recognize precedents,[33] as against law dealing with cases by

[31] Of course, there are decrees of the chancellor that seem to prohibit certain classes of contract, just as there is legislation that tends to establish freedom of contract. Such legislation simply formulates the spirit of the pre-statutory period, as in the case of our constitutions. And the attitude of the chancellors who abhorred forfeitures and penalties as well as contracts made under undue influence is quite reconcilable with their endeavor to get at the substance and ignore the form of the contract. It must be remembered, for example, that in law, the mortgage was an instrument for the creation of a status—an estate upon condition—and that the chancellors practically resolved it into a contract.

[32] We may see a parallel case in the consensual contract, developed under the Roman praetors, as contrasted with the older business with copper and scales, which it effectually supplanted—though we can no longer say with Savigny and Maine that the one grew out of the other. A corresponding development in Jewish legal history is suggested in 65 U. OF PA. L. REV. 757.

[33] The beginning of precedents in equity is illustrated in a colloquy referred to in John William Wallace, *Reporters* (4th ed.) 23, 303. *Vaughan,* C. J., "I wonder to hear of citing precedents in matters of Equity; for if there be Equity in a case, that Equity is an universal truth, and there can be no precedent in it . . . *Bridgman,* Ld. Keeper, "Precedents are very necessary and useful to us."

classes. If we would seek another period of triumph for the contract principle in English law, we must go back to the days when writs were forming, to the beginning of the thirteenth century. There are found donees of land changing their status by the use of the word "assigns".[34] At this point, the various forms of Jewish gages were being invented and freely introduced. And here, strangely enough, even in government a sort of precursor of the social contract theory was suggested in the wresting of Magna Carta from King John, and poorer charters from better kings. Thus, equity periods are connected with the impetus from status to contract, as strict law is with a movement in the other direction. Neither is a "progressing backward."

SOCIAL ENFRANCHISEMENT THROUGH STATUS LAW

The movement toward status law clashes, of course, with the ideal of individual freedom in the negative sense of "absence of restraint" or *laissez faire*. Yet, freedom in the positive sense of presence of opportunity is being served by social interference with contract. There is still much to be gained by the further standardizing of the relations in which society has an interest, in order to remove them from the control of the accident of power in individual bargaining. The new school of jurisprudence has a great work before it in educating the courts. It must, indeed, dispel the fear of status as an archaic legal institution which we have outgrown. It will not be compelled, however, to unteach what little the courts have learned directly or indirectly from Sir Henry Maine, or to unmake history. It will, on the contrary, simply be moving along with the current of legal development in resorting to status as an instrument at this particular time for the further enfranchisement of those to whom freedom of contract has become a mere mockery. Freedom of contract is not synonymous with liberty, nor is status slavery. But we must remember that the knife can cut both ways. In the last period of *jus strictum*, say the 1300's, status law was being used to drive laborers to their work; now it is looked to to force employers to a realization of their social duties. It then practically created a maximum wage; to-day it is the messenger of a minimum wage. The law that compelled a man to work at the trade that he had learned is not so different in principle from one that would have a man learn the trade at which he proposes to work. Thus, either law may create the status of

[34] 2 Pollock and Maitland, *op. cit.* 13, 14 n. 1, 311.

being a plumber. Something like a trader's status may be restored. Regrating, engrossing and forestalling may once more become commercial crimes of the first order, and a *justum pretium* may be tried in spite of all the demonstrations of the orthodox economists to the contrary. We are indeed going back to the principles of the *Year Books* in the law of public service, and who can say where the boundaries of public service will finally be drawn? Social legislation may not stop at supervision; the state may take over many of our private enterprises. But when juristic thought and practice are thoroughly socialized, will the great end of law be accomplished, and the sociological theory be the last word on jurisprudence? Or will a reaction set in, whereby our new statutes will be ground to powder by legal fictions and reconstructed by equity—until the law will seek to serve each man according to his need once more?[35]

[35] The causes that contribute to the predominance of one or another of the schools of jurisprudence in different times and places are the subject of a study by the present writer entitled "A Marshalling of the Schools of Jurisprudence" scheduled to appear in HARV. L. REV., January, 1918.

MATRIMONIAL DOMICILE

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Domicile is a term which is not easy of precise definition, but one nevertheless with a real and well-understood legal meaning. What of the term "matrimonial domicile"? Has it an equally clear meaning, or an obscure one, or is it only a convenient expression to describe the joint home of two persons joined in wedlock? Courts and text-writers talk of "matrimonial domicile" in two wholly different situations, and apparently it may mean a different thing in each, for no reference is made in one connection to its use in the other. The law of the "matrimonial domicile," it is said, determines the rights which are given the parties to a marriage in the movable property of each other. The phrase makes its second appearance when the question is raised as to the validity of a divorce granted at the domicile of one of the parties only, without personal service upon the other. The significance of "matrimonial domicile" in marital property rights will first be considered.

I

Suppose the easiest case. A of Iowa marries B of Iowa, and after the marriage the spouses make their home there. There is, of course, no difficulty with any question of domicile in this situation. Both parties were domiciled in the state and remain so afterwards. By the marriage, each is given such interest in the movable property of the other as the law of Iowa, the domicile, allows. It is, of course, immaterial where the marriage took place. The question of "matrimonial" domicile as something different from "actual" domicile is not brought up.

Now, let A the husband come from Illinois and B the wife be an Iowa woman, and suppose by Illinois law the personal property of the wife becomes the husband's upon marriage. Upon marriage, B would take her husband's domicile, Illinois. She acquires that domicile upon marriage, and the domicile's law gives A the property. The result is not made any clearer by saying that the law of the "matrimonial domicile" governs the property rights. Illinois law governs because it is the husband's domicile which becomes that of the wife. "Matrimonial domicile" might be used here as a term of convenience to describe the place where the

parties both have their home, but no added significance would be given by its use.

While cases involving facts as simple as the two just put are cited in proof of the general rule as to "matrimonial domicile," the real question of the existence of such a rule in this connection is yet to be tested. The general statement of the doctrine is as follows:

> "The question as to what place is to be regarded as the matrimonial domicile, the law of which will determine the effect of the marriage upon personal property owned by either party at the time, or subsequently acquired by either or both during the existence of such domicile, is in its last analysis one of the intention of the parties at the time of the marriage as to where they shall establish their residence, assuming that such intention is carried out within a reasonable time. The various rules that have been adopted on the subject are really rules for ascertaining that intention, or for supplying, by presumption, the lack of any evidence or other circumstances which will reveal it."[1]

Now, if a "matrimonial domicile" is one to be established by the intention of the parties, it differs greatly from domicile as that term is ordinarily understood, which is established by the law. The law says that every person must have a domicile because certain rights and liabilities depend upon domicile. And while the intention of the party is important in that the intention to make a home in a place must coincide with his physical presence there, no one would question that both elements are necessary to make a legal domicile. A domicile can not ordinarily be established by an intent alone, and it seems to be granted that in the absence of evidence of intention to the contrary, the parties are presumed to take the husband's domicile as their matrimonial domicile. The general rule that intent alone is not sufficient is so firmly established, that a statement that the parties to a marriage,

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[1] 57 L. R. A. 360, n. See, for a general statement of the rule, 5 R. C. L. 1007; 85 Am. St. Rep. 557; Story, *Conflict of Laws* (7th ed.) sec. 186; Wharton, *Conflict of Laws* (3d ed.) sec. 190. Cf. Westlake, *Private International Law* (5th ed. 1912) 40. That something different from ordinary domicile seems to be meant, is shown by the following note in Parmele edition of Wharton, 403: "The previous domicile of the parties seems to be entirely immaterial, except for the purpose of illustrating their intention as to the matrimonial domicile." The authorities are fully discussed below.

by mere intent, can make a "matrimonial domicile" in a place which is the domicile of neither one of them, and have the law of this place govern ownership in property, is to be regarded with suspicion unless it finds adequate support in the authorities. The prefix "matrimonial" would not, *a priori,* seem to have the magic effect of upsetting a reasonable and well established rule governing the acquisition of a domicile.

Assume that the newly married pair intend to make an entirely new home, as in the second case, where A of Illinois marries a young woman who has been a resident of Iowa up to the time of the marriage. The parties intend to live in Texas, where neither one has ever been up to this time. Suppose they go abroad on a trip before going to Texas. What are the rights in each other's property? Determined by the law of the "matrimonial domicile," the rule would say. But their matrimonial domicile is not in Texas yet, for the intention must be carried out within a "reasonable time." How long a trip can they take and still come within the reasonable time rule? And if they overstay the limit, what law will be found to have governed? Suppose instead of going to Texas, A finds a better position in London, and they settle there. Is this their "matrimonial domicile"? It was not the one they had in mind at the time of the marriage. If the wife had died before A got the London position, of how much of B's personal property owned by her at the time of the marriage had he become the owner so that it would not pass by descent? The answer to these questions without any doctrine of "matrimonial domicile" is simple enough. When A married B, the wife took A's Illinois domicile. His domicile remained in Illinois after they were married, because he had never established a new one, even though he had given up Illinois as his home. He got by the marriage such interest in her movable property as the law of Illinois gave. If they do go to Texas and acquire property there, or do live in London and acquire it, the law of Texas or of England will govern the marital rights in those acquisitions—nothing is left in abeyance awaiting the fulfillment of their intentions.

The test case, then, is the one where the intended domicile of the parties differs from that of the husband at the time of the marriage. Unless the authorities expressly cover such a case, is it not fair to say that the term "matrimonial domicile" is one of convenience only and means nothing more than the husband's domicile which the wife takes upon marriage?

As might be expected, the courts in their general statements on the doctrine of "matrimonial domicile" have been greatly influenced by Mr. Justice Story's discussion of "the rule of the true matrimonial domicile."[2] The learned author puts the case, "suppose a man domiciled in Massachusetts should marry a lady domiciled in Louisiana, what is to be deemed the matrimonial domicile?" "Foreign jurists," he says, "would answer that it is the domicile of the husband, if the intention of the parties is to fix their residence there; and of the wife, if the intention is to fix their residence there; and if the residence is intended to be in some other place, as in New York, then the matrimonial domicile would be in New York. . . . The same doctrine," continues Judge Story, "has been repeatedly acted on by the supreme court of Louisiana." He summarizes thus:

> "Under these circumstances, when there is such a general consent of foreign jurists to the doctrine thus recognized in America, it is not perhaps too much to affirm that a contrary doctrine will scarcely hereafter be established. . . ."

The Louisiana cases cited by the author are *LeBreton v. Nouchet*[3] and *Ford's Curator v. Ford.*[4] Because they are put forth here as the only American cases on the doctrine, and because they are frequently cited in this connection, they are worth stating in some detail.

In the *LeBreton* case, the defendant and the daughter of the plaintiff, both evidently domiciled in New Orleans, ran away and were married in Mississippi, returning to New Orleans a few weeks thereafter and remaining there until the wife died. The mother of the deceased sued the defendant to recover property owned by the daughter prior to her marriage. By Mississippi law, all personal property of a woman went to her husband upon marriage, and the defendant claimed that his rights were governed by the law. He was allowed to retain only the marital portion given by the law of Louisiana. It is to be noted in this case that the parties were originally domiciled in New Orleans. While there was evidence that the husband had expressed an intention to make a home in Mississippi, the court thought this evidence was "insufficient to counterbalance the weight of the

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[2] Story, *op. cit.* secs. 191-199.

[3] (1813 La.) 3 Martin 60, 5 Am. Dec. 736.

[4] (1824 La.) 2 Martin N. S. 574, 14 Am. Dec. 201.

facts which disclose the real intention of the parties." *LeBreton v. Nouchet* presents no difficulty. Both parties started with a Louisiana domicile and kept it throughout. The husband got such rights in the wife's property upon marriage as Louisiana law gave him. There is not even talk in the case which supports argument for an intended "matrimonial," as distinct from an actual, domicile.

Ford's Curator v. Ford is just as simple. Mrs. Ford before her marriage had lived in Mississippi with her brother. The intended husband had a furnished house and a farm in Louisiana, and the day after the marriage, which took place in Mississippi, the parties left for Louisiana. The question in the case was the ownership of certain movable property owned by the wife before her marriage. If Mississippi law governed, the husband would have become the owner. The court said the question was whether the matrimonial rights of the wife were to be regulated according to the laws of the place in which the marriage was contracted, or those of the intended domicile of the spouses. It is held that Louisiana law governed, and it is clear that this is correct. It would have been equally clear even without evidence of the wife's expressed intention of going to Louisiana to live and her carrying out that intention after marriage. The wife took the husband's domicile upon marriage, and this would have been equally true even had she not gone to his home to live with him.[5]

The court made the following statement, which is the closest thing there is in either case to support the suggestion of Judge Story:

> "We think, however, that it may be safely laid down as a principle, that the matrimonial rights of a wife, who, as in the present case, marries with the intention of an instant removal, for residence in another state, are to be regulated by the laws of her intended domicile."

It is not denied that there are to be found in the books statements which directly or by inference recognize the rule which Judge Story predicted would become the recognized American doctrine, though they are fewer in number than the imposing array of citations in some of the authorities already quoted would lead one to expect. In most of the cases, the "matrimonial"

[5] See authorities cited by Professor Joseph H. Beale in his article, *The Domicile of a Married Woman* (1917) 2 So. LAW QUART. 93, 96.

domicile was no more than that of the husband at the time of marriage.[6] Others of the decisions do not involve any question of "matrimonial" domicile at all but merely cite the rule given by Story in the course of the discussion,[7] or state it generally.[8] It will be seen from the cases cited that most of the recognition of the doctrine has come from the Louisiana court. This is indeed the only place where it has been enunciated repeatedly and clearly.[9] The civil law writers referred to by Judge Story have doubtless had influence here.

The only case directly raising the point at issue is *McIntyre v. Chappell.*[10] Husband and wife, both being residents of Tennessee, were married in that state. Previous to, and at the time of, their marriage they had the intention of removing to Texas. Two weeks after the marriage the husband went to Texas with some negroes, improved the land, planted a crop, and the next year moved to Texas with his wife. The dispute in the case was over the ownership of certain slaves. They were claimed for the child of the parties, as sole owner, by right of inheritance from the father, and for the wife it was claimed they were com-

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[6] *Jaffray v. McGough* (1888) 83 Ala. 202, 3 So. 594; *Mason v. Fuller* (1869) 36 Conn. 160; *Parrett v. Palmer* (1893) 8 Ind. App. 356, 35 N. E. 713, 52 Am. St. Rep. 479; *Townes v. Durbin* (1861 Ky.) 3 Metc. 352, 77 Am. Dec. 176; *Routh v. Routh* (1844 La.) 9 Rob. 224, 41 Am. Dec. 326; *Fisher v. Fisher* (1847) 2 La. Ann. 774; *Walker v. Duverger* (1849) 4 La. Ann. 569; *Hayden v. Nutt* (1849) 4 La. Ann. 65; *Percy v. Percy* (1854) 9 La. Ann. 185; *Connor v. Connor* (1855) 10 La. Ann. 440; *Arendell v. Arendell* (1855) 10 La. Ann. 566; *Mason v. Homer* (1870) 105 Mass. 116; *Harral v. Harral* (1884) 39 N. J. Eq. 279, 51 Am. Rep. 17; *Kneeland v. Ensley* (1838 Tenn.) Meigs, 620, 33 Am. Dec. 168; *Layne v. Pardee* (1852 Tenn.) 2 Swan, 232.

[7] *Long v. Hess* (1895) 154 Ill. 482, 40 N. E. 335, 45 Am. St. Rep. 143; *Fuss v. Fuss* (1869) 24 Wis. 256, 1 Am. Rep. 180.

[8] *Re Hernandez's Succession* (1894) 46 La. Ann. 962, 15 So. 461, 24 L. R. A. 831.

[9] Thus, in *Arendell v. Arendell, supra,* the following charge of the trial court to the jury was approved by the supreme court: "It may, as it often does, occur, that the husband has no residence, or having one, it is the intention of the parties previous, and at the time of their marriage, to fix the matrimonial domicile in some other state. Cases of this sort are governed by the well recognized principle of law, that the laws of the intended domicile of the husband are to govern the rights of the parties. In such cases, the jury should be well satisfied, that the parties at the time of the marriage, intended to fix their matrimonial domicile elsewhere, and that that intention was actually carried into effect."

[10] (1849) 4 Tex. 187.

munity property in which she had a half interest. The trial court instructed (p. 93):

> "That if the jury believed that the parties intended to remove to Texas at the time of their marriage, and immediately did remove to Texas, their respective rights must be determined according to the laws of Texas."

Of this instruction the supreme court said:

> "The national domicile of these parties was, we think, unquestionably, in the state of Tennessee; and we are aware of no principle which, under the circumstances, would justify the conclusion that their matrimonial domicile was elsewhere . . . . We conclude that the matrimonial domicile of the parties to this marriage was in the state of Tennessee, and that previous to the acquisition of a domicile, *facto et animo,* by the husband in this country the laws of that state must furnish the rule of decision as to their marital rights. . . . In its application to the facts of this case, we therefore, conclude that the instruction in question was erroneous."

The ruling on this point was not essential to the determination of the case, and this the court admits.[11] But the question was presented by the record, was the point principally discussed in argument, and counsel concurred in expressing a desire that it be decided. It is of a wholly different kind of authority than a broad general statement where the exact point is not before the court.[12]

McIntyre v. Chappel was doubted in a later Texas decision.[13] This case is a good one to show how the facts of many of the cases lie close to the question which will test the correctness of the quoted rule, but not quite touch it. The contest was over the ownership of a slave—by the laws of Texas, movable property—which was levied on as the property of Barrow and claimed by his wife as her separate property. Husband and wife had resided in Mississippi, but had decided to move to Texas. While visiting

[11] As the learned judge points out, the verdict was against the law and the evidence and a new trial should have been granted, for the community law in any event would not have applied to this property.

[12] Says the editor of the 3d edition of Wharton, *Conflict of Laws,* Vol. I, 403 n.: "It is somewhat singular that, in the only case in which it appeared that the intention was to establish a matrimonial domicile at a place other than the previous domicile of either party, the applicability of the rule was denied."

[13] *State v. Barrow* (1855) 15 Tex. 179, 65 Am. Dec. 109.

Mrs. Barrow's parents in Tennessee, evidently while on their way to Texas, Mrs. Barrow's father gave her the slave in controversy for her own exclusive use and benefit. The Barrows took the slave directly to Texas. If Tennessee law governed, the slave became the husband's property; if Texas law, or Mississippi law, the separate property of the wife. The court said the question was whether Tennessee or Texas law was applicable, and held that the Texas law applied, evidently because the parties having intended to become domiciled in Texas must be deemed to have intended Texas law to govern future acquisitions. The Mississippi law, however, was in evidence. Applying the general principle that the former domicile was not lost until a new one was acquired, the law of Mississippi would govern, and the result of the case would be the same—the wife would get the slave. The court recognized this.

Professor Dicey defines a "matrimonial" domicile[14] as that of the husband at the time of the marriage, with a query whether the intended domicile is included under English law. As he says:

> " . . . On the theory . . . . of a tacit contract between the parties about to marry, that their mutual property rights shall be determined by the law of their matrimonial domicile, the extension of the term so as to include the country in which they intend to become, and do become, domiciled immediately after their marriage seems to be reasonable."

This tacit contract theory is discussed below. Westlake[15] seems to be more sure of this point. Wharton on *Conflicts*[16] believes that the "matrimonial" domicile is the intended permanent residence, but Minor[17] very vigorously and, it is submitted, correctly, says:

> "to hold that country where the husband intends to settle (the *factum* not combining with the *animus*) to be his domicile, whether 'matrimonial' or otherwise, is violative of one of the leading principles governing the acquisition of a domicile of choice."

Judge Story gives two grounds for his "matrimonial domicile" rule:[18]

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[14] *Conflict of Laws* (2d ed. 1908) 511.
[15] *Op. cit.* sec. 40.
[16] (3d ed.) sec. 190.
[17] *Conflict of Laws,* sec. 81.
[18] *Op. cit.* sec. 199.

> "Treated as a matter to be governed by the municipal law to which the parties were or meant to be subjected by their future domicile, the doctrine seems . . . capable of solid vindication."

This seems pure assertion, for no explanation is given of the way the municipal law can affect matters before the actual domicile is fixed there; and this is the very point to be established.

The second reason suggested is that of a tacit matrimonial contract. To this the author seems to incline, for stating his belief as to what the accepted doctrine will be, he adds:

> "for in England as well as in America, in the interpretation of other contracts, the law of the place where they are to be performed has been held to govern."[19]

Stating the argument a little more fully: A and B are to be joined in wedlock. They might have contracted expressly with reference to rights in property owned by them at the time or thereafter to be acquired;[20] but because they enter into no express contract, we will say that they tacitly contracted with reference to marital rights in property by accepting the provisions of the law in that respect. "The tacit contract is to be construed precisely as if the laws of the place were inserted in it."[21] And imputing further intentions to the parties, we can say they tacitly contracted according to the provisions of the law where they were going to live. This would be allowed either on the theory that the parties intended to be governed by this law in making their contract,[22] or that it was the place of performance.[23]

The doctrine of tacit contract seems to have found favor with European writers, and is not without support in the authorities in common-law jurisdictions.[24]

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[19] But elsewhere Judge Story does not appear to approve of the doctrine of tacit consent as regulating the rights and duties of matrimony. See Story, *op. cit.* sec. 190.

[20] Note that such an agreement is not a part of the marriage contract at all, but a wholly different one.

[21] *Castro v. Illies* (1858) 22 Tex. 479, 73 Am. Dec. 277, 283.

[22] "As the contract of marriage was entered into and solemnized with the intention that it should be performed and fulfilled in the state of Connecticut. . . ." *Mason v. Fuller* (1869) 36 Conn. 160, 162.

[23] Authority may be found for either or both of these views as to the law governing the validity of contracts. See articles discussing the subject by Professor Joseph H. Beale (1909) 23 HARV. L. REV. 79, 194, 260.

[24] See Story, *op. cit.* sec. 147 *et seq.;* Wharton, *Conflict of Laws* (3d ed.) 190; Westlake, *Private International Law* (5th ed.), 74 *et seq.* In *Besse*

The whole argument seems to go at the question the wrong way. Calling a marriage a contract does not solve the legal puzzle of the relationships arising therefrom. It is true that people get into the married state *via* the contract route. But, once in, there is a relationship created which is much more than a matter of contract, and which depends for its rights and duties not upon the consent of either of the parties, but upon the authority of the law. Would it be argued that the common-law right of a husband to discipline his wife with a stick no bigger than his thumb was a matter of tacit consent between the spouses? The right of control over the wife's person seems clearly a right given by law as an incident of the marital status, but hardly more clearly than the right of curtesy in her reality and ownership of her chattels, and the power to reduce her *choses* in action to possession. Any explanation of marital rights on the basis of a tacit contract flies in the face of the facts. Laymen generally know very little about the law until they get involved in a lawsuit, and two young people anxious to wed do not sit up nights reading up on the law of marital property. They probably know very little about it, and what knowledge they do have is of the most general and indefinite kind. For the common law to give the husband all the wife's personal property, and then say that the reason is because the wife tacitly contracted to give it, is adding insult to injury.

A tacit agreement, if real, ought still to apply when the parties move from their first marital home to another jurisdiction and there acquire property; but there is ample authority that in such a case, the first law no longer applies, and the law of the new domicile governs.[25] The tacit agreement, if there were such a

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v. Pellochoux (1874) 73 Ill. 285, 292, the court says: "In all marriages, the parties may be presumed to tacitly adopt the laws of their domicile, and to agree to be governed by them, but the obligation will be limited by the extent of these laws."

[25] *Saul v. His Creditors* (1827 La.) 5 Martin N. S. 569, 2 Beale, *Cas. on Conflict of Laws*, 220 and cases cited; Wharton, *op. cit.* sec. 191; Story, *op. cit.* sec. 178; 57 L. R. A. 366, n. The contrary seems to have been held in an English case, *De Nicols v. Curlier* (1899, H. Lords) [1900] A. C. 21. The case is stated in Westlake, *op. cit.* 79: "The consorts, both French by nationality and domiciled, were married in France without express contract, and therefore under the system of community. They removed to England, where the husband was naturalized, and where they amassed by their industry a large fortune, of which a part was invested in English freeholds and leaseholds and a part remained in money and securities.

thing, ought to apply to land as well as to personalty; but rights in land acquired by parties upon marriage are governed by the law of the *situs* of the land.[26]

"Matrimonial domicile" may be used as a term of convenience to designate the domicile of the husband which the wife assumes upon marriage;[27] but as used to describe a place where an actual domicile has not been established, the doctrine seems utterly opposed to settled common-law rules of domicile, whatever may be said for it under any other system of law. It is not established by conclusive authority. The repeated citation of the language of Judge Story seems another case where the shadow of a great name has darkened the clearness of judicial expression.

II

What is "matrimonial domicile" in a divorce suit? The term is a recent one in this branch of law. Writers on conflict of laws do not use it; nor do the standard writers on domestic relations; nor is it taken over in this connection from the cases involving rights in marital property, for no mention of these cases is made in this connection, nor does the suggestion of "matrimonial"

The husband having died, leaving a will by which he had disposed of the whole as though he were sole owner, the widow claimed her share as of a community, and the House of Lords decided unanimously in her favor as to the personal chattels, which alone were before it." Mr. Baty, in *Polarized Law*, 96, explains the case by saying that it proceeded solely on the finding that the settlement made by French law for the parties must be held equivalent to an express contract by them to adopt it. "As foreign law is a matter of fact, it may in the future fail to be shown even for France; and certainly it may fail to be shown in the case of other countries." *Cf.* Dicey, *Conflict of Laws* (2d ed.) 511-14.

[26] Story, *op. cit.* sec. 159; Minor, *op. cit.* sec. 80; 57 L. R. A. 353, n. In *De Nicols v. Curlier* [1900] 2 Ch. 410, Kekewich, J. applied the contract made for the parties by the French code to interests in land in England. The decision seems a clear error, but Westlake, *op. cit.* 81, approves the result believing "the doctrine of tacit contract *on* marriage to be well founded, and that the unity of the matrimonial system of property generally coincides best with the wishes of persons who, by not entering into an express contract, show they do not desire complicated or unusual arrangements."

[27] Just why the first home of the parties is any more "matrimonial" than one to which they subsequently remove is not clear, but the distinction seems to be made. See Wharton, *op. cit.* sec. 191; Story, *op. cit.* sec. 178.

domicile as an intended domicile ever appear in cases of this kind. It is not found in the digests. Only in a very recent work does the term appear,[28] and its use therein is evidently based on the language of the courts in late cases, without additional definition of meaning.

A "matrimonial" domicile for the purpose of divorce, as something different from the actual domicile of husband or wife, gained for a time some recognition in the Scotch cases. In *Jack v. Jack*[29] there was held to be jurisdiction to grant a divorce to a husband who had formerly lived in Scotland with his wife, even though it was admitted in his pleading that he had been for some time a minister of the gospel in the state of New York, without any present intention of returning. The theory the court went on was that the "matrimonial domicile" of the pair was still in Scotland. Lord Neaves said:[30]

> "Perhaps, individually speaking, [the husband] may be domiciled in America. But the question still arises, whether, as regards the married pair, the matrimonial domicile, as it may be called, has been transferred from Scotland to any other country. . . ."

And the meaning of "matrimonial domicile" was explained by the Lord Justice Clerk:[31]

> "It would seem, then, that the place of residence of the married pair for the time is the place where jurisdiction ought to be found to give redress for conjugal infidelity, without inquiring whether the husband's domicile of succession may be in another country. . . . The place of residence has appropriately been called the domicile of the marriage."

Lord Deas, however, characterizes the use of the term "matrimonial domicile" as misleading, figurative and wanting in judicial precision:

> "Domicile belongs exclusively to persons. Having ascertained the domicile of the husband, and the domicile of the wife, the inquiry into domicile is exhausted."

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[28] 9 R. C. L. 510, 512.
[29] (1862) 24 Ct. Sess. 2d Ser. 467.
[30] *Ibid.* p. 476.
[31] *Ibid.* p. 483.

The conception of the "matrimonial domicile" as a temporary home of husband and wife was again brought out in *Pitt v. Pitt*.[32] The Lord Justice-Clerk said:[33]

> "The pursuer's English domicile of origin might subsist for many purposes, and yet he might be domiciled in this country so as to give jurisdiction to a Scotch Consistorial Court."

And Lord Cowan stated that

> ". . . it does not require to be shewn that the domicile to found jurisdiction is the paramount and real domicile of the parties, or, in other words, the domicile for governing succession; but that the essential matter to be investigated in each case is the matrimonial domicile—the residence of the married pair—where, as their home, they live and cohabit, or ought to live and cohabit, as man and wife."

Pitt v. Pitt was reversed in the House of Lords.[34] The validity of the doctrine of "matrimonial domicile" as a basis for jurisdiction was not settled, as the eminent counsel for the respondent, Sir R. Phillmore and Sir Hugh Cairns, abandoned the ground as untenable, a concession suggested by the Lord Chancellor to "be quite in accordance with the law of the case."[35]

But in *Le Mesurier v. Le Mesurier*[36] where the question was considered by the Judicial Committee of the Privy Council, the conclusion on the point was that "the domicile for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." Lord Watson said:

> ". . . any judicial definition of matrimonial domicile which has hitherto been attempted has been singularly wanting in precision, and not in the least calculated to produce a uniform result. . . . The introduction of so loose a rule into the *jus gentium* would, in all probability, lead to an inconvenient variety of practice, and would occasion the very conflict which it is the object of international jurisprudence to prevent."

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[32] (1862) 1 Ct. Sess. 3d Ser. 106.
[33] *Ibid.* p. 117.
[34] (1864) 4 Macqueen, App. Cas. 627.
[35] See also, *Niboyet v. Niboyet* (1878 Ct. App.) L. R. 4 P. D. 1.
[36] (Priv. Counc.) [1895] A. C. 517, 540, 538.

Yet, in the two famous cases of *Atherton v. Atherton*[37] and *Haddock v. Haddock*[38] the fact that a decree of divorce was or was not given by the court of the "matrimonial" domicile was made the turning point as to whether a second state must, under the "due faith and credit" clause, recognize the validity of such a decree given in the absence of the defendant. It would be affectation of learning to go over the ground covered by these and similar cases, in the light of the voluminous discussion of the subject by capable commentators. The one point we want to find is the difference between a "matrimonial" domicile and any other kind of domicile.[39] The *Atherton* case was said in *Haddock v. Haddock* to have been expressly decided on the ground that the "matrimonial" domicile of the parties was in Kentucky. This was what, in the mind of the court, made the difference; and that is all the help on the point given by the Supreme Court cases, except that in a later decision the *Atherton* case was followed on similar facts.[40]

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[37] (1901) 181 U. S. 155.

[38] (1906) 201 U. S. 562.

[39] It will be remembered that in *Atherton v. Atherton* the parties were married in New York and immediately took up their residence in Kentucky. Here the husband, after his wife had left him, had secured a divorce in accordance with the regular Kentucky procedure on the ground of desertion. Later, Atherton was made the defendant in an action for limited divorce in New York, the state to which his wife had returned; and it was there decided that the Kentucky decree was inoperative in New York, and the wife was given the decree prayed for. The United States Supreme Court held this a violation of due faith and credit to the Kentucky divorce. Mr. Justice Gray, in delivering the opinion, cautiously limited the holding to the facts before the court, and pointed out that Kentucky was the "only matrimonial domicile of the husband and wife." In *Haddock v. Haddock,* the parties were married in New York; Haddock went to Connecticut and secured a divorce there on the ground of desertion. The wife remained in New York, and having brought suit for limited divorce, Haddock set up the Connecticut decree. Judgment was given for Mrs. Haddock, however, and this was held to be no violation of due faith and credit.

[40] *Thompson v. Thompson* (1913) 226 U. S. 551. The parties were married and lived in Virginia, where the husband had secured a limited divorce on the ground of desertion. When the wife sued in the District of Columbia, after having made her residence there, it was held that due faith and credit required recognition of the Virginia decree. "It is clear, therefore, under the decision in the *Atherton* case, and the principles upon which it rests, that the state of Virginia had jurisdiction, and the proper courts of that state could proceed to adjudicate respecting it upon grounds recognized by the laws of that state," said the Court. The point was not further discussed.

It has been contended that a "matrimonial domicile" is not simply the common domicile of husband and wife, but is "that place where one spouse is rightfully domiciled and where the other ought to be to fulfill the marital obligations."[41] It is believed that there would be great difficulty in making this test work. Where ought a husband to be to fulfill his marital obligations? Anywhere, surely. If he has treated his wife with such cruelty that she has been compelled to leave him, his fault is not that he is living in the wrong place, but that he did not behave properly at home. Even if the husband deserts, his wrong is not in going to a new place to live—that is proper enough; the misconduct is in abandoning his wife. In *Atherton v. Atherton,* the New York court found that the wife had left the husband through no fault of hers, and was therefore rightfully domiciled in New York. The same must have been found in *Thompson v. Thompson;* yet in each of those cases the decree secured by the husband in the state where the parties had lived together, and where the husband still was living, was conclusive. If the test suggested is what determines "matrimonial domicile," why was it not open to the New York or District of Columbia court to find, as they did, that the wife was rightfully domiciled within the jurisdiction, and why would not that finding be material?

It has also been suggested that the "matrimonial domicile" is something that stays with a party who is abandoned or who is not in fault, so long as he or she stays within the jurisdiction where the parties had their common domicile, but that such innocent party can move to another jurisdiction and the "matrimonial domicile" will go along.[42] If the husband and wife lived in Mexico, for instance, as in the *Montmorency* case, and he abandoned his wife there, the matrimonial domicile stays with her, and she could transfer it to Texas by going to that state to live. But if this were so, why could not the wife in *Atherton v. Atherton* or in *Thompson v. Thompson* show that she had been wronged, and that when she took up a residence apart from her husband, the "matrimonial domicile" went with her? That is just what she could not do in either one of those cases.

From the language of the judges in the Supreme Court decisions mentioned, it would seem that a "matrimonial domicile" is

[41] Robert J. Peaslee, *Ex Parte Divorce* (1915) 28 HARV. L. REV. 457, 469.

[42] *Montmorency v. Montmorency* (1911 Tex. Ct. of Civ. App.) 139 S. W. 1168. See also *Parker v. Parker* (1915 C. C. A. 5 C.) 222 Fed. 186, 137 C. C. A. 626.

regarded as nothing more than the place where husband and wife have their common domiciles,[43] and the use of the term in several recent decisions seems to indicate that this is the sense in which it is used.[44] "Where parties are married out of the state but come to reside in the state afterwards, [they] thus establish a domicile of matrimony therein."[45] Applying this simple definition to the matter under discussion, namely, the use of the term in divorce proceedings, "matrimonial domicile" would, of course, mean the place where the parties last lived as husband and wife with the intent of making that place their home.[46] This too, is the natural meaning of the term. It seems neither necessary nor desirable to make further complications in an already tangled question by ascribing to these words a more difficult meaning.

It may well be that the introduction of this term into the law of divorce was a judicial mistake, "that what in the *Atherton* case . . . was referred to out of abundant caution . . . was later seized upon, in the *Haddock* case, . . . and . . . invested with magical qualities it did not, and does not possess."[47] Perhaps too, it works injustice.[48] In the years since *Haddock v. Haddock* was decided, it has not become any easier to "see any ground for distinguishing between the extent of jurisdiction in the matrimonial domicile and that . . . in a domicile later acquired;"[49] but such a distinction has been made by a court from which there is no appeal in this world, has been taken up by lesser tribunals, and has vitally affected the people whose rights have been decided under

[43] The headnote in the *Thompson* case says: "The state in which the parties were married, and where they reside after marriage, and where the husband resided until the action for divorce was brought, is the matrimonial domicile. . . ." In *Atherton v. Atherton* the marriage took place in New York.

[44] *Perkins v. Perkins* (1916) 225 Mass. 82, 113 N. E. 841; *Callahan v. Callahan* (1909) 65 Misc. Rep. 172, 121 N. Y. Supp. 39; *Hall v. Hall* (1910) 139 App. Div. 120, 123 N. Y. Supp. 1056; *Benham v. Benham* (1910) 69 Misc. Rep. 442, 125 N. Y. Supp. 923; *People v. Catlin* (1910) 69 Misc. Rep. 191, 126 N. Y. Supp. 350; *Post v. Post* (1911) 71 Misc. Rep. 44, 129 N. Y. Supp. 754; *State ex rel. Aldrach v. Morse* (1906) 31 Utah 213, 87 Pac. 705, 7 L. R. A. (N. S.) 1127. See also (1915) 4 CAL. L. REV. 59, 2 BENCH AND BAR 37.

[45] *State ex rel. Aldrach v. Morse, supra.*

[46] *Callahan v. Callahan, supra.*

[47] 2 BENCH AND BAR 37, 41.

[48] See (1908) 21 HARV. L. REV. 296.

[49] Holmes, J., dissenting, in *Haddock v. Haddock, supra.* See also, Andrews, J., in *Callahan v. Callahan, supra.*

it. Civilization has not come to an end, but human happiness of individuals has been made or marred by it. Unless the doctrine is soon repudiated, it bids fair to become permanently fixed in the law. The real difficulty seems to be not in the term "matrimonial domicile," but in the erroneous rule of law which has been supported by reliance upon it.

FAULTY ANALYSIS IN EASEMENT AND LICENSE CASES

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A recent Pennsylvania case, *Penman v. Jones*,[1] involving important coal mining interests, suggests not only some brief observations on what appears to be a novel decision as to easements, but also some critical comments on that which is of far greater significance: the reasoning by which the result was reached.[2]

The unusual chaos of conceptions and inadequacy of reasoning in easement and license cases have not infrequently been emphasized—without, however, any suggestion either as to the cause of the difficulties involved or as to the remedy to be applied. Thus, a learned New Jersey judge, Vice-Chancellor Van Fleet, has put the matter in terms none too strong:[3]

> "The adjudications upon this subject [easements and licenses] are numerous and *discordant*. Taken in their aggregate, they cannot be reconciled, and if an attempt should be made to arrange them into harmonious groups, I think some of them would be found to be so *eccentric* in their *application of legal principles*, as well as in their *logical deductions*, as to be *impossible of classification*."[4]

The difficulties so justly lamented by the New Jersey court find striking exemplification when one ponders and compares the majority opinion and the dissenting opinion in *Penman v. Jones*.[5] It is believed, moreover, that a close examination of this case and others may suggest both cause and remedy.

In 1873, A (Lackawanna Iron & Coal Co.), the owner of a certain large tract of land, sold and conveyed a part of it to B, excepting and reserving to the grantor, its "successors and

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[1] (1917, Pa.) 100 Atl. 1043.

[2] Similarly interesting for its reasoning and for its application of fundamental legal conceptions is the comparatively recent case of *Graff Furnace Co. v. Scranton Coal Co.* (1914) 244 Pa. 592, 598.

[3] *East Jersey Iron Co. v. Wright* (1880) 32 N. J. Eq. 248, 254. The italics in the passage quoted from this case and also in the passages to be hereafter quoted from other cases are those of the present writer.

[4] Compare Chancellor Kent's remarks on the same subject, 3 Kent, *Com.* *453.

[5] (1917, Pa.) 100 Atl. 1043.

assigns," the underlying mineral estate, in apt words creating a fee therein, together "with the sole *right and privilege* to mine and remove the same [coal and minerals] by any subterranean process incident to the business of mining, *without thereby incurring, in any event whatever, any liability for injury caused or damage done to the surface of said lot.*"

Eighteen years after this, that is in 1891, A, by a single instrument sold and conveyed to C (Lackawanna Iron & Steel Co.) all the coal under its lands; that is, created subjacent estates in fee, the superjacent estates being, by exception, vested in the grantor.[6] Included in the deed of conveyance, conveying all told about sixty-two parcels, was the subjacent mineral estate below B's lot. While this deed conferred, comprehensively, the "right" to "mine and remove the said coal" from the sixty-two parcels, the right and privilege of letting down the surface were given *in specific terms* only as regards a single tract not directly connected with B's lot.

On the other hand, as regards all the parcels included, the instrument purported to convey "all the estate, right, title, *interest, benefit,* property, claim, and demand whatsoever" together with "all and singular the . . . *appurtenances* . . . belonging to the said . . . property or in any wise appertaining to the same."

Twenty-four years later A executed a deed to D, a trust company, for "all and every the real estate or interest of any kind or nature" in certain land including, *inter alia,* the lot previously sold to B and "the coal and minerals underlying the same." Subsequently D quitclaimed to E (who had derived title from B),

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[6] The superjacent estate, though often spoken of as "remaining," after severance, in the grantor, is really, of course, a somewhat modified legal interest, that is an aggregate of rights, privileges, powers and immunities relating to the smaller *corpus* of land and having somewhat different elements or characteristics than the aggregate relating to the larger *corpus* originally "owned."

For this reason the usual language of the books is hardly adequate,—e. g., Tiffany, *Real Property* (1903) sec. 383:

"The purpose and effect of an exception in a conveyance is to except or exclude from the operation of the conveyance some part of the thing or things covered by the general words of description therein, as when one conveys a piece of land, excepting a certain part thereof, or the houses thereon, it being always of a thing actually existent. A reservation, on the contrary, as defined by the common-law writers, is a clause by which the grantor reserves to himself some new thing 'issuing out of' the thing granted, and not *in esse* before."

with the express purpose of investing E of the right of surface support against the owner of the subjacent estate.

In a suit by E against F for breach of a contract to purchase the surface lot, it was held by the Supreme Court of Pennsylvania, Moschzisker and Stewart, JJ., dissenting, that the "right and privilege" of letting down the surface of B's lot did not pass from A to C by the conveyance of 1891; that such "right and privilege" did pass by the later conveyance to D; and that by the latter's quitclaim deed the "right and privilege" were released and extinguished in favor of E, so as to make E's interest perfect as regards the right of surface support.

There are thus presented three questions: (1) Under the conveyance of 1891, did the "right and privilege" of letting down the surface of B's lot pass to C as an easement appurtenant to the subjacent mineral estate? (2) Did such "right and privilege" pass, under the language of the conveyance, independently of its being an easement? (3) Was the court consistent in holding, in spite of its negative answer to the second question, that the language in the conveyance from A to D was sufficient to pass the "right and privilege" to D? Each of these points may, for the sake of clearness, be somewhat separately considered.

(1) DID THE "RIGHT AND PRIVILEGE" PASS AS AN EASEMENT?

All legal interests concerning land or other tangible objects[7] may, on adequate analysis, be seen to consist of more or less comprehensive aggregates of rights (or claims), privileges,

[7] As regards the unfortunate tendency to blend and confuse *non-legal* (physical) and *legal* conceptions, especially in the use of the term "property" with rapid shifts to indicate both the physical object and the legal interest relating to it, see the detailed discussion in the writer's article, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16, 20 *seq.*

Compare also (1917) 26 YALE LAW JOURNAL, 710, 721:

"A man may indeed sustain close and beneficial *physical* relations to a given *physical thing:* he may *physically* control and use such thing, and he may *physically* exclude others from any similar control or enjoyment. But, obviously, such purely *physical* relations could as well exist quite apart from, or occasionally in spite of, the law of organized society: physical relations are wholly distinct from jural relations. The latter take significance from the law; and, since the purpose of the law is to regulate the conduct of human beings, all jural relations must, in order to be clear and direct in their meaning, be predicated of such human beings. The words of able judges may be quoted as showing their realization of the practical importance of the point now being emphasized: Mr. Chief Justice Holmes, in *Tyler v. Court of Registration* (1900) 175 Mass. 71, 76: 'All proceedings, *like all rights,* are *really against persons.* Whether they are proceedings or *rights in rem* depends on the *number of persons affected.*'"

powers, and immunities vested in the "owner" of the interest, other persons indiscriminately being under the respective correlative duties, no-rights, liabilities, and disabilities.[8] The

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[8] See *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 26 YALE LAW JOURNAL, 710, 746:

"Suppose, for example, that A is fee-simple owner of Blackacre. His 'legal interest' or 'property' relating to the tangible object that we call *land* consists of a complex aggregate of rights (or claims), privileges, powers, and immunities. *First:* A has multital legal rights, or claims, that *others,* respectively, shall *not* enter on the land, that they shall not cause physical harm to the land, etc., such others being under respective correlative legal duties. *Second:* A has an indefinite number of legal privileges of entering on the land, using the land, harming the land, etc., that is, within limits fixed by law on grounds of social and economic policy, he has privileges of doing on or to the land what he pleases; and correlative to all such legal privileges are the respective legal no-rights of other persons. *Third:* A has the legal power to alienate his legal interest to another, i. e., to extinguish his complex aggregate of jural relations and create a new and similar aggregate in the other person; also the legal power to create a life estate in another and concurrently to create a reversion in himself; also the legal power to create a privilege of entrance in any other person by giving 'leave and license'; and so on indefinitely. Correlative to all such legal powers are the legal liabilities in other persons,—this meaning that the latter are subject, *nolens volens,* to the changes of jural relations involved in the exercise of A's powers. *Fourth:* A has an indefinite number of legal immunities, using the term immunity in the very specific sense of non-liability or non-subjection to a power on the part of another person. Thus he has the immunity that no ordinary person can alienate A's legal interest or aggregate of jural relations to another person; the immunity that no ordinary person can extinguish A's own privileges of using the land; the immunity that no ordinary person can extinguish A's right that another person X shall not enter on the land or, in other words, create in X a privilege of entering on the land. Correlative to all these immunities are the respective legal disabilities of other persons in general.

"In short, A has vested in himself, as regards Blackacre, multital, or *in rem,* 'right—duty' relations, multital, or *in rem,* 'privilege—no-right' relations, multital, or *in rem,* 'power—liability' relations, and multital, or *in rem,* 'immunity—disability' relations. It is important in order to have an adequate analytical view of property, to see all these various elements in the aggregate. It is equally important, for many reasons, that the different classes of jural relations should not be loosely confused with one another. A's privileges, *e. g.,* are strikingly independent of his rights or claims against any given person, and either might exist without the other. Thus A might, for $100 paid to him by B, agree in writing to keep off Blackacre. A would still have his rights or claims against B, that the latter should keep off, etc.; yet, as against B, A's own privileges of entering on Blackacre would be gone. On the other hand, with regard to X's land, Whiteacre, A has, as against B, the privilege of entering thereon; but, not having possession, he has no right, or claim, that B shall not enter on Whiteacre."

For a more detailed analysis, explanation, and discrimination of the fundamental jural relations, see the earlier article, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16.

As there indicated, p. 41, the best synonym for *"legal privilege,"* in the very specific sense of "no-duty," is *"legal liberty."*

aggregate of the easement owner differs from that of the ordinary complete owner of land only in being far more limited as regards the number and the quality of the constituent jural relations involved. For this reason it is a serious obstacle to close analysis and clear thinking that courts and writers habitually deal with the easement (as they do also with all other legal interests) as if it were a simple unity to be adequately described by a few loose and ambiguous terms such as "property," "title," "ownership," "*right* of ownership," "right," "privilege," "incorporeal(!) right," etc.—terms utterly insufficient to indicate the precise elements involved. In none of the books has any strict analytical method been pursued. Some typical "definitions" disclose at a glance how hopelessly inadequate they are to indicate the varieties of jural relations actually included in each of the various kinds of easements.[9] The unfortunate fallacy consists in treating as if it were a solid, unanalyzable unity that which

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[9] Jones, *Easements* (1898) sec. 1:

"An easement is a privilege without profit which one has for the benefit of his land in the land of another."

Tiffany, *Real Property* (1903) 677:

"An easement is a right, in one person, created by grant or its equivalent, to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon, the right generally existing as an accessory to the ownership of neighboring land, and for its benefit."

Mr. Justice Thompson, in *Big Mountain Improvement Co.'s Appeal* (1867) 54 Pa. 361, 369:

"This was but the grant of an easement although described to be in fee, which is generally defined to be 'a liberty, privilege or advantage which one may have in the lands of another without profit:' Gale & Whately on Easements 6."

The usual definitions and explanations of "profits" and other "incorporeal" hereditaments are similarly deficient and unsatisfactory. Compare, *e. g.*, Tiffany, *Real Property* (1903) 678:

"An easement is to be distinguished from a *profit à prendre,* which signifies a right in a person to take a part of the soil belonging to another person, or something growing or subsisting on or in the soil."

The most significant and distinguishing elements in the entire aggregate of the "profit" owner are those which the books constantly fail to point out, viz., the *legal powers* of acquiring ownership of *severed parts* of the "servient" land by exercising the *legal privileges* of making physical severance. Of course, rights (or claims) and immunities, as well as privileges and powers, constitute elements in the profit owner's "aggregate." See *post* pp. 97 *seq.*

is really a complex aggregate of many distinct jural relations, actual and potential.[10]

Consider, for example, a right of way over Y's land Whiteacre, the "servient" tenement, X being the owner of Blackacre, the "dominant" tenement. Without attempting an exhaustive analysis of this interest, it is clear that the most significant jural relations included in X's complex aggregate are as follows: *First,* X has rights, or claims, against others,—Y and third parties,—that they shall not interfere with his crossing of Whiteacre, as *e. g.,* by erecting an obstruction;[11] and all such other persons are under respective correlative duties not to interfere, etc. *Second,* the most striking jural relations in X's complex aggregate consist of his legal privileges of crossing Whiteacre in various ways (as by walking, riding or driving); *i. e.,* his privilege in any such case is the negation of the duty to stay off which X would be under were it not for the special easement facts distinguishing him from other individuals. Correlative to X's privileges are the no-rights of Y; i. e., Y has no rights that X should stay off. Though, unfortunately, the point is generally overlooked, and sometimes, *in effect,* denied,[12] these "privilege—no-right" relations are as true jural relations as the "right—duty" relations already referred to.[13] Moreover, it is

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[10] The same tendency is manifest in the usual attempts to analyze even the most complex and intricate kinds of jural interests, such as equitable *trust interests, corporate ownership,* etc. Compare as regards *trusts, Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16-19; *The Relations between Equity and Law* (1913) 11 MICH. L. REV. 537, 553; *The Conflict of Equity and Law* (1917) 26 YALE LAW JOURNAL, 767-770; and, as regards the analysis of *corporate ownership, The Nature of Stockholders' Individual Liability for Corporation Debts* (1909) 9 COL. L. REV. 285, 287 *seq.; The Individual Liability of Stockholders and the Conflict of Laws* (1910) 10 COL. L. REV. 283, 296-326.

[11] These are, of course, *multital* rights (so-called rights *in rem*), as contrasted with *paucital* rights (so-called rights *in personam*).

For an extended analysis and explanation of these conceptions and terms—so often misunderstood—see *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 26 YALE LAW JOURNAL, 710.

For an explanation of the terms, *jus in re* and *jus in re aliena,* see *Ibid.,* 734 *seq.*

[12] See Pollock, *Jurisprudence* (2d ed., 1904) 62; and *cf.* Del Vecchio, *Formal Bases of Law* (tr. by Lisle, 1914) 166-182.

[13] See *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1913) 23 YALE LAW JOURNAL, 16, 42, n. 59, criticising, *inter alia,* the views expressed in Pollock, *Jurisprudence* (2d ed., 1904) 62.

See also *ante,* p. 69, n. 8.

the privilege elements in X's interest, involving an *affirmative* activity on Y's land, Whiteacre, that cause his easement to be classified as *affirmative,* in contrast to a negative easement, such as that of light. *Third,* X has various legal powers: *e. g.,* the power, subject to certain limitations, to create in others, e. g., servants and guests, respective privileges of crossing Whiteacre; the power to alienate his aggregate of relations by conveying it, along with his main Blackacre interest, to M—such alienation really consisting of the extinguishment of X's own relations and the creation of new and corresponding relations in M;[14] and the power to extinguish his aggregate of relations in favor of Y, leaving no-rights (or no-claims), duties, liabilities and disabilities in place of his previous interest, together with a corresponding transformation of jural relations as regards Y and all third persons. *Fourth,* X has various legal immunities, the term "immunity" being here used in the very definite sense of non-liability or non-subjection to legal power on the part of another person. Thus, *e. g.,* X is free from the power of any person, under ordinary conditions, to extinguish his easement interest.

Passing from *affirmative* easements to those classified as *negative,* the typical case is the easement of light. In that case the aggregate consists of rights, or claims, powers and immunities; the significant thing being the absence of privileges to be exercised by X through affirmative acts on Y's land.[15]

Coming nearer to the problem of the principal case, let us consider two adjacent parcels, Brownacre, owned by J, and Greenacre, owned by K. In the absence of special facts operating in favor of J or others, K has so-called "natural rights" to lateral support; *i. e.,* such rights, or claims, exist as ordinary elements of K's aggregate of jural relations called "ownership

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[14] As regards the "alienation" of "legal interests," see the article already cited (1913) 23 YALE LAW JOURNAL, 16, 24, 45; also Professor Walter W. Cook, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816-837; *The Alienability of Choses in Action—A Reply to Professor Williston* (1917) 30 HARV. L. REV. 449-485.

[15] Compare Holmes, in 3 Kent, *Com.* *419, note (c):

"In general it is supposed that the duty of the servient owner is the same as that of third persons in point of law, viz., to abstain from interfering with a right *in rem,* although it is more onerous in point of fact, by reason of his occupation of the land. See D. 43. 19. 3, sec. 5; *Saxby v. Manchester, Sheffield, &c., R. Co.,* L. R. 4 C. P. 198. But see *Lawrence v. Jenkins,* L. R. 8 Q. B. 274."

of Greenacre,"—being in no way dependent on special grant or equivalent operative facts, such as reservation or prescription. That is to say, K's right that J shall not, by removing the lateral support, cause K's land to collapse is exactly of the same general character as K's ordinary right that J, having no "right of way" easement or other basis of privilege, shall not walk across Greenacre.

Suppose, however, that K should, by instrument of grant under seal, purport to create in J, his heirs and assigns, the "right and privilege," of causing, through removal of support, the collapse of K's land. Is there any reason why the aggregate of relations so created should not be considered an "easement," and thus involve the application of the usual rules as to the alienation of easements, that is, that easements appurtenant pass ordinarily with the dominant estate even without express mention,[16] and, *a fortiori,* under a clause as to "appurtenances?" How, if at all, does J's aggregate of jural relations concerning and affecting Greenacre differ from X's aggregate of jural relations called "right of way" over Whiteacre?

In the Greenacre case, as in the Whiteacre case, we can easily discover right (claim) elements, privilege elements, power elements and immunity elements. The privilege is that of causing the collapse of K's land through removal of his own soil and concomitant change in the operation of natural forces on K's land. The privilege is limited, as indicated, to causing collapse *in a particular mode,* viz., through change in the operation of natural forces through removal of J's own soil. The power elements and immunity elements are equally obvious. Similarly, there seem to be rights, or claims, corresponding to those involved in X's right of way over Whiteacre. That is, since by the very terms of the supposed grant to J, K has given him the *"right* and privilege"[17] of removing lateral support, etc., the intentions of the parties are clear: J has rights against K (and, by analogy to a right of way, against third parties indiscriminately) that they shall not interfere with the "exercise" of J's privilege, that is with the physical activity bringing about a change in natural forces against K's land. Such an aggregate of jural

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[16] See Jones, *Easements* (1898), sec. 22, collecting the authorities at large.

[17] In *Penman v. Jones* (1917, Pa.) 100 Atl. 1043, it will be remembered, the same terms, "right and privilege," were used in the deed from A to B.

relations in J would thus seem to constitute an easement; and authority is not wanting for this view.[18]

A precisely similar analysis is applicable to the operative facts and resulting jural relations involved in *Penman v. Jones*,[19] the Pennsylvania case chiefly in view. By revolving Greenacre and Brownacre ninety degrees on an axis, the former would become the superjacent estate of B, and the latter would become the subjacent estate of A (Lackawanna Iron & Coal Co.)

It is well settled in Pennsylvania, in accord with the authorities at large, that on the original creation of a subjacent mineral estate, either by grant or by exception, the owner of the superjacent estate acquires an ordinary, or "natural," right of surface support corresponding to the right of lateral support already considered.[20]

Thus in one of the latest cases on the subject, *Youghiogheny River Coal Co. v. Allegheny National Bank*,[21] the Supreme Court of Pennsylvania said, by Mr. Justice Mestrezat:

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[18] See *Ryckman v. Gillis* (1874) 57 N. Y. 68, 74. In this case Johnson, C., who dissented only on other grounds, said, at p. 78:

"But if the right to have support from adjoining land be not an easement, then what may be called the antagonistic *right of removing your own soil so as to diminish the support* to which the adjoining owner was entitled, *is an easement affecting his land in favor of yours*, and making his land the servient tenement in that regard, and subject to the easement of being deprived of its natural support. That such an easement may be acquired by grant or agreement of the parties is obvious, and has been settled by repeated adjudications between surface owners and mine owners underneath."

See also, to similar effect, Tiffany, *Real Prop.* (1903) 690. *Cf.* Jones, *Easements* (1898) sec. 589.

Compare also the easement of causing noises and vibrations harmful to the owner of neighboring land. *Sturges v. Bridgman* (1878) 11 Ch. D. 852.

[19] (1917, Pa.) 100 Atl. 104.

[20] *Jones v. Wagner* (1870) 66 Pa. 429, 434; *Horner v. Watson* (1875) 79 Pa. 242, 251; *Coleman v. Chadwick* (1875) 80 Pa. 81; *Williams v. Hay* (1888) 120 Pa. 485, 496; *Robertson v. Youghiogheny River Coal Co.* (1896) 172 Pa. 566, 571.

The same principle is recognized and discussed in many of the later Pennsylvania cases cited in the footnotes following.

The leading English case for the same doctrine is *Humphries v. Brogden* (1850) 12 Q. B. 739. See also the careful discussion in *Howley Park Coal & Cannel Co. v. London & N. W. Ry. Co.* [1913] A. C. 11, 25, *per* Viscount Haldane, L. C.

For the similar American cases at large, see Tiffany, *Real Property* (1903) 672, n. 74.

[21] (1905) 211 Pa. 319, 324.

> "If the *owner* of the *whole fee* conveys *the coal in the land* in general terms, as in this case, retaining the residue of the tract, the purchaser acquires the coal with the right to mine and remove it, provided he does so without injury to the superincumbent estate. His *estate* in *the coal,* like that of the owner of the surface, is governed by the maxim *"sic utere tuo ut alienum non laedas."* The *owner* of *the surface* is *entitled to absolute support of his land,* not as an easement or right depending on a supposed grant, but as a proprietary right at common law: *Carlin v. Chappel,* 101 Pa. 348; 2 Snyder on Mines, sec. 1020."

But it is equally well settled in Pennsylvania, as in England, that the "right and privilege" of letting down the surface can, by apt words, be created in the owner of the subjacent estate either through grant or through reservation. In the leading Pennsylvania case deciding this point, *Scranton v. Phillips,*[22] the court said, by Mr. Justice Mercur:

> "We see no reason why a person shall not be bound by his agreement to exempt another from liability for damages in working a coal mine, as well as from liability for damages resulting in the performance of any other kind of labor. *No rule or policy of law forbids it.* The undoubted intention of the parties to the contract was, that Fellows might mine and remove the coal without any obligation to support the surface or liability in case it fell. It was well said by Justice Blackburn, in *Smith v. Darby et al.,* Law Rep., 7 Q. B. 716, 'the man who grants the minerals and reserves the surface is entitled to make any bargain he likes; both parties are just as much at liberty to make a bargain with reference to coals and minerals, as to make a bargain with reference to anything else.' The same rule applies when one grants the surface and retains the minerals. In each case the question is, did the parties agree there should be no obligation in regard to support?"

In a much later case, *Miles v. Pennsylvania Coal Co.,*[23] the same proposition was enunciated even more clearly and definitely by Mr. Justice Mestrezat:

> "While, however, the owner of the surface is entitled as of natural right to its support by the owner of the subjacent mineral estate, it is *equally well settled* that the common owner of both estates, or the owner of the fee simple title to the tract of land, may by contract *relieve* the *owner* of *the mineral estate* from *any duty to support the*

[22] (1880) 94 Pa. 15, 22.
[23] (1907) 217 Pa. 449, 451.

> *surface* and from liability for any injury or damage done to it by mining and removing all the mineral. Being the common owner of the whole title and, therefore, having the *jus disponendi,* he may make any legal disposition of the property he may desire. He may sell the coal and retain the surface, or he may sell the surface and retain the coal. In selling or leasing the coal, he may grant *such rights* to the vendee or lessee as either may desire or deem proper or necessary *to remove the entire body* of coal, *as well as* such *rights in, through or over* the *surface* as may be necessary for the same purpose. In other words, *having the absolute dominion* over the property he *may grant such rights therein and thereto as may be agreed upon* and are stipulated for in the contract. This naturally and logically follows from his ownership of the fee simple title to the property."

Let us next consider the change in legal relations resulting either from an alienation of the superjacent ("servient") estate or from an alienation of the subjacent ("dominant") estate.

First, suppose the superjacent estate is transferred. Does the transferee take subject to the "right and privilege" of the subjacent owner? That is, does the transferee get an aggregate of legal relations (rights, privileges, powers, and immunities) equivalent only to those that his grantor had—and no greater? Or, putting the same question in different form, does the transferee take subject to the same no-rights, duties, liabilities, and disabilities as his grantor was under? This question was, in substance, presented in *Kellert v. Rochester & Pittsburgh Coal & Iron Co.*[24] In that case the original grant of the subjacent estate ran to the grantee "his heirs and assigns." But the language creating the privilege of letting down the surface did not expressly purport to "bind" subsequent takers from the grantor:

> "And the said parties of the first part, do hereby release all and every claim or claims for damages to the said land caused by operating or working of said mines in a proper manner."[25]

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[24] (1909) 226 Pa. 27, 29.

[25] It seems nothing short of remarkable that in instruments involving such important interests the draftsman should employ such loose and inexact language as appears in so many of the deeds on which the Pennsylvania decisions are founded.

The words, "release all and every claim or claims for damages to the

Yet the court held, in effect, that the subsequent transferee took the superjacent estate subject to similar limitations as regards rights, privileges, powers, and immunities:

> "On the trial of the cause as well as on the argument of the present motion to lift the nonsuit, it was contended that the release of damages contained in this deed bound the grantors alone, and did not extend to their grantees, the plaintiffs, since it is not in express words made to apply to the grantors, 'their heirs and assigns.' In my opinion this contention can find no support either in the law or the facts in this case. The deed from Samuel Craft and wife to Adrian Iselin in apt words conveys a fee in the coal, and the subsequent related stipulations and *the release of damages to the surface* that might result from the removal of the coal are germane to and *an integral part of the grant.* It was not necessary to repeat the words 'heirs and assigns' in connection therewith to make said stipulations and release apply to *subsequent* grantees of the *surface* land."

Second, let us assume that the subjacent estate, being *already in existence* along with the "right and privilege" of letting down the surface, is transferred to another. As conceded by the majority judges in *Penman v. Jones,* such "right and privilege" may by apt words be granted along with the existing subjacent estate.[26] The previous Pennsylvania decisions supporting this proposition all seem, however, to be cases in which the conveyance to the subsequent grantee purported in express *and specific* terms

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said land," purport, so far as direct meaning is concerned, to be a present release (extinguishment) of a *secondary* right (or "claim") to damages arising from breach of a *primary* right. Yet such secondary rights (or "claims") could not arise until the *future.* Obviously, what is really intended, so far as the grantor's rights, privileges, etc., are concerned, is an extinguishment of *primary* rights, privileges, etc. In correlative terms, the purpose is to create in the *grantee* of the subjacent estate immediate *primary* privileges, rights (or claims), powers, and immunities. It is of course entirely possible to express this purpose in unmistakably clear and precise terms. No doubt instruments more intelligently and artistically drawn in cases of this character would prevent serious controversy and save enormous waste from litigation.

Compare *post,* p. 79, n. 30.

[26] *Madden v. Lehigh Valley Coal Co.* (1905) 212 Pa. 63, 64 (subsequent grantee of the subjacent estate held to have privilege of letting down the surface; terms of his grant do not appear in the report); *Stilley v.*

to grant the "right and privilege" along with the subjacent estate proper. Under such circumstances it was held both in *Stilley v. Buffalo Co.*,[27] and in *Kirwin v. Del., L. & W. R. R. Co.*[28] that the "right and privilege" passed, so that the subsequent grantee was privileged to let down the surface. It is significant, however, that no emphasis was in either case placed on the fact that *specific* terms had been employed for the purpose of alienating the "right and privilege."[29] Thus, in the first case just mentioned Mr. Justice Elkin, speaking for the court, rested the result, very justly, on a broad foundation, viz., the intentions of the original grantor and grantee of the subjacent estate:

> "Our cases relating to this question may very properly be divided into three classes: 1. Those relating to grants of coal without any mention of damages to the surface by mining and removing the same; 2. Those relating to grants of coal coupled with mining rights and the waiver of damages resulting by reason of the proper exercise of the mining privileges; and, 3. Those cases in which *the grant* of *the coal together with mining rights* is followed either by an *express waiver of damages to the surface* resulting from the removal of the coal, *or* by words *importing such a waiver*. . . . In the cases last cited it was expressly held that the rule giving to the owner of the soil the right of surface support had no application in a case in which the parties had otherwise covenanted. *Like any other right, the owner of the surface may waive the right of surface support by his deed or covenant.* It is therefore *just as well settled* that *a surface owner may part with his right of surface support by a covenant to do so, as it is that the servitude of support is imposed upon the subjacent estate.* The important question in cases of this character is whether the surface owner by *express words* or by *necessary implication* has waived the right of

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Buffalo Co. (1912) 234 Pa. 492, 497 (deed to subsequent grantee of subjacent estate contained express and specific terms granting the right and privilege of letting down the surface); *Kirwin v. Del., L. & W. R. R. Co.* (1915) 249 Pa. 98, 100 (same as in preceding case).

[27] (1912) 234 Pa. 492, 497.

[28] (1915) 249 Pa. 98, 101.

[29] It is to be remembered that, as regards the Pennsylvania cases, the "right and privilege" have generally, if not always, been granted or reserved to the holder of the subjacent estates, "his heirs and assigns"; or else equivalent language has been used.

In *Penman v. Jones*, the original owner of the subjacent estate having been a corporation, the reservation was to the grantor, "its successors and assigns."

surface support. *The intention of the parties must and should govern.* . . . The *mining privileges granted* were *incident to* the mining and removing of *all* the coal underlying the tract of land, and the covenant as to damages was in these words, 'hereby waiving *all* damages arising *therefrom.*' If this waiver referred to damages to the land arising from the removal of *all* the coal, the case at bar is *squarely ruled* by *Kellert v. Coal & Iron Company,* 226 Pa. 27. . . .

"In that case as in this the waiver of damages *related to the land not included in the grant* of the coal. . . . The grantor conveyed *all* the coal and no doubt intended to release *all* damages occasioned by the removal of it. As we have hereinbefore pointed out the release of damages in the present case related to the injuries resulting to the land by the removal of the coal, just as the waiver in the Kellert case above cited had reference to the land there in question."[30]

In *Graff Furnace Co. v. Scranton Coal Co.*[31] there is an important *dictum* tending to show that the "right and privilege" in question would ordinarily pass with the subjacent estate to a subsequent grantee. Said Mr. Justice Mestrezat, in delivering the opinion of the court:

"Equally true, however, is it that the owner in fee of the entire estate may grant the mineral estate and by apt words in the deed of conveyance may part with or release his right to surface support, and where he does so his grantee *or* those *claiming through him* may mine *all* the coal even though it should result in the surface falling in. The owner of the entire estate may likewise grant the surface of the land and reserve the mineral estate with

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[30] As to the adequacy of language of "covenant," "agreement," "waiver," "release," etc., to create easements, compare Mr. Justice Holmes, in *Hogan v. Barry* (1886) 143 Mass. 538:

"There is no doubt that *an easement* may be created by words sounding in *covenant. Bronson v. Coffin,* 108 Mass. 175, 180. If the *seeming covenant* is for *a present enjoyment* of a nature recognized by the law as capable of being conveyed and made an *easement,*—capable, that is to say, of being *treated as a jus in rem,* and as not merely the subject of a *personal undertaking,*—and if the deed discloses that the covenant is for the *benefit* of *adjoining land conveyed at the same time,* the covenant *must be construed as a grant,* and, as is said in Plowden, 308, 'the phrase of speech amounts to the effect to vest a *present property in you.*' An easement will be created and attached to the land conveyed, and will pass with it to assigns, *whether mentioned in the grant or not.*"

See also cases cited in 10 *Am. & Eng. Ency. of Law* (2d ed., 1899) 414, n. 1.

[31] (1914) 244 Pa. 592, 596.

> the right to mine and remove it without liability for any injury or damage done to the surface, and in such case the grantor *or* those *claiming through him* may mine and remove all the coal without being compelled to support the surface."

The language of the last three quotations all imports that the "rights, privileges," etc., as to letting down the surface constitute an integral part of the subjacent owner's interest, just like the rights and privileges of "a right of way" appurtenant to the subjacent estate.[32] *Penman v. Jones,* however, is evidently the first case to require or involve a more careful consideration of the exact nature of the subjacent owner's "right and privilege" and a classification of that form of legal interest either as an "easement" or as something other than an easement. As already intimated in dealing with a similar "right and privilege" concerning withdrawal of *lateral* support,[33] it would seem that in *Penman v. Jones* the "right and privilege" reserved to A, its "successors and assigns" should have been treated as an easement, especially as regards the matter of alienation.

As Mr. Justice Moschzisker says in his dissenting opinion:[34]

> "How shall the character of that right be defined? If it must be classed as an 'easement appurtenant,' then it would pass by a subsequent conveyance of the mineral estate. (*Cathcart v. Bowman,* 5 Pa. 317; *Horn v. Miller,* 136 Pa. 640, 654, 20 Atl. 706, 9 L. R. A. 810; *Richmond v. Bennett,* 205 Pa. 470, 472, 55 Atl. 17; *Held v. McBride,* 3 Pa. Super. Ct. 155, 158; *Citizens' Elec. Co. v. Davis,* 44 Pa. Super. Ct. 138, 142; *Dority v. Dunning,* 78 Me. 381, 384, 6 Atl. 6; *Winston v. Johnson,* 42 Minn. 396, 402, 45 N. W. 958), unless some exceptional rule applies to an easement of this particular kind. An easement 'is generally defined to be a "liberty, privilege or advantage which one may have in the lands of another without

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[32] Compare Mr. Justice Mestrezat in *Miles v. Penn. Coal Co.* (1907) 217 Pa. 449, 451.

In this case the learned judge's language is such as to lump together, as of the same nature, both a right of way and a "right and privilege" of letting down the surface:

"In selling or leasing the coal, he may *grant such rights* to the vendee or lessee as either may desire or deem proper or necessary *to remove* the *entire body* of coal, *as well as* such rights in, *through* or *over* the *surface* as may be necessary for the *same purpose.*"

[33] See *ante,* pp. 73-74.

[34] *Penman v. Jones* (1917) 100 Atl. 1043, 1047-1048.

profit."' *Big Mountain Improvement Co.'s App.*, 54 Pa. 361, 369. Jones on *Easements*, at page 4, states their qualification thus:

'First, they are incorporeal; second, they are imposed on corporeal property; third, they confer no right to a participation in the profits arising from such property; fourth, they are imposed for the benefit of corporeal property; fifth, there must be two distinct tenements—the dominant, to which the right belongs, and the servient upon which the obligation rests. . . .'

"Thus it may be seen that the right created in the grantor by the deed from A. to B. has all the attributes of an easement appurtenant to the mineral estate vested in the former. It is an incorporeal right attached to corporeal property, and, when brought into legal existence, generally speaking, it would pass upon a conveyance of the latter under the general description of 'appurtenances.' Id., sec. 20 et seq., and cases hereinbefore cited."

Various authorities support the conclusion here suggested as sound.[85]

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[85] *Rowbotham v. Wilson* (1857) 8 E. & B. 123, affd. 8 H. L. Cas. 348. Compare *Aspden v. Seddon* (1875) 10 Ch. App. 394, 402; *Wilms v. Jess* (1880) 94 Ill. 464, 468 (reasoning and dicta).

In *Aspden v. Seddon, supra*, Mellish, L. J., said:

"Now, by the deed, all mines and seams of coal, ironstone, and other minerals are reserved to *Stott*, with full liberty, power, and authority for *Stott* and his lessees 'to search for, get, win, take, cart and carry away the same, and sell or convert to his or their own use the said excepted mines, veins and seams of coal, cannel, and ironstone and other mines and minerals, or any of them, or any part or parts thereof, at pleasure, and to do all things necessary for effectuating all or any of the aforesaid purposes.' . . . If the sentence had stopped there, these words would be consistent with the construction that the mineral owner may take away every part of the minerals, provided he can do so without violating the surface-owner's right to support, but not otherwise, and some further words would be necessary to prove that the intention of the parties was that the mineral owner should be at liberty to take away the whole or any part of the minerals, notwithstanding he might thereby let down the surface or any buildings thereon. Accordingly the Respondents rely on the words which immediately follow in the deed as sufficient for this purpose. Those words are, 'but without entering upon the surface of the said premises, or any part thereof, so that compensation in money be made by him or them for all damage that should be done to the erections on the said plot by the exercise of any of the said excepted liberties or in consequence thereof.'

"As by the express words of the reservation the mine-owner in working the mines is not to enter upon the plot of land conveyed by the deed, the damage to the buildings for which compensation is to be given must be damage to the buildings caused by the removal of the minerals reserved, and therefore it follows that *a right* to remove *all* the minerals, notwithstanding the buildings above might be thereby damaged, was *one of the liberties* reserved by the deed. . . .

"It was argued on the part of the Appellants, that the right to com-

The contrary opinion of the majority judges in *Penman v. Jones* seems to be founded on four interesting and crucial points which may be indicated and discussed as follows: (a) The court's reliance on cases involving an original "severance" of the superjacent and subjacent estates; (b) The court's confusing of the *subjacent* owner's legal *privilege* of removing surface support, etc., with the *superjacent* owner's *right* (in the sense of *"legal claim"*) that *another* person shall *not* remove the surface support; (c) The court's reasons for refusing to treat the interest as an easement; (d) The court's explanation of the interest as an "irrevocable license." Each of these matters must here be treated with as great brevity as may be consistent with clearness:

(a) *The court's reliance on cases involving an original "severance" of the superjacent and subjacent estates.* The court begins its argument by quoting from a series of cases running from *Jones v. Wagner*[36] to *Youghiogheny River Coal Company v. Allegheny National Bank*,[37] the court's quotation from the latter case having already been reproduced at an earlier point in the present discussion.[38] All of such cases announce merely the well settled doctrine that the holder of the superjacent estate, at the moment of "severance," has, apart from *grant or reservation*, etc., a so-called "natural" right of surface support; or, correlatively, that the owner of the subjacent estate has immediately *the duty* of not causing collapse through removal of support: that is, has *no privilege* of causing collapse, etc. These cases, which are in entire accord with the authorities at large, would seem very difficult of application to the situation in *Penman v. Jones*. In that

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pensation was merely an additional remedy given to the surface-owner in case his buildings were damaged, but did not give the mine-owner a right to get the minerals in such a way as to cause damage to the buildings. It seems to us, however, clear that the compensation is given for damage caused by rightful acts which the deed makes lawful, and not for damage caused by wrongful acts. The *exercise* of any of the *excepted liberties* must *surely apply* to *rightful* acts, and not to wrongful acts, because it is *absurd to suppose* that *a liberty* is reserved *to do wrongful acts*. If *liberty* is reserved to do the act complained of, that reservation, as between the parties and those claiming under them, *makes the act rightful*."

In *Rowbotham v. Wilson, supra*, the judges, both of the Exchequer Chamber and of the House of Lords deliberately and definitely characterized the interest in question as an *easement*. The important passages to this effect are quoted *post*, pp. 90-91.

[36] *Jones v. Wagner* (1870) 66 Pa. 429, 434.

[37] (1905) 211 Pa. 319, 324.

[38] For the court's quotation from this case, see *ante*, pp. 74-75.

case the subjacent estate had already been "severed" for *eighteen* years; and the "right and privilege" of letting down the surface, having at the moment of "severance" been created as an *integral part* of the *subjacent owner's aggregate of legal relations,* had had a similar period of life. The transfer of the subjacent estate and its accompanying "right and privilege" was, at that moment, a matter admittedly concerning only the *subjacent* owner and *his* transferee: the *superjacent* owner had no power to prevent the alienation of the "right and privilege." Whatever we call the "right and privilege," its transfer *along with* the subjacent estate proper would be like the transfer of an *existing* easement, not like the creation of a *new* easement at the moment of severance.

Yet the majority opinion, immediately after the quotation from *Youghiogheny River Coal Co. v. Allegheny National Bank,*[87] continues as follows:

> "In the light of the *foregoing authorities,* it is *clear* that there is *nothing* in the *language of the deed* from the Lackawanna Iron & Coal Company to the steel company, which *can be regarded as indicating an intention* to convey the minerals free from liability upon the part of the purchaser to support the surface in their removal. *No such privilege* follows from the mere conveyance of *coal,* machinery, fixtures, tools, etc., *with the 'hereditaments and appurtenances' belonging thereto.* The conveyance of 'all the estate, right, title, *interest, benefit,* property, claim and demand whatsoever' of the grantor, is properly referable to the *subject-matter* of the grant, to wit, the *coal* conveyed, and does not *necessarily* amount to a *waiver* of *the right* of *the grantor to insist upon support being left for the surface.*"

(b) *The court's confusing of the subjacent owner's legal privilege of removing surface support, etc., with the superjacent owner's right (in the sense of legal claim) that another person shall not remove surface support, etc.* Let us consider certain passages from the court's opinion in juxtaposition:

(1) "No such *privilege*" [of removing surface support ("free from liability")] "follows from the mere conveyance," etc. (*From above quotation.*)

(2) "The conveyance . . . is properly referable to . . . the coal conveyed and does *not* necessarily *amount* to a *waiver* of the *right* of the *grantor* to insist upon *support being left for the surface.*" (*From above quotation.*)

(3) "The insertion" etc. . . . "indicates an *intention* upon the part of *the grantor not to waive* the *right* of support as to other lots" [including superjacent lot in question]. (*Later passage.*)

(4) "In the present case, whatever *right*" [privilege] "the *coal company* retained *to interfere* with the *surface support* was relinquished by it to the Scranton Trust Company" [D], etc. (*Still later passage.*)

This is not simply a matter of *terms*, as such: it is a matter of *basic legal conceptions* constituting *the very essence* of the court's reasoning.[39] In the *first* and *fourth* passages, the court is dealing with "privilege—no-right" relations; in the *second* and *third* passages with "right—duty" relations. More specifically, in the *first* and *fourth* passages the question is whether the "privilege" of A, the Coal Company, (the correlative "no-right" being in B, the superjacent owner) has been alienated to another person—in passage "(1)" to C, the Steel Company, in passage "(4)" to D, the Trust Company. But in the *second* and *third* passages that question is treated as *identical* with the question whether "the *grantor*" of the *subjacent* estate has made a "waiver" of "the right" [= claim] "of support" as to B's lot.[40]

As, of course, the ownership of the superjacent lot in question was in B at the time the conveyance of the subjacent estate was made, it is clear that the *grantor* of the *subjacent* lot had no "right of surface support" to waive or extinguish. It is clear that he had no such right, or claim, against *himself;* and it is equally clear that he had no such "naked" rights, or claims, against C (the Steel Company) or anyone else. Such grantor

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[39] Similar serious difficulties as regards the application of fundamental legal conceptions are to be found in *Graff Furnace Co. v. Scranton Coal Company* (1914) 244 Pa. 592, 598.

[40] Elsewhere in the opinion, *Penman v. Jones* (1917) 100 Atl., at 1046, more baffling language is used:

"The Scranton Coal Company has no direct interest in this case; but, considering that its rights might be affected by the conclusion herein reached, it presented a brief, and has been represented by counsel, who among other points raised, have contended that, if the deed from the coal company to the steel company did not *pass to it* the *waiver of liability* for failure to support the surface *which had been retained* by the *coal company,* then the deed to the trust company was also insufficient to *release* or *reconvey* that *waiver* to the owner of the surface. But this contention overlooks the fact that the law gives to the owner of the surface the right to subjacent support of his land in its natural condition, as a result of, and as an incident to that ownership."

had (apart from various powers and immunities not now necessary to be considered) merely the "right and privilege" of removing the surface support (and causing damage thereby), i. e., the *privilege* of removing support, and the rights, or claims, that all others, including B, the superjacent owner, should *not interfere* with his *privileged acts of removing* such support, etc. These rights, or claims, against interference are, of course, entirely different from any supposed right, or claim, that such surface support should *not* be removed. Similarly, in the "right of way" case heretofore put, with X owning the dominant tenement, Blackacre, and Y owning the servient tenement, Whiteacre, it is clear that X's privileges of crossing Whiteacre and his rights of non-interference against Y and others are entirely distinct from Y's rights, or claims, that *others* than X shall not *trespass* on Whiteacre.

Very possibly, had the learned Pennsylvania court seen that, as regards the conveyance of the subjacent estate to C (the Steel Company) it was not dealing with "the grantor's" natural "right of surface support," the decision of the case would have gone the other way.[41] A similar suggestion may, indeed, be ventured as regards the earlier case of *Graff Furnace Co. v. Scranton Coal Co.*,[42] involving a somewhat different question of great importance to mining interests. In any event, it seems altogether likely that in *Penman v. Jones,* had there been a more careful discrimination and application of fundamental legal conceptions as above specified, the court would have realized the inapplicability of the series of cases running from *Jones v. Wagner*[43] to *Youghiogheny River Coal Co. v. Allegheny National Bank.*[43]

(c) *The court's reasons for refusing to treat the "right and privilege," as an easement.* For the proposition that the "right and privilege" of letting down the surface was *not an easement,* the majority judges cite no authorities; and their own argument

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[41] Compare Mr. Justice Holmes, in *The Path of the Law* (1897) 10 HARV. L. REV. 456, 474-475:

"Therefore, it is well to have an accurate notion of what you mean by law, by *a right,* by a duty, by malice, intent, and negligence, by ownership, by possession, and so forth. I have in mind cases in which the highest courts seem to me to have floundered because they had no clear ideas on some of these themes."

[42] (1914) 244 Pa. 592, 598.

[43] See *ante,* p. 74, n. 20.

is as follows, the various portions thereof being consecutively numbered and paragraphed by the present writer so as to facilitate subsequent reference:

> "(1) This stipulation cannot *properly* be *regarded* as the creation of another *easement appurtenant* to the mineral estate, *which would pass merely with its conveyance.* The stipulation for *the right to remove* the coal *without liability* for injury to the surface *did not* have the *effect* of *retaining in* the grantor *any interest* outside of *the coal,* in the land which was being conveyed. It did not authorize the grantor *to do* anything *upon* the *land of the surface owner,* but its effect was *merely* to *absolve* the owner of the coal *from responsibility* for *injurious consequences* which might *follow* the removal of the coal. The stipulation may fairly *be considered* as being a *license* to do the desired act, that is, *to let down the surface,* if necessary, in order to remove the coal. It was *authority* to do an act *affecting* the land, *without, however, conferring* upon the licensee *any estate* in the land. An easement is always an estate in the land.
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> "(2) But *'a license* properly *passeth no interest,* nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful.' *Thomas v. Sorrell,* Vaughan's Rep. (Eng.) 330, 351. It is distinguished in this from an easement. Jones on *Easements,* 64, 65. The *only effect* of the *stipulation in this case* would be *to make lawful* the *letting down of the surface,* which *otherwise* would be *unlawful. Further than that, it could not go.*
>
> "(3) Its force would be spent with the removal of the coal.
>
> "(4) The *license* in this case, *being coupled with a grant* of the coal, or *rather* with the *reservation* of the coal, was irrevocable by the owner of the surface, and was assignable by the licensee.
>
> "(5) *Beyond question* the coal company *had power to assign* to the steel company *its right to remove the coal without liability* for injury to the surface, but it did not see fit to do so."

In this argument the *first* point to emerge is that "the right and privilege" did "not authorize the grantor *to do* anything *upon* the land of the surface owner," and that it was only "authority *to do* an act *affecting* the land." The mere assembling of the two parts of this proposition would seem sufficient to show how attenuated is the objection urged. The privilege of causing the surface owner's land to collapse would seem a more substantial *affirmative* privilege than the privilege of walking "upon" the

surface of the subjacent owner's land. For the living law affecting practical coal miners the distinction laid hold of appears, at best, purely arbitrary: it has no teleological basis in relation to the general purposes intended to be achieved by the law of easements. Still looking at the *privilege* elements alone, we may profitably compare the well-recognized easement of making disagreeable noises on one's own land so as to cause annoyance to the owner of adjacent land.[44] It is interesting, in the same

[44] See *Sturges v. Bridgman* (1879) 11 Ch. D. 852, 857, 858, 864. In this case the claim of easement *by prescription* was rejected by the court; but it is recognized in the opinions of Jessel, M. R., and Thesiger, L. J., that such an easement *could be created by grant.* Jessel, M. R., said, at pp. 857-858:

"There are really all sorts of difficulties in the defendant's way. In the first place the easement must be an easement 'upon, over, or from.' Now the noise in question, in my opinion, is not properly described in that way. No doubt the waves by which the sound is distributed pass over the plaintiff's land; there is no question about that. But is that an easement enjoyed 'upon, over, or from any land?' Well, I think it is not. That appears not only from the natural meaning of the words, but from authority. . . . He claims the right of setting the air or ether in motion by something or other that he does upon his own property."

Thesiger, L. J., said, at p. 864:

"The passage of water from his land on to yours may be physically interrupted, or may be treated as a trespass and made the ground of action for damages, or for an injunction, or both. Noise is similar to currents of air and the flow of subterranean and uncertain streams in its practical incapability of physical interruption, but it differs from them in its capability of grounding an action."

Compare also, as regards noises and odors, *Elliotson v. Feetham* (1835) 2 Bing. N. C. 134, 137; *Bliss v. Hall* (1838) 4 Bing. N. C. 183, 186; *Ball v. Ray* (1873) L. R. 8 Ch. App. 467, 471.

Such an easement is generally classified as an *affirmative* or *positive* one. See, e. g., Leake, *Uses and Profits of Land* (1888) 193:

"The transmission and diffusion of noise or noxious vapours over the servient tenement is a positive easement which cannot be effectually opposed by physical obstruction; the only mode of resisting it is by action, when it amounts to an actionable nuisance."

Compare also Salmond, *Torts* (4th ed., 1916) 260-261:

"A *positive* easement is a right to enter *upon* the servient land or to do some other act *in relation* thereto which would otherwise be illegal. A negative easement is a right that the owner of the servient land shall refrain from doing some act which he would otherwise be entitled to do—*e. g.*, the erection of a building which would obstruct his neighbour's lights. In other words, the obligation of the owner of the servient land consists either *in patiendo* (i. e., in suffering the dominant owner to do an act on or in relation to the servient land) or in *non faciendo* (i. e., in refraining from doing some act on the servient land). In the first case the servitude is positive, and in the second negative. . . .

"The chief recognized easements are . . . (6) rights to do some act which would *otherwise* amount to a *nuisance* to the servient land."

connection, to notice the easement (as distinguished from "natural" right) of lateral or subjacent support for a building leaning against or resting upon a structure belonging to the servient land.[45] Turning from privileges to rights (claims),

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[45] Compare Lord Chancellor Selborne, in *Dalton v. Angus* (1881) L. R. 6 App. Cas. 740, 793-795:

"I think it clear that any such right of support to a building, or part of a building, is an easement; and I agree with Lindley, J., and Bowen, J., that it is both scientifically and practically inaccurate to describe it as one of a merely negative kind. What is support? The force of gravity causes the superincumbent land, or building, to press downward upon what is below it, whether artificial or natural; and it has also a tendency to thrust outwards, laterally, any loose or yielding substance, such as earth or clay, until it meets with adequate resistance. Using the language of the law of easements, I say that, in the case alike of vertical and of lateral support, both to land and to buildings, the dominant tenement imposes upon the servient a positive and a constant burden, the sustenance of which, by the servient tenement, is necessary for the safety and stability of the dominant. It is true that the benefit to the dominant tenement arises, not from its own pressure upon the servient tenement, but from the power of the servient tenement to resist that pressure, and from its actual sustenance of the burden so imposed. But the burden and its sustenance are reciprocal, and inseparable from each other, and it can make no difference whether the dominant tenement is said to impose, or the servient to sustain, the weight.

"Lord Campbell in Humphries v. Brogden referred to the servitude *oneris ferendi* (applied in the law of *Scotland* to a house divided into 'flats' belonging to different owners), as apt to illustrate the general law of vertical support. The servitude so denominated (*ut vicinus onera vicini sustineat*) in the Roman law was exclusively 'urban,' that is, relative to buildings, whether in town or country; and the instances of it given in the Digest refer to rights of support acquired by one proprietor for his building, or part of it, upon walls belonging to an adjoining proprietor: Inst. lib. 2, tit. 3; Dig. lib. 8, tit. 2, sects. 24, 25, 33; also tit. 5, sects. 6, 8. But, in principle, the nature of such a servitude must be the same, whether it is claimed against a building on which another structure may wholly or partly rest, or against land from which lateral or vertical support is necessary for the safety and stability of that structure. . . .

"The *pressure* of the dominant tenement, in the case of support, is *upon* the soil of another man's land, and I can see no material difference between this and 'something positive done or used *in* the soil of another man's land.'"

Compare to similar effect, Lord Watson, at p. 831.

The above quotation seems, for present purposes, not without significance and interest even if one must think that there is in Lord Selborne's opinion an unfortunate failure to discriminate between "right" and "privilege" elements in the various easements that he discusses. The privilege of pressure against the neighboring *soil* would doubtless exist as a "natural" or ordinary privilege quite independently of any easement proper.

See, to this effect, Mr. Justice Lindley and Mr. Justice Bowen, S. C., L. R. 6 App. Cas. 740, 764, 784. As Lord Bowen says, at p. 784:

"There is certainly no case which decides that this pressure gives rise to a right of action on the neighbour's part, and practical reasons of

the court apparently overlooks, and certainly ignores, the fact that the subjacent owner was, at the time of severance, granted, in express terms, rights (claims) as well as privileges—the *"right* and privilege," etc. That is, as in the case of a right of way, the subjacent owner would have rights, or claims, that the superjacent owner and third parties should refrain from disturbance of the exercise of his privileges of doing that which might cause the collapse of the superjacent owner's land. If it were not for these "right (claim)" elements in the subjacent owner's interest, very possibly the superjacent owner might, through operations conducted partly on his own land, prevent the subjacent owner's removal of surface support. These rights, or claims, of the subjacent owner correspond, *pro tanto,* to the negative rights constituting the chief elements in the ordinary easement of light.

A *second* point urged in the Pennsylvania court's argument is that "its force" [that is the force of the stipulation for the "right and privilege" of letting down the surface] "would be spent with the removal of the coal." The suggestion seems to be that the *indefinite* duration of the "right and privilege" tends to show that no "estate" and hence no "easement" was created in favor of the subjacent owner. But it is clear that even an easement may exist as a freehold interest of *uncertain duration;*[46]

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convenience may be adduced against such a surmise, although it might perhaps be argued that an action ought on principle to lie against, and an injunction be obtainable to restrain, the man who is actually availing himself of his neighbour's soil and using it in a manner which in twenty years will be evidence of the acquisition of a right so to do."

[46] See *Hewlins v. Shippam* (1826) 5 B. & C. 221, 228, *per* Bayley, B.:

"The declaration claimed the right as a license and authority granted to the plaintiff's landlords, *their heirs and assigns,* to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard. One of the counts claimed it indefinitely, without fixing any limits; others restricted it either to the time the defendant should continue possessed of his yard or house, or so long as it should be requisite for the convenient occupation of the plaintiff's house; some stated, as part of the consideration that defendant's landlord should do some repairs to the defendant's premises; others did not. Now, what is the interest these counts stated? *A freehold interest."*

An easement may even exist merely as an interest "for years." As said by Strong, J., in *Huff v. McCauley* (1866) 53 Pa. St. 206, 210:

"All easements and profits *a prendre* may be held for life, in fee, or for years."

See, in accord, Alderson, B., in *Wood v. Leadbitter* (1845) 13 M. & W. 838, 843.

so that it is difficult to see the force of the suggested objection. As the "right and privilege" was reserved to the owner of the subjacent estate, "its successors and assigns," there was clearly an attempt to create an interest in fee; and the uncertainty of possible duration would seem immaterial.

Neither of the two points directly urged in *Penman v. Jones* to show that the "right and privilege" in question could not be an easement is supported in any case cited by the Pennsylvania court; and such authorities as have been observed by the present writer are opposed in reasoning or in decision.

The leading English case is *Rowbotham v. Wilson;*[47] and the following passages are instructive:

> *Bramwell, B.:* "The first question is, Can there be a right to take the mines and remove all support from the surface? . . . I cannot see how, if there may be a grant of mines, and of the right to enter, sink shafts, and work, there may not be such a grant as that contended for here. Nor can I see how, if a grant of the right of unobstructed light and air, or of support of the soil, to an adjoining owner, would be good, a grant of such a right as claimed here would not be. . . . But another objection is taken. It is said that all easements suppose a right exercised *over* the servient tenement: even in the case of lights it is the passage of the rays of light and of air; and in the support of the neighbouring soil it is its continuance in its place; and that the claim of the defendant here is not to do something *on* the plaintiff's land, but merely not to be sued for what he does on his own. It is no answer to this objection to say that it is exceedingly subtle. It certainly would be strange if such a right could not be given with a *grant* of an *estate* in the mines, but could to a licensee; and yet to the latter the objection would not apply. And I think the *true answer* to it (assuming the defendant claims an *easement*) is, that the rules which are applicable to the owners adjoining vertically, which is the natural order, are not applicable where there is an unusual order of things, viz. a division of horizontal ownership. I think, therefore, such a right may exist. . . ."
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> *Martin, B.:* "In the present case, the Commissioners and Samuel Pears, in the same instrument by which the former executed their powers, the latter under his hand and seal, for a valuable consideration to himself, declared that the mines below the land allotted to him should belong to Henry Howlette in fee simple, and his own lands be subject to the *incident* or *quality* that *the*

[47] (1857) 8 E. & B. 123; affirmed 8 H. L. Cas. 348.

owner of the *mines* should not be responsible for any injury to the surface consequent upon the working of them. In my opinion, the incident was lawfully created, and *attached* to the *estate* of Samuel Pears; and that he and *all persons claiming under him* took the estate subject to it."

Williams, J.: "But it cannot, I think, be doubted that, if an owner of land with subjacent mines were to grant away the mines together with the power of winning the minerals, without regard to any injury done thereby to the surface, such a grant would be good, and would bind the inheritance, and his *estate* in the surface would pass to his assigns *abridged, to that extent,* of the right of support from the minerals, whatever the nature of that right may be. Hence it seems to follow that it is competent for the owner of the surface of land effectually to curtail by *grant* in favour of the owner of the subjacent mines, the right to support therefrom."

Lord Wensleydale: "And supposing this power is not to be considered as given by the act of the Commissioners, but only by the contract of the parties, Pears' covenant, he being seised in fee by virtue of the award, would certainly *operate* as a *grant,* by him, to Howlette (who, at the same instant, took the fee simple in the mines), of the power to get the minerals, and to disturb the surface of his own land for that purpose by winning the mines below from some adjoining land or bed of coal.

"I *do not feel any doubt* that this was the *proper subject* of a *grant,* as it *affected* the land of the grantor; it was a grant of the *right* to *disturb* the *soil* from below, and *to alter the position* of the *surface,* and is *analogous* to the grant of a right to *damage* the *surface* by a *way* over it; and it was admitted, at your Lordships' bar, that there is no authority to the contrary."

In *Ryckman v. Gillis,*[48] a New York case concerning lateral support, Johnson, C., who dissented only on points not now involved, expressed views in accord with the English cases:

"But if the right to have support from adjoining land be not an easement, then what may be called the antagonistic right of removing your own soil so as to diminish the support to which the adjoining owner was entitled, is an easement *affecting* his land in favor of yours, and making his land the servient tenement in that regard, and subject to the easement of being deprived of its natural support. That such an easement may be acquired by grant or agreement of the parties is obvious, and has been

[48] (1874) 57 N. Y. 68, 78.

> settled by repeated adjudications between surface owners and mine owners underneath. *Rowbotham v. Wilson* and *Smart v. Morton* are instances establishing further that the party claiming the ordinary rule not to be applicable must establish its renunciation by the other party."

(d) *The court's explanation of the "right and privilege" of letting down the surface as an "irrevocable license."* The limitations of space forbid here any attempt to discuss comprehensively and thoroughly the numerous and troublesome classes of cases commonly associated with the chameleon-hued term, "license." Like the terms *"res gestae"* and "estoppel," "license" may be said to be a word of convenient and seductive obscurity; and the task of dealing at all adequately with the intricate and confused subject would, in and of itself, require a long article.[49] In this place, therefore, only a few suggestions may be ventured—with particular reference, of course, to paragraphs "2" and "4" of the above-quoted argument from *Penman v. Jones.*

In spite of such ambiguities as attach to the term "license," it would seem that the court's effort to fit that legal category to the "right and privilege" of letting down the superjacent land encounters not only the *supposed* objections to its being considered an easement,[50] but also several additional ones.

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[49] Many of the difficulties would be removed if effort were made to confine the term "license" to that group of *operative facts* which constitute a "mere permission" to do or cause, or not to do or cause, a given thing. Instead of this, the term is rapidly shifted about by lawyers and courts,—usually even by the more careful writers,—so as to cover not only more complex groups of operative facts, but also the *jural relations* flowing either from a "mere permission" or from such more complex sets of facts. See, e. g., Salmond, *Torts* (4th ed., 1916) sec. 76 (compare the usage in paragraphs "1" and "2").

For more general consideration of these difficulties, see (1913) 23 YALE LAW JOURNAL, 16, 20, 44; and compare (1917) 26 YALE LAW JOURNAL, 710, 725, n. 34; 755, n. 90.

[50] In directly negativing the contention that the "right and privilege" constituted an easement, the court said that the "stipulation" did "not authorize the grantor to do anything *upon* the land of the surface owner," and that it was only "authority to do an act *affecting* the land." If any distinction of this kind is to be pressed, has the category of license any greater chance?

A typical definition is to be found in Tiffany, *Real Property* (1903) 678:

"A license given to a person to do something *on* the land of another should be carefully distinguished from an easement. A license is a mere permission to do something *on* another's land."

A so-called "license" resulting, when "executed," in the *extinguishment*

Quoting the well-known dictum of Vaughan, C. J., in *Thomas v. Sorrell,*[51] the Pennsylvania court says, *inter alia:* "An easement is always an *estate* in the land. But 'a license properly passeth *no interest,* nor alters or transfers property in anything,'" etc.,—the further point being that the "right and privilege" of letting down the surface is a "license," hence not an "interest," and hence also not an easement. It is clear, however, that in the passage quoted Chief Justice Vaughan was referring exclusively to a simple case not at all like that of *Penman v. Jones.* This is shown impressively by the examples which the learned chief justice himself gives immediately after the words quoted by the Pennsylvania court:

> "A dispensation or *licence* properly *passeth no interest, nor alters or transfers property* in any thing, but only makes an action lawful which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which without licence, had been unlawful.
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> "But a licence to hunt in a man's park, and *carry away* the deer kill'd *to his own use;* to cut down a tree in a man's ground and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree; but as to the *carrying away* of the *deer* kill'd, and *tree* cut down, they are *grants.*
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> "So to licence a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are licences; but it is consequent necessarily to those actions that my *property* be *destroyed* in the meat eaten, and in the wood burnt, so as in some cases by *consequent* and *not directly,* and as *its effect,* a dispensation or licence may destroy and *alter* the *property.*"

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of an existing *easement* is, of course, to be distinguished. Such a "license," for example, when given by the owner of an easement of light, extinguishes, before execution, *pro tanto,* and, after execution, *in toto,* the rights or claims of the easement owner, so far as the particular obstruction is concerned. But such extinguishment amounts simply to a new creation ("restoration") of the former "natural" privilege or privileges of the owner of the servient tenement. See *Winter v. Brockwell* (1807) 8 East, 308 (as explained by Bayley, B., in *Hewlins v. Shippam* (1826) 5 B. & C. 221, 233); *Morse v. Copeland* (1854, Mass.) 2 Gray, 302.

It is obvious, moreover, that such "natural" privileges, on being thus "restored," would pass, *even without express mention,* to any subsequent grantee of the estate of which they are constituent elements.

[51] (1672) Vaughan, 330, 351.

Suppose that R says to S, "I give you permission to walk across my land, Longacre." This language, in and of itself, purports merely to create in S the privilege, or, more strictly, series of privileges, of walking across R's land.[52] In correlative terms, R's rights that S stay off are extinguished, and no-rights substituted. The important point is that the permission constitutes a *grant* to S of *privileges alone:* S is not granted any accompanying rights (or claims) that R or other persons shall not interfere with S's entering on the land, Longacre, and walking across. If, therefore, S succeeds in entering on the land, no rights (or claims) of R are violated; but, if, on the other hand, R closes the gate in the high stone wall, or bars the one and only path midway, no rights (or claims) of S are violated;[53] and so also if some third party locks the gate or bars the path half way across Longacre.[54] Further than that, it is assumed,

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[52] Of course the *creation* of such *privilege or privileges* amounts, in other words, to an *extinguishment* of S's *duty or duties* to stay off R's land.

[53] See, for a full explanation of this matter (1913) 23 YALE LAW JOURNAL, 16, 35 *seq.*

[54] Compare *Wood v. Leadbitter* (1845) 13 M. & W. 837; *Hill v. Tupper* (1863) 2 H. & C. 121, also cases cited in comment entitled, *Right of Ticket-holder to Recover in Tort* (1917) 26 YALE LAW JOURNAL, 395. But *cf. Case v. Webber* (1850) 2 Ind. 108.

In *Hill v. Tupper, supra,* no doubt the deed of grant was *intended* to create a substantial interest—an "easement in gross"; and the explanation of the actual decision lies in the fact that, so far as pure "legal" doctrine was concerned, such an interest in gross could not be created in England. See *Ackroyd v. Smith* (1850) 10 C. B. 164. Compare a very recent case, *Sports & General Press Agency v. "Our Dogs" Publishing Co.* (1916) 2 K. B. 880; affd. (1917) 61 S. J. (C. A.) 299.

In *Wood v. Leadbitter, supra,* the intentions of the parties were evidently similar,—that is the unsealed ticket to the race course was intended to grant both "irrevocable" privileges and "irrevocable" rights; but that purpose failed both because, *even if* the intended interest were permissible though not "coupled with a grant," the common law would require a deed for the creation of such an "incorporeal" interest (even "for years"), and because such an interest was not deemed a permissible one when not coupled with a grant such as that involved in a profit or such as that exemplified by *Wood v. Manley* (1839) 11 A. & E. 34 (see *post,* p. 97, n. 58a, and p. 100). It would seem, also, that the plaintiff's pleading was faulty, his replication of "leave and license" *as of the time of the battery* not being sustained by the facts.

For the later English authorities concerning an unsealed written permission given for consideration and expressed to be for a continuous period, definite or indefinite, see the important case of *Hurst v. Pictures Co., Ltd.* [1915] 1 K. B. 1, involving a theatre ticket and depending on the "con-

in accordance with the actually existing law, that R, instead of exercising his *physical* power of closing the gate or barring the path, might exercise his *legal* power of extinguishing S's series of privileges: that is, R might simply say to S, "I withdraw my permission."

What shall we say of this "uncompanioned" "privilege—no-right" relation (or series of such relations) thus vested in S subject to the *liability* of being extinguished by R's exercise of his legal power of "revocation?" Was Chief Justice Vaughan strictly correct in asserting, in effect, that a mere privilege of this kind is not an "interest" or "property" in land? Very likely, as *Thomas v. Sorrell* was decided in 1672, some years before the Statute of Frauds, he put it so on the assumption that, if it were recognized as an "interest" in land, a deed would be requisite to create such a privilege, just as in the usual case of "incorporeal" interests.[55] Possibly also, as is so often the case even at the present day, he failed to see that a "privilege—no-right" relation is as true a legal relation and advantage as is a "right—duty" relation.[56]

But, whatever his reasons, it is submitted that his statement is, strictly and analytically considered, erroneous; and that it has had its full measure of influence in confusing the vast number of later judicial discussions and decisions relating to the subject. The "privilege—no-right" relation of S or, *a fortiori,* a series of such relations seems indeed to be an "interest" in land, although it be unaccompanied by rights (or claims) and even though S be under a liability of having his privilege or privileges divested as already indicated. If, for example, M were a judgment debtor and his land, Redacre, were about to be sold by the sheriff, M's privileges concerning Redacre would be *substantial elements* in his *total ownership* or *interest,* even in spite of the *liability* of their being divested by the exercise of the sheriff's power under the writ of execution.

If all this be so, it would seem that the more accurate and satisfactory way to meet the supposed objection as to a deed

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flict" of substantive "legal" and "equitable" rules and the determining of their "net effect" under the Judicature Acts.

For explanation of the latter, see the writer's articles, *The Relations between Equity and Law* (1913) 11 MICH. L. REV. 537; and *The Conflict of Equity and Law* (1917) 26 YALE LAW JOURNAL, 767, 770.

[55] See *Hewlins v. Shippam* (1826) 5 B. & C. 221, 229; *Wood v. Leadbitter* (1845) 13 M. & W. 838. See also preceding note.

[56] See *ante,* p. 71, notes 12 and 13.

is to recognize that the creation of a very limited interest such as R gave to S was never within the contemplation of the rule that an "incorporeal" interest in land must be created by deed. Similarly, after the Statute of Frauds, the privilege or series of privileges over Longacre, even though frankly conceded to be an "interest," might well be held not within the intention of Section 1, requiring a writing for the creation of interests in land.[57]

But it is necessary to hurry along to the next step in the Pennsylvania court's reasoning. After quoting Chief Justice Vaughan's dictum[58] concerning a mere *temporary* and *revocable* privilege in order to show that the "right and privilege" of letting down the surface was not an "interest" or "estate," the learned court proceeds to assert that "the license [in *Penman v. Jones*], being coupled with a grant of the coal, or rather with the reservation of the coal, was *irrevocable* by the owner of the surface, and was assignable by the licensee." That is, the assumption is made,—erroneously, it would seem,—that Chief Justice Vaughan's language applies not only to a *temporary* and *revocable* privilege, but also to a *permanent and irrevocable* (inextinguishable) privilege or series of privileges as to letting

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[57] In support of these suggestions, the following utterance of an able New York judge may be noted:

"A claim for an *easement* must be founded upon grant, by deed or writing, or upon prescription which presupposes one, for it is a *permanent* interest in another's land, with a right, at all times, to enter and enjoy it; but a license is an authority to do a particular act, or a series of acts upon another's land, without possessing any estate therein. It is founded in personal confidence, and is not assignable. This distinction between a privilege or easement carrying an interest in land, and requiring a writing within the statute of frauds to support it, and a licence which may be by parol, is quite subtle, and it becomes difficult, in some of the cases, to discern a substantial difference between them.

"I shall not undertake to reconcile these various cases. It is evident the subject has been understood very differently by different judges. But in this all agree, that according to the Statute of Frauds, any *permanent* interest in the land itself cannot be transferred, except by writing. *Much of the discrepancy* may have arisen from the *different ideas* attached to the word *licence*." Savage, C. J., in *Mumford v. Whitney* (1836) 15 Wend. 380, 392.

This passage, in spite of the tendency to use language similar to that of Vaughan, C. J., in *Thomas v. Sorrell*, shows that the real contrast is that of a *permanent* interest as opposed to a *temporary* and *"revocable"* one, rather than that of *an* interest as opposed to none at all.

Compare also Chancellor Kent, in 3 *Com.* 452:

"Such a parol license to enjoy a beneficial privilege is not an *interest* in land *within the Statute of Frauds*."

[58] See *ante*, p. 93.

down the surface land. Such an "irrevocable" continuing privilege (or series of privileges) would seem clearly to be an interest in land—so substantial an interest as to require a deed at common law, and a writing under Section 1 of the Statute of Frauds.[58a] This would seem to be true, even if the "right and privilege" in *Penman v. Jones* were conceded to consist merely of a continuing series of privileges; and, of course, it becomes increasingly difficult to deny that the "right and privilege" is an "interest" when we take into consideration the accompanying legal rights (claims) against interference either by the superjacent owner or by third parties.

Passing this point by, however, it is interesting to notice that the Pennsylvania court regards the "right and privilege" as irrevocable because "coupled with a grant [reservation] of the coal." Whatever plausibility this statement has at first glance because apparently fitting in with certain well-known classes of so-called "licenses coupled with grants," does it not lose its persuasive force when we notice that the supposed license would be coupled, in *Penman v. Jones,* not with the grant of a *power* concerning *another's* land as in the case of *profits,* or with the grant of a movable *on* another's land as in a case like *Wood v. Manley,*[59] but with the grant of the whole mineral *estate,* as such, to the supposed holder of the "license?" That is, it would be a license "coupled exclusively with" the grant of the licensee's *own estate.* The court cites no case either to explain or to exemplify its conception of a "license coupled with a grant"; and such cases as have been observed are of a very different character.

The first important class of cases consists of those relating to profits *à prendre.* Thus, a profit consisting of the so-called "right" to dig for and carry away minerals involves a "grant" of an aggregate of jural relations including, *inter alia,* the *legal powers*[60] of vesting ownership of the severed parts of the servient

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[58a] See Alderson, B., in *Wood v. Leadbitter* (1845) 13 M. & W., at 843, 852, 854.

[59] (1839) 11 A. & E. 34.

[60] Compare the somewhat analogous *legal powers* of a tenant for life without impeachment for waste.

As said in *Kekewich v. Marker* (1851) 3 McN. & G. 311, 333:

"We then find that the grantor has given the ordinary profits to the tenant for life, with exemption from waste, or a license to *appropriate* a portion of the inheritance, subject to the prior right and discretion of the trustees for raising portions. It was further insisted that the tenant for life is the owner of the timber, but that is quite out of the question; *he has nothing but a power,* though when he has felled the timber *under*

land in the profit owner—*legal powers,* that is, to alter *pro tanto* the jural relations of the servient landowner and to create aggregates of jural relations concerning the (severed) movables in the owner of the profit.[61] In such grants there are also included

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the power, it would become a chattel and he would be owner of it. We are now, however, discussing the relative rights as to *standing timber,* and *the case cannot therefore be argued,* or the claim to fell the timber supported, upon *any existing property* in the timber as owner."

Compare also *McPherson v. Temiskaming Lumber Co., Ltd.* (1913) A. C. 145, 152; and (1913) 23 YALE LAW JOURNAL 16, 42, n. 60.

[61] *Doe v. Wood* (1819) 2 B. & Ald. 738; *Muskett v. Hill* (1839) 5 Bing. N. C. 706; see *Clement v. Youngman* (1861) 40 Pa. 341, 344; *Ryckman v. Gillis* (1874) 57 N. Y. 68; and *cf. Chartiers Block Coal Co. v. Mellon* (1893) 152 Pa. 286, 296.

In *Doe v. Wood, supra,* Abbott, C. J., *said:*

"The purport of the granting part of this indenture, is to *grant,* for the term therein mentioned, a *liberty,* license, *power,* and authority, to dig, work, mine, and search for metals and minerals only, that should within that term be there found, to the use of the grantee, his partners, etc.; and it gives also further *powers* for the more effectual exercise of the main *liberty* granted . . . its words import a *grant* of such parts thereof only as should, upon the *licence* and *power* given to *search* and *get,* be found within the described limits, which is nothing more than the grant of a *licence* to search and get (irrevocable, indeed, on account of its *carrying* an *interest*) with a *grant* of such of the ore only as should be found and got. . . . If so, the *grantee* had no estate or property in the land itself, or of any particular portion thereof, or in any part of the ore, metals, or minerals, ungot therein; but he had a right of property only as to such part thereof as upon the *liberties* granted to him should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal *privileges* granted for the purpose of obtaining it. . . . These expressions . . . can . . . have no further effort than to shew that the grantor *supposed* that the soil or minerals, and not a mere *liberty or privilege,* passed by his deed."

Profits involving wild game and fish differ in one particular. They involve *legal powers* to acquire title ("qualified" or "absolute") "by reducing the game to possession." But the exercise of these powers does not affect the landowner in precisely the same way; for the latter himself does not have ordinary ownership of the game, but merely *legal powers* of acquiring title by reducing the game to possession,—these powers being accompanied, of course, by various rights, privileges and immunities. *Blades v. Higgs* (1865) 11 H. L. CAS. 621.

For profits of this character, compare *Wickham v. Hawker* (1840) 7 M. & W. 62; *Fitzgerald v. Firbank* [1897] 2 Ch. 96; *Bingham v. Salene* (1887) 15 Or. 208, 212, 14 Pac. 523.

For a novel and interesting *attempt* to apply the idea of "a license coupled with a grant" to the case of a theatre ticket—a license to enter and remain coupled with the "grant" of a *privilege* (not *power* as in the case of a profit), see the *dictum* of Buckley, L. J., in *Hurst v. Picture Theaters, Ltd.* [1915] 1 K. B. 1, 7: "Let me for a moment discuss this present case upon the footing that *Wood v. Leadbitter* stands as good law

the privileges of physically severing or causing to be severed the various mineral portions from the *corpus* of the land; various rights (or claims) against interference with or disturbance of the activities and advantages connected with the exercise of such privileges and powers—rights (or claims) against third parties as well as against the grantor of the profit;[62] also various immunities similar to those that any owner of property ordinarily has.[63] As regards such profits, the aggregate of jural relations is not, in any ordinary case, subject to a power of "revocation" or extinguishment by the grantor. This is true of the continuing or repetitive privileges involved as well as of the other elements. Hence the frequent loose description of the situation as involving an "irrevocable license" coupled with a grant. But the term license is really used here most unfortunately,—as that term, for the sake of clearness of thought and exactness of expression, should be reserved for the "mere permission" under consideration by Chief Justice Vaughan in *Thomas v. Sorrell*—that is, in the first paragraph of the quotation above given.[64]

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at this date. I am going to say presently that to my mind it does not, but suppose it does stand as good law at this date. What is the *grant* in this case? . . . . That which was *granted* to him was the right [privilege] to enjoy looking at a spectacle, to attend a performance from its beginning to its end. That which was *called* the *license,* the right [privilege] to go upon the premises, was only something granted to him *for the purpose* of enabling him *to have* that which had been *granted* to him, *namely,* the *right* [privilege] *to see.* He could not see the performance unless he went into the building . . . So that here there was a *license* coupled with a grant. If so, *Wood v. Leadbitter* does not stand in the way at all. A *license coupled with a grant* is not revocable; *Wood v. Leadbitter* affirmed as much."

Sed qu.: was there not, in *Wood v. Leadbitter* an attempted grant of the *privilege of seeing* the races?

[62] *Fitzgerald v. Firbank* [1897] 2 Ch. 96.

[63] See *ante,* p. 69, n. 8.

[64] To be compared with cases of profits *à prendre* are those referred to in Tiffany, *Real Property* (1903) 683:

"So, in some states, an oral sale of growing trees is insufficient to pass them as such, and is regarded as giving the vendee *merely a license or permission* to cut the trees, which is revocable until the trees are cut, but, after they are cut, the *sale takes effect* upon them in their chattel character, and the vendee then, having an interest in the trees, has an irrevocable license to enter on the land for their removal."

See, for this doctrine, *Giles v. Simonds* (1860, Mass.) 15 Gray, 441; *United Soc. v. Brooks* (1888) 145 Mass. 410.

Tiffany's characterization of these cases seems hardly adequate, as it fails to bring out the "revocable" *legal powers* of acquiring title to the

A second class of authorities involving so-called "licenses coupled with a grant" consists of cases like *Wood v. Manley*.[65] This leading case established the rule that the sale of a movable located on the vendor's land, coupled with permission to enter on the land for the purpose of removal, results in an "irrevocable" privilege (frequently called "license") of entering on the land and removing the object purchased. It would seem clear that in this case also there are accompanying rights (or claims) against interference. It is equally clear that the total aggregate (rights, privileges, powers, and immunities) should be recognized as an interest in land, even though not within the general common law requirement of a deed or the requirement of Section 1 of the Statute of Frauds. Similar considerations are applicable to cases involving permission to place movables upon another's land and to remove them at some subsequent time.[66]

In leaving this part of the discussion, the suggestion may be ventured that an examination of the court's application of the category of license tends only to confirm the conclusion, already reached on independent grounds, that the "right and privilege" in *Penman v. Jones* should more properly have been classified as an easement appurtenant, with the necessary inference that such "right and privilege" passed with the subjacent estate, even apart from the special language about to be considered.

(2) DID THE "RIGHT AND PRIVILEGE" PASS UNDER THE LANGUAGE OF THE CONVEYANCE OF 1891, INDEPENDENTLY OF ITS BEING AN EASEMENT?

The court concedes that the interest, whatever it may be called, is freely alienable, along with the subjacent estate proper. Earlier Pennsylvania cases, already noticed in detail, leave no room for doubt as to this point. Unless, therefore, there is something peculiar about this sort of interest so as to require *unusually specific* terms of conveyance, it would seem that the words "all the estate, *right*, title, *interest, benefit, property,*

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severed trees by exercising the "revocable" legal *privileges* of physically severing the trees.

The cases put by Vaughan, C. J., in the second paragraph of the quotation given in the text seem to be similar to those now under consideration. The "grant" that he refers to is, in reality, the grant of *legal powers*, rather than of ownership of the severed things as such.

[65] (1839) 11 A. & E., 34.

[66] *Giles v. Simonds* (1860, Mass.) 15 Gray, 441; *cf.* the explanation given in Browne, *St. Frauds* (5th ed., 1895) sec. 27; also the similar explanation of Alderson, B., in *Wood v. Leadbitter* (1845) 13 M. & W., at 853.

claim and demand whatsoever" together with "all and singular . . . the appurtenances . . . belonging to the said property or in anywise appertaining to the same" were ample to cover the "right and privilege" of letting down the surface. Apart from *absolutely specific* terms, it would be difficult to find more comprehensive language. It is true that in *Stilley v. Buffalo Co.*[67] and in *Kirwin v. Del., L. & W. R. R. Co.*[68] the terms employed were quite specific; but, as will be remembered, no reference to this point was made in either of these cases, and, instead, the court's reasoning proceeded along very broad lines as to the intentions of the *original* parties as indicated by their instruments of conveyance and the surrounding circumstances.

It would seem unnecessary, however, to resort to these earlier cases to show the adequacy of such inclusive generic terms as have just been quoted from the conveyance of 1891; for does not the very case of *Penman v. Jones* afford all-sufficient authority?

(3) WAS THE COURT CONSISTENT IN HOLDING, IN SPITE OF ITS NEGATIVE ANSWER TO THE SECOND QUESTION, THAT THE LANGUAGE IN THE CONVEYANCE FROM A TO D WAS SUFFICIENT TO PASS THE "RIGHT AND PRIVILEGE" TO D?

This question is clearly enough suggested by the facts of *Penman v. Jones,* although the limited purposes of this article do not demand an extended discussion thereof or, much less, any positive answer. The important words in the conveyance from A to D were, it may be recalled, "all and every the real estate or interest of any kind or nature in real estate, lands, tenements or hereditaments," etc. These words, in and of themselves, seem less comprehensive and intensive than those in the conveyance from A to C. The court's reasons for denying natural force and effect to the words of the "A—C" conveyance and attributing such force and effect to the weaker words of the "A—D" conveyance are hardly convincing. Those reasons are given chiefly in the language already quoted from the majority opinion; and, as will be remembered, they seem to turn largely, if not entirely, on an unfortunate identification of the *subjacent* owner's *privilege* of *letting down* the surface with a *superjacent* owner's *right* (*or claim*) that the surface should *not* be let down.[69]

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[67] (1912) 234 Pa. 492, 497. For full consideration of this case, see *ante,* p. 78.

[68] (1915) 249 Pa. 98, 101. For full consideration of this case, see *ante,* p. 78.

[69] See *ante,* p. 83, and p. 84, n. 40.

YALE LAW JOURNAL

Published monthly during the Academic Year by Yale Law Students
with Advice and Assistance from Members of Faculty

SUBSCRIPTION PRICE, $2.50 A YEAR SINGLE COPIES, 35 CENTS

Canadian subscription price is $3.00 a year; foreign, $3.25 a year.

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THE BROADENED POLICY OF THE JOURNAL.—One year ago the YALE LAW JOURNAL began its second quarter century. At that time it found itself in the midst of a rapidly broadening development in the School of Law. It had been the long established tradition of the school that there was a real and worthy science of jurisprudence and that law must be studied and taught historically, analytically, and comparatively. Especially since the early 'seventies, when the graduate curriculum was definitely organized by Professor Simeon E. Baldwin, the legal systems of Rome and of modern Europe had been continually studied, legal concepts had been analyzed, and the history of legal doctrines and institutions had been investigated. Increased emphasis on these lines of work has, especially in recent years, had an important influence, as regards spirit, method, and content, on the undergraduate as well as graduate courses.

Of necessity, this progress has been reflected in the pages of the JOURNAL. The appreciation received from the alumni of

the school and from legal scholars and practitioners at large encourages still further improvement and development. The present volume will endeavor to foster the science of jurisprudence, to bring home to its readers something of the deeper phases of law and the factors in its growth, to take notice of such defects as may appear in our own system of law as it is actually being applied, and to draw upon other legal systems—past and present—for the means of improvement by legislation and judicial action.

The practice of the law must be recognized as social service and not as a mere means of livelihood. The public is already demanding of the legal profession more than it has been receiving. Soon it will refuse longer to endure the lawyer of no insight into social needs and of smug provincial satisfaction with things as they are. Even the most ignorant man now knows that he is a citizen of the world and not merely of a province. Now is the time for leadership possessing foresight and capacity for reorganization. He only can look far into the future who has seen far into the past. He only can reorganize wisely whose industry has mastered the organizations of others. It is even now the duty of the legal profession—even while our country is in the throes of a war whose end we cannot see but whose successful end we shall achieve—to prepare for a scientific reorganization.

No new or sudden development is contemplated; but earnest effort will be made to publish articles relating to international and comparative law, legislation foreign and domestic, and every aspect of jurisprudence. Doubtless this will mean an increase in the size of each number published; for the JOURNAL will not abate one jot in its efforts to cover the field it has covered in the past, to discuss topics in the traditional branches of our American law, to give a critical review of recent decisions in the courts. Indeed, it is hoped to increase and improve these discussions and to bring about a larger perspective, a greater power of analysis and a wiser criticism because of the broader undertakings already indicated.

The JOURNAL recognizes that legal system is not an end in itself and that jurisprudence is but a sickly plant when cultivated only by Professor Dryasdust. Our sole interest is in the law as it is applied by our courts, as it is made by our legislatures, and as it is a living force among our people. But the understanding of the law in these practical senses requires the deeper investi-

gation and the wider outlook. This fact must be brought home to every practicing lawyer and to every law student. It is believed, moreover, that this can be done most effectively, not by publishing an additional review to be devoted exclusively to the broader lines of legal thought and development, but, by sending forth a well-balanced periodical that participates in all lines of legal research, publishing the results of careful investigation in all branches of legal theory and legal practice. To this end the JOURNAL is dedicated; and it is hoped that the present volume may have some modest degree of success in attaining it.

THE LAW SCHOOL.—The JOURNAL records with satisfaction the addition of four new professors to the Law School Faculty. One of the four, Professor Edmund M. Morgan, formerly of the University of Minnesota faculty, has not yet assumed his duties here, having been given leave of absence to perform war service. He has received a commission as Judge Advocate, with the rank of Major, in the Officers Reserve Corps and has been detailed for service in Washington. On account of Professor Morgan's absence the course in Court Practice which he was to inaugurate will not be given this year.

The three other new professors have taken up their work at Yale. Professor Ernest G. Lorenzen, also called from the University of Minnesota, is to give courses in Sales, Damages, Roman Law and Modern Developments, and the Comparative Conflict of Laws.

Professor Henry W. Dunn, formerly Dean of the University of Iowa Law School, is to give courses in Property I, Property III and Office Practice.

Professor Edwin M. Borchard, formerly Law Librarian of Congress and an Assistant Solicitor of the Department of State, is to give courses in Property II, Administrative Law and International Law. He also has charge of the Law Library.

Professor Wurts is to be away during the coming year on a sabbatical leave of absence.

The registration of students this year is almost exactly fifty per cent. of last year's enrollment.

THE RIGHT OF ALIEN ENEMIES TO SUE IN OUR COURTS

The question of the right of "alien enemies" to sue in municipal courts, which has frequently, since the outbreak of the war, been presented to the English courts, has recently come up for

decision in this country. *Posselt v. D'Espard* (1917, N. J. Ch.) 100 Atl. 893.* Much of the confusion in which the general question has been left by the courts in England and in this country is due to the loose way in which the term "alien enemy" has been used. The connotation of the term varies with the circumstances to which it is applied. With reference to naturalization, it signifies a person having the nationality of an enemy country.[1] With reference to suits for the recovery of property or money damages, it signifies, in the present state of Anglo-American law, a person resident in the territory of the enemy country or adhering to the enemy. This is made apparent by the *purpose* of the rule, inaccurately expressed, that "alien enemies cannot sue in the courts."

The rigorous disabilities imposed upon all aliens by the early English law extended to their suits in court.[2] The privileges conferred upon alien merchants in general ameliorated the harshness of the law, and the alien friend, as distinguished from the alien enemy (subject of an enemy state), was allowed to maintain personal actions. That this right to sue was extended as an incident to the right to trade is shown by Coke's commentary on Littleton:

> "For an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either real or mixt actions."[3]

When we recall that, with the development of international law, England adopted the rule that trading with the "enemy" was prohibited during war,[4] and the further rule that "enemy" character for purposes of trade is determined not by nationality but by "trade domicil" or (in the case of individuals) by voluntary residence in the enemy country,[5] the reason for the rule

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* For complete statement of the facts see page 128, *infra*.

[1] *In re Cimonian* (1915, Ont. S. C.), 23 Dom. L. R. 363.

[2] 1 Pollock & Maitland, *History of English Law*, 461.

[3] *Co. Litt.* (1st Am. ed.), 129 b.

[4] 2 Halleck, *Int. Law* (4th ed.), 143 *et seq.* Trotter, *The Law of Contract during War* (London, 1914), Pt. I, sec. 9; British Trading with the Enemy Act, 1914, 4 and 5 Geo. 5, ch. 87, and Proclamation No. 2, Sept. 9, 1914, and Amendment October 8, 1914. U. S. Trading with the Enemy Act of Oct. 6, 1917, sec. 3 (a). *Horlock v. Beal* [1916] 1 A. C. 486.

[5] *The Pizarro* (1817, U. S.), 2 Wheat. 227, 246; *McConnell v. Hector* (1802, Eng. C. P.), 3 B. & P. 113; *Janson v. Driefontein Cons. Mines* [1902] A. C. 484, 505. *Ingle v. Mannheim Ins. Co.* [1915] 1 K. B. 227.

prohibiting "alien enemies" from suing becomes clearer. The right to sue is in aid of the right to trade, and the prohibitions are, in the main, parallel. The prohibition to trade with any person, firm or corporation resident or doing business in the enemy territory is founded on the principle of public policy "which forbids the doing of any act which will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods or other resources available to individuals in the enemy state."[6]

As a corollary to the above rules, it would seem that there should be no prohibition against suit where there is no prohibition to trade, or where the alien is permitted to continue to reside unmolested. And so, indeed, has the law developed. The state's power of expulsion of subjects of the enemy state has not been frequently exercised in modern times,[7] and in England and the United States, the modern practice, confirmed by treaty,[8] has been to permit peaceable subjects of the enemy to remain, either with express or implied license; a practice which has introduced into the law an exception to the usual procedural disability of the "alien enemy" in favor of those permitted to remain *sub protectione domini regis*.[9]

An examination, in the light of these principles, of the leading cases in which "alien enemies" were non-suited as plaintiffs, discloses that in many of them the alien enemy was a non-resident "alien enemy," generally resident in the enemy state.[10] These are "alien enemies," strictly speaking. In others, the

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2 Westlake, *Int. Law*, 140; 2 Oppenheim, *Int. Law*, sec. 88, 90; *Laurent (Gt. Brit.) v. United States*, Feb. 8, 1853, Moore's Arb., 2671. Japan has also adhered to this criterion of enemy character, but not the countries of continental Europe, which, with minor exceptions in Holland and Spain, adhere to the test of nationality. 3 Fiore, sec. 1432 *et seq.*; 4 Calvo, sec. 1932 *et seq.*; Bonfils, sec. 1343 *et seq.*

[6] Lord Reading in *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857, 868. See also Dicey, *Conflict of Laws* (2d ed.) 737.

[7] Borchard, *Diplomatic Protection of Citizens Abroad*, 61 *et seq.*

[8] E. g. Article 23 of Treaty between the United States and Prussia, July 11, 1799, renewed May 1, 1828, 2 Malloy's Treaties, 1494, giving the respective subjects of either state in case of outbreak of war nine months to remove their property, collect their debts, and settle their affairs.

[9] 1 *Bac. Abr.* (ed. 1813) 139, where it is said that the right to sue is consequential on the right to protection.

[10] *Brandon v. Nesbitt* (1794, K. B.) 6 T. R. 23; *Le Bret v. Papillon* (1804, K. B.) 4 East. 502; *Daubigny v. Davallon* (1795, Ex.) 2 Anstruther 462; *O'Mealey v. Wilson* (1808, N. P.) 1 Campb. 482 (a British subject

decision passed off on technical points of pleading.[11] The most important cases involve the right of a resident subject of the enemy state to sue, and in this matter the modern rule dates from *Wells v. Williams* (1698),[12] for in this case the first exception to the disability of the alien enemy plaintiff was introduced. Chief Justice Treby there held that an alien enemy living in England by the King's license and under his protection may sue. Subsequent English cases, while showing some differences of opinion as to the party on whom rested the burden of proof of "license" by the King[13] have, nevertheless, held with practical uniformity that a resident alien, subject of an enemy state, who could show that he was present with the express or implied license of the King could sue.[14] Such a license has been implied, in the cases which have arisen since the beginning of the war, in the system of alien registration created by the Orders in Council under the Aliens Restriction Act, 1914,[15] and has been considered as strengthened rather than weakened by internment of the "alien enemy."[16]

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resident in enemy territory); *In re Wilson* (1915) L. J. K. B., 1893; *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857. *Bonneau v. Dinsmore* (1862, N. Y. Sup. Ct.) 23 How. Pr. 397; *Sanderson v. Morgan* (1868) 39 N. Y. 231; *Seymour v. Bailey* (1872) 66 Ill. 288; *Jackson v. Decker* (1814, N. Y. Sup. Ct.) 11 Johns, 418; *Luczycki v. Spanish River Pulp Mills* (1915, Ont. Sup. Ct.) 25 Dom. L. R. 198.

[11] *Derrier v. Arnaud* (1695, K. B.) 4 Mod. 405; *Sylvester's Case* (1702, K. B.) 7 Mod. 150; *Casseres v. Bell* (1799, K. B.) 8 T. R. 166; *Society etc. v. Wheeler* (1814, U. S. C. C., N. H.) 2 Gall. 105; *Hutchinson v. Brock* (1814) 11 Mass. 119; *Levine v. Taylor* (1815) 12 Mass. 8.

[12] 1 Ld. Raym. 282.

[13] Compare *Casseres v. Bell* (1799, K. B.) 8 T. R. 166 with *Boulton v. Dobree* (1808, N. P.) 2 Camp. 163; *Alciator v. Smith* (1812, N. P.) 3 Camp. 245.

[14] See *Boulton v. Dobree, supra; Alciator v. Smith, supra;* and *Alcinous v. Nigreu* (1854, Q. B.) 4 E. & B. 217, where there was a failure to show that the plaintiff was residing in the Kingdom with "the license, safe-conduct, or permission" of the King. See also the recent Ontario case of *Bassi v. Sullivan* (1914, Ont. Sup. Ct.) 18 Dom. L. R. 452.

[15] *Princess Thurn and Taxis v. Moffit* [1915], 1 Ch. 58; *Porter v. Freudenberg* (C. A.) [1915] 1 K. B. 857. Hall, *Int. Law* (6th ed.) 388. Proclamations in Canada, similar to those of England, have been held to remove the procedural disability from alien enemies permitted to remain in residence. *Topay v. Crow's Nest Co.* (1914, B. C. Sup. Ct.) 18 Dom. L. R. 784; *Viola v. MacKenzie, Mann & Co.* (1915, Que. K. B.) 24 Dom. L. R. 208. *Pescovitch v. Western Can. Flour Co.* (1914, Man. K. B.) 18 Dom. L. R. 786.

[16] *Schaffenius v. Goldberg* [1916] 1 K. B. 284.

In the United States, Chief Justice, afterwards Chancellor, Kent, in the leading case of *Clarke v. Morey*,[17] extended the doctrine of *Wells v. Williams* to the conclusion that an alien enemy who comes and resides here, even without a safe conduct or license, is entitled to sue until ordered away by the President; and this, too, although the party is not known by the Government to have his residence in the United States. License is implied from his being suffered to remain. This would seem to be the rule most consistent with enlightened practice.

The English "Trading with the Enemy" proclamation of September 9, 1914 (sec. 3), expressly, and the recently enacted United States "Trading with the Enemy" Act of October 6, 1917 (sec. 2), by implication, exclude from the definition "alien enemy" a person not resident or carrying on business within the territory of the enemy country.

Inasmuch as, in law, the declaration of war makes enemies of all the respective subjects of the belligerents, Vice Chancellor Lane's attempt in the principal case to translate into a legal distinction the political distinction made by the President between the German Government and the German people cannot be supported. It is submitted that the German stockholders, as alien enemies resident in the enemy state, should have been non-suited.

The question as to whether the national character of the American corporation is affected by the majority German stock ownership is discussed in the COMMENT following.

E. M. B.

IS AN AMERICAN CORPORATION SUBSTANTIALLY OWNED BY GERMAN STOCKHOLDERS AN ALIEN ENEMY?

This complex problem was recently submitted to an American court in the case of *Fritz Schultz Jr. Co. v. Raimes & Co.* (1917, N. Y. Sup. Ct.) 166 N. Y. Supp. 567. There is thus raised, at a very early stage of our participation in the Great War, the question adjudicated in England in the celebrated *Daimler* case (*infra*).

There are no internationally accepted rules in existence with respect to the nationality and domicil of corporate bodies. Both concepts, nationality and domicil, can be applied to corporations

[17] (1813, N. Y.) 10 Johns 69.

in a metaphorical sense only.[1] The privileges and duties incidental to allegiance and the "animus" necessary to domicil cannot be ascribed to corporate bodies. Nevertheless, the determination of questions of taxation and jurisdiction with respect to corporations has necessitated adjudications upon the question of their nationality and domicil. In England it has been held that for purposes of the provisions of the income tax law the domicil (more accurately "residence") of a company is at the place where its center of administration, the controlling brain, is located.[2] For purposes of jurisdiction, the "domicil" has been construed to be the place where it has a registered office,[3] and there may indeed be two such "domicils."[4] In the United States, the "fiction theory" of the corporate entity has served to impute to a corporation, for jurisdictional purposes, the citizenship of the

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[1] Foote, *Private International Jurisprudence,* (4th ed.) 143 *et seq.* Volumes have been written, particularly on the continent, on the debatable question of the nationality of corporations. The various theories are well summarized in the work of E. Hilton Young, *Foreign Companies and other Corporations,* Cambridge, 1912, 110-168. See also, Mamelok, *Die juristische Person in internationalen Privatrecht,* Zurich, 1900, 211 *et seq.* Schwandt, *Die deutschen Aktiengesellschaften,* Marburg, 1912, pp. 25-75; Pillet, *Des Personnes Morales en Droit Int. Privé,* Paris, 1914; Isay, *Die Staatsangehörigkeit der juristischen Personen,* Tübingen, 1907, in which the legislative systems of the various countries are outlined (pp. 214-224); Levin, M., *De la nationalité des sociétés et ses effets juridiques,* Paris, 1900, p. 199 *et seq.;* Fromageot, H., *De la double nationalité des individus et des sociétés,* Paris, 1892, pp. 114-121; Lyon-Caen in 12 Clunet (1885) 265-274; Lainé in 20 *Clunet* (1893) 273 *et seq.;* Arminjon in *4 Rev. de droit int.* n. s. (1902) 381 *et seq.,* translated into English by William E. Spear, Clerk, Spanish Treaty Claims Com., Washington, 1907, Document 53; Marais and Barclay in 23rd Report, *International Law Assn.* (1906) 360-372; Jacobi in 27th Rep. *ibid.,* 368-380; Baumgarten in 28th Rep. *ibid.,* 246-254. The various theories relating to the nationality of corporations are summarized in Borchard, *Diplomatic Protection of Citizens Abroad,* 617-618.

[2] *Calcutta Jute Mills v. Nicholson* (1876) 1 Ex. D. 428. *De Beers Cons. Mines v. Howe* (C. A.) [1905] 2 K. B. 612; [1906] A. C. 455. *Goerz v. Bell* [1904] 2 K. B. 136; *Mitchell v. Egyptian Hotels, Ltd.* [1915] A. C. 1022, 1037; *San Paulo Ry. Co. v. Carter* [1896] A. C. 31. See an excellent article by *E. J. Schuster* in (1917) Papers read before the Grotius Society, vol. II, p. 57.

[3] *Keynsham, etc., Co. v. Baker* (1863, Ex.) 2 H. & C. 729.

[4] *Carron Iron Co. v. Maclaren* (1855) 5 H. L. C. 416, 449 and analysis of that case by Prof. Wesley N. Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws* (1910) 10 COLUMBIA L. REV. 319.

state in which it was incorporated,[5] although this conclusion was subsequently rested upon the further fiction that there is merely "an indisputable legal presumption that a state corporation . . . is composed of the citizens of the state which created it."[6]

The persuasiveness and apparent simplicity of the "fiction theory" of the corporation have led the English courts to hold that the nationality of a corporation is to be deemed that of the country in which it was incorporated, regardless of its center of administration,[7] and, most curiously, regardless of the fact that for *belligerent* purposes domicil, and not nationality, is the test of enemy character.[8] Consistently with this theory they have declined to investigate the nationality of the stockholders, as a matter which could not affect the nationality of the corporation.[9] Lord Macnaghten in the *Janson* case (arising out of the Boer war), in which a company incorporated in the Transvaal was largely owned by British stockholders, stated:

> "If all its members had been subjects of the British Crown, the corporation itself would have been none the less a foreign corporation and none the less in regard to this country an alien."[10]

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[5] *Louisville, Cinci., etc., R. R. v. Letson* (1844, U. S.) 2 How. 497, 555. This is the theory followed by Lehman J. in the principal case in deciding that the New Jersey corporation had the right to sue.

[6] *St. Louis and San Francisco Ry. v. James* (1896) 161 U. S. 545, 562.

[7] *Attorney General v. Jewish, etc., Assn.* [1900] 2 Q. B. 556; [1901] 1 Q. B. 123.

[8] *Amorduct Mfg. Co. v. Defries* (1915) 84 L. J. K. B. 586; *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484. *Daimler v. Continental Tyre Co.* (C. A.) [1915] 1 K. B. 893. (But see notes 12-14.)

[9] *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484; *Amorduct Mfg. Co. v. Defries, supra. The Roumanian* [1915] P. 26. In the matter of ownership of British ships (under the Merchant Shipping Act)—such ships cannot be owned by aliens—the courts until recently adhered to the fiction theory of the corporate entity. *Queen v. Arnaud* (1846) 16 L. J. Q. B. (n. s.) 50. (Lord Denman, C. J.: "In no legal sense are the individual members [of the corporation] the owners.") Recently, however, they have in this matter refused to be bound by the mere incorporation in England as conferring British nationality upon a corporation (and thus upon a ship) substantially owned by alien (German) stockholders, where the ship was under the control of the alien owners. *The Polzeath* [1916] P. 117 (C. A.) 241; *Dictum* in *The Tommi* [1914] P. 251. Compare, in the United States, *Hastings v. Anacortes Packing Co.* (1902) 29 Wash. 224.

[10] *Janson v. Driefontein Cons. Mines, Ltd.* [1902] A. C. 484, 497.

The principle was carried to its logical, if somewhat startling, conclusion by the Court of Appeal in the *Daimler* case,[11] in which Lord Reading held that a company incorporated in England, only one of whose 25,000 shares was owned by a British subject, the balance being owned in Germany, was a British company and entitled to sue in a British court.[12] This decision was reversed in the House of Lords[13] on another ground, so that the opinions of the law lords on the question of the nationality of the plaintiff company are *dicta* only. Nevertheless, they will carry great weight by reason of the authority of the judges delivering them. Of the eight judges, two (Lord Shaw and Lord Parmoor) followed Lord Reading's decision in the Court of Appeal, although Lord Parmoor would, on evidence that the business of the company was carried on in an enemy country, have held otherwise. The Earl of Halsbury took the view that the company had an enemy character if the whole or a large part of its capital were owned by persons residing or doing business in Germany. He was the only one of the fourteen judges who sat in the two appellate courts who, it is submitted, consciously declined to be misled by the fiction theory, but concluded that a corporation was merely a form of association, analogous to a partnership, to enable human beings to do business and enjoy their property.[14]

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[11] *Daimler v. Continental Tyre Co.* (C. A.) [1915] 1 K. B. 893. (Four of the justices concurred, Buckley, L. J., now Lord Wrenbury, alone dissenting on what would seem intuitive rather than legal grounds.)

[12] The decision was substantially aided by the Trading with the Enemy Proclamation of Sept. 9, 1914, which provides (§3) that "In the case of incorporated bodies, enemy character attaches only to those incorporated in an enemy country." A less restrictive but similar provision is included in the United States Trading with the Enemy Act of October 6, 1917 (§2a). Although the British Proclamation substitutes nationality for domicil in determining enemy character, it is proper to recall that in Anglo-American law the nationality and domicil of corporations are usually considered identical. Subsequent British Orders in Council and the Trading with the Enemy Amendment Act, 1916 (5 and 6 Geo. V, c. 105) have extended the prohibition of trading with the enemy very widely to include those having "enemy association" (which has been construed by the political department of the Government to include firms even in neutral countries having German sympathies, connections or trade relations) and give the Board of Trade wide powers to wind up British concerns with such association. See Frank Evans: Trading with the Enemy Amendment Act, 1916 (1916) 32 LAW QUAR. REV., 249.

[13] [1916] 2 A. C. 307.

[14] An able analysis of the fiction theory of the "corporate entity" showing its true relations to legal realities is to be found in an article by

The opinions of the other judges, as expressed by Lord Parker, while purporting to uphold the legal entity theory, in fact laid particular emphasis upon the actual control and directing center of management as the determining factor in reaching a conclusion as to enemy character; and on this point, while the nationality of the shareholders could not affect the nationality of the company, they considered the character of the stockholders material to the question whether the control of the company's business was in fact vested in persons adhering to or under the control of enemies.[15]

While unwilling to modify in any way the corporate entity theory, Lehman, J., in the principal case, nevertheless adopted so much of Lord Parker's *dictum* as touched upon the question of "control" of the corporation by persons resident in an enemy country or adhering to the enemy, concluding that inasmuch as three of the four directors, including the manager, were residents of this country, the company was not under the "control" of alien enemies.[16] Thus, by the organization of subsidiary companies, with local directors in ostensible control, it would seem possible for large corporations doing an international business, to minimize the effects of an eventual taint of enemy character—a result created by the courts through their hesitation in piercing the corporate veil.

In conclusion, it may be observed that International Claims Commissions have almost uniformly adopted the rule, for purposes of jurisdiction, that the nationality of corporations is that of their country of incorporation, although the Department of

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Professor Wesley N. Hohfeld: Nature of Stockholders' Individual Liability for Corporation Debts (1909) 9 COLUMBIA L. REV. 285, 288 *et seq.* For cases in which the "fiction theory" (under statutory construction) has been discarded see the Australian cases of *Osborne v. The Commonwealth* (1911) 12 Commonw. L. R. 321, 365; and *Morgan v. Deputy Federal Comm.* (1912) 15 Commonw. L. R. 661. A leading extreme case supporting the corporate entity theory is that of *Salomon v. Salomon & Co.* [1897] A. C. 22.

[15] [1916] 2 A. C. 307, 344. Story, J., in the case of *Society etc. v. Wheeler* (1814, U. S. C. C., N. H.) 2 Gall. 105, a case much misunderstood, really decided that the courts could determine the character of the British corporation from the character, enemy or friendly, of its members.

[16] It should be observed that in England, one-third stock ownership in an English company by subjects of the enemy suffices to give the Board of Trade supervision of its affairs, and some similar rule will undoubtedly be adopted by the Alien Property Custodian in the United States. A recent newspaper report mentioned 52% stock membership in Germany as the minimum.

State, acting administratively, always seeks, before extending protection to American corporations abroad, to establish the fact that the substantial beneficial ownership of the company is vested in American stockholders.[17]

CONFLICT OF LAWS IN WORKMEN'S COMPENSATION LEGISLATION.

A recent Connecticut case involves problems in the conflict of laws that are at once of compelling theoretical interest and of great practical importance. An employee under a Massachusetts contract was injured in Connecticut while at work within the scope of his employment. Under the decision of the Supreme Judicial Court of Massachusetts in *Gould's Case*[1], in accordance with the court's conclusion as to legislative intent, the Workmen's Compensation Act of Massachusetts has no application to an injury occurring outside of that jurisdiction. In an action brought in Connecticut recovery was allowed under the statute of the latter state. *Douthwright v. Champlin* (1917) 91 Conn. 524; 100 Atl. 97.

Such a result would have been reached without difficulty under the authority of *Gould's Case, supra.* This case, mainly on considerations applicable to the law of torts generally, while deciding that the Massachusetts act did not apply to extraterritorial injuries, expressly stated that it did apply to all intraterritorial injuries irrespective of the place of the contract. The court gave full effect to the presumption that a legislative act designed partially to supersede a particular branch of the law of torts is coextensive in application with the law thus superseded.[2] The fact that this dominant purpose was effected by reading certain unexpressed terms into certain contracts of employment was deemed not to affect this presumption. The rule of conflict of laws applicable to torts generally,[3] and not that applicable to contracts, was therefore consistently applied.

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[17] Borchard, *op. cit.*, pp. 620-626.

[1] (1913) 215 Mass. 480, 102 N. E. 693. Accord, *Tomalin v. Pearson* [1909] 2 K. B. 61; *Schwartz v. India Rubber, etc. Co.* [1912] 2 K. B. 299. Applying the principle of *Gould's Case* to the question of waiver of common law rights are *Johnson v. Nelson* (1915) 128 Minn. 158, 150 N. W. 620; *Piatt v. Smith* (1915) 188 Mo. App. 584, 176 S. W. 434; *Pendar v. H. & B. Mach. Co.* (1913) 35 R. I. 321, 87 Atl. 1.

[2] *Gould's Case, supra,* 487.

[3] See cases cited in *Gould's Case,* 487; and compare the very important case of *Brown v. Western Union Tel. Co.* (1914) 234 U. S. 542, 547, 34 Sup. Ct. 955, 956.

Such, however, was not the reasoning of the principal case. It had previously been decided[4] that the Compensation Act of Connecticut was in effect an amendment of contract law, in its dominant characteristic a rule of construction applicable to a special class of contracts, whereby certain so-called "implied" terms were added. Accordingly the act was held to apply to all injuries wherever occurring, if arising under Connecticut contracts of employment, with the further intimation[5] that a similar application would be accorded to foreign acts in case of injuries occurring within Connecticut under foreign contracts. This, now probably the prevailing view among the states,[6] while recognized as law by the principal case, was refused application on the ground that the jurisdiction of the contract had, under *Gould's Case,* no applicable compensation act.[7]

We are not now concerned as between the two opposing theories of the workmen's compensation acts. The issue between them is merely one of degree. All rules of contract law, properly speaking, are ultimately concerned with the modification of certain conditions non-contractual in character. Conversely many rules of law, plainly within the domain of tort or quasi-contract law, obtain their compulsory fulfillment through the prohibition of certain terms in certain contracts. In no case is the mere regulation of the contractual relationship as such the sole and ultimate purpose of legislation.[8] In any case a regulation partaking of the nature of tort law *may* involve the incidental modification of the construction of certain contracts.[9] The decisive question should be, therefore: what is the dominant purpose of the statute,—to abolish certain unspecified evils arising from a certain way of contracting, the latter being the direct object of legislative attack, or to remedy certain factual conditions directly selected as the object of remedial legislation, with only an incidental effect upon contract law?

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[4] *Kennerson v. Thames Towboat Co.* (1915) 89 Conn. 367, 94 Atl. 372.

[5] *Ibid.,* 89 Conn. 381, 94 Atl. 378.

[6] *Post v. Burger* (1916) 216 N. Y. 544, 111 N. E. 351; *Schweitzer v. Hamburg-Amerikanische, etc. Co.* (1912, N. Y. Sup. Ct.) 78 Misc. (N. Y.) 448, 138 N. Y. Supp. 944; *Grinnell v. Wilkinson* (1916, R. I.) 98 Atl. 103; *Gooding v. Ott* (1916, W. Va.) 87 S. E. 862. See also Bradbury, *Workingmen's Compensation* (2d ed.) 56.

[7] See principal case, 91 Conn. 528-529, 100 Atl. 98.

[8] E. g., statutes of frauds, and regulations of life insurance contracts.

[9] E. g., regulations of hours of labor.

A graver practical question, however, is here involved. Can a court, consistently with the principles of conflict of laws, presume that an act combines both these characteristics simultaneously? Can it extend its own act to extraterritorial injuries occurring under contracts made within its own jurisdiction, and incorporate by reference foreign acts,[10] if applicable, as a part of the law of the contract in cases of intraterritorial injuries under foreign contracts, on the one hand, and, on the other hand, apply its own act to intraterritorial injuries under foreign contracts when the *lex contractus* has no applicable statute providing compensation, and also give effect to the law of the place of injury irrespective of the law of the contract in the matter of statutory waiver of common law rights of action? No conclusive theoretical objection to such a position exists, as the legislative intention may be deemed to have embraced both objects in equal degree. Such, indeed, has become the settled doctrine of at least one state.[11]

But the principles of conflict of laws are designed to provide a method of selection of specific rules universally applicable to specific groups of facts, without variation dependent upon the place where the remedy is sought.[12] The rule under present consideration must stand or fall according as it, if consistently followed, subserves this end; for, whatever the legislatures might have done by express enactment, they should not be presumed to have acted in contravention of the objects for which rules of conflict of laws exist.[13] We may assume any of the following

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[10] For the logical and legal bases of the conflict of laws, more particularly as regards "incorporation by reference," see Professor Wesley N. Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws* (1909) 9 COL. L. REV. 496, 520, 522, note, and 10 COL. L. REV. 526; see also Comment entitled *Moratorium Decrees and the Conflict of Laws* (1917) 26 YALE LAW JOURNAL, 771, 772.

[11] Except that the tort or quasi-contract aspect of the statute has been carried so far as to embrace intra-territorial injuries, even though the foreign *lex contractus* was an applicable statute. *Am. Radiator Co. v. Rogge* (1914) 86 N. J. L. 436, 92 Atl. 85, 93 Atl. 1083, 94 Atl. 85; *Rounsaville v. Central R. Co.* (1915, Sup. Ct.) 87 N. J. L. 371, 374; Atl. 392, 393 (applying the contract theory). Also compare *Pendar v. H. & B. Mach. Co., supra,* with *Grinnell v. Wilkinson, supra.*

[12] See Pillet, *Essai d'un système général de solution des conflicts des lois* (1894) 21 Clunet 417, 711; also Comment, *Moratorium Decrees and the Conflict of Laws* (1917) 26 YALE LAW JOURNAL, 771, 773.

[13] *In re Wood* (1902) 137 Cal. 129, 69 Pac. 900; *N. Y. Mut. Life Ins. Co. v. Prewitt* (1907) 127 Ky. 399, 105 S. W. 463.

alternative hypotheses, with respect to states X and Y. First, an injury occurs in state X under a Y contract of employment, the injury being of such a nature as to come within the terms of the X statute and not within the terms of the Y statute. Second, the injury comes within the terms of both statutes but with different scales of compensation. Third, state Y has no applicable workmen's compensation act. Fourth, under the law of state Y there has been no waiver of common law rights of action, while under the law of state X there has been such a waiver. Upon the fundamental assumption that the X statute is a branch of the contract law of state X, it necessarily follows that the failure to enact a similar statute in state Y is equally a characteristic of the contract law of the latter state. The absence of an applicable statute, therefore, and the provision of a different scale of compensation, and the rule resulting in no waiver of common law rights are as decisive features of the law of the contract as any positive applicable provision would be. To refuse to give effect to them, by swinging over to the tort theory of the local act, is in direct violation of the principles of international reciprocity applicable to contract law.

If it should be urged that such a policy is in accord with the well-settled rule[14] that the *lex contractus* will not be incorporated by reference when contrary to the declared public policy of the forum, two answers may be made. First, it has been decided,[15] and the result seems incontestable on principle, that contracts made under common law rules of industrial accident liability do not fall within such a classification. Second, the assumption of the existence of such a rule of policy established by the local statute is precisely the position which we contend to be incompatible with the simultaneous assumption that the legislation falls within the category of contract law. It is immaterial that a similar practical result is reached when, as sometimes unavoidably happens, different rules of conflict of laws obtain acceptance in different jurisdictions, or when different notions of public morals require a forum to repudiate a contract valid under the law of the contract. Our suggestions are directed to the fact that the court has in the present instance raised a gratuitous presumption of legislative intention intrinsically leading to this exceptional result.

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[14] *Greenwood v. Curtis* (1810) 6 Mass. 358.

[15] *Reynolds v. Day* (1914) 79 Wash. 499, 140 Pac. 681.

We have seen that a consistent application of the doctrine of the principal case has already produced an actual overlapping of the positive provisions of two compensation statutes.[16] Such a result has not yet been reached under the law of the principal case.[17] It would, however, logically follow from a refusal to recognize the negative features of the law of the contract on a point assumed to be one of contract law.

We submit, therefore, that the decision in the principal case should be reached under the reasoning of Gould's Case, *supra,* or not at all, and that the courts should decisively elect between the theory of that case and the contract theory of the workmen's compensation acts. If the latter prevails, the place of injury should in all cases be immaterial, whether or not the jurisdiction of the contract happens to possess an applicable statute.

C. R. W.

EXTRATERRITORIAL RECOGNITION OF A DECREE OF JUDICIAL SEPARATION

For the first time, apparently, a court has passed upon the extraterritorial effect, in a subsequent action for full divorce, of an *ex parte* judicial separation.[1] *Pettis v. Pettis* (1917) 91 Conn. 608, 101 Atl. 13. Immediately after marriage in New York the parties had separated; the wife remained resident there and obtained the decree in question. When the husband, who was domiciled throughout in Connecticut, began suit for divorce on grounds of desertion she pleaded the decree, which was based on cruelty, to justify her living apart. The court held that a decree of judicial separation, as opposed to full divorce, did not affect the marriage status, was personal in its nature, and to be in any way effective in another State, called for personal jurisdiction over the defendant.

If such a decree from bed and board is indeed personal merely, it cannot of course be enforced abroad against a non-appearing, non-resident party; nor can it be *res judicata* as to the grounds

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[16] See note 11, *supra.*

[17] See principal case, 91 Conn. 528, 100 Atl. 98.

[1] Where *both* parties have been before the court, the decree will bar subsequent suit by the original defendant for divorce on grounds of desertion; and is conclusive as to the issues of fact on which it is based. *Harding v Harding* (1905) 198 U. S. 317, 25 Sup. Ct. R. 679.

on which it was based.[2] Doubt may well be entertained, however, whether such a decree does not sufficiently affect the marriage status to be considered, in the same way as that of divorce proper, a decree *in rem*. This marriage status cannot be literally a *res*, a thing physical; it is rather the condition of the parties in society, the sum of their jural relations with each other and with people at large: their rights, powers, disabilities,[3] etc. Now with judicial separation, as with divorce, the wife loses what disabilities marriage imposed upon her[4]: she may now acquire and hold personal property in her own right[5]; she may convey realty, sue, be sued.[6] The decree may fix her property rights and those of her husband.[7] His control over her and his right of cohabitation he has lost.[8] Has he not then likewise lost his rights against all men that they do not alienate his wife's affections which are no longer his; or interfere with the consortium he no longer enjoys?[9] With the right of cohabitation he has at least lost the duty to support his wife;[10] with this

[2] *Pennoyer v. Neff* (1877) 95 U. S. 714.

[3] When married women's property acts cut away perhaps the major portion of these relations, the *in rem* character of proceedings directed "against" the status grew considerably more shadowy than it was when established in *Ditson v. Ditson* (1856) 4 R. I. 87.

[4] To this an exception ought perhaps to be made as to the power of either party to dispose of real estate acquired before the decree. *Castlebury v. Maynard* (1886) 95 N. C. 281. But see *Marshall v. Baynes* (1892) 88 Va. 1040, 14 S. E. 978.

[5] *Meehan v. Meehan* (1848 N. Y.) 2 Barb. 377.

[6] *Delafield v. Brady* (1888) 108 N. Y. 524, 15 N. E. 428; *Barber v. Barber* (1858 U. S.) 21 How. 582.

[7] See *Davis v. Davis* (1878) 75 N. Y. 221. In *Thompson v. Thompson* (1913) 226 U. S. 551, 33 Sup. Ct. R. 129, a Maryland decree from bed and board was held to blot out the wife's claim to maintenance and her rights in her husband's property.

[8] *People v. Cullen* (1897) 153 N. Y. 629, 635, 636, 47 N. E. 894; and see *American Legion v. Smith* (1889) 45 N. J. Eq. 466, 17 Atl. 770. That cohabitation in the broad sense involves a right as well as a privilege is shown by the remedy granted in case of desertion.

[9] *Barrere v. Barrere* (1819, N. Y.) 4 Johns. Ch. 187, 196, squints in passing toward the persistence of this set of rights. The problem all through here is whether the possibility of reconciliation would be sufficient to found an action; ordinarily such reconciliation would appear not only contingent, but improbable. In any case, the right to compensation for loss of consortium is fading. *Feneff v. R. R. Co.* (1909) 203 Mass. 278; 89 N. E. 436.

[10] Unless it is expressly imposed upon him. *People v. Cullen, supra. Contra, State v. Ellis* (1898) 50 La. Ann. 559; 23 So. R. 445; but the court in the principal case was considering a New York decree.

latter it would seem as if her power to pledge his credit for necessaries must also fall.[11] Further, if no alimony has been decreed, it is not easy to see how the husband's death by the wrongful act of another can any longer found an action by his wife.[12] Even the power to reëstablish the old status must be exercised through a decree of the court;[13] it is hardly to be distinguished from divorcees' powers to remarry each other. The New York judicial separation, in fact, seems to leave very little of the marriage status save a duty in each party not to commit adultery[14] and the incapacity of either to contract a valid marriage with another person;[15] while even this last is matched in the case of the guilty party by like incapacity after full divorce.[16]

Still, though in pure theory we concede to the decree from bed and board an effect *"quasi" in rem,* there are considerations of public policy to be urged against its being so regarded in practice. In the case of divorce *a vinculo,* though constitutional compulsion extends only to decrees obtained in the matrimonial domicile,[17] public policy requires an *ex parte* proceeding at the

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[11] Such power in the wife is decidedly founded on the husband's duty of support; will it stand without its foundation? *Erkenbach v. Erkenbach* (1884) 96 N. Y. 456, 465, suggests that it may still continue.

[12] Statutes confer this right for the purpose of making up to mentioned relatives the entire pecuniary loss resulting from the deceased's death. *Murphy v. N. Y. C. R. R.* (1882) 88 N. Y. 445, basing on the N. Y. Code sec. 1902 ff. But unless the wife be entitled to support, what pecuniary loss does she sustain? It is held, *Countryman v. Fonda etc. R. R. Co.* (1901) 166 N. Y. 201, 208 f., 59 N. E. 822, that the jury may consider prospective damages beyond what they might at common law; would the wife's damage in the supposed case be even prospective?

[13] Bliss' Ann. N. Y. Code sec. 1767.

[14] As shown by the fact that breach of the duty by either would ground a bill by the other for a complete divorce. *Vischer v. Vischer* (1851, N. Y.) 12 Barb. 640.

[15] To these should be added a joint power, legal as well as physical, to produce legitimate children. *Barrere v. Barrere, supra,* indicates a presumption, *prima facie* only, against the legitimacy of children born under such circumstances.

[16] It is worth thought in this connection that this last, this species of "marital celibacy," although decreed by a court having jurisdiction of the person, against one of its own citizens, and although surely intended to affect status, will be given no recognition extraterritorially. *Van Voorhis v. Brintnall* (1881) 86 N. Y. 18; *In re Crane* (1912) 170 Mich. 651, 136 N. W. 587. But *cf. Hall v. Industrial Commission* (1917, Wis.) 162 N. W. 312, discussed p. 131 *infra.*

[17] *Haddock v. Haddock* (1906) 201 U. S. 562, 26 Sup. Ct. R. 525, as interpreted in *Thompson v. Thompson, supra.*

domicile of either spouse to be treated as *in rem.*[18] There is need for certainty in the matters of legitimacy, bigamy, adultery. People are best everywhere married, or everywhere not. There seems to be no such urgent call to recognize in like manner decrees manufacturing states of part- or almost-marriage, distinct each one according to the law of the jurisdiction where its particular decree of limited divorce happened to be granted. Thus in the principal case the court assimilated the parties' status to that nearest like it known to the law of Connecticut: marriage. On the other hand, this use of the judicial separation decree as purely personal leads to difficulty to which the court is sensible: because it did *not* affect status, recognition is denied to a decree which the New York court could not have rendered *ex parte,* had they not held it in some sort *in rem,* precisely because it *did* affect status.[19]

But though we admit it to be so to speak *in rem,* it still does not follow that the decree of judicial separation would have served the purpose for which it was introduced. It was not pleaded in bar; it seems to have been intended to establish against the husband the cruelty on which it was based.[20] But *ex parte* divorce decrees seem to be anomalous—if they are *in rem* in truth—in that they swim free and have effect, though the necessary grounds on which they base sink away; in that they need not even bar further divorce proceedings by the original defendant. So an *ex parte* divorce judgment has been held not to estop the wife from showing that her husband had committed acts entitling her to alimony and divorce, and that *she committed*

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[18] New York and a few other States do not admit this. See *Haddock v. Haddock, supra,* dissenting opinion of Brown, J. And elsewhere limitations are imposed: as, not recognizing jurisdiction in the divorcing court unless the defendant receive actual notice. *Felt v. Felt* (1899) 59 N. J. Eq. 606, 45 Atl. 105; and *cf. Perkins v. Perkins* (1916) 225 Mass. 82, 113 N. E. 841.

[19] To answer that the status concerned is not the same in the two cases; i. e., that a wife's marital status may be affected materially without changing that of her husband, leads into a metaphysical labyrinth. But *cf.* the language in *Haddock v. Haddock, supra;* in *Perkins v. Perkins, supra;* and in the principal case.

[20] Though not included in the pleadings either to the husband's action for desertion or in the wife's cross-action for cruelty, the record was admitted in evidence without objection. The wife's task was to justify leaving her husband on the very day of the wedding; the decree could help in that only so far as it concluded him on the point of cruelty.

none to either bar alimony or ground divorce.[21] And, throwing theory to all the winds of heaven in the interests of justice, courts have, without wishing to "impugn" the prior decree, granted new divorce to an already divorced wife, because without it the ancillary decree of alimony could not be rendered.[22]

Whether, therefore, the *ex parte* decree of judicial separation be, as here held, *in personam* merely,[23]—because it does not in fact affect status, or because it seems more advantageous to act as if it did not; or whether, as fully as divorce *a vinculo*, it finally achieve extraterritorial recognition—in either case the finding of fact on which it is based seems destined, unlike the prophet, to honor only in its own country.

K. N. L.

AN EXPANSION OF THE DUE PROCESS CLAUSE: FEDERAL SUPREME COURT REVIEW OF ERRORS IN THE APPLICATION OF STATE LAWS

Since our Federal Supreme Court, in its interpretation of the due process clause of the fourteenth amendment,[1] is committed to the policy of waiting for cases[2] rather than that of binding itself in advance with a definite rule, each new decision on this subject from that learned body is likely to contain points and reasoning of more than ordinary moment. Three cases recently decided are here to be considered together in so far as their differences will permit.

Mississippi Railroad Commission v. Mobile & Ohio Railroad (1917) 37 Sup. Ct. 602, is a case of attempted railroad regulation which was defeated by the decision of the United States courts. The state commission is an elected branch of the executive department.[3] It held the legally required hearings in this matter, considered the evidence presented by the railroad and others and

[21] *Thurston v. Thurston* (1894) 58 Minn. 279, quoted at length and approved, *Toncray v. Toncray* (1910) 123 Tenn 476, 131 S. W. 977. It is, however, difficult to make out just which marriage relations those are, which the court there holds to have been "seized" by the foreign *ex parte* divorce.

[23] For proceedings *in rem* and *in personam cf.* (1917) 26 YALE LAW JOURNAL 710, 759-764.

[22] *Turner v. Turner* (1870) 44 Ala. 437; *Stilphen v. Stilphen* (1870) 58 Me. 508.

[1] "Nor shall any State deprive any person of life, liberty, or property, without due process of law."

[2] "The process of judicial inclusion and exclusion," *Davidson v. New Orleans* (1877) 96 U. S. 97, 104.

[3] Miss. Code 1906, sec. 4826.

thereafter ordered the reinstatement of numerous local passenger trains recently taken off between Meridian and certain less important points. When the railroad filed a bill to enjoin the enforcement of this order it appeared that under capable management the road was operating at a considerable deficit at that time and further, that some, although not remarkably convenient, service was still offered between the towns. The Supreme Court declared that a fair rate of return must be allowed, otherwise a commission's ruling would be altogether unreasonable and its enforcement a violation of due process. And so it was here.

A second case, *Saunders v. Shaw* (1917) 37 Sup. Ct. 638, probably involves a more novel state of facts. Here a landowner in his suit to enjoin collection of a special drainage assessment levied against him in Louisiana, offered evidence to show that he received no benefit from the improvement. The trial court ruled out this evidence as incompetent but permitted it, as well as some evidence of the defendant drainage board, to be spread upon the record for use by the Supreme Court on appeal. The trial judge did not permit cross-examination, however; and, in view of its ruling which rejected the landowner's evidence, an intervenor, who held bonds payable from this tax, offered no evidence in rebuttal. There was judgment below against the landowner, which was first affirmed by the Supreme Court of Louisiana but on rehearing, on account of a subsequent decision of the United States Supreme Court,[4] was reversed without remanding,[5]—the Louisiana Court probably feeling satisfied of the facts on inspecting those which were before it in the record and only changing position on the point of law, namely, as to whether benefit to the land assessed was material. On the appeal to the United States Supreme Court, the intervenor contended that he had been given no opportunity to present his evidence (since it would have been an idle procedure to attempt to answer that of the landowner which had been rejected by the trial court). In this contention he was upheld; he had not been given due process of law.

A third case also presenting a novel point is *Chicago Life Insurance Company v. Cherry* (1917) 37 Sup. Ct. 492. Two insurance companies being sued in Tennessee but not served there,

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[4] *Myles Salt Co. v. Iberia & St. M. Drainage Dist.* (1915) 239 U. S. 478; 36 Sup. Ct. 204.

[5] *Shaw v. Board of Commrs.* (1916) 138 La. 917, 70 So. 910.

nevertheless contested the jurisdiction of the trial court by a plea in abatement and lost in both the lower and the supreme court of that state, judgment being given for the plaintiff. Suit on the judgment was later brought in Illinois where, in the Superior Court of Cook County, the plaintiff once more had judgment. On appeal the Illinois Appellate Court refused to look further into the question of jurisdiction in Tennessee than to note that the issue had been raised, argued and considered in the courts of that state before judgment was given there.[6] Two lines of reasoning are followed by the United States Supreme Court in affirming the Illinois Appellate Court in this decision.

The first considers the question of jurisdiction in Tennessee as if the case had come up from there without a trip to Illinois. If the Tennessee court did not have personal jurisdiction of the insurance companies it clearly could not issue a valid judgment against them.[7] On the other hand if there had been personal service on the defendants in Tennessee, jurisdiction would of course have been established. There seems to be no well settled rule as to the exact point between these two extreme states of fact at which the line is drawn. The United States Court recognizes that a difference of opinion on the subject is possible and reasonable as well and regards as not lacking in due process a rule that the mere filing of a plea in abatement gives the court jurisdiction.[8]

The second line of reasoning to uphold the Illinois court amounts briefly to this: A decision rendered in good faith by a state court although predicated on a mistake of fact will ordinarily give the defeated party no ground of appeal under the fourteenth amendment of the Federal Constitution. To Illinois courts Tennessee law is a matter of fact and hence the rule applies in this case.[9]

It should be recalled in considering these cases that the meaning of the phrase, "due process of law" has in the United States

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[6] *Cherry v. Chicago Life Ins. Co.* (1914) 190 Ill. App. 70.

[7] *Pennoyer v. Neff* (1877) 95 U. S. 714; *Scott v. McNeal* (1893) 154 U. S. 34, 46; 14 Sup. Ct. 1108, 1112 (administration upon the estate of a supposed decedent).

[8] Equally unobjectionable whether provided by statute or by a court.

[9] Similarly held where a state court is in error on a point of conflict of laws. *Kryger v. Wilson* (1916) 242 U. S. 171, 37 Sup. Ct. 34; see Comment, *Due Process and Full Faith and Credit clauses as applied to the Conflict of Laws* (1917) 26 YALE LAW JOURNAL 405.

been expanded so as to include not only process in the everyday meaning, process-proper, but the result or outcome of that process, the decision or judgment handed down.[10] It should also be recalled that the application of the limitation has been extended to embrace the legislative[11] and judicial departments of our government, including the inferior bodies and officers of each.[12]

The railroad commission in Mississippi was one of these inferior bodies. The case may be classified as one containing a mistake of law and a resulting unreasonable regulation.[13] It may then serve as a background for the others.

The two remaining cases are judicial appeals. Where the act of a court is in question it has been stated upon high authority[14] that an erroneous decision, simply, is not a violation of the due process clause in the fourteenth amendment. That the rule is not applicable to the *quasi* judicial acts of executive bodies is evidenced by the railroad case just considered, there having been no charge of bad faith on the part of the commission. The principal importance of the Louisiana and Illinois cases would seem to consist in showing that the rule is not always and absolutely applicable to judicial decisions either. In other words, they recognize that certain kinds of errors, even by a court relative to its own law, may be denials of due process. One of the cases does this by suggestion; the other seems to decide just that.

For a number of years *dicta,* and to some extent decisions, have been approaching this point from various angles. The progress

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[10] Whether anything turns on the distinction between "process-proper" and result it is difficult to say. A close case may some day bring the distinction into prominence but at present no statement can be made with assurance. See Harlan, J., in *Chicago, B. & Q. R. R. v. Chicago* (1897) 166 U. S. 226, 234-235, 17 Sup. Ct. 581, 584, col. 1.

[11] On the total lack of meaning of the phrase when applied to the legislature without the expanded interpretation, see Cooley, *Constitutional Limitations,* p. 503.

[12] *Ex parte Virginia* (1879) 100 U. S. 339, 346. That the amendment is intended even to cover cases where the state agents act in excess of, or in violation of state law, see, *Yick Wo v. Hopkins* (1886) 118 U. S. 356, 6 Sup. Ct. 1064.

[13] Mistake of law because it appears that the Commission computed railroad service expense on the actual "out of pocket" cost, this rule of computation being held to be wrong.

[14] Chief Justice Waite in *Arrowsmith v. Harmoning* (1886) 118 U. S. 194, 195; 6 Sup. Ct. 1023, 1024. See also, *Patterson v. Colorado* (1907) 205 U. S. 454, 460, 27 Sup. Ct. 556, 557. Cooley, *Constitutional Limitations,* p. 587.

may be set forth as a series of steps. Numerous dicta may be found to the effect that fraudulent decisions or those rendered in bad faith are wanting in due process and may be carried to the United States Supreme Court for that reason.[15] Likewise it has been stated that due process of law requires a competent and impartial tribunal.[16] In one case whose facts were widely aired in the press[17] the dissenting opinion[18] declared that a criminal trial before a mob-controlled tribunal is not due process of law, which general rule seems to have been recognized as well by the majority. A very definite step in this general direction was taken in the case of *Scott v. McNeal*,[19] in which the United States Supreme Court reversed the State Supreme Court of Washington on the question of jurisdiction in a lower court of that state. At that time it is hardly likely that the state court would have been reversed on a question of procedure in the lower court, once the jurisdiction of the latter was established.[20] And yet that is the point to which the decision in *Saunders v. Shaw* now carries us.

This result has been foreshadowed, not only by analogy as outlined above, but directly in the language of the Justices. It has been intimated that extraordinary cases might arise in which a state would deprive a person of due process of law solely by the decision of its courts.[21] Just such an intimation is found in the *Life Insurance* case now before us, but neither therein nor in the previous cases was the required grossly erroneous decision thought to be present. It did arrive when a court rendered a decision which concluded a case without any evidence by one of the parties.

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[15] *Fallbrook Irrig. Dist. v. Bradley* (1896) 164 U. S. 112, 17 Sup. Ct. 56. *Chicago, M. & St. P. Ry. v. Minnesota* (1890) 134 U. S. 418, 466, 10 Sup. Ct. 462.

[16] *Jordan v. Mass.* (1912) 225 U. S. 167, 176, 32 Sup. Ct. 651.

[17] *Frank v. Mangum* (1915) 237 U. S. 309, 35 Sup. Ct. 582.

[18] That of Holmes, J.; Hughes, J., concurred in the dissent.

[19] (1893) 154 U. S. 34, 14 Sup. Ct. 1108.

[20] But it has been urged very forcibly on the ground of this decision and some others, as well as on independent reasoning, that the United States Supreme Court should review all cases in which the state courts are in error concerning their own law. See Professor Henry Schofield, *The Supreme Court of the United States and the Enforcement of State Law by State Courts* (1908) 3 ILL. L. REV. 195.

[21] Dissenting opinion of Holmes, J., in *Raymond v. Chicago, Un. Tr. Co.* (1907) 207 U. S. 20, 28 Sup. Ct. 7, 14.

We have no new rule from these three cases but we do have in one of them a square decision on a disputed question and one from which, in looking forward, we may well inquire how far the Federal Supreme Court will go in future cases involving state court interpretation of state law.

M. S. B.

REVIVING BARRED DEBT AS A FRAUDULENT "INCUMBRANCE" UNDER THE BANKRUPTCY ACT

A recent federal decision holds that the revival by an insolvent debtor just before bankruptcy of a debt barred by the statute of limitations may be treated as an "incumbrance" of the debtor's property, and void as such under section 67e of the Bankruptcy Act. *In re Salmon* (1916, S. D. N. Y.) 239 Fed. 413.[1] In its ordinary meaning, "incumbrance of property" denotes some charge or lien attaching to specific property. To refer to a simple unsecured debt as an incumbrance of property causes considerable linguistic strain. Moreover, under the familiar *ejusdem generis* rule of construction, the term "incumbrances," in conjunction with its accompanying words in section 67e—"all conveyances, transfers, assignments, or incumbrances of his property"—would naturally be confined to the narrower and more usual meaning above suggested. Furthermore, the purpose of section 67e is to invalidate only such transfers as would have been fraudulent at common law or would constitute an act of bankruptcy under section 3 of the Act.[2] The learned judge says that the destruction by the bankrupt of a valid defense against the claimant's debt is analogous to a voluntary conveyance in fraud of creditors. But at common law a transfer of property was not fraudulent as to creditors when the debtor was under a moral obligation to the transferee, though the obligation was legally unenforceable because of some statutory provision.[3] The payment of a barred debt was not deemed a badge of fradu-

[1] For more complete statement of facts, see page 129, *infra*.

[2] *Coder v. Arts* (1908) 213 U. S. 223, 242; 29 Sup. Ct. 436, 444.

[3] Bump, *Fraudulent Conv.* (3d ed.) 223; *Del Valle v. Hyland* (1894, N. Y. Sup. Ct.) 76 Hun. 493 (outlawed debt); *Livermore v. Northrop* (1870) 44 N. Y. 107 (debt within Statute of Frauds); *Wilson v. Russell* (1858) 13 Md. 494 (debt discharged under insolvent laws); *Gardner v. Rowe* (1825, Eng. V. C.) 2 Sim. & St. 346 (transfer to *cestui* of land held on oral trust).

lent intent but a satisfaction of the debtor's moral obligation to pay a creditor, for the statute of limitations is usually considered as merely suspending the creditor's remedy, not as destroying the debtor's obligation.[4] When the statute is waived, the old obligation again becomes effective.[5] The running of the statute creates in the debtor the power of defeating the claim, if he cares to exercise it. This power passes to the trustee in bankruptcy, and cannot, after bankruptcy proceedings have been instituted, be exercised by the debtor.[6] But apart from bankruptcy, the privilege of exercising the power by pleading the statute is personal to the debtor and he is under no duty to exercise it for the benefit of other creditors.[7] Consequently it would seem to follow that creditors cannot object to his releasing or destroying the power by a new promise, actual or implied from part payment. If sound policy forbids the revival of barred debts within four months of bankruptcy, it is believed that further legislation is necessary. The part payment of a barred debt might (as well as reviving the debt) constitute a preference, voidable under section 60b, if the debtor were charged with notice;[8] but it is difficult to see how such a revival can be avoided as a fraudulent incumbrance under sec. 67e. The only other cases found on the point are opposed to the principal case, and would seem to represent the sounder view.[9]

M. B.

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[4] *Johnson v. Albany & S. R. R. Co.* (1873) 54 N. Y. 416.

[5] *Ilsley v. Jewett* (1841, Mass.) 3 Met. 439.

[6] *In re Zorn & Co.* (1912, E. D. Pa.) 193 Fed. 299.

[7] *Elliot v. Trahern* (1891) 35 W. Va. 634, 643, 14 S. E. 223, 226; see also *Cahill v. Bigelow* (1836, Mass.) 18 Pick. 369, 372 (Statute of Frauds).

[8] See *In re Banks* (1913, N. D. N. Y.) 207 Fed. 662.

[9] *In re Banks, supra; In re Blankenship* (1915, S. D. Cal.) 220 Fed. 395.

RECENT CASE NOTES

ALIEN ENEMIES—NATURALIZATION—"APPLICATION."—U. S. Rev. St. sec. 2171 (Comp. St. 1916, sec. 4362), first enacted in 1802 (Act April 14, 1802, ch. 28, 2 Stat. 153) declares that no alien who is a native citizen or subject or a denizen of any country with which the United States is at war "at the time of his application" shall then be admitted to citizenship in the United States. By the Act of June 29, 1906, c. 3592, 34 Stat. 596 (Comp. St. 1916, sec. 4362) the naturalization law was changed and aliens were for the first time required to file a petition for citizenship, and ninety days' notice of such petition had to be given before final hearing thereon in open court. The applicant was a German citizen. War was declared between the filing of his petition and the date set for final hearing. *Held,* that the final appearance of the applicant in open court and not the filing of the petition should be regarded as the "application" referred to in the act of 1802, and the applicant must be denied admission. *In re Naturalization of Subjects of Germany* (1917, E. D. Wis.) 242 Fed. 971.

See, in accord, *Ex parte Borchardt* (1917, E. D. S. C.) 242 Fed. 1006; *In re Haas* (1917, N. D. Tex.) 242 Fed. 739; *In re Jonasson* (1917, D. C. Md.) 241 Fed. 723. But see, *contra, United States v. Meyer* (1917, C. C. A. 2d) 241 Fed. 305, Hough, J., *dissenting; In re Nannanga* (1917, S. D. Ga.) 242 Fed. 737; *In re Kreuter* (1917, S. D. Cal.) 241 Fed. 985. The principal case would seem to represent the better view. The apparent purpose of the statute being to protect the United States against the admission of persons whose loyalty might be doubtful, it should be strictly construed in favor of the Government.

ALIEN ENEMIES—RIGHT TO SUE.—The resident manager (erroneously assumed by the court to be a German) of a domestic corporation, practically all of whose stock was owned by a German corporation, brought suit on behalf of himself and with power of attorney to represent the German majority stockholders for an injunction against the two American directors, charging them with deliberately seeking to wreck the corporation. A motion was made to stay the prosecution of the suit on ground that plaintiffs were alien enemies. *Held,* that the suit might be maintained, since the tolerance implied in the President's proclamation assuring German residents that they would be undisturbed in the peaceful pursuit of their occupations, and his statement that the sins of the German Government "ought not to be visited on" the German people, were a declaration of public policy, by which policy the courts were bound. *Posselt v. D'Espard* (1917, N. J. Ch.) 100 Atl. 893. See COMMENTS, p. 104.

ALIEN ENEMIES—RIGHT TO SUE—DOMESTIC CORPORATION WITH GERMAN STOCKHOLDERS.—The plaintiff was a New Jersey corporation. Of its capital stock of 50 shares, 45 were owned by a German corporation, 2 by a German subject, 2 by American citizens, and 1 by an Austrian subject who

resided in the United States and acted as manager of the plaintiff corporation. The four individual stockholders constituted the board of directors. A motion was made to stay the further prosecution of the suit on the ground that the plaintiff was an alien enemy. *Held,* that the suit might be maintained because the corporation should be regarded as an entity separate and apart from its stockholders and because the control of the company was vested in a board of directors, of whom the majority (including the manager) were residents of the United States. *Fritz Schultz, Jr., Co., v. Raimes & Co.* (1917, N. Y. Sup. Ct.), 166 N. Y. Supp. 567. See COMMENTS, p. 108.

BANKRUPTCY—REVIVING BARRED DEBT AS FRAUDULENT "INCUMBRANCE."—The day before a petition in bankruptcy was filed against him, a debtor made a payment upon a statute-barred debt, intending to revive it. The debtor was aware of his insolvent condition, the creditor was not. The creditor, offering to restore the payment, filed his claim on the revived debt. *Held,* that the claim should be disallowed, its revival being an "incumbrance" of the bankrupt's property and void under section 67e of the Bankruptcy Act. *In re Salmon* (1916, S. D. N. Y.) 239 Fed. 413. See COMMENTS, p. 126.

BILLS AND NOTES—HOLDER IN DUE COURSE—CORPORATION'S CHECK USED IN INTEREST OF FISCAL OFFICER.—W. was treasurer of the plaintiff corporation and also of the B. company. The defendant bank held for collection a note of the B. company which W. had indorsed. To pay this note W. wrongfully drew the plaintiff company's check, signed by himself as treasurer, to the order of the defendant. This check, after being certified, was received by the defendant from a representative of the B. company in payment of the note on its date of maturity. *Held,* that there was nothing in the transaction to put the defendant bank on notice that W. was misappropriating the funds of the plaintiff to pay his own debt. *Colonial Fur Ranching Co. v. First Nat. Bank* (1917, Mass.) 116 N. E. 731.

The fact that the corporate obligation is drawn by the official payable to himself and used to pay his own debt is not of itself constructive notice of lack of authority. *Fillebrown v. Hayward* (1906) 190 Mass. 472, 77 N. E. 45; *contra, Rochester Turnpike Road Co. v. Paviour* (1900) 164 N. Y. 281, 58 N. E. 114. But even in Massachusetts, where the instrument is made payable to a creditor of the officer, the creditor takes at his peril. *Johnson v. Longley Co.* (1910) 207 Mass. 52, 56, 92 N. E. 1035. The question before the court in the principal case was whether or not it would carry this doctrine farther and apply it where the officer was not absolutely liable to the payee, as a debtor, but only contingently as an indorser. The liability of a bankrupt indorser has been called a provable "debt." *In re Philip Semmer Glass Co.* (1905 C. C. A., 2d) 135 Fed. 77. But the purpose of the Bankruptcy Act was to relieve insolvents from their pecuniary liabilities. *Moch v. Market*

St. Nat. Bank (1901, C. C. A., 3d) 107 Fed. 897, 898. So that while the Bankruptcy Act seems to treat an indorser as an actual debtor, it does not do so in reality, for "debt" as used there may mean only "claim" or "liability." *Moch v. Market St. Nat. Bank, supra.* In the instant case, the court said that the debt was primarily that of the B. company, the officer being only contingently liable. Refusal to extend the doctrine of notice to such a case is believed to be sound.

G. L. K.

CARRIERS—CARMACK AMENDMENT—BILL OF LADING ISSUED BY CONNECTING CARRIER.—The plaintiff as shipper of live stock received a bill of lading from the initial carrier. The connecting carrier issued a second bill changing the liability by requiring 30 days' notice of claim in order to hold the carrier liable. *Held,* that the second bill was invalid for lack of consideration and because the enforcement of its terms would defeat the policy of the Carmack Amendment. *Missouri K. & T. Ry. Co. v. Ward* (1917) 37 Sup. Ct. 617.

This holding is a natural corollary to the rule already established under the Carmack Amendment that the bill of lading issued by the initial carrier applies to the entire transportation and fixes the rights and duties of all participating carriers. See *Georgia, Fla. & Ala. Ry. Co. v. Blish Milling Co.* (1915) 241 U. S. 190, 196, 36 Sup. Ct. 541, 544, and cases there cited.

CARRIERS—CARMACK AMENDMENT—PRESUMPTION AGAINST TERMINAL CARRIER.—In an action against the terminal carrier to recover damages for injury to goods, the plaintiff introduced evidence to show that the goods were delivered in good condition to the initial carrier and were received from the defendant in a damaged condition. The defendant contended that since the passage of the Carmack Amendment this did not make a *prima facie* case. *Held,* that the common law presumption against the terminal carrier was not superseded by the Carmack Amendment, which did not establish any presumption, but merely gave an optional remedy against the first carrier for the entire transportation. Salinger, J., *dissenting. Erisman v. Chicago B. & Q. R. Co.* (1917, Ia.) 163 N. W. 627.

The point decided is not new, even in Iowa (see cases cited on p. 631 of the opinion), but the case is worthy of note for its detailed reëxamination of the whole subject, with full discussion of both sides of the question and an apparently exhaustive collection of authorities.

CARRIERS — NON-DELIVERY — RESTRAINT OF PRINCES.—The defendants agreed with the plaintiffs to provide a steamer to proceed to Marionpol, and there load a cargo and carry it to Japan. On September 1, the defendants refused to name a steamer on the untrue assertion that the British government had prohibited steamers going to the Black Sea to load. The Turkish government closed the Dardanelles on September 26. The defendants pleaded "restraint of princes" as a justification of their breach of the charter-party. The ship would not have had time to reach the

Dardanelles before the closing. *Held,* that a reasonable apprehension of the impending closing of the Dardanelles, though justified by the event, did not constitute a restraint of princes, and the defendant was not excused. *Watts & Co. Ltd. v. Mitsui & Co. Ltd.* [1917] A. C. 227.

The question decided was similar to that involved in the case of the *Kronprinzessin Cecilie,* discussed in (1917) 26 YALE LAW JOURNAL, 247, 791, in which the decision of the United States Circuit Court of Appeals that the owners of the ship were not excused by reasonable apprehension of war, was reversed by the Supreme Court. The opinion in the Supreme Court cites as authority a dictum in the English case in the Court of Appeal, which appears to be contradicted by the above decision of the House of Lords.

CONFLICT OF LAWS—EX PARTE DECREE OF JUDICIAL SEPARATION—FOREIGN RECOGNITION.—A husband and wife from the time of their marriage in New York never lived together. The wife, "domiciled" in New York, procured an *ex parte* divorce from bed and board, on grounds of cruelty. When her husband, domiciled throughout in Connecticut, began suit there for divorce *a vinculo* for desertion, she introduced the New York decree to justify her living apart. *Held,* that such a decree, as opposed to full divorce, did not affect the marriage status, was personal in its nature, and was not in any way effective in another state unless entered by a court having jurisdiction over the defendant. *Pettis v. Pettis* (1917) 91 Conn. 608, 101 Atl. 13. See COMMENTS, p. 117.

CONFLICT OF LAWS—FOREIGN MARRIAGE—REMARRIAGE PROHIBITED FOR LIMITED TIME AFTER DIVORCE.—Two residents of Illinois were married in Indiana within a year after the woman had obtained a divorce in Illinois. By statute in Illinois, and by the terms of the divorce decree, such a marriage was prohibited, and would not have been recognized in Illinois. Subsequently the parties removed to Wisconsin where a similar statute was in force. Upon the death of the "husband," the woman filed a claim under the Wisconsin Workmen's Compensation Act. *Held,* that the marriage was void and that the claimant was not entitled to compensation as the wife of the deceased. *Hall v. Industrial Commission* (1917, Wis.) 162 N. W. 312.

It is the general American rule, based on the policy of giving legal sanction wherever possible to what may be called a marriage in fact, that the *lex loci celebrationis* determines the validity of a marriage. Wharton, *Conflict of Laws* (3d ed.) sec. 127 *et seq.* Accordingly, statutes prohibiting marriage for a specified period after divorce have frequently been construed as applying only to marriages in the same state, and a marriage elsewhere may be held valid even in the prohibiting state. *Estate of Wood* (1902) 137 Cal. 129, 69 Pac. 900; *Dudley v. Dudley* (1911) 151 Ia. 142, 130 N. W. 785; *contra, Lanham v. Lanham* (1908) 136 Wis. 360, 117 N. W. 787; *Wilson v. Cook* (1912) 256 Ill. 460, 100 N. E. 222. Outside the prohibiting state, it is not believed that such a marriage, if valid where

celebrated, has ever before been denied recognition, and this is conceded in the principal case. The decision seems to proceed in part on the theory originally followed by the civil law, which finds some support in the English cases, that capacity to marry is a matter of personal status, to be determined by the law of the domicile. *Cf. Sottomayor v. De Barros* (1877) 3 P. D. 1; *Brook v. Brook* (1861) 9 H. L. Cas. 192. But the question is confused by the emphasis placed on the public policy of the forum, as evidenced by the Wisconsin statutes, and its similarity to the policy of Illinois. If the law of the domicile is the proper criterion, its application can hardly be conditioned on such similarity. And since it was not the public policy of Wisconsin, but the similar policy of Illinois, which the court professedly enforced, the decision cannot be explained on the analogy, which would be strained at best, of cases holding that the distinctive public policy of the forum may deny recognition to certain classes of foreign marriages. *State v. Bell* (1872, Tenn.) 7 Baxt. 9 (miscegenation); *United States v. Rodgers* (1901, D. C. E. D. Pa.) 109 Fed. 886 (consanguinity). The decision might possibly be supported by regarding the situation as similar to that existing before a decree *nisi* has become absolute, and considering the divorce incomplete until the year has expired. This ground also is suggested in the opinion, but no other decided case has been found to support it. See, however, dissenting opinion in *Estate of Wood, supra;* and *cf. McLennan v. McLennan* (1897) 31 Oreg. 480, 50 Pac. 802.

L. F.

CONFLICT OF LAWS—WORKMEN'S COMPENSATION ACT—FOREIGN CONTRACT OF EMPLOYMENT.—The plaintiff, employed under a contract made in Massachusetts, was injured in Connecticut while working within the scope of his employment. Suit was brought in Connecticut under the Connecticut Workmen's Compensation Act. *Held,* that the plaintiff might recover. *Donthwright v. Champlin* (1917) 91 Conn. 524, 100 Atl. 97. See COMMENTS, p. 113.

CONSTITUTIONAL LAW—ADMIRALTY—STATE WORKMEN'S COMPENSATION ACT NOT APPLICABLE TO INJURIES WITHIN ADMIRALTY JURISDICTION.—An employee of a company operating a coastwise steamship line was accidentally killed while engaged in the work of unloading a cargo at a pier in New York. In proceedings under the New York Workmen's Compensation Act, his widow and children received an award which was approved by the New York Court of Appeals. The case was taken by writ of error to the United State Supreme Court. *Held,* that the state compensation act, as applied to matters within admiralty jurisdiction, was in conflict with the grant of exclusive admiralty jurisdiction to the federal courts by the Constitution, and was to that extent invalid, and the award must be set aside. *Southern Pacific Co. v. Jensen* (1917) 37 Sup. Ct. 524. See COMMENTS, next month.

CONSTITUTIONAL LAW—CONSTITUTIONAL CONVENTIONS—LEGISLATURE'S POWER TO CALL.—The plaintiff brought suit for himself and all other

tax-payers of the state, to enjoin the enforcement of an act of the legislature providing for the calling of a constitutional convention without first submitting the question to the people. The state constitution contained no provision for the calling of such conventions. On a submission of the question three years before, the electorate had declined to authorize a convention. *Held,* that the act in question was beyond the powers of the legislature and the injunction should issue. Lairy, J., *dissenting. Bennett v. Jackson* (1917, Ind.) 116 N. E. 921.

In the absence of judicial authority the weight of opinion among text-writers seems to be against the instant case. Jameson, *Const. Conv.* (6th ed.) 211; Dodd, *The Revision and Amendment of State Constitutions,* 44; 6 Am. & Eng. Enc. of Law, 896; Cooley, *Const. Lim.* (6th ed.) 42. But there are strong arguments in favor of the decision. Legislative power may be divided into two classes, ordinary and fundamental. Jameson, *Const. Conv.* 84-86. The grant of legislative authority to the General Assembly confers only the power to pass ordinary legislation. *McCullough v. Brown* (1893) 41 S. C. 220, 248, 19 S. E. 458, 473. The power to pass fundamental legislation is still retained by the people. In drawing the line between the two, extra-legal factors, such as custom, political tendency, expediency, public policy, must necessarily have influence. It is an almost universal custom in the states, in the absence of constitutional provision, first to submit the question of calling a convention to the people. 6 R. C. L. 27. In the few contrary instances cited by the dissenting judge the power of the legislature had not been challenged. Granting that where the people have no machinery to institute legislation there must be an implied power in the legislature to take the first step, this may well be limited to what is absolutely necessary to enable the people to exercise their reserved powers. Nor can it be said to be immaterial whether the people act before or after the convention, in view of the large expenditure of public money which the calling and holding of such conventions necessarily involve. In view of these considerations, the decision in the instant case may well be accepted as sound.

C. S. B.

CONSTITUTIONAL LAW—CONSTITUTIONALITY OF SELECTIVE DRAFT ACT.—The defendants were indicted for conspiring to procure persons to violate certain penal provisions of the "selective draft act" of May 18, 1917. On a motion to quash the indictment they attacked the constitutionality of the act, objecting, among other grounds indicated below, that it deprived the courts of the United States of the power to pass on the exemptions provided by the act, and that it called out the militia for a purpose not authorized by the Constitution. *Held,* in sustaining the indictment, that the act was within the power "to raise and support armies" conferred by Art. I, sec. 8, subdivision 12 of the Constitution; that it did not call out the militia as such, but, in the exercise of the general power to draft all citizens, drafted into the national army the members of the militia organizations; that compulsory military service is not "involuntary servitude" within the prohibition of the Thirteenth Amendment; that the exemption boards, if courts at all, were military courts established under the power given by Art. I, sec. 8 of the Constitution "to make rules for

the government and regulation of the land and naval forces" and their decisions, like those of other military tribunals, need not be reviewable by the civil courts; and that the act involved no unconstitutional delegation of legislative or judicial powers. *United States v. Sugar* (1917, E. D. Mich.) 243 Fed. 423.

The constitutionality of the same act was upheld against certain of the same objections in an eloquent opinion by Judge Speer in *Story v. Perkins* (1917, S. D. Ga.) 243 Fed. 997, and the claim of "involuntary servitude" was disposed of in a single sentence in *Claudius v. Davie* (1917, Cal.) 165 Pac. 689. In the *Story* case the further objection was made and overruled that Congress had no power to compel service outside the United States. The decisions are interesting as current history, but the questions raised presented little novelty and less difficulty. Several cases upholding the draft act of Civil War times are cited in the principal case.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—DECISION OF STATE COURT.—In a suit to collect special assessments the defendant landowner offered evidence that he was not benefited. The evidence was refused. Consequently an intervenor (the owner of bonds payable from the tax) offered no evidence to rebut that which had been rejected. When judgment favorable to the intervenor was reversed by the state Supreme Court without remanding, the intervenor claimed a violation of his constitutional rights. *Held,* that since the decision of the state court on appeal amounted to excluding the intervenor's evidence at trial, it denied him due process of law. *Saunders v. Shaw* (1917) 37 Sup. Ct. 638.

Two insurance companies being sued in Tennessee but not served, filed pleas in abatement in the Tennessee court, which, on the strength of these pleas, assumed jurisdiction over the parties and rendered judgment for the plaintiff. Suit being brought in Illinois on this judgment, the Illinois court refused to question the jurisdiction of the Tennessee courts. *Held,* that such a refusal did not amount to a denial of due process of law to the insurance companies. *Chicago Life Ins. Co. v. Cherry* (1917) 37 Sup. Ct. 492. See COMMENTS, p. 121.

CONSTITUTIONAL LAW—DUE PROCESS—EMPLOYMENT AGENCIES FORBIDDEN TO TAKE FEES FROM WORKERS.—The plaintiffs, proprietors of private employment agencies, sought to enjoin the enforcement of the Washington Employment Agency Law which forbade the collection of fees from workers for furnishing them with employment. *Held,* that the statute was an infringement of the Fourteenth Amendment. Brandeis, McKenna, Holmes, and Clarke, JJ., *dissenting. Adams v. Tanner* (1917) 37 Sup. Ct. 662.

Under the police power the states have the right to regulate any business, vocation, or occupation. *Schmidinger v. City of Chicago* (1913) 226 U. S. 578, 33 Sup. Ct. 182. They may go even farther and prohibit absolutely the maintenance of any business, where the public welfare requires its discontinuance. *Cosmopolitan Club v. Virginia* (1908) 208 U. S. 378, 28

Sup. Ct. 394. Private employment agencies are regulated by statute in at least thirteen states and such statutes have been upheld, the purpose of preventing fraud being a sufficient justification for the exercise of the police power. *Brazee v. Michigan* (1916) 241 U. S. 340, 36 Sup. Ct. 561. The Washington statute purports to regulate private employment agencies but it was alleged that its actual operation would practically prohibit them, as such agencies could scarcely exist without the privilege of collecting fees from those seeking employment. Yet, have such agencies any constitutional right to exist? There seems to have been ample evidence of such evils as would render them fit subjects for the police power; and it was primarily for the state legislature to determine how drastic a remedy was necessary. The statute is not arbitrary according to the test laid down in *Lindsley v. Natural Carbonic Co.* (1911) 220 U. S. 61, 31 Sup. Ct. 337. It is submitted that the dissenting opinion of Mr. Justice Brandeis, remarkable for its modern method of approach and comprehensive marshalling of social data, presents the better view and is more in line with the recent progressive policy of the Supreme Court, which has affirmed with but rare exception state statutes intended to advance "social justice."

S. J. T.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—ORDER OF RAILROAD COMMISSION.—The plaintiff railroad having cut down its local passenger service as a war economy measure, was, after a hearing by the State Railroad Commission, ordered to operate additional trains. It appeared that the traffic would not pay a reasonable profit over cost of operation. *Held,* that such a regulation was a violation of the due process clause of the Fourteenth Amendment to the Federal Constitution. *Mississippi R. R. Com. v. Mobile & Ohio R. R.* (1917) 37 Sup. Ct. 602. See COMMENTS, p. 121.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — FEDERAL EMPLOYERS' LIABILITY ACT EXCLUDING STATE LEGISLATION.—The plaintiff, while in the employ of a railroad company engaged in interstate commerce, suffered personal injuries without negligence on the part of the company. The Federal Employers' Liability Act (Comp. Stat. 1916, §§8657-8665) regulated the liability of such railroad companies to their employees in cases involving negligence, but did not impose any liability in the absence of negligence. The New York Workmen's Compensation Act (N. Y. Laws 1913, ch. 816; Laws 1914, ch. 41 and 316) provided that employees might recover for injuries received in the course of their employment, without regard to the negligence of the employer. *Held,* that the plaintiff could not have the benefit of the New York act since the Federal act was exclusive. Brandeis and Clarke, JJ., *dissenting. New York Cent. R. R. Co. v. Winfield* (1917) 37 Sup. Ct. 546.

This decision reverses the holding of the New York Court of Appeals in *Winfield v. New York Cent. R. Co.* (1915) 216 N. Y. 284, 110 N. E. 614, which was adversely criticised in (1916) 25 YALE LAW JOURNAL, 497. For a discussion of a recent Supreme Court decision still further narrowing the field of state legislation of this character, see COMMENTS, next month.

CONSTITUTIONAL LAW—WORKMEN'S COMPENSATION ACT—COMPULSORY COMPENSATION.—The plaintiff sued in a common law action to recover for injuries received in the course of employment through the negligence of the defendant company. The Maryland Employer's Liability Act (Laws 1914, ch. 800) required employers to provide compensation and limited the amount that might be recovered, giving the employer an option to secure the compensation through state insurance, insurance with an authorized insurance corporation, or by a deposit of securities with the state commission. If he failed to secure it in any of these ways, the employee could proceed either for compensation under the act or by common law action in which the employer was denied the benefit of certain common law defences. The defendant pleaded that it had complied with the provisions of the act and was not liable to a common law action. The plaintiff demurred, on the ground that the act contravened the Fourteenth Amendment. *Held*, that the act was constitutional. *Solvuca v. Reilly & Ryan Co.* (1917, Md.) 101 Atl. 710.

The act here in question was similar to the New York act upheld in *New York Cent. R. Co. v. White* (1917) 37 Sup. Ct. 247. For a discussion of the constitutionality of the Washington act, which is even more rigid in character, in that it requires employers of certain hazardous occupations to make enforced contributions and denies even the alternative of self-insurance, see (1917) 26 YALE LAW JOURNAL, 618.

CONTRACTS—ASSIGNABILITY—ASSIGNMENT BY PURCHASER ON CREDIT.—The defendant undertook to transport sand and gravel for the plaintiff's assignor, and was to be paid each month for the previous month's deliveries. On being notified of the assignment to the plaintiff, the defendant refused to perform on the ground that the contract was non-assignable. *Held*, that the contract was assignable. *C. H. Little Co. v. Cadwell Transit Co.* (1917, Mich.) 163 N. W. 952.

The assignment in this case involved the substitution of a new party both in respect of the *right* to have sand and gravel transported by the defendant and in respect of the *duty* to pay the price. The power of the possessor of a contract right to effect such a substitution has long since been fully recognized by the common law, by equity, and by statute. See Walter Wheeler Cook, *The Alienability of Choses in Action* (1916) 29 HARV. L. REV. 816. It has been thought, however, that an assignment is invalid if it involves the substitution of a new party to perform a duty of the assignor as well as to enforce his right. *Arkansas V. S. Co. v. Belden Mining Co.* (1888) 127 U. S. 379; *Boston Ice Co. v. Potter* (1877) 123 Mass. 28. This depends on whether or not the duty is one requiring performance by the assignor *in person*, a question to be determined in the same way as are other questions involving the doctrines of conditions precedent. The tendency is now clearly in the direction of holding that performance in person is not a condition precedent. *British Waggon Co. v. Lea* (1880) 5 Q. B. D. 149; *Northwestern L. Co. v. Byers* (1903) 113 Mich. 534, 95 N. W. 529; *Rochester Lantern Co. v. Stiles P. Co.* (1892) 135 N. Y. 209; *cf.* the earlier case of *Robson v. Drummond* (1831, K. B.) 2 B. & Ad. 303. The fact that financial credit has been given to the

assignor does not make the duty to pay the price a purely personal duty; for the assignment does not affect the assignor's liability in case of non-payment, and the assignment deprives the other party of no part of his security. The English courts seem to have carried this to the extreme of holding the assignment good, even though the duty of making payment in the future has been turned over to the assignee and the assignor has disabled himself from performing (as where the assignor is a corporation and has been dissolved). *Tolhurst's Case* [1903] A. C. 414. The principal case goes to no such extreme and is easily sustainable.

C. I.

CRIMINAL LAW—CONSPIRACY TO DEFRAUD UNITED STATES—FRAUDS IN CONGRESSIONAL ELECTIONS.—The defendants demurred to indictments under section 37 of the federal Criminal Code (Comp. St. 1913, sec. 10,201) which makes it an offense to "conspire . . . . to defraud the United States in any manner or for any purpose." The indictments were based on alleged conspiracies to bribe voters or cause illegal voting at congressional elections. *Held,* that the conspiracies described were not within the statute. *United States v. Gradwell* (1916) 37 Sup. Ct. 407.

The question has several times arisen under this statute whether the word "defraud" should be interpreted in an exact technical sense as meaning to deprive, by fraudulent means, of money or property, or whether it should be extended to cover any deceit or imposition practiced on the government or its agents in connection with the government service. Some decisions and dicta in early cases tend to support the narrower construction. *United States v. Thompson* (1886, C. C. D. Oreg.) 29 Fed. 86; *United States v. Milner* (1888, C. C. N. D. Ala.) 36 Fed. 890. *Cf. Cross v. North Carolina* (1889) 132 U. S. 131, 138-139, 10 Sup. Ct. 47, 49. And the general rule is of course well recognized that penal statutes should be strictly construed. *Baldwin v. Franks* (1887) 120 U. S. 678, 691, 7 Sup. Ct. 656, 662; *France v. United States* (1897) 164 U. S. 676, 682, 17 Sup. Ct. 219, 222. Nevertheless the later cases have rejected any limitation to property frauds and have held that the statute is broad enough to cover "any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of government." *Haas v. Henkel* (1910) 216 U. S. 462, 479; 30 Sup. Ct. 249, 254 (conspiracy to obtain advance information of government cotton reports). See also *Curley v. United States* (1904, C. C. A. 1st) 130 Fed. 1 (conspiracy to impersonate another in civil service examination); *United States v. Stone* (1905, D. C. D. N. J.) 135 Fed. 392 (conspiracy to deceive government inspectors of life preservers). Whether the principal case marks a tendency to return to stricter construction may well be doubted. The opinion proceeds chiefly on the special ground that Congress, having constitutional power to regulate congressional elections, and having at one time exercised that power by a comprehensive system of legislation, subsequently repealed this legislation and thus elected to leave the matter to state regulation. Perhaps the case is most noteworthy as an exception to the current tendency to extend the scope of the federal laws and leave less and less to the states.

G. L. K.

CRIMINAL LAW—FALSE PRETENSES—PROFESSIONAL SERVICES AS "VALUABLE THING."—The defendant by false representations obtained medical services from a physician. Section 1166 of the Mississippi Code of 1906 made it an offense for any person, with intent to cheat or defraud another, designedly to "obtain from any person any money, personal property, or valuable thing." *Held,* that professional services were a valuable thing, within the meaning of this section. *State v. Ball* (1917, Miss.) 75 So. 373.

This decision seems rather at variance with the *"noscitur a sociis"* rule of construction. Professional services were held not to be "property" under the Oklahoma false pretenses statute. *Ex parte Wheeler* (1912) 7 Okla. Cr. 562, 124 Pac. 764. (See Okla. Rev. L., 1910, sec. 2694.) But see *United States v. Ballard* (1902, D. C. W. D. Mo.) 118 Fed. 757 (a month's lodging held a "valuable thing"). *Cf. State v. Black* (1890) 75 Wis. 490, 44 N. W. 635 (board and lodging not "property").

CRIMINAL LAW—THREAT TO KILL THE PRESIDENT.—A statute, enacted by Congress February 14, 1917, provided that anyone who knowingly or wilfully threatened the life of the President should upon conviction be liable to $1,000 fine or five years' imprisonment, or both. The accused declared, "President Wilson ought to be killed. It is a wonder some one has not done it already. If I had an opportunity, I would do it myself." *Held,* that a demurrer, based on the ground that the language employed by the accused did not amount to a threat, was properly overruled. *United States v. Stickrath* (1917, S. D. Oh.) 242 Fed. 151.

The statute, rather than the application of it, is noteworthy as illustrating the unexampled stringency of our present war legislation.

FRAUDULENT CONVEYANCES—SALES IN BULK ACT—OMISSION OF CREDITOR FROM VENDOR'S LIST.—A "sales in bulk" statute provided that the transfer of a stock of merchandise should be void against the transferor's creditors "unless the transferee demands and receives from the transferor a written list . . of the creditors of the transferor" certified by him as complete, and unless the transferee "shall . . notify . . every creditor whose name and address is stated in said list . ." A vendor omitted the name of one creditor from the list furnished under this statute. The vendee had no knowledge of the omission and the creditor was not notified. In all other respects the statute was complied with. *Held,* that the vendee's title was good as against an attachment by the omitted creditor. *Glantz v. Gardiner* (1917, R. I.) 100 Atl. 913.

This case lines up another jurisdiction in favor of the proposition that the fraud or mistake of the vendor in omitting a creditor's name is not attributed to the bona fide vendee, so as to invalidate the sale as to him. See, in accord, *Coach v. Gage* (1914) 70 Oreg. 182, 138 Pac. 847; *International Silver Co. v. Hull* (1913) 140 Ga. 10, 78 S. E. 609. In the principal case the court decided that as the statute made the validity of the sale dependent on the action of the vendee, not that of the vendor, and as it did not require of the vendee that he obtain a complete list, but merely a list certified by the vendor as complete, the omission by the vendee could

not invalidate the sale. There is a dictum apparently *contra* in a Massachusetts case where the seller, through misunderstanding of the statute, included only merchandise creditors in the list, but the facts are not fully stated and it is not clear whether or not the purchaser knew of the omission. If he did, of course, mistake of law would not excuse him. See *Rabalsky v. Levenson* (1915) 221 Mass. 289, 108 N. E. 1050. The objection to the decision in the principal case, that it does not protect the creditor, for whose benefit the statute was passed, is met by the observation of the court that this defect, if any, is for the legislature to remedy; and with regard to the possibility of collusion the court points out that the creditor still has all his previous remedies, and may show fraud in fact, if it exists, and so avoid the sale, even if the vendee has fulfilled all the statutory requirements. The decision seems justified as a matter of construction, but discloses a weakness in the statute, since the vendor is under no effective compulsion to furnish a complete list.

L. F.

MONOPOLIES—SHERMAN ACT—"RULE OF REASON."—In a suit for triple damages under the Sherman Act it appeared that the defendants, owners of steamship lines operating between New York and South African ports, in pursuance of an effective combination to restrict competition, established by concerted action, if not by formal agreement, uniform freight rates, including a "primage charge" which was subsequently refunded to those shippers who shipped exclusively by the vessels of the combining companies. *Held*, that the acts of the defendants amounted to a combination in restraint of trade in violation of the Sherman Act. *Thomsen* v. *Cayser* (1917) 37 Sup. Ct. 353.

There has been much popular misapprehension of the meaning of the "rule of reason" announced by the Supreme Court in its construction of the Sherman Act in *Standard Oil Co. v. United States* (1911) 221 U. S. 1, 31 Sup. Ct. 502, and *United States v. American Tobacco Co.* (1911) 221 U. S. 106, 31 Sup. Ct. 632. The Circuit Court of Appeals seems to have shared this misapprehension when it reversed its former opinion in the principal case and held that the combination was not shown to be in violation of the statute because not in "unreasonable" restraint of trade. *Union Castle Mail S. S. Co. v. Thomsen* (1911, C. C. A. 2d) 190 Fed. 536. In reversing this decision the Supreme Court reasserted what should have been clear from its former rulings, that the "rule of reason" is to be applied, not to determine whether the motives of the defendants were good or bad, or whether the power of the combination was used benevolently or oppressively, or whether the results were in the Court's opinion beneficial or injurious, but whether the underlying policy of the statute,—to preserve competitive conditions,—was in fact violated. Under some of the decisions before the *Standard Oil Co.* case, there was at least ground for the inference that the combination of two out of fifty competing concerns must necessarily be held unlawful, merely because it theoretically destroyed the actual or potential competition between the two. See *Northern Securities Co. v. United States* (1904) 193 U. S. 197, 331; 24 Sup. Ct. 436, 454; *United States v. American Tobacco Co.* (1908, C. C. S. D. N. Y.) 164 Fed. 700, 701-702. This conclusion no longer follows,

if the "rule of reason" shows that the general condition of competition in the trade is not substantially impaired. But if, in a given case, the purpose or result of the combination appears to be to establish, in any substantial sense, non-competitive conditions in the trade as a whole, the policy of the law is violated, and no room is left for the court to apply its own theories of policy, economics or morals. *Standard Sanitary Mfg. Co. v. United States* (1912) 226 U. S. 20, 49; 33 Sup. Ct. 9, 15; *Cf. International Harvester Co. v. Missouri* (1914) 234 U. S. 199, 209; 34 Sup. Ct. 859, 862. Judged by this test the combination in the principal case was clearly illegal.

H. W. D.

SALES—SERVING OF GAME AS "SALE" WITHIN GAME LAW.—Two guests at the defendant's hotel were served native partridge. The New York Conservation Law provides that the dead bodies of birds native to the state, and protected by law shall not be "sold, offered for sale, or possessed for sale for food purposes within this state, . . ." *Held,* that the serving of partridges as part of the guests' table d'hôte meal constituted a sale in violation of the statute. *People v. Clair* (1917, N. Y.) 116 N. E. 868.

Both at common law and under the Sales Act, general property as distinguished from special property must pass in order to effect a sale. *Jenkyns v. Brown* (1849) 14 Q. B. 496. Uniform Sales Act, Sec. 1, §76. But a guest at a hotel or restaurant does not get general property, *i. e.,* all the incidents of ownership, in the food that he orders. He is privileged to eat as much as he desires, but, having eaten, his control over the remaining food is at an end. What he buys is not a specified quantity of food, but service and the *privilege* of eating. The transaction of serving and receiving pay for a meal has, therefore, been held not to constitute a sale under the Sales Act. *Merrill v. Hodson* (1914) 88 Conn. 314, 91 Atl. 533; Beale, *Innkeepers* §169. On the other hand it has been held in cases relating to statutes regulating the sale of liquor, impure milk, and oleomargarine that serving and receiving pay therefor does constitute a sale. *State v. Lotti* (1900) 72 Vt. 115, 47 Atl. 392; *Commonwealth v. Warren* (1894) 160 Mass. 533, 36 N. E. 308; *Commonwealth v. Miller* (1890) 131 Pa. St. 118, 18 Atl. 938. Since a technical interpretation of the term "sale" in the case of game laws and similar prohibitory statutes would open the way to evasion of the law, it is submitted that the more liberal construction adopted in the principal case, and in the great majority of similar cases, is both reasonable and desirable.

C. S. B.

TAXATION—INHERITANCE AND TRANSFER TAXES—EXEMPTION OF INSTITUTIONS RECEIVING "STATE AID."—The Connecticut Inheritance Tax statute exempted "all property passing to or in trust for the benefit of any corporation or institution located in this state which receives state aid." (Pub. Acts of 1915, ch. 332, sec. 3.) The will of Justus S. Hotchkiss, a Connecticut testator, left bequests to five institutions, including Yale University, all of which enjoyed under general or special laws more or less complete exemption from ordinary taxation. *Held,* that such tax exemptions constituted "state aid" within the meaning of the inheritance tax

law, and the institutions receiving them were also exempt from the inheritance tax. *Corbin v. Baldwin* (1917, Conn.) 101 Atl. 834.

Several instances of the use of the term "state aid" in various senses in Connecticut statutes and decisions are referred to in the opinion. The decision seems justified from the standpoint of statutory construction and is in line with the previous policy of the state, both legislative and judicial, in treating educational, religious and charitable institutions as in a sense agencies of the state, established and encouraged for the public benefit.

TAXATION—INHERITANCE AND TRANSFER TAXES—SURVIVORSHIP OF JOINT TENANT.—A husband and wife owned jointly certain bonds, which they delivered to a trust company as trustee to pay them the income in equal shares and, if the agreement was in force at the death of either, to deliver the bonds to the survivor. An amendment to the Transfer Tax Act, subsequently passed, provided that where property was held jointly and payable to the survivor, the survivor's right should be deemed a taxable transfer. The husband died and a transfer tax was assessed on his interest in the bonds. *Held,* that the husband and wife were joint tenants and not tenants by the entirety, and that his interest passing to his wife by survivorship was taxable. *In re McKelway's Estate* (1917, N. Y.) 116 N. E. 348.

Apart from any question of constitutionality, inheritance and transfer tax statutes are commonly construed as applying to such transfers and devolutions only, as take place after the passage of the act imposing the tax. Ross, *Inheritance Taxation,* sec. 36. *Matter of Seaman* (1895) 147 N. Y. 69, 41 N. E. 401. And it was held in New York, in a case involving a vested remainder not yet come into possession, that a statute attempting to tax past transfers was unconstitutional. *Matter of Pell* (1902) 171 N. Y. 48, 63 N. E. 789. It has also been held, both in New York and elsewhere, that contingent remainders created before the passage of the tax law are not subject to tax though the contingency occurs subsequently. *Matter of Seaman, supra; Lacey v. State Treasurer* (1911) 152 Iowa 477, 132 N. W. 843. The principal case recognizes the rule against retroactive operation, but argues that since the husband had power to defeat the wife's right of survivorship by conveying his interest in his life-time, her right was not vested until his death, and therefore at his death there was a taxable transfer. This seems to be attaching undue weight to mere inaction on the husband's part. The wife's right in the principal case would seem to be closely analogous to a remainder subject to be defeated by the exercise of a power of appointment. The New York court has expressly held that in such a case, while the exercise of the power would be a taxable transfer, its non-exercise is not, and when the instrument creating the power was prior to the statute, property passing in default of appoinment cannot constitutionally be taxed. *Matter of Langdon* (1897) 153 N. Y. 6, 46 N. E. 1034; *Matter of Lansing* (1905) 182 N. Y. 238, 247, 74 N. E. 882. In Massachusetts, however, a statute expressly imposing such taxation has been upheld. *Minot v. Treasurer* (1911) 207 Mass. 588, 93 N. E. 973. The decision in the principal case thus finds support in a case from another jurisdiction but is difficult to reconcile with the previous New York decisions.

S. J. T.

TAXATION—INHERITANCE AND TRANSFER TAXES—TRUSTEE'S COMMISSIONS—APPROXIMATING EXPENSES OF ADMINISTRATION.—A New Jersey testator left the residue of his estate to his executors to hold as trustees during the life of his wife, with remainders after her death. By the New Jersey statutes, commissions of trustees are to be fixed by the courts with reference to the "actual pains, trouble and risk" involved. Under the Transfer of Property Tax Act of 1909 (N. J. Comp. St. 1910, p. 5301) a tax was assessed on the residue without allowance for trustees' commissions, and the executors and trustees appealed. *Held,* that trustees' commissions should be deducted in determining the net taxable value of the residue passing to the beneficiaries, but that the comptroller's office could not lawfully estimate in advance the amount of such commissions, and must await the final allowance of the commissions by the proper court. *In re Christie's Estate* (1917, N. J. Prerog. Ct.) 101 Atl. 64.

On the first point the court follows the New York decisions, on the ground that the New Jersey Transfer of Property Tax Act was copied from the New York act, from which it would be presumed that the legislature intended to adopt the established construction in New York. The New Jersey act applies to all stocks in New Jersey corporations held by foreign decedents, and its administration is therefore of practical interest to lawyers everywhere. The practice of the comptroller's office has been to approximate and allow in the assessment the estimated expenses of administration, without waiting for the estate to be finally settled. This practice is disapproved by the court as "not warranted in law." It is to be hoped that the decision on this point may be qualified or overruled or the act amended to permit a continuance of the former practice, at least in the case of foreign decedents. Otherwise the settlement in other states of estates containing New Jersey corporation securities will be subjected to great practical inconvenience and delay.

WILLS—OLOGRAPHIC WILL—USE OF TYPEWRITER.—The California Civil Code, sec. 1277, required that an ologràphic will should be entirely "written, dated and signed by the hand of the testator himself." A testator wrote his will on the typewriter himself and signed it with his own hand. *Held,* that in view of the reason for dispensing with witnesses to wills, namely the protection against forgery furnished by identification of handwriting, the word "written" in section 1277 should not be construed to include typewriting, and that the will was not entitled to probate as an ologràphic will. *In re Dreyfus' Estate* (1917, Cal.) 165 Pac. 941.

The California statutes, like those of other states, require every will, except a nuncupative will, to be "in writing." Cal. Civil Code, sec. 1276. Yet it is hardly to be doubted that typewritten wills, when fully attested by witnesses, are constantly admitted to probate in California, as elsewhere. Nevertheless, the reasoning of the court would seem to justify giving a narrower meaning to the word "written" in section 1277, though the only case found on the same point is *contra. In re Aird* (1905) 28 Quebec Super. Ct. 235.

WORKMEN'S COMPENSATION ACT—INJURY ARISING OUT OF THE EMPLOYMENT—"HORSEPLAY."—An employee sustained fatal injuries when another

employee, as an act of sport, turned an air-compressor upon him. The employer had known of the employees' habit of using the air-compressor in sport, but had made no objection. The employee was working when injured. *Held,* that the injury arose out of the employment within the meaning of the Workmen's Compensation Act. *In re Loper* (1917, Ind.) 116 N. E. 324.

It is generally held that the employer is exempt from liability for compensation where the injury to the employee is caused by the wilfully tortious act of either fellow employees or outsiders. *Armitage v. Lancashire & Y. R. R. Co.* [1902] 2 K. B. 178; *Union Sanitary Mfg. Co. v. Davis* (1917, Ind.) 115 N. E. 676. Such injuries are said not to arise "out of the employment." On similar principles compensation is generally denied where the injury is the result of "horseplay." *Wilson v. Laing* (1909) 46 Sc. L. Rep. 843; *Fishering v. Pillsbury* (1916) 172 Cal. 690. The principal case appears to be the first to recognize an exception where the habit of horseplay is knowingly allowed by the master to continue—thus, in the court's view, making the habit an element of the conditions under which the employee is required to work. The decision seems sound, and an analogy to support it may be found in such cases as *Rowland v. Wright* [1909] 1 K. B. 963 (the "stable-cat case"), and *Nisbet v. Rayne, etc.* [1910] 2 K. B. 689. By failing to control his recklessly playful employees the master subjects their fellow employees to a special hazard. A further analogy is found in the common-law doctrine that the master is not only under a duty to a servant to make proper rules for the use of safe methods of work by fellow servants, but may also be liable if, having made such rules, he permits their habitual violation. See *Ohio & Miss. R. R. Co. v. Collarn* (1881) 73 Ind. 261, 273; *cf. Hogle v. Franklin Mfg. Co.* (1910) 199 N. Y. 388, 92 N. E. 794.

F. C. H.

WORKMEN'S COMPENSATION ACT—INJURY "ARISING OUT OF" EMPLOYMENT—PERIL ATTACHED TO WORKMAN'S PARTICULAR LOCATION.—The falling of a wall on the adjoining premises of a neighbor carried down the roof of the defendant's shed, in which the plaintiff was at work as a herring packer, and injured the plaintiff. *Held,* that the injury was caused by an "accident arising out of the employment." *Thom v. Sinclair* [1917] A. C. 127, 116 L. T. 609.

The compensation acts of many of the states are identical with the English Act in limiting compensation to employees injured by accident "arising out of" and "in the course of" the employment. Drawing a distinction between the two conditions of liability indicated by the above-quoted phrases, it has generally been held that "arising out of" includes only risks incidental to the nature or character of the employment. *Craske v. Wigan* (C. A.) [1909] 2 K. B. 635; *Hoenig v. Industrial Com.* (1915) 159 Wis. 646, 150 N. W. 996. The accident need not be one that could have been foreseen or expected. *Larke v. Hancock Life Ins. Co.* (1915) 90 Conn. 303, 97 Atl. 320. Nor need it be one peculiar to the employment, if the employment accentuates a common hazard. *Andrew v. Failsworth Ind. Soc.* (C. A.) [1904] 2 K. B. 32; *State v. District Court* (1915) 129 Minn. 502, 153 N. W. 119. But the weight of judicial opinion has been opposed to the

proposition that an injury is shown to be compensable merely by showing that the presence of the person injured in the place where the accident befell him was due to his employment. *Klawinski v. L. & M. S. Ry. Co.* (1915) 185 Mich. 643, 152 N. W. 213. It would seem that the principal case marks a departure in the character of causation required to satisfy the Act. The court refuses to go beyond the *"proxima causa,"* i. e., the falling of the roof, and declares that the remote cause which brings down the roof—whether it be a neighbor's wall or a bolt of lightning—is immaterial. Such a view seems to render indistinguishable the two conditions of liability imposed by the Act. It makes the employer an insurer against accidents whether or not they are related to the nature of the employment. *Cf. Trim School Bd. v. Kelly* [1914] A. C. 667. One American case has been found in accord. *Kimbol v. Industrial Acc. Com.* (1916) 173 Cal. 351, 160 Pac. 150. It is submitted, however, that the dissenting opinion in that case contains the more cogent reasoning.

H. S.

WORKMEN'S COMPENSATION ACT—RECOVERY FOR DISEASE CONTRACTED IN THE COURSE OF THE EMPLOYMENT.—The plaintiff, after working for twenty-five years rolling cigars, was disabled by "neurosis" resulting from his working posture, which caused a certain amount of pressure on the brachial plexus. *Held,* that this was not a personal injury within the meaning of the statute. *In re Maggelet* (1917, Mass.) 116 N. E. 972.

Under Workmen's Compensation Acts limiting recovery to "personal injury by accident," unless, as in England, special provision to the contrary is made, no recovery can be had for diseases not resulting from a definite injury constituting the "accident." *Adams v. Acme White Lead Works* (1914) 182 Mich. 157, 148 N. W. 485. In several states, however, the act omits the qualifying words, "by accident." Yet the majority of the courts do not put a broader interpretation on such statutes than on those of the former class. *Industrial Commission v. Brown* (1915) 92 Oh. St. 304, 110 N. E. 744. *Miller v. American Steel & Wire Co.* (1916) 90 Conn. 349, 97 Atl. 345. Massachusetts, however, had already construed its statute very liberally in permitting recovery for disease. *In re Hurle* (1914) 217 Mass. 223, 104 N. E. 336 (optic neuritis); *In re Johnson* (1914) 217 Mass. 388, 104 N. E. 735 (lead poisoning). The test, as explained in the principal case, seems to be whether the diseased condition results from the cumulative effect of what might be regarded as a succession of physical injuries, though each "injury" in itself may be too slight to be perceptible; with the further requirement that these "injuries" must be the result of some exposure, strain, or other cause "peculiar to the employment." The final test is, therefore, one of causation, and the plaintiff failed in the principal case because it did not appear that his posture was a necessary incident of his employment. The case is interesting chiefly for its further exposition of the exceptional Massachusetts doctrine.

H. S.

BOOK REVIEWS

Some Legal Phases of Corporate Financing, Reorganization and Regulation. By Francis Lynde Stetson, James Byrne, Paul D. Cravath, George W. Wickersham, Gilbert H. Montague, George S. Coleman and William D. Guthrie. Published by The Macmillan Co., New York. 1917. pp. ix, 389.

The contents of this book consist of lectures delivered before the Association of the Bar of the City of New York in 1916. They embody the best thought and the wide experience of some of the leading members of the New York bar whose activities have been particularly addressed to the solution of the complicated present-day problems of corporate financing, organization and operation.

Mr. Stetson deals with corporate bonds and mortgages; Mr. Byrne, with the foreclosure of railroad mortgages; Mr. Cravath, with the reorganization of corporations. Many of the great reorganizations and mergers of recent years have been carried out under the direction of these lawyers, and the bar is in their debt for the publication of some of their accumulated experience. Mr. Wickersham presents in short space a history of the Sherman Anti-Trust Law with many weighty observations thereon. Mr. Coleman discusses the Public Service Commission Law of New York with which he has had a great deal to do. Mr. Guthrie's suggestion that in many instances a Public Service Commission necessarily becomes "that judicial monster, a judge in his own cause," and that such commission should partake of the character of a body of experts and less of that of a judicial body, will be favored by many. Mr. Montague foresees a wider field of usefulness for the Federal Trade Commission in the handling of anti-trust questions and troublesome questions of commerce. This series of lectures will well repay careful study by the profession.

A. E. HOWARD, JR.

HARTFORD BAR.

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Carnegie Endowment for International Peace, Year Book for 1917. Washington. 1917. pp. xvii, 213.

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Science of Legal Method. Select Essays by Various Authors. Modern Legal Philosophy Series, Vol. IX. Published by The Boston Book Co., Boston. 1917. pp. lxxxvi, 593.

The National Budget System. By Charles Wallace Collins. Published by The Macmillan Co., New York. 1917. pp. vi, 151.

United States Statutes Annotated. Editor-in-Chief, Bruce Barnett. (To be complete in 12 volumes. Five volumes received to date.) Published by T. H. Flood & Co., Chicago. Beginning 1916.