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CONFLICTS OF OPINION IN INSURANCE LAW.

Few considerations are of more insistent importance in the study of insurance law than its curious conflicts of opinion, which have frequently been the subject of comment. It is singular that we should find the law of insurance, so important an element in trade, marked by uncertainty today, since the demand for definite and uniform rules of law now, as always, has been particularly urgent from the commercial world. Organized commercial intercourse is based upon credit, impossible without the protection of a definite body of legal rules, under

1 "*** the chaos of decisions that are so often obscure, as well as contradictory." Cooke, Life Insurance, Preface (May, 1891).

See also remarks of John A. Finch, Esq., of Indiana (XIX Rep. Am. Bar Assn., pp. 31, 32, 1896). After referring to the large sums of money represented by outstanding policies, he said: "*** the law by which the contracts covering this almost inconceivable sum are construed is almost absolutely chaotic. The law now is in a confused and contradictory condition. *** It would be the duty of the proposed section on Insurance Law to bring to the attention of the Association at large the vicious legislation affecting the companies and the anomalies in the decisions of the courts upon their contracts."

"It is unnecessary, and it would be a hopeless task to enter upon the dreary wilderness of judicial decisions upon the subject of insurance, with the view of deducing a rule from it for our government in the present instance." Morris, J., in Dumas v. Ins. Co., 12 D. C. App., 245, 255 (1898).

"*** the needed crystallization of this branch of the law from its present amorphous condition." Vance, Insurance, Preface, vii (1904).

"*** out of all the existing confusion and chaos ***" Clement, Fire Insurance (September, 1905).

See Richards, Insurance, Preface, 3rd Edition, page v, where, speaking of the tendency of the courts to construe policies favorably to the insured, he says: "This purpose of the courts has found expression in various rules or doctrines, the application of which, by no means concordant in the many jurisdictions of this country, has also exhibited a varying degree of departure from common law canons, as applied to other branches of the law ***" (1914).

"Accident policies have, from the very nature of things, been drawn in many different ways. For this reason, and because of the limited character of the hazard insured against and the difficulty of stating that hazard in general terms, it is not surprising that there is much confusion and misunderstanding in the law." Cornelius, Accidental Means, Preface (November, 1916).

"*** in all commercial transactions, the great object is certainty. It will, therefore, be necessary for the court to lay down some rule, and it is of more consequence that the rule should be certain, than whether it is established one way or the other." Willes, C. J., in Lockyer v. Offley, 1 T. R. 259 (1776)). This is needed in insurance also; see the record of the continual struggle for uniformity in insurance law in the reports of the American Bar Association's Committee on Uniform State Laws, beginning with XIV Rep. Am. Bar Assn., p. 368 (1891).
which property rights are enjoyed and business enterprises fostered. Indeed, the author of the first modern work on insurance repeatedly and pointedly refers to the "system of insurance," as a valued feature, and develops this thought in his book.3 Today the law has acquired a new power of accommodation to commercial needs, and, in this respect, it is better equipped to do substantial justice in commercial causes than when the law of insurance was in the making. The merchant of the early eighteenth century sought in vain for a court, which would be properly informed upon commercial usage and able to enforce its decrees.4 Several fruitless experiments were tried, but it was not until Mansfield's appointment to the bench that the common law judge saw the light. Campbell could say truthfully that, before that time, "Mercantile questions were so ignorantly treated when they came into Westminster Hall, that they were usually settled by private arbitration among the merchants themselves."5 In 1704, Lord Holt, himself, had refused to allow the endorsee of a promissory note to recover upon it, because, at common law, a chose in action could not be assigned; the custom of merchants in such cases, continued for thirty years before, and the effect of his ruling upon business had no weight with him.6 In fact, the common law, as a system of social justice, had perhaps reached the limit of its development, as theretofore administered, unaided by larger contributions from the juristic thought of nations other than England; it was beginning to lose touch with the fresh and vigorous life around it. Alone, it was not sufficient to meet the needs of the rapid growth of English commerce.7 The inelastic and somewhat meagre system of the common law, hampered by the inbreeding of Coke and the bias of judicial thought of the men of his tradition, quickened with new life through the introduction of the foreign strains of equity

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3 Park, Preface to Marine Insurance, Vol. I, pages xii, xciv (8th Ed. by Hilliard, 1842). His object in writing the book is "to prove to the world that the doctrine of insurance now forms a system as complete in every respect as any other branch of the English law."

4 "* * * * the merchant courts, whose great weakness lay in the lack of a sheriff, * * * *" Vance, Insurance Law, Select Essays in Anglo-American Legal History, Volume III, p. 98.

5 Campbell's Lives of the Chief Justices, Vol. IV, p. 112. As showing the dearth of litigation on insurance among merchants, see also Stat. Elizabeth, ch. 12 (1601), "* * * * heretofore such assures have used to stand so justly and precisely upon their credits, as few or no controversies have arisen thereupon, * * * *"

6 Butler v. Crips (6 Mod. 29).

7 "* * * * no man qualified to form an opinion upon the subject, can think that the common law of England, as we find it in the old text books and reports, was a perfect code, adapted to the wants of a civilized, commercial nation." Campbell, Lives of the Chief Justices, Vol. IV, p. 165.
and the law merchant. Mansfield's solid achievement in framing the commercial code of England, by infusing the customs of merchants into the "freshly growing fabric of the common law," is the more remarkable in a judge of his type, educated in the narrow, rigid, intensive school of the common law, and descended too from noble Scottish ancestry, with an aristocratic contempt for trade. In a small man this hereditary feeling might have been heightened by the reduced circumstances of his early life, for it was not only that the common law judge loved the law of his day more, but that he sympathized less with the merchant and his usages. There was, in fact, a chasm of caste between the judge and the merchant. It was his breadth of view which made Mansfield, as has been remarked of Chief Justice Shaw, a great magistrate. When he retired from the bench, he was able to read the eulogy of Mr. Justice Buller, who called him "the founder of the commercial law of England." Mansfield's work has proved of enduring value. It is a far cry indeed from Lord Holt's refusal to enforce the right of the endorsee of a promissory note, because the common law forbade the assignment of a chose in action, to the recent ruling of the Supreme Court of the United States that the assignee of a valid policy of life insurance, though he has no insurable interest, may recover upon the policy. Lord Holt belittled the "mighty ill consequences that it was pretended would ensue by obstructing this course," and asked

* See Campbell, Lives of the Chief Justices, Vol. III, pp. 392, 393, where Mansfield is quoted as saying: "My father was a man of rank and fashion," and Campbell's slighting references to the poverty of the Murrays; he relates how the future Lord Chief Justice rode a "wretched pony from Perth to London." But see page 433, ibid., where he speaks of Murray's talents and preparation for legal work: "There had not hitherto appeared at the English Bar a young man so well qualified to follow the law as a liberal profession."

* Sometimes it had been thought necessary to point out that the plaintiff was a gentleman, not a merchant. Sarsfield v. Wetherby, Carthew, 82 (1692).

* * * * the strength of that great judge lay in an accurate appreciation of the requirements of the community, whose officer he was. Some, indeed many, English judges could be named who have surpassed him in accurate technical knowledge, but few have lived who were his equals in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest magistrate which this country has produced." Holmes, The Common Law, page 106.


12 "The early law was adverse to the alienation of property and to the assignment of contracts. The modern law is favorable to bringing all things intra commercium." 10 Growth or Evolution of Law," Richard M. Venable, XXIII Am., Bar Assn., Rep., 278, 284 (1900). Mansfield's work has been regarded as well nigh indispensable. Pound, Uniformity of Commercial Law on the American Continent, VIII Mich., L. Review, 91, 105.

13 Butler v. Crips, 6 Mod. 29.

“why do not dealers use that way which is legal?” So complete has been the change in the judicial point of view, that Justice Holmes says: “So far as reasonable safety permits, it is desirable to give to life policies the ordinary characteristics of property.” Notwithstanding the far more sympathetic attitude of courts and of the bar toward commercial usages and needs, the conflicts of insurance law persist. The causes, then, for the lack of uniformity in the law of insurance in this country today must be sought elsewhere than in such a narrow view as marked the seventeenth century judge.

A source of inconsistency, lying on the surface, but occasionally more than superficial in its effect, is the “inaccurate language” of some courts in decisions, often lengthy, involving the principles of insurance—the failure to differentiate between dictum and decision. How deeply this may arrest the evolution of a consistent body of insurance law, is illustrated by the famous case of Warnock v. Davis (104 U. S. 775, 1881.) In this case one Crosser entered into an agreement with a trust company, which had no insurable interest in his life, by which Crosser was to take out insurance on his own life, payable to himself; the policy was then to be assigned to the trust company, which, on Crosser’s death, was to pay one-tenth of the sum due under the policy to Crosser’s widow, retaining the balance itself; the trust company paid all the premiums. On Crosser’s death, the trust company collected the sum due, and paid one-tenth of it to the widow, retaining the balance, as agreed. Crosser’s administrator sued the trust company to recover the balance. The Supreme Court decided that the assignment was invalid, and allowed the plaintiff to recover. The case, therefore, presented a clear instance of fraudulent collusion to cloak a lack of insurable interest; this vitiated the assignment, and the decision of the court was admittedly correct.

15 Grigsby v. Russell, 222 U. S. 149. 156 (1911).
16 The United States is pre-eminently the land of the business spirit. The business man has been for a generation our type and exemplar. Hence, not unnaturally, lawyers have come to be pure business men.” Pound, Uniformity of Commercial Law on the American Continent, VIII Michigan Law Review, 91, 105.
17 Section 7 of the Negotiable Instruments Act of 1897 is as follows: “In any case not provided for in this act the rules of the law merchant shall govern.”
18 * * * * that in deciding Insurance cases, rather more frequently than in deciding cases on other subjects, judges have been prone to use inartistic and inaccurate language, and that consequently it is important to ascertain exactly what was the problem presented, and exactly how it arose, and to lay stress upon what the court did, and not merely upon which the judges said; * * * *” Wambaugh, Preface, A Selection of Cases on Insurance (1902).

The fact that courts seem unable to avoid lengthy discussions in deciding insurance cases has been pointed out. “Insurance cases, especially those of more recent date, are usually long and generally involve many different issues.” Vance, Preface to Cases on Insurance (1914).
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But, Mr. Justice Field, who wrote the opinion, said, in the course of it: "The assignment of a policy to a party not having an insurable interest, is as objectionable as the taking out of a policy in his name." (104 U. S. 779.) In using the word "assignment" the court had in mind such an assignment as the one before it, a colorable assignment, arranged to defeat the requirement of an insurable interest. The opinion was interpreted, however, quite literally, to apply to all assignments of a life policy to one without interest, and there was confusion as to the position of the Supreme Court for thirty years; the Supreme Court did not have an opportunity to make its position clear until 1911.

Other causes contributing to the conflicts of opinion in insurance law lie much deeper. The heavy loss of life during the Civil War brought home the uncertain tenure of human existence in an arresting way; a general ignorance of the true function of the theory of risk exaggerated what could be accomplished by insurance; these factors combined to produce an enormous growth in the business of life insurance. Men were fascinated by the very novelty of the idea of insurance. A few stock companies had been able to carry on the business for the country in 1840; by 1870 there were over one hundred active companies in the United States, with outstanding policies aggregating over a billion dollars. So rapidly did the business grow that trained men to organize it, upon a scientific basis, could not be produced in sufficient number when they were needed. Unsound financial methods

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19 Among the cases citing and following Warnock v. Davis are the following: Missouri Valley Life Ins. Co. v. McCrum, 12 Pac. 517, Kansas; Stoelker v. Thornton, 6 So. 680, Alabama; Manhattan Life Ins. Co. v. Hennessey, 99 Fed. 64, 70. "The rule established by the latter court" (Supreme Court of the United States) "is that the assignee must have an insurable interest." See Russell v. Grigsby, 168 Fed. 577, 582, where Judge Lurton cites Warnock v. Davis as one of the decisions of the Supreme Court of the United States referred to by counsel on both sides of the case to sustain their contention. For a further comment on the opinion in Warnock v. Davis, see Vance, Insurance, page 140 et seq.

20 Grigsby v. Russell, 222 U. S. 149, 156, 157, where Justice Holmes refers to Warnock v. Davis, as an "intimation," to the "language" of that case, and then goes on to say that "there has been no decision" disposing of the question in the Supreme Court of the United States (1911).

21 "With the companies ignorantly transacting business on false assumptions, the masses of people were led to believe that a new device had been discovered, whereby men could obtain protection for almost nothing." Zartman, History of Life Insurance in the United States, Yale Readings in Insurance, Life Insurance, Chap. VI, p. 88.

22 Zartman, Yale Readings in Insurance, Chap. VI, p. 86.
were almost inevitable. The depression in business in the early seventies still further complicated affairs. To protect themselves, insurance companies, not infrequently, adopted a litigious attitude toward policyholders, and, upon technical defenses, threw cases into court which might well have been settled without a contest. Apparently, the very contracts of insurance were drafted so as to defeat recovery upon them. The bench, reflecting popular feeling, reacted strongly to the belligerent attitude of the companies. Later, the investigations of the Armstrong Committee in New York disclosed how sinister a temptation was carried by the enormous assets of large companies. It was felt that something had to be done to prevent discrediting the entire business of insurance; the panacea was thought to lie in legislation. The stringent acts passed in the State of New York were followed by other states, in reliance upon the position of the Supreme Court of the United States, that the regulation and control of insurance companies was a matter for State, and not for Federal action. Naturally, the determination of what was proper regulation, in life insurance and in other branches, varied in the different state legislatures.

23 Vance, Insurance, p. 15. There is lay testimony that this condition was duplicated in England. See Dickens, Martin Chuzzlewit, Chap. II, page 11, where the operations of the "Anglo-Bengalee Disinterested Loan and Life Insurance Company" are described.

24 See the tirade of Chief Justice Doe against the insurance companies of his day in DeLancey v. Rockingham Mut. Fire Ins. Co., 52 N. H. 381. "Some companies chartered by the legislature as insurance companies, were organized for the purpose of providing one or more officers, at headquarters, with lucrative employment,—large compensation for light work,—not for the purpose of insuring property; for the payment of expenses, not of losses. There was no stock, no investment of capital, no individual liability, no official responsibility,—nothing but a formal organization for the collection of premiums, and their appropriation as compensation for the services of its operators. The principal act of precaution was to guard the company against liability for losses. Forms of applications and policies (like those used in this case), of a most complicated and elaborate structure, were prepared and filled with covenants, exceptions, stipulations, provisos, rules, regulations, and conditions, rendering the policy void in a great number of contingencies. Seldom has the art of typography been so successfully diverted from the diffusion of knowledge to the suppression of it. * * * * As a contrivance for keeping out of sight the dangers created by the agents of the nominal corporation, the system displayed a degree of cultivated ingenuity which, if it had been exercised in any useful calling, would have merited the strongest commendation. * * * * (May, Insurance, Vol. I, Section 180a, calls this a "graphic and masterly statement" and says the "learned Chief Justice seems to have said, in a very striking and effective way, what many other judges must often have thought.")

25 Paul v. Virginia, 8 Wall. 168 (1868); Hooper v. California, 155 U. S. 648 (1895)

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differed in their rulings on similar issues, either—though this was not always perceived—because the statutory law of the state applicable to the case was not the same as in other jurisdictions, or because there was room for divergent views of what were the local requirements of public policy, a matter always difficult of precise determination.27 Added to this are the variations in the interpretation and enforcement of statutes applying to insurance companies by the state departments of insurance. Legislative and administrative action, because often emphasizing very strongly local conditions, is certain to produce a lack of uniformity in the requirements operating upon insurance companies throughout the United States.28 The courts, as a branch of state sovereignty, have been inclined to look to precedents in their own jurisdiction.29 Naturally, the interpretation of insurance contracts has varied, even though the standard form of policy is coming more and more into general use throughout the country. The insurance company is, of course, an expert in its own business, and has framed with care and deliberation the form of contract by which it is to be bound; this is sufficient to justify the rule of strict interpretation applied to insurance contracts in favor of persons insured.30 But the rule of strict construction, while uniformly applied, has not produced uniformity in results.31 Instead of adhering to the construction placed by the courts upon their policies, insurance companies have frequently attempted to meet each new interpretation by a change in the wording of their con-

27 "That the law has recognized one sort of public policy as a foundation for its judgment at one period, and another sort at another period, is undoubted. From these varying applications of the principal called 'public policy,' I think it obvious that no accurate definition of that phrase can be devised in respect to any particular matter." Magie, C. J., in Trenton P. Ry. Co. v. Guarantors L. Ins. Co., 60 N. J. L. 246, 248.


29 "* * * * the fact that courts of last resort, in the larger states, now rarely cite decisions from the other states, as they did a generation ago, all tend to prevent that approach to unity, which the existence of the common law might be supposed to foster." Address of Lyman D. Brewster, Uniform State Laws, XXI Am. Bar. Assn. Rep. 316, 1898.

30 "The policy, although of standard form, was prepared by insurers, who are presumed to have had their own interests primarily in view, and hence when the meaning is doubtful it should be construed most favorably to the insured who had nothing to do with the preparation thereof." Matthews v. American C. Ins. Co., 154 N. Y. 449.

31 See, for example, Steinbach v. Ins. Co., 13 Wall. 183, and Steinbach v. Ins. Co., 54 N. Y. 90, where the Supreme Court of the United States and the Supreme Court of New York reached opposite conclusions upon identical provisions in the two fire insurance policies covering the same property, the loss being the same.
tract, and thus escape liability. This shortsighted policy has reacted upon the companies themselves, by introducing further uncertainty and inconsistency into the law of insurance, and by tending to create a hostile attitude toward the companies.

I venture to say that among the chief causes of inconsistency and conflict of opinion in insurance are the following: 1. The use of careless or inaccurate language by the courts occasionally in decisions upon insurance cases; 2. The second cause is historical and transitional. The rapid growth of the business of insurance was attended by unsound financial methods in many companies, and the continuance of such companies depended upon their ability to defeat, through litigation, the payment of sums due under their policies. Investigations disclosing the enormous assets of large companies, showed, too, that these assets were not always wisely managed, and confirmed the tendency of courts and legislatures to hold the companies strictly to their undertakings. Naturally, legislative and judicial views of what was needed in the way of regulation have varied, because the problem has always important local features, in which the larger needs of consistency and uniformity have not been fully considered. Much of the legislation is also open to criticism, and has probably been enforced, sometimes.

32 "The forms of policies have been frequently changed in an effort to adjust them to judicial decisions upon controverted points. It is a matter of regret that the insurance companies have not shown a greater disposition to retain the condition and forms which have been judicially construed, and in this way, gradually evolve a contract in which the rights of both parties might be approximately exact in their construction. The introduction of new obligations and changes of phraseology mark the date of legal controversies and thus become an index to the maturing law of this branch of insurance." Fuller, Accident, Employers' Liability Insurance, Preface, p. vi. "These variant policies furnish ample proof of the manner of their growth; their complicated provisions, bristling often with technicalities and arbitrary conditions, are largely the composite product of the ingenuity of the insurance companies in their effort, from time to time, to meet the decisions of the courts, fixing their liability, * * * * " Report of the Committee on Insurance to the Conference of Commissioners on Uniform State Laws, Vol. XXX, Part II, 1906, page 336, Rep. Am. Bar Assn.

33 "It would be an easy matter for insurance companies to devise policies which, while they would more carefully protect their interests than those now in general use, would also at the same time protect the interests of the assured. There is no reason why organizations whose purpose is so beneficent and so essential to the manifold business interests of the country should not be popular with the people, except the circumstance that by their contracts an dby the litigious attitude of some of them, they have created a feeling in the minds of the people that they are constantly attempting to overreach and cheat their unwary patrons. I do not believe that many of these companies are actuated by any such motives, but rather that they have adopted their form of contracts under the impression that these conditions are necessary to protect them against fraud on the part of the assured, but as a result of this course the courts are compelled to look for reasonable grounds upon which to defeat the unjust operation of their contracts, instead of giving them the effect which is given to ordinary contracts." Wood, Fire Insurance, Preface to 2d Edition, May 1, 1886.
in what has been called "the predatory spirit of politics." Meanwhile, the individual underwriter is extinct; the corporate form of organization has been tested and found best adapted to serve the public in the capacity of insurer. A very great part of the business of insurance is national in character, though local as far as its regulation is concerned; the net result of these divergent rules is an increased operating cost for the insurance companies, which must, of course, be borne finally by the policyholders. This has been realized by insurance men.

Several remedies have been proposed to secure uniformity. A direct attack has been made upon the line of decisions of the Supreme Court, beginning with Paul v. Virginia, declaring that insurance is a mere incident of commercial intercourse, and not commerce within the meaning of the Constitution, and, therefore, not a proper subject of legislation by Congress. A model code of insurance law has also been prepared, with great care, for the District of Columbia, with the view of securing its adoption by Congress, and, following that, its enactment in the States. Many of the conflicts of insurance law seem to be beyond the reach of a purely legislative remedy. The most perfect insurance code, after it has been enacted, must receive judicial interpretation, and lawyers know how often interpretation may produce widely differing results out of the same language. Judicial interpretation or legislative action will not be uniform until the pressure of local needs, as they are seen locally, gives way before a broader vision in the legal profession, and in the legislatures, with respect to insurance.

It is well to recognize that part of the conflict of opinion in the law of insurance we may have always with us. From the broader outlook

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34 So true is this that in Pennsylvania it has been held constitutional for the State to confine the business of insurance to corporations. Commonwealth v. Vrooman, 164 Penna. 306.
35 Addresses of John F. Dryden.
36 8 Wall. 168 (1868).
39 This should lead to a change in the tendency of juries to be strongly prejudiced against insurance companies. Ellison, Fire Insurance, Insurer and Insured, p. 21.
of the jurist and legal philosopher, inconsistencies, the empirical and tentative advance in the determination of legal principles, to be made good later, are conditions of development, part of the gradual process of evolution, which is continually at work in the legal organism, by the law of its growth.40 It may well be, too, that inconsistencies in the law of insurance are not greater than have been declared to exist in other branches of the law.41 All this is part of the continual struggle for law.42 The broader vision will come, in part, from a study of the principles of insurance as a science, from the point of view of the actuary, as well as of the lawyer.43 This should be accompanied by a firmer conviction that law is a means, justice the end; a clearer understanding of insurance as one of the most effective forms of social co-operation, before which local conditions are seen in a new light. This is part of the movement toward a new social justice.44 The power of accommodation to present needs is inherent in our law; it has been said that the Anglo-American system of jurisprudence has never failed us, but will prove adequate, in the hands of the legal profession, as it did in Mansfield's day, to the needs of the community; but it has also been well said that this development must come mainly from within, and not wholly from without.45

40 "The truth is the law is always approaching, and never reaching consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow." Holmes, The Common Law, page 36.
42 "There is in all modern states today a general conflict between certainty in the law and concrete justice in its application to particular cases; in other words, between the effort to have a general rule everywhere applicable to all cases at all times and the effort to reach what may be concrete right dealing between the parties at bar upon the particular facts in each case." Mr. Frederic R. Coudert quoted in The Organization of the Courts for the Better Administration of Justice, W. L. Ransom, Cornell Law Quarterly, Vol. II, No. 3, p. 189 (March, 1917).
43 "In the department of law there is also much weakness regarding the principles of insurance, and but few lawyers have any grounding whatever in the fundamental ideas at the root of all insurance plans. The result is that many conflicting decisions have been rendered by judges who frequently have only the haziest notion of the scientific basis of insurance contracts, and who are always recruited from the ranks of lawyers; true progress is delayed by the friction caused by such annoyances and disagreeable incidents." Insurance Education, Henry Moir, "The Business of Insurance," Vol. I, p. 8. "To an intelligent grasp of the subject a certain amount of information concerning the science, the practice and the law is essential. * * *" Thompson on Insurance, Foreword, iii.
44 "Pound, Justice According to Law, Col. L. Review, XIV, No. 2, p. 120.
45 "The changing of law by statute seems to me like mending a garment with a patch; whereas law should grow by the life that is in it, not by the life that is outside of it." Woodrow Wilson, Am. Bar Assn. Rep., XXXIX, pagi 6.
With the growing spirit of nationality, a product of the great events of our time, we may hope confidently for a new consistency and harmony in a branch of the law of the greatest practical value.

Hugh J. Fegan.

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NECESSITY FOR ARRAIGNMENT AND PLEA IN CRIMINAL CASES.

The trend of judicial decisions in this particular is an excellent illustration of the modern effort to get away from technicalities in the prosecution of crimes. The omission of arraignment and plea a few years ago was treated as a violation of a sacred rite, rendering a conviction void; today it is treated as a technical defect, to be brushed aside, if the defendant has actually been tried as though he had pleaded not guilty.

Arraignment consists in calling the defendant to the bar to plead. The manner and purposes of the arraignment are thus described in 

_Cravin v. U. S._ 1:

"The arraignment of the prisoner." Lord Coke said, "is to take order that he appear, and for the certainty of the person to hold up his hand, and to plead a sufficient plea to the indictment or other record." Co. Litt. 263a.

According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, and informed of the charge against him, is the "demanding of him whether he is guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him _cul pro_, and enters the prisoner's plea: then he demands how he will be tried, the common answer is by God and the country, and thereupon the clerk enters _pro se_ and prays to God to send him a good deliverance." 2 Hale, P. C. 219. So, in Blackstone: "To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment. . . . After which (after the indictment is read to the accused) it is to be demanded of him whether he is guilty of the crime whereof he stands indicted, or not guilty." 4 Bl. Com. 322, 323, 341. Chitty says: "The proper mode of stating the arraignment on the record is in this form, 'and being brought to the bar here in his own proper person, he is committed to the marshal,' etc. And being asked how he will acquit himself of the premises (in case of felony, and of high treason in case of treason) above laid to his charge, saith,' etc. If this statement be omitted, it seems the record will be erroneous." 1 Chitty, Crim. Law, 419.

A vivid description of the old fashioned arraignment is given in _Wood v. Oklahoma._ 2

At common law it was absolutely essential that the defendant actually plead at the arraignment. Until he did so, he could not be tried. If the prisoner stood mute on a charge of treason, his act was treated as a confession, and he was forthwith sentenced. In lesser offenses the law concerned itself with forcing the defendant to plead. First a jury was sworn to determine whether the standing mute was due to act of God or obstinacy. If the latter, instead of simply entering a plea of not guilty and proceeding with the trial, pressure in a literal sense was put upon the defendant to extort a plea. The punishment

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1 162 U. S. 637.
“hard and strong” was imposed until the defendant yielded or died. If the victim perished rather than yield, he saved his property for his heirs, because there was no corruption of blood or forfeiture without conviction.

Theoretically this barbarous procedure continued in England until a statute of 12th George III provided that under such circumstances the prisoner should be deemed convicted of the offense, and it was not until the act of 7 and 8 George IV, chapter 28, that Parliament hit upon the happy expedient of directing that a plea of not guilty be entered for the prisoner standing mute.

Generally in this country the same provision is made by statute. Sec. 1032 R. S. U. S. is a fair sample.

But suppose this step be overlooked in a given case; the defendant is not arraigned nor does he plead but is put upon trial and convicted. Suppose there was in fact both arraignment and plea, but the record or appeal fails to show it. What will the appellate court do when the omission is discovered?

In the early days there could be no doubt about the answer to these questions. It was held that the arraignment and plea were essential; that on appeal the record imported absolute verity and could not be contradicted; if it failed to show these essential steps, the appellate court was bound to hold that they were not taken, and to reverse the case and direct a new trial.

Rulings of this character were carried far. In a Massachusetts case there was an arraignment before a single judge; the defendant was tried and convicted before three judges. The statute provided that all indictments for capital offenses should be heard, tried and determined in the courts held by three or more justices. The case was reversed on the ground that the arraignment should have been before three judges, and to the objection that this was a quibble, the court remarked that if ever quibbling is justifiable certainly a man may quibble for his life.⁸

For years the cases were unanimous; the rule was applied universally.

Probably the first case to the contrary was State v. Jerry (a slave)⁴ decided in 1848, but it was not followed by the later decisions of that state.⁵ While here and there a few courts brushed aside these technical

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⁸ Com. v. Hardy, 2 Mass. 303.
⁵ State v. Chenier, 32 La. An. 103.
objections, there is no question but that as late as Crain v. U. S. ⁶ decided in 1896, the vast majority of the decisions took the technical view.

In that case, in an elaborate opinion written by Mr. Justice Harlan, the Supreme Court, following the weight of authority, reversed a conviction simply because the record failed to show arraignment and plea. The court said that a plea was essential to determine the issue, and until a plea was entered there was nothing for the jury to try. The theory of the decision is contained in the following quotation from Hopt v. Utah, ⁷ where the Supreme Court, after observing that the public has an interest in the life and liberty of an accused person said:

"Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

A vigorous dissenting opinion in the Crain Case, written by Mr. Justice Peckham, was concurred in by Mr. Justice Brewer and Mr. Justice White.

Within less than twenty years, in the case of Garland v. Washington, ⁸ decided in 1914, the Supreme Court has overruled the Crain case, and has unanimously adopted the views in the dissenting opinion. Chief Justice White is the only member of the Court participating in the Crain case who has lived to see his dissenting view adopted as the law. Garland was convicted of larceny upon one information, to which he had duly pleaded; a new trial was granted, whereupon a second information covering the same facts was filed. He never pleaded to this, but was tried in all respects as though he had entered a formal plea of not guilty. The court said, in an opinion delivered by Mr. Justice Day:

"Technical objections of this character were undoubtedly given much more weight formerly than they are now. Such rulings originated in that period of English history when the punishment of offenses, even of a trivial character, was of a severe and often of a shocking nature. Under that system the courts were disposed to require that the technical forms and methods of procedure should be fully complied with. But with improved methods of procedure and greater privileges to the accused, any reason for such strict adherence to the mere formalities of trial would seem to have passed away, and we think that the better opinion, when applied to a situation such as now confronts us, was expressed in the dissenting opinion of Mr. Justice Peckham, speaking for the minority of the court in the Crain Case, when he said, (p. 649):

⁶ 162 U. S. 637.
⁷ 110 U. S. 574, 579.
⁸ 232 U. S. 642.
"Here the defendant could not have been injured by an inadvertence of that nature. He ought to be held to have waived that which, under the circumstances, would have been a wholly unimportant formality. A waiver ought to be conclusively implied where the parties had proceeded as if defendant had been duly arraigned, and a formal plea of not guilty had been interposed, and where there was no objection made on account of its absence until, as in this case, the record was brought to this court for review. It would be inconsistent with the due administration of justice to permit a defendant under such circumstances to lie by, say nothing as to such an objection, and then for the first time urge it in this court."

"Holding this view, notwithstanding our reluctance to overrule former decisions of this court, we now are constrained to hold that the technical enforcement of formal rights in criminal procedure sustained in the Crain Case is no longer required in the prosecution of offenses under present systems of law, and so far as that case is not in accord with the views herein expressed, it is necessarily overruled."

While of course the Crain Case, so long as it stood, was controlling in the federal and territorial courts, and was persuasive in the state courts, many of the latter refused to follow it, but held that under such circumstances a defendant had waived his right to plead.

*State v. O'Kelley,* (Missouri) is a leading case. It was decided in 1914 just a few days after the decision of *Garland v. Washington,* but apparently without knowledge of that case. There was no arraignment or plea, but defendant's counsel at the opening of the trial said "No statement at this time except we plead not guilty." The majority of the court held that this statement constituted a waiver, but Justice Faris, in a very elaborate and interesting concurring opinion, preferred to put the waiver on the entire conduct of the defendant, rather than on this particular statement, which might never occur in another case.

In *Hack v. State,* decided in 1910, the record failed to show arraignment or plea. A number of early Wisconsin decisions had reversed convictions under such circumstances. The majority of the court overruled the old cases, and held that the time had come to apply common sense to such a situation. The case evidently gave considerable trouble to the court. There were seven judges, and four of them wrote opinions. There was a concurring opinion, a dissenting opinion, and finally, a dubitante opinion. The dubitante opinion is an excellent illustration of the attitude of some judges towards the precedents. After remarking that the cases overruled were old and numerous, and that such a violent revolution should come from the legislature, the learned justice concluded:

"These considerations make me doubt, hesitate, and refuse my assent. Again,

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9 52 L. R. A. N. S. 1063.
10 141 Wis. 346, 45 L. R. A. N. S. 664.
with such slaughter of precedent there should go in justification of mitigation ‘reasons of good regard.’ Else this were a savage spectacle.

Now it may be that these precedents deserved this fate. They perhaps deserved death in order that we all might live. They were certainly guilty of being old. They were not innocent of having been born at the wrong time. They perhaps distracted the circuit judges in the consideration of fine scholastic distinctions concerning lack of ordinary care by intruding upon them some rude, practical experience in the exercise of ordinary care. Like primeval man before his fall, unconscious of sin, they neglected to cover themselves with foliage. They obtruded their classical clearness and simplicity against the turgid toploftiness which closed the nineteenth and began the twentieth century. They failed to stand for any corporate privilege or advantage. For all this they perhaps deserved amortization. But before oblivion’s curtain falls upon them forever, let me say that in my youth, before professional success and competence and a seat on the supreme bench had their value impaired by realization, and while such things were bright with the glamour of anticipation, these precedents seemed to me authority, and clear, definite, and correct in their doctrine. Mentors of my brighter days, farewell!"

It is to be noted that none of these cases involved a capital offense. In their opinions the judges were careful to mention this fact; and to leave the question open as to capital crimes. While it is true that, generally, in capital cases, the courts are much more strict as to a defendant’s waiver of his right, logically there is no ground for distinction. The rule adopted in the foregoing decisions should be followed in all classes of cases. In fact in one capital case, *State v. Straub*, 16 Wash. III, decided in 1896, this view was followed.

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APPEALS FROM THE SUPREME COURT TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA IN DISBARMENT PROCEEDINGS.

In view of the fact that the Court of Appeals of the District of Columbia in the case of In Re Adriaans, reviewed, on appeal, the order of the Supreme Court of the District of Columbia disbarring an attorney of the lower court, and reversed that order of disbarment, it might be taken as beyond doubt that there is a right of appeal in such cases.

The attempt, however, will be made in this article to establish the proposition that the effect of said decision is not conclusive, but may be overruled should the right to appeal in such cases be asserted again. In this connection, decisions of other courts involving either appeals or writs of error are pertinent, because the distinction between appeals and writs of error is not preserved in our local practice.

The cases of Ex Parte Burr and Ex Parte Secombe were both applications for mandamus to restore disbarred attorneys to the rolls of the lower Courts, and, therefore, not on the precise question of the right of review by writ of error or by appeal, but, nevertheless, Mr. Chief Justice Marshall and Mr. Chief Justice Taney, respectively, took occasion to say:

"No other tribunal can decide, in a case of removal from the bar, with the same means of information as the court itself. If there be a revising tribunal, which possess controlling authority, that tribunal will always feel the delicacy of interposing its authority, and would do so only in a plain case.

Some doubts are felt in this court respecting the extent of its authority as to the conduct of the circuit and district courts towards their officers;"

and

"It has been well settled by the rules and practice of the common law that it rests exclusively with the court to determine who is qualified to become one of its officers, as an attorney and counselor, and for what cause he ought to be removed. * * * * It is not necessary to inquire whether this decision of the Territorial Court can be reviewed here in any other form of proceeding."

Then, in the case of Ex Parte Bradley, although the Supreme Court of the United States granted a writ of mandamus to restore a disbarred attorney to the Bar of the Supreme Court of the District of Columbia, there was an express dictum to the effect that an order of disbarment could not be reviewed by writ of error, namely:

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1 28 App. D. C. 515.
2 9 Wheat. 529.
3 19 How. 9.
4 7 Wall. 364.
"The order disbarring them (attorneys), or subjecting them to fine or imprisonment, is not reviewable by writ of error, it not being a judgment in the sense of the law for which this writ will lie. Without, therefore, the use of the writ of mandamus, however flagrant the wrong committed against these officers, they would be destitute of any redress."

And, again, in Ex Parte Robinson⁵ (not to be confused with Ex Parte Robinson,⁶ petition for mandamus), the attorney had been disbarred by a United States District Court, and then prosecuted an appeal to the Supreme Court; and, on the motion to advance the case, the Supreme Court said:

"Cases involving great hardship are frequently brought here for revision, and in such cases it is competent for the court to advance the same on motion. Still the motion must be denied, as it is well settled law that neither an appeal nor a writ of error will lie in such a case. Hence it was held in the case of Ex Parte Bradley, that mandamus from this Court to a subordinate Court was a proper remedy to restore an attorney-at-law, disbarred by such subordinate court. * * * *

"Whether the present case can be distinguished from the case cited will not now be decided, but the court is of opinion that the remedy of the party, if any, in this court, is not by appeal."

The words "will not now be decided" referred to the petition for mandamus on behalf of the same attorney; and, on the hearing thereon,⁷ the court ordered the writ of mandamus to issue.

Now, the statute in effect at the time of the Bradley case, supra, was the Act of Congress of March 3, 1863, Chap. 23, R. S. U. S., Relating to the D. C., secs. 750-850, and sec. 846 provided:

"Any final judgment, order, or decree of the Supreme Court of the District may be re-examined and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders, and decrees of the circuit courts of the United States."

And, the then section of the Revised Statutes of the United States, relating to writs of error or appeals from the Circuit Court of the United States, was as follows:

"Sec. 691. All final judgments of any circuit court, or of any district court acting as a circuit court, in civil actions * * * * * may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

And, in the Bradley case, it was held that the order of disbarment entered by the Supreme Court of the District was not a "judgment in the sense of the law for which this writ (of error) will lie."

Also, in the Robinson case, supra, the statute then in force was the above quoted section 691 of the R. S. U. S., and also the following section:

⁵ 19 Wall. 513.
⁶ 19 Wall. 505.
⁷ 19 Wall. 503.
"Sec. 636. A circuit court may affirm, modify, or reverse any judgment, decree, or order of a district court brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings had by the district court, as the justice of the case may require."

And yet the Court held: "It is well settled law that neither an appeal nor a writ of error will lie in such a case" (from order of disbarment entered by the District Court.)

There does not seem to be any decisions, or *dicta*, in the reports of the Supreme Court of the United States, bearing directly on the precise question here under discussion, since the Robinson case, *supra*, was decided in 1873. Since then the Court of Appeals of the District was established by Act of Congress in 1893, and section 7 of that Act provided:

"That any party aggrieved by any final order, judgment or decree of the Supreme Court of the District of Columbia, or of any justice thereof, may appeal therefrom to the Court of Appeals hereby created; and upon such appeal the Court of Appeals shall review such order, judgment, or decree, and affirm, reverse, or modify the same as shall be just. * * * * *"

this Act of 1893 being practically the same, for the purpose of this argument, as the statutes in the Bradley and Robinson cases, *supra*.

From the time of the establishment of the Court of Appeals there appear to have been only two cases (eliminating disbarments from practice before the Government Departments, and Juvenile Court) of disbarment before that Court, both in reference to the same attorney.

In the first of said two cases, In Re Adriaans, the proceeding was instituted originally in the Court of Appeals to disbar the attorney from practice before that Court, and he was so disbarred. In delivering the opinion of the Court, Mr. Chief Justice Alvey said:

"If the respondent should feel himself aggrieved by this judgment, and suppose that any fundamental right of his has been impaired or violated thereby, we are glad to know that he has a recourse for the correction of any error, if error there be, *by an application to the Supreme Court of the United States. Ex Parte Bradley, 7 Wall. 364; Ex Parte Robinson, 19 Wall 505; Ex Parte Wall, 107 U. S. 265.*"

It will be noted that Mr. Chief Justice Alvey did not specify, in terms, the exact form of the "application" that the respondent might make to the Supreme Court of the United States. That he intended his language to mean an "application" for *mandamus*, and not by way of appeal or writ of error, would seem to be clearly evidenced by the use of term "application" instead of saying "by appeal or writ of error," and also by his express reference to the three decisions of the Supreme Court, cited by him, which were all mandamus cases, and the first two of

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which hold, as hereinbefore quoted, that appeal and writ of error do not lie in such a case, but that mandamus is the proper remedy in a proper case.

Therefore, in view of said decisions of the Supreme Court, and of said dictum in the first Adriaans case, supra, it seemed to be settled law in this jurisdiction that an order of disbarment of the Supreme Court of the District could not be reviewed on appeal by the Court of Appeals, but that mandamus was the only remedy, until the second Adriaans case, which was an appeal from an order of the Supreme Court of the District disbarring appellant, and in which case the appellate court reversed the lower court.

It cannot be successfully contended that the enactment of the D. C. Code, which went into effect in the period of time between the two Adriaans cases, enlarged the statutory right of appeal in disbarment cases, because section 226 of the Code is but practically a re-enactment of section 7 of the Act of 1893. Therefore, all statutes with respect to the right of appeal or writ of error were substantially the same in the Bradley case, Robinson case, first Adriaans case and second Adriaans case.

In the last cited case, it did not seem to be very seriously contended, or considered, that there was no right of appeal in that case. It is true that the able brief on behalf of appellant relied on section 226 of the Code, as giving him the right of appeal, on the ground that:

"The order appealed from in this case is a final order, by which the appellant is deprived of a valuable property right."

and recited many cases purporting to support appellant's contention, but the fact that it was evidently thought necessary to advance the contention, and cite authorities in support thereof, would seem to indicate that the question was at least debatable. And, the brief in opposition to the appeal devoted about six lines in all to making the objection that the appellate court was without jurisdiction to entertain the appeal; it contained no quotation from the Bradley case, supra, and not even a citation to the Robinson case, supra, nor to the dictum of Mr. Chief Justice Alvey in the first Adriaans case, and was mainly a review of the testimony in the case.

The only language in the opinion of the Court, delivered by Mr. Justice McComas, bearing on the point, was:

"We omit many questions urged by the respondent's counsel, because we

deem discussion of them unnecessary. We do not doubt the respondent's right of appeal in this case."

Mr. Justice McComas then proceeded to review the proof adduced below and held that it was "legally insufficient to disbar" the respondent, and, therefore, reversed the order of disbarment.

Now, bearing in mind that the ground relied upon in appellant's brief (second Adriaans case), as giving him the right of appeal, was that the right to practice law is a "valuable property right," the language of the Court in Re Thatcher,\(^9\) decided in 1911, is most significant. That case contains a very exhaustive review of disbarment decisions, both Federal and State, including the United States reports cited above, and distinctly and expressly, in a well-reasoned opinion, disposes of the fallacious assumption of appellant in the second Adriaans case, supra, upon which the right of appeal was predicated therein, viz: the right to practice law is a "property right," by saying:

"We wholly disagree with respondent that the right to practice law is a property right.

* * * * * * * * * * *

"Admission to and continuance at the bar of the federal courts are not the subject of statutory regulations, and are governed wholly by rules which the several courts adopt and enforce in the exercise of powers inherent in their construction. * * * * Undoubtedly, therefore, under this authority, which stands unquestioned in the federal practice, respondent's status is to be decided solely by the application of the facts to the rules of this court respecting admission and exclusion.

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"The language of Chief Justice Marshall in Ex Parte Burr, 9 Wheat. 529, uttered 80 years ago, is the present law on the subject, and protects both attorney and court. * * * * The Court uttering those words surely did not consider that it was dealing with a property right. Except where some constitutional or statutory provision intervenes, all reported attempts to review judgments of disbarment are found to have encountered this same theory of the status of the practice of the law as a privilege, in distinction to an absolute right."

From the language of this opinion but one fair conclusion can be drawn as to the rule of the Federal Courts in regard to the right of appeal in disbarment cases—that such an appeal or writ of error does not lie. Moreover, in considering the effect of the opinion just quoted, it should be always borne in mind, as previously stated, that our local statute on the subject is practically the same as the Federal statute, and that in cases of similar statutes the Federal decisions are controlling authority in our local Courts.

Further, the force of the last quoted opinion and of the decisions of the Supreme Court, supra, is not lessened because of the statutory provisions of section 65 of the D. C. Code, that the Supreme Court of

\(^9\) 190 Fed. 969.
the District, in general term, "may admit persons to the bar of said court and dismiss them." This section is but legislative recognition of the court's inherent power to disbar, which power is, as was said in Ex Parte Burr, supra, "incidental to all courts;" and in Ex Parte Bradley,11 "this power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice there-
in."

Also, it would seem that sections 219 and 220 of our Code should not be construed as specifying statutory grounds for disbarment because the court previously to their enactment had inherent power to disbar on the facts set forth in said two sections. It was said of section 219, in Diggs v. Thurston,12 that it is "at least as broad as the rule of the common law." Rather section 219 should be taken as providing an expeditious and simple method of suspending or disbarring an at-
torney in the same case in which he was derelict in his duty, instead of resorting to the formal formulation of charges for disbarment, and regular hearing thereon by the Court in general term. And section 220, it would seem, is intended rather as a rule of evidence—for providing a simple expeditious manner of proving the charge in disbarment pro-
ceeding in a proper case, by dispensing with the necessity of a hearing anew on the facts of the alleged offense and making the record of the prior conviction thereof the only proof required.

The fact that, while the Code provides in section 65 that the court may dismiss members of its bar, and in sections 219 and 220 provides for the above stated summary procedure and proof, without providing in specific terms in those or any other sections for the right of appeal from an order of disbarment, would seem to add cogency to the argument that such right of appeal does not exist.

It is true that in some jurisdictions there are decisions holding that there is the right of appeal, or writ of error, from an order of disbar-
ment, but, upon analysis, it will be discovered that many of those State decisions are based upon State statutes expressly giving the disbarred attorney the right of appeal in express words; that is, the State statute, in addition to the general section giving right of appeal from final judg-
ments, etc. (similar to sec. 226 of the D. C. Code), also contains another section expressly providing, in terms, that in disbarment proceedings the disbarred attorney has the right of appeal. Hence, the argument, that in other jurisdictions it has been held that there is the right of ap-

11 7 Wall. 364.
peal in such cases, turns against itself, because many of those States have deemed it necessary to give that right of appeal by express and precise phraseology.

It might be suggested that the case of Cobb v. United States,\(^\text{13}\) in which the United States Circuit Court of Appeals reviewed and affirmed, on writ of error, a judgment of suspension made by the District Court of Alaska, is Federal authority for the contention that a writ of error lies in disbarment cases.

However, an examination of that case discloses that no objection to the appellate court reviewing the case was ever made, and that the proceeding was conducted under the specific provisions of sections 743-752 of the Alaska Code relating to suspension and disbarment of attorneys.

The case of Barnes v. Lyons, 187 Fed. 881, also arose in Alaska under said Code. It came to the Circuit Court of Appeals on petition for mandamus to restore a disbarred attorney to the roll, and the Court, in refusing mandamus, said:

"Beyond the reasons discussed for denying the writ, it is not clear that the petitioner was without a remedy by writ of error from the original proceeding. Such a writ was prosecuted to this court in Cobb v. United States, 172 Fed. 641. But the point was not made in that case."

The correct Federal rule would seem to be as stated in the later case of Re Thatcher, supra, and the decision of the Supreme Court, supra.

If it should be said, in opposition to the contention advanced in this article, that 2 CYC 595 says that "An appeal will lie from an order suspending or disbarring an attorney," and that the footnote thereto refers to cases from sixteen different States, the reply can be made that an analysis of all those cases, and also of all the cases cited in 2 Century Digest, sec. 625, and also of some additional State cases, shows the following:

That the cases from Illinois and Iowa are not in point;
That the objection was practically waived in the Kentucky, Connecticut and Wisconsin cases;
That in the cases from Arkansas, Indiana, South Dakota, Oklahoma, and Texas, there was either a separate statute, or separate section of a statute, relating to disbarment of attorneys and procedure therein, and giving the disbarred attorney in express words the right of appeal or writ of error; that is, those cases do not hold that a disbarred attorney

\(^{13}\)172 Fed. 641.
has the right of appeal by virtue of a statute relating to appeals in general similar to sec. 226 of our Code, but the State statutes give the right in specific terms in a statute relating to disbarment proceedings;

That the Missouri case would seem to be contrary doctrine, from a dictum, but assigns no reason therefor;

That the Massachusetts cases would seem to be contrary doctrine, but only so far as to "matter of law" apparent on the record;

That the Illinois, New York and Tennessee cases would seem to be contrary doctrine, but base the right of appeal on a previous ruling that the right to practice law is a "substantial right," which ruling is directly contrary to the Federal ruling as expressed in Re Thatcher, supra, Also, that the New York cases predicate their decisions on a ruling that a disbarment proceeding is a "special proceeding," and that the State statute provided for the right of appeal from "a final order affecting a substantial right made in a special proceeding," and that this right of appeal from a "special proceeding" was provided for in a separate section in addition to the section giving the right of appeal from an "ordinary action" and that the Wisconsin case mainly relied on the New York cases, and also the Wisconsin statute gave the right of appeal in a "special proceeding";

That the Connecticut, North Carolina and Pennsylvania cases, squarely hold that an order of disbarment is not appealable.

Therefore, it would seem as though the great weight of the State authorities is to the effect that, under a statute similar to our local statute, there is no right of appeal or writ of error from an order of disbarment; and, that such is the Federal rule has also been previously herein established.

Since the Supreme Court and Court of Appeals of the District are Federal Courts, surely it cannot be successfully maintained that Congress by the enactment of the Court of Appeals Act of 1893, and of section 226 of the Code (providing that "any final order, judgment, or decree" of the Supreme Court may be reviewed by the Court of Appeals, on appeal), intended those statutes to confer the right of appeal upon an attorney stricken from the rolls of the lower court, when we recall that Congress at the time of legislating had before it the knowledge that, under similar Federal statutory provisions, an order of disbarment had been previously held by the Supreme Court of the United States. (Ex Parte Bradley, and other cases, supra) as "not reviewable by writ of
error, it not being a judgment in the sense of the law for which this writ will lie."

Therefore, it would seem as though the effect of the decision in the second Adriaans case, supra, would probably be overruled in any subsequent disbarment proceeding, if the question of the want of jurisdiction in the Court of Appeals, to review on appeal disbarment orders, could be presented to the Supreme Court of the United States.

THE LIMITS OF OWNERSHIP UNDER PATENT RIGHTS.

"It is obvious that the conclusions arrived at in this opinion are such that the decision in Henry v. Dick Co.\(^1\) must be regarded as overruled." In these words the Supreme Court of the United States in Motion Picture Patents Company v. Universal Film Manufacturing Company, et al., decided April 9, 1917, has effectively set aside its former interpretation of the patent laws defining the right of exclusive use granted by letters patent for inventions.

Section 4884 R. S. provides that every patent shall contain a grant "of the exclusive right to make, use and vend the invention or discovery throughout the United States and the territories thereof" for a period of seventeen years. No rights are given the patentee whereby he may make, vend or use the subject of his patent. He may make or use or vend any article he may choose without statutory sanction so long as he does not trespass upon rights granted another. The patent franchise is one of exclusion—the privilege of barring others from making, using or vending any article covered by the patent. Under a long line of earlier interpretations of the statute the owner of a patent had absolute freedom in disposing of the rights secured to him and it was recognized that he might dispose of his rights according to his pleasure, and regard an infraction of the conditions or disposition an infringement of his patent privilege. If he was a manufacturer of the patented article, it was clearly within his power to vend such article upon whatsoever terms or conditions as to resale or use he might impose. The Supreme Court in Bement v. National Harrow Co.,\(^2\) referring to the rights secured under the patent laws, stated that "the very object of these laws is monopoly and the rule is with few exceptions that any conditions, which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts."

Fortified by such interpretations of the grant secured by letters patent as that in the Button Fastener Case\(^3\) and other decisions of the Circuit Courts of Appeals, upholding the patentee's right to control the sale and use of the patented article, manufacturers found it to their

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\(^1\) 224 U. S. 1.
\(^2\) 186 U. S. 70.
THE LIMITS OF OWNERSHIP UNDER PATENT RIGHTS. 27

advantage to dispose of some one or all of the exclusive rights granted
them under letters patent upon terms and conditions regulating the re-
sale of the patented article or the use of that article after a sale.

Later day decisions relating to this subject, which are of particular
interest to manufacturers and the patent profession, include the
"Mimeograph," "Sanatogen" and the recently decided "Motion Pic-
ture" cases.

In Henry v. Dick Co., the "Mimeograph" case, the plaintiff was
the owner of two letters patent covering a stencil-duplicating machine
known to the trade as the "Rotary Mimeograph." This machine was
manufactured by the plaintiff and sold with notice, attached to the
machine, that it "may be used only with the stencil paper, ink and other
supplies made by A. B. Dick Company, Chicago, U. S. A." The de-
fendant, Henry, sold ink to the purchaser of the machine adapted to be
used with the mimeograph with knowledge of the license agreement
and with full expectation that the ink would be used with the machine.
The case was before the Supreme Court on a certificate from the Circuit
Court of Appeals for the Second Circuit, that court asking instruction
on the question, "Did the acts of the defendants constitute contributory
infringement of the complainant's patents?" Mr. Justice Lurton de-
ivered the majority opinion of the Court, answering the question in the
affirmative. In its opinion the Court made clear that "the property
right to a patented machine may pass to a purchaser with no right of
use, or with only the right to use in a specified way, or at a specified
place, or for a specified purpose." In a dissenting opinion Mr. Chief
Justice White contended that the sale of the mimeograph completely
removed it from the monopoly created by the patent, and while he
recognized the right in the owner to dispose of the machine on such
conditions in the nature of covenants as to use as were not contrary to
public policy, yet he maintained that this right of conditional use was
not a "right derived from or protected by the patent law, but was a
mere right arising from the ownership of property."

The "Sanatogen" case (Bauer v. O'Donnell, 229 U. S. 1) was before
the Supreme Court on a certificate from the Court of Appeals of the
District of Columbia. Sanatogen, a food composition, was sold by the
sole licensee under the patent with a license restriction that the package
"is licensed for sale and use at a price not less than one dollar ($1.00)."
The license notice further provided that any sale in violation of the
conditions would constitute an infringement of certain letters patent.

4 224 U. S., 1.
The infringement complained of by Bauer was the resale of packages of Sanatogen, purchased from jobbers, at less than the price stipulated in the notice attached to each package. The question before the Supreme Court was, "Did the acts of the appellee (defendant) in retailing at less than the price fixed in said notice, original packages of 'Sanatogen' * * * constitute infringement of appellant's (plaintiff's) patent?" The question propounded by the Court of Appeals was answered in the negative by a Bench divided five to four. It is to be noted that this case differs from the Dick case in that the latter was one concerning the use of a patented article while the "Sanatogen" case dealt with the right to vend a patented article. The Court says:

"The jobber from whom the appellee purchased had previously bought, at a price which must be deemed to have been satisfactory, the packages of Sanatogen afterwards sold to the appellee. The patentee had no interest in the proceeds of the subsequent sales, no right to any royalty thereon, or to participation in the profits thereof. The packages were sold with as full and complete title as any article could have when sold in the open market, excepting only the attempt to limit the sale or use when sold for not less than one dollar. In other words, the title transferred was full and complete with an attempt to reserve the right to fix the price at which subsequent sales could be made. There is no showing of a qualified sale for less than value for limited use with other articles only, as was shown in the Dick case. There was no transfer of a limited right to use this invention, and to call the sale a license to use is a mere play upon words."

It was the view of the Court that the sale of the article had carried it outside the limit of the patent monopoly.

The case which occasions this comment, Motion Picture v. Universal Co., et al. (October Term, 1916), was a suit for infringement of letters patent for Projecting-Kinetoscopes, the patent covering part of the machanism in picture projecting apparatus for feeding a film through the machine with a regular, uniform and accurate movement in such manner as to not expose the film to excessive strain or wear. The machine was sold with the following notice:

"The sale and purchase of this machine gives only the right to use it solely with moving pictures containing the invention of reissued patent No. 12192, leased by a licensee of the Motion Picture Patents Company, the owner of the above patents and reissued patent, while it owns said patents, and upon other terms to be fixed by the Motion Picture Patents Company and complied with by the user while it is in use and while the Motion Picture Patents Company owns said patents. The removal or defacement of this plate terminates the right to use this machine."

The Circuit Court of Appeals affirmed the decree of the lower court dismissing the bill and held that the notice attached to the machines and which attempted to impose conditions as to its use with certain films was illegal and within the inhibitions of the Clayton Act (C. 323, Sec. 3, 38 Stat. 731), the testimony in the case showing that the plain-
tiff had a monopoly under its patents for projecting machines so that if no films not manufactured by the plaintiff can be used upon these machines it will obtain an absolute monopoly of the film business.

The Supreme Court notices that the state of facts presents two questions for decision, namely:

"May a patentee or his assignee license another to manufacture and sell a patented machine and by a mere notice attached to it limit its use by the purchaser or by the purchaser's lessee, to films which are no part of the patented machine, and which are not patented?"

and

"May the assignee of a patent, which has licensed another to make and sell the machine covered by it, by a mere notice attached to such machine, limit the use of it by the purchaser or by the purchaser's lessee to terms not stated in the notices but which are to be fixed, after sale, by such assignee in its discretion?"

Each of these questions the Court answers in the negative.

It is plain to the Court that the statute and established rules restrict the patent granted on a machine to the mechanism described and claimed in the patent as necessary to produce the results which the inventor set out to obtain, and that the patent is not concerned with and has naught to do with materials with which or on which the machine is adapted to operate. The Court says:

"The grant is of the exclusive right to use the mechanism to produce the result with any appropriate material, and the materials with which the machine is operated are no part of the patented machine or of the combination which produces the practical result. The difference is clear and vital between the exclusive right to use the machine which the law gives to the inventor and the right to use it exclusively with prescribed materials to which such a license notice as we have here seeks to restrict it. The restrictions of the law relate to the useful and novel features of the machine which are described in the claims of the patent, they have nothing to do with the materials used in the operation of the machine; while the notice restrictions have nothing to do with the invention which is patented but relate wholly to the materials to be used with it. Both in form and in substance the notice attempts a restriction upon the use of the supplies only and it cannot with any regard to propriety in the use of language be termed a restriction upon the use of the machine itself."

The decision in the Motion Picture case, which is a direct reversal of the Dick case as to the right of a patentee to restrict the use of his patented machine, brings in harmony the decisions of the Supreme Court with reference to a patentee's rights as to use and sale of his invention, the "Sanatogen" case making plain that there was no right to control the resale of the patented article after the patentee or his licensee had obtained the purchase price asked for the patented article, and the Motion Picture case indicating "that it is not competent for the owner of a patent by notice attached to its machine to, in effect, extend the scope of its patent monopoly by restricting the use of it to materials necessary in its operation, but which are no part of the
patented invention." The Court is clearly of the opinion that "The
patent law furnishes no warrant for such a practice and the cost, incon-
venience and annoyance to the public, which the opposite conclusion
would occasion, forbid it."

Confirmation of its announced conclusions is found by the Court
in the enactment by Congress of the so-called Clayton Act, which
declares it unlawful to lease or sell goods, machinery or supplies on a
condition that the lessee or purchaser shall not use or deal in the goods,
machinery or supplies of a competitor of the lessor or seller when such
condition may substantially lessen competition and create a monopoly.
This act was passed subsequent to the decisions in the Dick and Sana-
togen cases, but even had it been on the statute books at the date of
the decision in the Dick case it is not believed that that case would
have come within the terms of the act since it did not appear that the
restriction placed on the use of the mimeograph in any way created
a monopoly in the sale of mimeograph ink.

A restriction such as the Motion Pictures Company sought to enforce
under the patent laws is characterized as "a potential power for evil
over an industry which must be recognized as an important element
in the amusement life of the nation" and is declared plainly void "be-
cause wholly without the scope and purpose of our patent laws and
because, if sustained, it would be gravely injurious to that public
interest, which we have seen is more a favorite of the law than is the
promotion of private fortunes."

Mr. Justice Holmes in dissenting from the majority decision in
the Motion Picture case states that it is undisputed that a patente has
the right under his patent to forbid the rest of the world from making
it and he may keep it wholly out of use, and he can see

"no predominant public interest to prevent a patented tea pot or film feeder from
being kept from the public, because, as I have said, the patentee may keep them
tied up at will while his patent lasts. Neither is there any such interest to
prevent the purchase of the tea or films, that is made the condition of the use
of the machine. The supposed contravention of public interest sometimes is
stated as an attempt to extend the patent law to unpatented articles, which of
course it is not, and more accurately as a possible domination to be established by
such means. But the domination is one only to the extent of the desire for the
tea pot or film feeder, and if the owner prefers to keep the pot or the feeder
unless you will buy his tea or films, I cannot see in allowing him the right to
do so anything more than an ordinary incident of ownership."

The patent profession is as far as it ever was from having any set-
tled doctrine regarding the substantive rights under letters patents
for inventions.

Francis S. Maguire.

Georgetown Law School.
Drilling was taken up at the Law School April 2, 1917, when Major E. V. Bookmiller, U. S. A., was designated by the War Department to take charge of the work. A meeting of students was held at which Dean Hamilton presided. Dean Hamilton and Chief Justice J. Harry Covington urged the students to take up military instruction at once; Major Bookmiller outlined the course of military instruction he planned to give. It was found that nearly ten per cent. of the student body had had military instruction at military schools, in the National Guard or at Plattsburg. These students were appointed drill masters, and were given a short preliminary course under Major Bookmiller to prepare them for the work of instructing their classmates in the fundamentals of the School of the Soldier and the School of the Squad. The first drills were held indoors, in one of the large classrooms. Permission has been obtained to drill on the grounds of Judiciary Square, where the Court of Appeals buildings and the building occupied by the Supreme Court of the District are located. These grounds are within
one hundred yards of the law school building, cover several acres in extent and are well adapted for the purpose. On the occasion of the first company drill an eloquent address was delivered to the Georgetown students by Senator Harding, of Ohio.

It is interesting to note that military instruction was begun for the first time in the history of Georgetown almost seventy years ago to the day, the first cadet company of Georgetown men having been organized April, 1849.
NOTES.

Passenger of Common Carrier.—In a recent Massachusetts case the court had presented to it for consideration the interesting question, when a person is to be deemed a passenger on a street railway car. The plaintiff was a passenger on one of the defendant’s cars in Watertown, intending to go to Newton. This car, known as the Watertown car, went no farther than the car barn, and it became necessary for the plaintiff to change there in order to enter the Newton car which was about three car lengths farther on in a direct line. While the plaintiff was walking in the direction of the Newton car, the Watertown car having started, struck her as it rounded the curve to enter the barn. In her declaration the plaintiff alleged that while transferring from the Watertown car to the Newton car, she was a passenger. The presiding judge left it to the jury to decide whether, on the facts shown, she was a passenger. The defendant excepted to this instruction of the judge, which exception was sustained on appeal. (Niles v. Boston Elevated Ry. Co.)

The determination of the question, when the relation of carrier and passenger begins and when that relation ceases, is of especial importance in connection with the degree of care that the carrier will be held to exercise. A carrier owes a higher degree of care to a passenger than it owes toward one not a passenger. A carrier is not, however, an insurer of the safety of its passengers, but is responsible for the exercise of the highest degree of care consistent with the reasonable conduct of its business. Care may be defined as the doing of what a reasonably prudent man would do in like circumstances. Although carriers as a general rule must exercise extraordinary care toward their passengers, yet that extraordinary diligence is no more than an ordinary requirement in extreme situations and conditions. In all cases the amount of care bestowed must be equal to the emergency, however the standard be denominated.

In this connection the question has arisen whether carriers are held to the exercise of the same high degree of care for the safety of passengers at stations, as for their safety during transportation. Some courts have declared in favor of the extreme view that carriers must

1 114 N. E. 730. (Massachusetts, January 10, 1917.)
3 Bacon v. Casco Bay S. B. Co., 90 Me. 46; 37 Atl. 328
exercise extraordinary diligence in the care and safety of their passengers at all times, while the majority of cases recognize the more liberal view that a distinction should be made between the care due a passenger while on the station grounds of the carrier and while in actual transportation on the cars of the company. The latter is no doubt the better rule from the point of reason and justice to all parties concerned. It is clear that a very high degree of vigilance, foresight, and skill is required to fill the measure of care in the transportation of passengers, whereas the requirement of care for the safety of passengers on platforms and other parts of the station premises is satisfied by the exercise of a lesser degree of skill and foresight. Thus, in Falls v. San Francisco & N. P. R. Co. the court stated that the higher degree of care is exacted only during the time in which the passenger has given himself wholly in charge of the carrier; that is, while on the train, or getting on or off, for then only is the passenger subjected to the peculiar hazards of that mode of travel, against which the carrier must exercise the highest degree of skill and care.

In connection with the measure of care to be exercised by the common carrier it becomes important to know definitely who is a passenger. In other words, when does a person who has started to take a passage on a train or street car become a passenger, and how long does that status continue? Must one have purchased a ticket or deposited his fare with the conductor before he is entitled to the privileges and care of a passenger? Undoubtedly the relation of passenger and carrier commences when the traveler goes into the carrier's premises and purchases a ticket for the purpose of taking a train, the carrier assuming the duty of reasonable care for the protection of his person while proceeding to take the train. The weight of opinion seems to be that a person may sometimes be a passenger when attempting to take a train, although he has not yet boarded the cars or even procured a ticket. In Grimes v. Pa. Co. it was held that one who, in good faith, goes to a depot at a reasonable hour to take a train is a passenger entitled to pro-

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*97 Cal. 114, 31 Pac. 901.


tection against unsafe platforms, as in case of the absence of a light, although he has not yet purchased a ticket. With respect to street railways the law seems to be well settled that as soon as the party takes hold of the car and attempts to board it, in an orderly way, he is entitled to all the rights of a passenger. It would be unreasonable to assume that one entering a street car is to be regarded as a trespasser until a contract has been entered into with the conductor, based upon the payment of the required fare.⁹

It must be borne in mind, however, in this connection, that in order to be regarded as a passenger, one must present himself in a proper place and in a proper manner, because one is not presumed to have the invitation to present himself in any other way. This point is illustrated clearly in *Baltimore Traction Company v. State*,¹⁰ where one who attempted to board a street car going six miles an hour, and had signaled for it to stop, was held to be not a passenger. In *Webster v. Fitchburg R. Co.*,¹¹ the plaintiff was running from the direction of a public street across the premises outside the station to catch a train about to start, and, while crossing a track, was struck by an incoming train. In holding that the plaintiff was not a passenger at the time of accident, the court stated that he (plaintiff) at no time presented himself in a proper way to be taken as a passenger, having been all the time running rapidly, without precautions for his safety, towards a point directly in front of an incoming train.

In *Duchemin v. Boston Elevated Ry.*,¹² the plaintiff was injured by the fall of a trolley pole and car sign as he was about to enter the street car of the defendant. The question presented to the court was whether the jury should have been instructed that the defendant owed to the plaintiff the same high degree of care while he was approaching the car, and had not yet reached it, that it would owe to a passenger. It is apparent that a person in such a situation is not in fact a passenger. He has not entered upon the premises of a carrier, but is on a public highway where he has a clear right to be, independently of his intention to become a passenger. He may change his mind at the last moment and not become a passenger. Certainly the carrier owes him no other duty to keep the street clear of obstructions to his progress than it owes to all other travelers on the highway. The liability of the defendant company was therefore held not to be determined by the application of

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¹⁰ 78 Md. 409.


the rule governing the relation of carrier and passenger. However, if the plaintiff in this case had actually taken hold of the car in the attempt to enter it,\(^3\) when he was injured, he would unquestionably have been considered a passenger.

With respect to the termination of the relation of passenger and carrier, it may be said that a passenger on a street car does not cease to be such by momentarily stepping to the ground to enable other passengers to leave the car.\(^4\) Especially during the rush hours is one obliged to stand on the platform of a crowded street car, and under such circumstances he cannot be said to have ceased to be a passenger while temporarily stepping from the car to the street to allow passengers from the interior of the car to alight. In \textit{Wakeley v. Boston Elevated Railway Co.},\(^5\) the plaintiff was held to have been a passenger when she was injured while alighting from a street railway car, by reason of stepping into a depression. The contract of carriage places a duty on the carrier to provide a reasonably safe place for its passengers to alight,\(^6\) and furthermore, the relation of passenger and carrier continues until the passenger not only has alighted from the train or car, but also has left the premises by the means provided.\(^7\)

In the principal case, \textit{Niles v. Boston Elevated Ry. Co.}, \textit{supra}, the plaintiff when injured, was not on the defendant's premises, nor at a station or platform within the control of the carrier, in use for the purpose of transferring passengers. Neither was she under its direction or within its care, but upon a public highway, free to choose her own way while transferring from one car to another, and as a matter of law was not therefore a passenger. The defendant company was, of course, liable to plaintiff if it was guilty of negligence, but not for that high degree of care required of a carrier towards its passengers.

J. M. M.

\textbf{Right of Inmates of an Orphans' Home to Attend School.—}
In the case of \textit{Ashley v. Board of Education},\(^1\) which arose in a state having in force a statute requiring the board of education to establish a sufficient number of free schools for the accommodation of all persons in the district of school age, the question as to the right of inmates

\begin{itemize}
\item[\(^3\)] \textit{Davey v. Greenfield & T. F. St. R. Co.}, 117 Mass. 106.
\item[\(^5\)] 217 Mass. 488.
\item[\(^6\)] \textit{Beaden v. St. Louis & S. F. R. Co.}, 215 Mo. 105, 114 S. W. 961.
\item[\(^7\)] \textit{Louisville & N. R. Co. v. Johnson}, 182 S. W. 214, 168 Ky. 351.
\item[\(^1\)] 114 N. E. 20. (Illinois, decided October 24, 1916.)
\end{itemize}
of an orphans' home to attend school without charge was presented to the court for determination.

The appellees insisted that only residents of the school district were entitled to the benefit of the schools without the payment of tuition; that the appellants were minors, who could not voluntarily change their place of residence, and that their legal residence and domicile was the place where their parents resided. The appellants contended that they were bona fide residents of the district and entitled, under the law, to attend the public schools.

As a general rule, the free school privileges of a district, town or city are open only to children, otherwise eligible, who are bona fide residents of that district, town or city; and in determining whether a person is or is not a resident in a school district within the meaning of such a rule, the usual and ordinary indicia of residence or the absence thereof, should be the proper guide, and not the secret mental resolves or concealed intentions of persons living or having lived, in the district. Such rule, however, does not usually require that there shall be a legal domicile; but it is sufficient if the child and his parent, or the person in control of him, are actually resident in the district, with apparently no present purpose of removal.

Although there is some conflict among the decisions as to what constitutes a residence which will entitle a child to school privileges, statutes providing for a free public school system are by the weight of authority construed as evidencing an intention on the part of the state that all the children within its borders shall enjoy the opportunity of a free education. In line with this construction of the statutes, residence entitling an infant to school privilege is distinguished from domicile, or the technical and narrow use of the term "residence" for the purpose of suffrage or other like purposes, and it is construed in a liberal sense as meaning to live in, or be an inhabitant of, a school district, the purpose being not to debar from school privileges any child of school age found within the district under the care, custody or control of a resident thereof.

As a general rule, the residence of parents is the residence of their children. Boarding children in a district does not, of itself, entitle

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*Yale v. West Middle School Dist., 59 Conn. 489; 22 Atl. 295.
*State v. Smith, 64 Mo. App. 313.
*Yale v. West Middle School Dist., 59 Conn. 489; 22 Atl. 295.
*Board of Education v. Lease, 64 Ill. App. 60; School Dist. No. 2 v. Pollard, 55 N. H. 503.
them to the benefits of the free school in said district. The mere temporary residence of a family in a district, solely to enjoy the benefits of the free schools and with the intention of removal as soon as that purpose is accomplished, does not entitle the children to the privileges of said schools. The removal of a portion of a family from the legal domicile to another district in order to send to the free schools thereof does not confer the right to do so. As a general rule, the residence of their parents is the residence of employees; hence the privilege of the free schools in another district is not acquired by placing children temporarily at service in that district. This includes those who are placed in families to attend school and do chore work for their board, etc. The most liberal policy is, however, recommended toward this class of children. The state has as much interest in their education as in that of the more favored, and, although not legally eligible to attend free, the directors should permit them to do so when not inconsistent with the rights of others and the welfare of the school. Children who have been apprenticed or adopted into a new family, or who have been placed permanently in the care of others, with no intention of withdrawal, or those over whom parents have relinquished all control, from whatever cause, or those who have no parents or guardians, or whose parents or guardians live in another state or country and exercise no control over their children, or those who have no permanent abode, but go from place to place in search of employment, and whose only home is where they find work—the children included in all the above classes are to be enumerated in the district where they live, and are entitled to all the rights and benefits of the free schools in said district.

In the case of poor persons it is frequently necessary, particularly when one of the parents is dead or disabled, or for any reason cannot or will not assist in the support of his family, that homes shall be found for the children in places other than those where the parents reside, and under such circumstances the child is entitled to be enumerated among the school children and to attend the school in the district in which he actually resides, as a matter of right, not dependent upon the payment of tuition by the school district in which the parents reside or the consent of the directors of that school district or of the directors of the district in which such child actually resides.

It has been said that “the state is interested to have all the children

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6 Haverhill v. Gale, 103 Mass. 104.
7 Gardner v. Fargo Board of Education, 5 Dak. 259.
educated in order that they may become good citizens.” Experience has demonstrated that it costs the public much more to support one ignorant or vicious person than to educate many children. On the simple ground of economy, the state cannot afford to permit any child to grow up without being sent to school. The school laws recognize this fact and their provisions are framed accordingly. If any child is actually dwelling in any school district, so that some person there has the care of it, and is within the school age, not incapable by reason of physical infirmity of attending school, and is not instructed elsewhere, then that child must go to the public school.  

Where a child, with the consent of her parents, goes to live in the family of another as a member of the family, under an agreement that it is to be her home and she is to be cared for and provided with school facilities, she becomes, under the arrangement, a bona fide resident of the district in which she lives.

And a child whose parents have no established home acquires a residence in a school district, entitling him to school privileges, by making his home with a resident of the district and working for his board, although he came to the district for the purpose of attending that particular school.

So a child going to live with a relative under an arrangement by which she is to raise and educate her, and treat her in all respects as her own child, is a resident of the school district in which she resides with such relative.

To establish a rule that a minor cannot have a residence for school purposes, other than that of his parents, would in many cases deprive him of all benefits of the schools. When a minor has poor parents, the poverty of the parents renders it absolutely necessary in many cases that a home for a minor should be found in places different from that of the parents, and if the rule was applied, such children, for whose benefit the free schools were especially instituted, would be deprived of all benefit of them.

So far as a rule can be deduced from the cases upon this subject it seems to be that a child is entitled to the benefits of the public schools in the district in which he lives, if he has gone there in good faith for

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9 Yale v. West Middle School Dist., 59 Conn. 489; 22 Atl. 295.
10 Mizer v. School District No. 11, 96 N. W. 128.
11 State v. Thayer, 74 Wis. 48; 41 N. W. 1014.
12 McNish v. State, 74 Neb. 261; 104 N. W. 186.
the purpose of securing a home and not for the purpose of taking advantage of school privileges. But that it will not be permitted to go into a district chiefly for the purpose of getting school advantages.

In the case considered it was held that "every child of school age in the state is entitled to attend the public schools in the district in which it actually resides for the time being, whether that be the place of its legal domicile, or the legal domicile of its parents or guardians, or not."

F. C. V.

Unfair Competition — Family Name as Trade Mark.—That there are sometimes occasions when the use of one's own family name in trade and business should be restricted and even prohibited is universally admitted. These occasions exist when the use of one's own name to designate a certain business or article of trade causes confusion in the mind of the purchasing public with regard to another article of the same or similar character designated by that name already upon the market, or with some established business under that name. Where such similarity or identity is not clearly explained so as to differentiate the new article from the old a fraud is committed upon the public and an injury done to the original trader. To try to compete for the custom, which has been established for the initial article, or by the original business, by reason of this identity is unfair competition, notwithstanding the competitor is merely using his own name to describe his product. The essence of the wrong is not the violation of any trade mark right in the name, itself, but the fraud in the effort to pass off for the genuine and original article that which is a mere substitute and a newcomer in the trade. Cases involving various acts of unfair competition have been frequently built up around the subject. The recent case of Lapointe Machine Tool Co. v. J. N. Lapointe Co.\(^1\) illustrates very clearly the position taken by courts of equity in cases involving the question of unfair competition. In this case the court was asked to enjoin the defendant from using the name "Lapointe" in any way, whether to describe the corporation or the broaching machine manufactured by it. Lapointe had organized the Lapointe Machine Tool Company to manufacture a certain broaching machine which he had invented. He was president of the corporation and also general manager, and continued in these positions until a few years before the suit for injunction, when, because of a disagreement with a member of

\(^1\) 99 Atl. 348. (Maine. December 18, 1916.)
the corporation, who had gained control of it, he left it and organized the J. N. Lapointe Company. The latter company manufactured the same article as the former, except that it had been very materially improved by the inventive genius of Lapointe. The new company soon demonstrated a remarkable capacity to compete with the original company. In fact, the marvelous growth in the sale of its products and the consequent decrease in the business of the old company resulted in the institution of this suit. The court, after exhaustively considering all the acts of the defendant, refused to grant an injunction. In the course of its opinion the court observed that competition is of two kinds, fair and unfair, the latter being subdivided into ethically unfair and legally unfair. Courts have to do only with the last named.

That a person has the right to use his own name in his business, even though injury results to others, is well settled. This limitation is a natural and proper one, which the law prescribes, to prevent dishonest persons, who may chance to have the same name by which some well known product or established business is designated, from fraudulently misrepresenting their wares to the public. The reason for the restriction rests upon the law's desire to protect the public from fraud and the original trader from unfair methods of competition, and not upon anything in the nature of a trade mark right in the name itself. If one person has succeeded in business under a certain name this does not preclude another of the same name from embarking his fortunes upon that same kind of business under his own name, but he must see to it that he employs every reasonable means possible to differentiate his business or product from that already established in the confidence of the purchasing public so as to avoid confusion in the public mind as to the identity of the new and the old. It is a well recognized principle that every person has the right to use his own name honestly in his business, and any injury that may incidentally result to others, even though they be already established, is damnum absque injuria. It is only in the interest of fairness to the original trader and protection of the purchaser from fraud that equity will interpose and enjoin the use of the name. In the principal case the court

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\* W. R. Lynn Shoe Co. v. Auburn Lynn Co., 100 Me. 461.
\* Brown Chemical Co., supra.
was asked to enjoin Lapointe from using his own name which was already associated with the corporate name of a corporation of established reputation with which Lapointe was formerly connected. It was contended by complainant that Lapointe's former affiliations with it in addition to the use of the name "Lapointe" in the competing company's name and also its product amounted to acts of unfair competition. From the evidence, however, it seemed that Lapointe had by public advertising and in other ways attempted to inform the trade of the difference between his machine and that of his former associates. The court, however, was of opinion that, under the authorities, Lapointe had met the requirements of the law. It observed that the test of unfair competition was not merely the similarity of names, but whether the adoption of a similar name had enabled the new firm by mistake to obtain business of the old firm. Lapointe, as the court found, had exercised all necessary care to prevent confusion between the two companies, and therefore unfair competition, which in a legal sense is beguiling the purchaser into buying the new wares, believing them to be the old established article, had not been proved.

There can be no doubt of the correctness of the decision in the principal case. In *Croft v. Day,* it was said: "It has been very correctly said that no man has a right to sell his own goods as goods of another. You may express the principle in a different form and say that no man has a right to dress himself in colors or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud." Of course, a person may lose the right to use his own name by transferring the right along with the stock, good will, etc., of the business. But the mere previous use of one's name in a company with which he was associated does not preclude him from using the name in a new business provided always such use does not produce confusion in the mind of the purchaser and lead to unfair and fraudulent practices. As to the right to use his own name as the whole or part of a corporate name the Supreme Court of the United States has said: "If every man has the right to use his name reasonably and honestly in every way, we cannot perceive any practical distinction between the use of the name in a firm and its

*7. Beav. 84.*
*Fish Bros. Wagon Co. v. Fish, 82 Wis. 546.*
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use in a corporation. It is dishonesty in the use that is condemned, whether in a partnership or corporate name, and not the name itself." 10 This rule was followed in a later case, 11 and it was held where one assisted in the formation of a corporation in the name of which his own name was a part, this fact merely did not preclude such person from using his name in the corporate name of another company organized by him to compete with the first, provided he had not by contract transferred to the first company the exclusive right to his name for trade purposes. This was precisely the rule followed in the principal case, and is well supported and established as the true concept of the law in all instances where unfair competition is charged.

In following this rule some courts have gone to what seems to be the extreme, and have required the new competitor to specifically negative on the article manufactured any connection with the original article manufactured by the other trader. 12 Thus the New Jersey courts compelled one manufacturing a certain well known brand of silverware to place upon his product the words, "not the original Rogers," notwithstanding the fact that he was already stamping packages, wrappers and boxes in which the product was packed, "not connected with any other Rogers." But, as a rule, the court will not debar the new competitor from using the name in any manner he desires, provided he makes clear that his goods are not those of the original manufacturer, and unless he does this he will be denied the use of the name altogether. 13

In the principal case the court felt that defendant, Lapointe, had endeavored to the best of his ability to fully acquaint the trading public that his machine was not that of the Lapointe Machine Tool Co., but one distinctly his own, with features not found in the original machine, and therefore it very properly held that Lapointe had the right to use his own name in his business, notwithstanding the damage which did undoubtedly result therefrom to the original company in the sale of its product. This case is one to which may be applied the familiar maxim, *damnnum absque injuria*. The fact that damage may result from the use of a name cannot be made the foundation for an injunction, as the

10 Howe Scale Co. v. Wychoff, Seaman & Benedict, 198 U. S. 118.
right to the writ does not depend upon damage merely, but also upon the dishonest and fraudulent use of the name.

F. B. C.

WILLS — CONSTRUCTION.—Few doctrines of the law of wills are better settled than the doctrine that the intention of the testator is to be sought from the language of the provisions of the will and that wherever possible this intention is to be given full effect. This rule is universally admitted by courts, lawyers, and laymen to be wise, salutary and eminently fair. Another doctrine of importance is that of the ademption of specific legacies; that is, the failure of such a legacy to take effect on account of the fact that at the time of the death of the testator the specific property bequeathed is no longer under his control and therefore nothing passes under this provision of the will.

In the recent case of In re Brann (Appeal of Johnston)\(^1\) the court in the construction of a will applied the former doctrine and endeavored to ascertain from the provisions of the will the intention of the testatrix. By her will made in 1908, the testatrix created a trust to provide an annuity to her brother for life with the remainder to charities, the subject of which was 30 shares of the stock of the Standard Oil Company, which constituted the bulk of the estate. All of the residue of the estate was bequeathed to a friend.

In 1911 two significant events occurred: First, the brother for whom the trust was originally created, died; and second, the Standard Oil Company was ordered by the United States Supreme Court to dispose of its holdings in other corporations. The method of disposal not being specified in the decree of the court, the company distributed to its shareholders its holdings in other corporations. In addition to the 30 original shares owned by the testatrix, as the result of said distribution, she acquired stock of considerable value in the subsidiary companies. Subsequent to the events referred to the testatrix altered her will by the execution of a codicil, giving certain sums to various individuals and charities, and in all other respects specifically ratified and confirmed the provisions of the will.

The disposition to be made of the shares of stock in the subsidiary companies was the principal question in issue. The lower court held that no ademption of any part of the specific legacy of 30 shares had taken place; that this legacy constituted the whole body of shares then owned by the testatrix, and that the shares in subsidiary companies

\(^1\) 114 N. E. 404. (New York. November 21, 1916.)
passed with the original shares and formed part of the trust fund. The appellate tribunal reversed the lower court as to the disposition of the stock, giving the subsidiary shares to the residuary legatee, but sustained it in the conclusion that no ademption had taken place; that the original 30 shares were still intact, and had and still formed the whole of the specific legacy. Although holding that there had been no ademption, the appellate court recognized that the subsidiary shares helped to give the primary shares their value, and, therefore, in deciding the case, applied a doctrine somewhat analogous to that of ademption. It declined to regard the subsidiary stock as part of the original stock, preferring to consider it as an extraordinary dividend, separate and distinct property from the original shares, which might as well have been paid in money.

Taking into consideration the fact that testatrix left no money or other property, except the subsidiary stock, out of which the money legacies provided for in the codicil could be paid, and as these shares were in her possession at the time she made the codicil, although no specific reference therein was made to them, the court were of the opinion that the testatrix must have intended that the subsidiary shares should be used to pay the money legacies, otherwise they would fail, and that the remaining shares should become part of the residuum of her estate and pass to the residuary legatee.

In the course of its opinion the court took occasion to criticise the argument of counsel that the testatrix would not intend the residuary clause to pass a considerable amount of property when the fund at the time of the original making of the will was but a small one, pointing out that the very purpose of a residuary clause is to take care of all of the estate existing at the time of death which is not otherwise specifically disposed of by the provisions of the will.

The leading English case of *Slater v. Slater*\(^2\) presented a statement of facts very similar to that set forth in the particular case. There the will of the testator was made in 1904 and included bequests of stock in certain companies, among others, the “Lambeth Water Works.” There was also a residuary clause. After this will was made and before the death of the testator the Lambeth Water Works, being forced by Act of Parliament to surrender its business to a municipal water company and take in compensation therefor either money or stock, elected to take stock in the Metropolitan Water Board, to which the business was surrendered. This stock was then distributed among the

shareholders of the former company, the testator being credited with
his share amounting in value to about 4,000 pounds, and this stock
stood to his credit on the books of the Lambeth Water Works at the
time of his death. The main question litigated was whether this stock
passed to the person named in the specific bequest or whether it was
included in the residuary fund.

The court considered this question from two points of view, reach-
ing the same conclusion in each instance. It was first held that there
was no stock in the Lambeth Water Works and that therefore nothing
passed under the specific bequest. It was also held that there had been
an ademption of the specific bequest, notwithstanding the change in
the nature of the property was due to an Act of Parliament, the court
stating that the old doctrine that ademption occurred only by inten-
tion of the testator was no longer law, and that ademption now took
place in all cases except where the change was “in name and form
only *** yet substantially the same thing.” 3 In accordance with this
opinion the stock passed not to the beneficiary of the specific bequest,
but to the residuary legatee as a part of the residuum of the estate.
Thus it will be noted that both the English and New York court, pro-
ceeding upon different theories,—the former basing its reasoning some-
what upon ademption, and the latter upon an analogy thereof, laying
particular stress upon the probable intention of the testatrix,—arrived
at the same conclusion, namely, that the subsidiary shares of stock
should not follow the original shares, but should become a part of the
residuum of the estate and pass to the residuary legatee. It may be
stated, however, that in this country, as in England, ademption may
take place without any intention of the testator to this effect.4

To indicate what change will not constitute an ademption reference
may be made to the case of Mellam v. McFie,5 in which a testator made
a specific bequest of “twenty-three of the shares belonging to me in”
a certain company. At the date of making the will be owned 104 origi-
inal 80-pound shares. Subsequently the company was reorganized,
its name changed, and the shares mentioned exchanged for 416 20-
pound shares. The same business, that of banking, was carried on by
the new company. It was held that these were changes in name and
form only, and ninety-two of these new shares passed under the spe-
cific bequest mentioned. It is, of course, clear that this statement of
facts differs materially from that in either the Slater case or the princi-

3 See Oakes v. Oakes, 9 Hare 666.
4 Wycoff v. Perrine, 37 N. J. Eq. 118; Abetrano v. Downs, 70 N. Y. Suppl. 833.
5 1 Ch. Div. 29.
pal case. Here, the new shares were substituted in whole for the old shares, there was a fixed number of shares which could be neither decreased nor increased, and the company did not close its business, but merely changed the management. In the Slater case, the company in which the testator owned shares was forced by Act of Parliament to surrender its business to an entirely different company, while in the principal case, the holding company, in which testatrix owned 30 original shares, disposed of its stock in subsidiary companies by way of a distribution in the nature of a stock dividend.

In the principal case, in support of the view taken by it, that the subsidiary shares were in the nature of an extraordinary dividend, the court referred to the case of Equitable L. A. Society v. U. P. R. R. Co.* In that case it was held that when a corporation retired its bonds by the issue of one share of stock at par for $175 par value of bonds, the $100 par value became part of the capital of the corporation which must be preserved against liabilities, but that the additional $75 received was not capital and could be distributed as extraordinary dividends to holders of the common stock; further, that the holders of preferred stock, who were guaranteed a fixed rate of interest in lieu of sharing in the profits, had no right to any part of such surplus.

Finally, as to the suggestion of counsel in the principal case respecting the considerable amount of property to pass under the residuary clause of the will. The size of a residuary devise or bequest was especially considered in the case of Jewett v. Jewett,* decided in 1900. There it was held that although the whole estate could not be disposed of in a residuary devise, since the words clearly mean a part remaining after some other part is disposed of, nevertheless there was no reason why the residuary devise should not comprise very nearly the whole estate.

F. S. H.

* 212 N. Y. 360.
RECENT CASES.

Attorney and Client — Gratuitous Services — Courtesy of Profession.

Defendant, an attorney who had withdrawn from active practice, sought the services of plaintiffs in certain litigation in which he was involved. After successfully representing defendant, plaintiffs sought to recover on an implied contract the reasonable value of their services. Defendant admitted the allegations of their petition, but, relying upon a custom of the local bar for attorneys, representing each other in matters of litigation, to charge no fees, denied that plaintiffs had any reason to expect compensation. Held, that plaintiffs were entitled to compensation. Thigpen and Harold v. Slattery, 73 Southern 780. (Louisiana. January, 1917.)

The rule of courtesy among the members of the bar agreeably to which each will render services to the other without expectation of reward other than such as may come by way of similar service is not to be strained to meet the demand of one who, having practically withdrawn from the profession and thereby disabled himself from reciprocating in kind, demands the courtesy as an aid to the accumulation of wealth in another pursuit.

J. H. V.

Bankruptcy — Preferences — Agreements Before and After Composition.

In consideration of plaintiff's indorsing his note in order that he might obtain sufficient cash to effect a settlement with his other creditors, defendant, a bankrupt, promised to pay plaintiff's claim in full. The composition was arranged and defendant discharged. After the composition, defendant renewed his promise to plaintiff, but subsequently refused to pay the latter's claim in full. Plaintiff brought suit for the difference between the amount received on the composition and the full amount of his claim. Held, that the bankrupt's promise prior to the composition agreement was fraudulent and void, and that the repetition of the promise after the composition amounted to a reassurance of payment based on the same consideration as the first promise and was, therefore, also void. Lieblein v. George, 160 N. W. 538. (Michigan. December 21, 1916.)

E. J. H.
RECENT CASES.

Death — Action — Beneficiaries — Aliens — Ambassadors and Consuls — Power to Compromise.

Plaintiff's intestate, an alien, was killed by the negligent act of the defendant while crossing, upon a highway, the tracks of defendant. Decedent was a subject of Russia, in which country his family, consisting of a wife and several children, resided at the time of his death. A statute in the particular jurisdiction where this action arose allowed damages, not for an injury to decedent's estate, but for an injury through the loss of him, to the estate of the beneficiaries, who, in this case, under the statute, were the wife and children. Under certain treaties existing between this and other countries, the Imperial Russian Consul General had authority to appear in all proceedings relating to the settlement of the estate of deceased subjects of Russia until the heirs or legal representatives of such deceased subject themselves appeared. Assuming authority under the treaty with Russia to compromise the claim against defendant, the Russian Consul General accepted a sum in full settlement of all claims and demands against defendant for the death of decedent. Held, that the beneficiaries' claim for damages, under the statute creating the right of action for death from negligence, was theirs not by devolution or succession and as a part of the estate of the intestate, but through original and primary ownership, and that the Russian Counsel General did not have the right without judicial proceedings to release defendant from damages arising from the death of decedent. Hamilton v. Erie R. Co., 114 N. E. 399. (New York. November 28, 1916.)

R. M. H.

Insane Persons — Contract With Guardian for Attorney's Services — Liability of Estate.

Plaintiff, an attorney at law, at the instance of the guardian of both the person and estate of an insane person, succeeded, two weeks before the latter's death, in effecting his release from an asylum for the criminally insane. No agreement had been entered into as to plaintiff's compensation. He refused as inadequate a sum offered him by the guardian, and brought suit against decedent's estate for a larger sum as compensation for his services. Held, that, assuming that there was a contract with the guardian for attorney's services in procuring the release of decedent from the asylum, as such contract was not made under authority of the probate court, it was not enforceable against

E. J. H.

**Insurrection — Intoxicating Liquors — Amenability of Military Officer to Civil Suit for Official Act.**

Defendant, a major in command of a detachment of organized militia, was ordered to a State, declared by its governor to be in a state of insurrection, to restore order and civil authority. In the furtherance of his task, defendant issued an order closing all saloons and other places which sold intoxicating liquors, later modifying the order so as to permit the sale of such liquors during specified hours. Plaintiff, the owner of a saloon, disregarding defendant's order, sold intoxicants during the prohibited hours, and thereafter defendant ordered certain of the men under his command to take and destroy plaintiff's stock. Plaintiff instituted suit to recover damages for the loss sustained as the result of said order. *Held*, that, conceding the order prohibiting the sale of intoxicating liquors to be valid, the circumstances of the particular case created no justification for the destructive acts complained of, neither as a penalty for violation of the order, nor on the ground of military necessity, no state of war existing. *Herlihy v. Donohue*, 161 Pac. 164. (Montana. Decided November 10, 1916.)

In this case the subordinate officers who destroyed plaintiff's stock in accordance with defendant's order were joined with the latter as defendants, but the court very properly held that inferior officers, by reason of the necessity of prompt obedience to commands of the superior officers by the military, should not be liable for executing an order valid on its face, and should only be liable for executing an order manifestly illegal or beyond the authority of the superior officer issuing it.

G. E. E.

**Libel and Slander — Business Letters — Publication — Sufficiency — Privilege.**

Appellees brought suit against appellant, a corporation, for libel, alleging that the contents of certain letters written to appellees by appellant were libelous, and that the dictation of the letters by an officer of the corporation to a stenographer was a sufficient publication to render it liable. *Held*, that the letters written by the corporation to appellees, concerning a business transaction existing between them, were privi-
RECENT CASES.

leged, and that, as a corporation can act only through its agents and as the acts of both the officer and the stenographer to whom the letters were dictated, were the acts of the corporation, there was not, in a legal sense a publication of the letters. Cartwright-Caps Co. v. Fishel & Kaufman, 74 Southern 278. (Mississippi. March 5, 1917.)

Where an officer of a corporation, in connection with its business, dictates a libelous letter to a stenographer in the corporation's employment, both being engaged in the performance of duties which their respective employments require, the stenographer is not to be regarded as a third person in the sense that either the dictation or a subsequent reading can be regarded as a publication by the corporation,—the dictation, copying and mailing of the letter constituting but a single act,—the acts of both servants being necessary to make the letter complete. Edmondson v. Birch, 1 B. R. C. 444, 1 K. B. 371; Owen v. J. S Ogilvie Pub. Co., 53 N. Y. Suppl. 1033.

Motor Vehicles--License--Interstate Commerce.

Defendant, a resident of New York, was arrested while driving his automobile on the public highways of New Jersey. He was tried, found guilty and fined under a New Jersey statute providing that no person, resident or non-resident, shall operate an automobile upon a public highway in that State unless he shall have been licensed so to do, and his automobile shall have been registered under the statute, and also that a non-resident owner shall appoint the Secretary of State of New Jersey his attorney upon whom process may be served in any legal proceeding against the owner caused by the operation of his machine within the State. Held, that the movement of motor vehicles over highways, being dangerous to the public and destructive to the highways themselves, is a proper subject of police regulation by the State, that such a power of regulation extends to non-residents as well as residents, and includes the right to exact reasonable compensation for special facilities afforded. Kane v. New Jersey, 242 U. S. 160. (New Jersey. December 4, 1916.)

The defendant contended that the statute in question was invalid as against a non-resident, because it violated the Constitution and laws of the United States regulating interstate commerce, and, in requiring the appointment of the Secretary of State by a non-resident to accept service of process, was discriminatory under the Fourteenth Amendment, denying to a non-resident owner the equal protection of the laws. The
Supreme Court held that it was not unreasonable for the State to attempt to secure observance of its law by establishing, by legal proceedings within the state, the liability of non-resident automobile owners, and that rather than discriminating against and denying to non-resident owners equal protection of the law, it puts them upon an equality with resident owners.

W. B.

Nuisance — Private Nuisance — Injunction.

Plaintiff sought to enjoin defendant from maintaining a nuisance consisting of pig pens immediately adjacent to plaintiff’s premises. Plaintiff purchased his property from defendant, who, at the time, was engaged in raising pigs, for a summer residence. At the trial it was found that the pens were kept in as clean and sanitary condition as could be expected, that there were no odors except those necessarily incident to pig pens, and that the effect of such odors was not such as to materially interfere with the enjoyment of plaintiff’s premises. Held, plaintiff not entitled to have defendant enjoined from raising pigs. Clark v. Wambold, 160 N. W. 1039. (Wisconsin, January 16, 1917.)

L. H. V.

Railroads — Agent — Bill of Lading — Waiver.

Plaintiff brought an action against two railroad companies for damages alleged to have been sustained by reason of the negligence of defendants in unreasonably delaying the transportation of cattle from Illinois to Kentucky. The bill of lading covering the shipment provided that no claim for damages should be allowed unless such claim were filed with the general freight agent of the initial carrier within a specified time after receipt of the shipment, or with some officer or agent of any connecting carrier if the alleged damage occurred on the road of such carrier. It was shown that the connecting carrier delivered the cattle to plaintiff; that before the time allowed for filing claims had expired plaintiff appeared at the office of the connecting carrier and complained of his losses; that the agent of the company inspected the cattle and waived the provision of the contract of carriage calling for the filing of claims within the specified time, advising plaintiff to communicate to him by letter the amount of damage claimed, and that, without any requirement as to time, such letter would constitute a sufficient claim. In view of this plaintiff did not file a formal claim until
after the time specified had expired. The defendant initial carrier filed
a petition for rehearing, contending that the action of the connecting
carrier's agent could not be considered a waiver, as the form of the
bill of lading was drawn up under the provisions of a federal statute and
that the terms of the contract of carriage must be construed to be as
inflexible as the provisions of a statute; that, in the absence of any men-
tion of a waiver in the bill of lading, no valid waiver could be made,
and that even if such waiver could be made, it would not be binding
upon the initial carrier. Held, that the terms of the bill of lading could
not be placed on the same plane as those of a statute; that to lay down
the rule that a party for whose benefit a certain provision in a contract
was inserted would not be free to waive compliance with that provi-
sion would be unreasonable, and would result, in its application, in
much hardship to the other party. B. & O. R. R. Co. v. Leach, 191 S.
W. 310. (Kentucky. January 26, 1917.)

The court further held that the agent of the connecting carrier,
being the agent of the initial carrier for purposes of delivery, was the
agent of both carriers, having authority to waive notice of injury in
accordance with the stipulations of the contract as to the time within
which the claim for damages should be made.

W. B.

SALES — EXPRESS AND IMPLIED WARRANTIES — BREACHES.

Plaintiff purchased seed corn from defendant on the strength of rep-
resentations in the latter's catalogue to the effect that all seeds were
thoroughly tested, that purchasers should be allowed ten days in which
to test the seeds, and if not satisfactory, the price would be refunded.
The catalogue further declared that the seed corn sold was guaranteed,
and that all kernels germinated quickly. Plaintiff did not test the seed
before planting, the crop was a failure, and he sued defendant to re-
cover damages sustained on the theory that, the corn having been
sold for seed, there was an implied warranty that it was suitable for
the purpose for which it was sold. Held, that the defendant, by ex-
pressly warranting the corn to test satisfactorily, limited his warranty
to the results of a test, and by agreeing to refund the purchase money
in case a test did not show satisfactory results, limited his liability to
the amount of the purchase money. Slinger v. Totten, 160 N. W. 1008.
(South Dakota. January 20, 1917.)

Plaintiff was precluded from insisting on an implied warranty under
the well settled rule that an implied warranty arises only when there is no express warranty, and that an express warranty always excludes an implied warranty.

L. H. V.
BOOK REVIEWS.


Professor Tiffany's treatment of the subject of Domestic Relations was so well received as to require a second edition. The well-known plan of the Hornbook Series of prefacing each subdivision of the subject with a concise statement of the law in large type, followed and illustrated by a fuller treatment of each subdivision is adhered to.

The general plan of the author in treating the subject is to thoroughly state the common law followed by a discussion of the numerous statutory changes and the judicial interpretations of such enactments.

The author divides the subject into five parts: Husband and Wife; Parent and Child; Guardian and Ward; Infants, Persons Non-Compos Mentis and Aliens and Master and Servant. He concisely, yet exhaustively, treats each with numerous and well selected cases to illustrate and support the doctrine of the text. Particular attention is paid in the second edition to the treatment of the law with reference to separate property of married women and the extraterritorial effect of divorce.

The work is a distinct contribution to the law of Domestic Relations, valuable not only to the student, but, because of the numerous and well selected references, to the general practitioner as well.

The volume of selected cases on the subject by Professor Cooley, issued by the publishers to accompany the Handbook, renders the treatment of the subject helpful to the student as well as the instructor, whether his method of study or instruction be the lecture or the case book system.

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