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THE POWER OF CONGRESS TO INVESTIGATE THE EXECUTIVE

By Abram F. Myers, '12
Of the District of Columbia Bar

WHEN the Constitutional Convention was engaged in its momentous deliberations in Philadelphia, Montesquieu's celebrated maxim in reference to the separation of the legislative, executive and judicial branches of government was the great democratic slogan. It was exemplified in principle in the constitutions of all the states, and was quoted in some as one of the eternal verities. It is not remarkable, therefore, that the maxim figured so prominently in the debates and that so much time was occupied in giving it practical effect. The only wonder is that there could have been any wide difference of opinion as to the meaning and scope of this clearly expressed doctrine.

Strange as it may seem, this very maxim was invoked against the proposed constitution reported by the Convention. Of course, the maxim, taken literally, could not have been so employed. But men are never at a loss to devise reasons for opposing measures which conflict with their interests. And so the men who opposed a Federal Union attributed to the maxim a meaning at variance with its terms and which the author could not have intended. Instead of a mere separation of the three great branches of government, they argued that the maxim required the complete independence of those branches. According to them, the ideal of the Gascon sage was not a government of three separate parts, but three distinct governments.

1 "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty. . . . Again, there is no liberty, if the judiciary power be not separated from the legislative and executive." Spirit of Laws, Book XI, § 6.
with different powers and functions. Hence the checks against usurpations of power which had been provided as a safeguard against tyranny were assailed as dangerous to the liberty of the people. Shallow as were these contentions, the proponents of the Constitution were compelled vigorously to defend it against the charge that it violated this fundamental law.2

The word "independent," when used in respect of the several branches of the Federal Government, has a somewhat restricted meaning. These branches are separate and distinct and the powers of government have been appropriately distributed among them. To the extent that each draws its authority directly from the Constitution it is, in a very real sense, independent. But in a broader sense, there can be no such absolute independence between them as was imagined by opponents of the Constitution. They together form one complete government and are as indispensable to each other as the three angles of a triangle. In this view, they are interdependent rather than independent. But this interdependence is inherent and is not to any considerable degree enhanced by the barriers against encroachment and abuse of power provided in the Constitution. The framers recognized that it was one thing to make an appropriate distribution of power among the several branches and quite a different thing to maintain the balance between them. It was then an accepted maxim, since vindicated by experience, that power gravitates to the legislature in time of peace and to the executive in time of war. But these necessary checks did not destroy the proper independence of the several branches as integral parts of the same government or belittle the dignity of any of them.

With Congress making the laws and appropriating the funds for their execution, it is not unnatural that Congress should display a lively interest in the manner in which the laws are enforced and the moneys expended. In the discharge of its constitutional function, the Congress is entitled to have, and must receive, information as to the state of affairs in the executive departments. Article II,

2 The Federalist, No. XLVII.
section 3, provides that the President shall from time to
time give to the Congress information of the state of the
union. In the nature of the case, the power must reside
in the Congress, or either house thereof, to compel the
executive to furnish the necessary information on which
to legislate. Moreover, the Congress is vested with the
power to impeach all civil officers, and while no executive
officer is accountable to either house in the way that a
subordinate would be accountable to his superior, never-
theless the conduct of every executive officer is subject to
the scrutiny of the House of Representatives in so far as
the power to impeach necessarily implies the right to scruti-
nize official conduct. To the credit of the executive let it
be said that there have been very few instances of reluc-
tance on its part to furnish the Congress with information
which it was legitimately entitled to receive. The con-
flicts have resulted, for the most part, from departures from
the constitutional scheme by Congress. Of course, the
temptation to overstep the mark is much greater in the
legislative than in the executive branch; the eagerness of
the opposition to embarrass the executive, the desire for
personal notoriety, the feeling entertained by some legis-
lators that the executive is a dependent agency of the legis-
lature—all are contributing causes.

1. The earliest assertions of inquisitorial power took the
form of resolutions calling on the executive for the produc-
tion of papers or for information. In 1796 the House of
Representatives requested President Washington to lay be-
fore it certain papers relating to the negotiation of the
treaty with the King of Great Britain. The President re-
fused the request, pointing out that the assent of the House
is not necessary to the validity of a treaty, and that the
treaty exhibited in itself all the objects requiring legis-
lative provision. "As it is essential to the due administra-
tion of the government," he wrote, "that the boundaries
fixed by the Constitution between the different departments
should be preserved, a just regard to the Constitution and
to the duty of my office * * * forbids a compliance
with your request." ¹ In 1825, the House of Representa-

¹ 1 Messages and Papers of the Presidents, 104.
tives requested that President Monroe transmit certain documents relating to the conduct of certain officers of the Navy. The documents were refused on the ground that it was due the individuals under criticism, and to the character of the government, that they be not censured without just cause, which could not be ascertained until after a thorough and impartial investigation. The President's grounds would have been less clear had the accused individuals been civil officers subject to impeachment. In 1833, the Senate requested President Jackson to communicate to that body a copy of a paper alleged to have been read by him to the heads of the executive departments relating to the removal of deposits of the public funds from the Bank of the United States. Here was a clear case of meddling by a body which did not even possess the power to initiate impeachments. One can picture the temper of the irascible Jackson as he penned the following reply:

"The executive is a coordinate and independent branch of the government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the legislature has a right to require of me an account of any communication, either verbally or in writing, made to the heads of departments acting as a Cabinet Council. As well might I be required to detail to the Senate the free and private conversations I have held with those officers on any subject relating to their duties and my own.

"Feeling my responsibility to the American people, I am willing upon all occasions to explain to them the grounds of my conduct, and I am willing upon all proper occasions to give to either branch of the legislature any information in my possession that can be useful in the appropriate duties confided to them.

"Knowing the constitutional rights of the Senate, I shall be the last man under any circumstances to interfere with them. Knowing those of the executive, I shall at all times endeavor to maintain them agreeably to the provisions of the Constitution and to the solemn oath I have taken to support and defend it.

* 2 Messages and Papers, 278.
"I am constrained, therefore, by a proper sense of my own self-respect and of the rights secured by the Constitution to the executive branch of the government, to decline a compliance with your request."

Nothing daunted, the Senate in 1834 and again in 1835 called on Jackson for certain documents relating to persons who were in nomination before that body. To both of these requests Jackson replied that while he did not concede the right of the Senate to make them, he preferred to submit the documents rather than to expose the persons concerned to improper and injurious imputations. Flushed by these successes, the Senate finally adopted a resolution calling on Jackson to communicate copies of the charges, if any, which might have been made to him against a former surveyor-general who had been removed from office. Here the President was again on firm ground, and he let go with both barrels. "It is now my solemn conviction," he said, "that I ought no longer, from any motive nor in any degree, to yield to these unconstitutional demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the executive." In support of his position, he pointed out that the President, in such cases, possesses the exclusive power of removal from office, and under the sanction of his oath and his liability to impeachment, he is bound to exercise it whenever the public welfare shall require. Abuse of the power from corrupt motives, or otherwise, exposes the President to the same responsibilities. "But," thundered the answer, "on no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution." 

President Tyler had the same experience with the House that Jackson had had with the Senate. While a

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8 Messages and Papers, 36.
9 Messages and Papers, 53; id., 127.
9 Messages and Papers, 132.
more temperate man than Jackson, he was no less rigid in his insistence on the executive prerogative. In 1842, the House passed a resolution requesting the President and the heads of the several departments to communicate to that body the names of such members, if any, of the 26th and 27th Congresses as have been applicants for office, with the details relating to such applications. The request was refused on the ground that, as the appointing power is solely vested in the executive, the House could have no legitimate concern therein.8 During the next year, the House called on President Tyler to communicate the several reports made to the War Department by Lieut. Col. Hitchcock relative to the affairs of the Cherokee Indians. After a lengthy discussion of the matter, the President, from a desire to avoid even the appearance of a desire to suppress the facts, and to prevent an exaggerated estimate of the importance of the information from the mere fact of its being withheld, transmitted the same. He pointed out, however, that his action was purely gratuitous, and he based his right to refuse compliance on the ground of unconstitutional interference with executive discretion rather than upon the ground of exclusive jurisdiction, which, in this instance, did not obtain. He said:

Nor can it be a sound position that all papers, documents and information of every description which may happen by any means to come into the possession of the President or of the heads of the departments must necessarily be subject to the call of the House of Representatives merely because they relate to a subject of the deliberations of the House, although that subject may be within the sphere of its legitimate powers. * * * The executive departments and the citizens of this country have their rights and duties as well as the House of Representatives, and the maxim that the rights of one person or body are to be so exercised as not to impair those of others is applicable in its fullest extent to this question.9

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8 4 Messages and Papers, 105.
9 4 Messages and Papers, 220.
A request of the House, preferred in 1843, for information as to the instructions issued Captain Jones of the Navy, who was charged with having made a warlike invasion of the territories of the Mexican Republic, met with a similar response from President Tyler.\textsuperscript{10}

A request by the Senate for information from President Polk as to what steps had been taken by his predecessor in execution of the resolution of Congress looking to the annexation of Texas, was resisted on the ground that to divulge the information would interfere with proceedings pursuant to the resolution and hence would be incompatible with the public interest.\textsuperscript{11} In 1846, the House requested of President Polk that he cause to be furnished to that body an account of all payments made on President’s certificates from the fund appropriated for the contingent expenses of foreign intercourse during the incumbency of Daniel Webster as Secretary of State. The right of the House to this information was denied in an elaborate reply in which the confidential nature of the expenditures was emphasized and the position taken that the House had not the right to demand the information except in a formal proceeding for impeachment, when its power would be plenary. “If the House of Representatives, as the grand inquest of the nation, should at any time have reason to believe that there has been malversation in office by an improper use or application of the public money by a public officer, and should think proper to institute an inquiry into the matter, all the archives and papers of the executive departments, public or private, would be subject to the inspection and control of a committee of their body and every facility in the power of the executive be afforded to enable them to prosecute the investigation.”\textsuperscript{12}

A remarkable assertion of legislative control of the executive departments occurred in the first Cleveland administration. The President’s party having been so long out of power, there was some haste to make places for the deserving faithful. This irritated the Senate, the com-

\textsuperscript{10} 4 Messages and Papers, 227.
\textsuperscript{11} 4 Messages and Papers, 388.
\textsuperscript{12} 4 Messages and Papers, 434.
plexion of which remained unchanged, and the heads of
departments were bombarded with demands for the rea-
sons for the removal of various officeholders. In 1886, the
Senate adopted a resolution directing the Attorney Gen-
eral to transmit to it all papers in the Department of
Justice “in relation to the management and conduct of the
office of district attorney of the United States for the
southern district of Alabama.” In his reply, the Attorney
General stated that “the President of the United States
directs me to say * * * it is not considered that the
public interests will be promoted by a compliance with
said resolution.” Objection was taken in the Senate to
the statement in the Attorney General’s reply that it was
made by direction of the President. This, it was thought,
 implied that the Attorney General is the servant of the
President, and is to give or withhold documents in his
office according to the will of the executive. The majority
report of the committee appointed to consider the matter
took this narrow view of the question:

The important question then is, whether it is
within the constitutional competence of either House
of Congress to have access to the official papers and
documents in the various public offices of the United
States created by laws enacted by themselves.

And on the recommendation of the majority of the com-
mittee, the Senate passed a resolution which, among other
things, expressed its condemnation of the refusal of the
Attorney General, under any circumstances, to send to the
Senate copies of the papers called for by its resolution, as
in violation of his official duty and subversive of the funda-
mental principles of the government and of the good ad-
ministration thereof.

The President replied in a communication to the Senate,
dated March 1, 1886, in which, after lengthy discussion,
he justified the withholding of the papers on the ground
that they were really the private papers of the President
which he could at any time have withdrawn from the files
of the Department of Justice. But Grover Cleveland was
too good a lawyer to allow to go unchallenged the assertion

13 8 Messages and Papers, 375.
that because the executive departments were created by Congress the latter has any supervisory power over them. The whole question is treated with great ability, and his views are summarized in the following choice example of political repartee:

I do not suppose that "the public offices of the United States" are regulated or controlled in their relations to either House of Congress by the fact that they were "created by laws enacted by themselves." It must be that these instrumentalities were created for the benefit of the people and to answer the general purposes of government under the Constitution and the laws, and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation.14

(2) The foregoing instances are valuable as showing the completeness and accuracy with which the Presidents have defined the respective powers and prerogatives of the legislature and the executive in resisting the unwarranted encroachments of the former. But these resolutions are not "self-executing" as the phrase goes, they have no sanction beyond the great consideration due the dignity of the body adopting them, and no matter how mandatory their terms, are addressed to the discretion of the executive. What are the powers of Congress, or either house thereof, to compel the attendance of witnesses or the production of documents and to inflict punishment for contumacy?

This question was first considered by the Supreme Court in 1821 in the case of Anderson v. Dunn.15 Anderson sued Dunn for false imprisonment, and Dunn justified under a warrant of the House of Representatives directed to him as sergeant-at-arms of that body. The warrant recited that Anderson had been found by the House "guilty of a breach of the privileges of the House, and of a high contempt of the dignity and authority of the same."

14 On the point that the executive departments are integral parts of the executive, and that the official act of the head of such a department is in legal contemplation the act of the President, see Wilcox v. McConnell, 18 Pet. 493, 513; The Confiscation Cases, 20 Wall. 92, 109; Welsey v. Chapman, 101 U. S. 755, 769.
15 6 Wheat. 204.
Anderson’s “high contempt” consisted in attempting to bribe a congressman, although that fact did not appear in the warrant or in the pleadings. The warrant directed the sergeant-at-arms to bring him before the House when, by its order, he was reprimanded by the speaker. The defense of the sergeant-at-arms rested on the broad ground that the House, having found the plaintiff guilty of a contempt, and the speaker, under the order of the House, having issued a warrant for his arrest, that alone was sufficient authority for the defendant to take him into custody.

The court considered the issue simply to be “whether the House of Representatives can take cognizance of contempts committed against themselves under any circumstances.” No such power is given by the Constitution, except when the contempts are committed by members. But the question was resolved in the affirmative upon the doctrine of implied powers. How, otherwise, could the House protect itself from molestation in the discharge of its duties? As regards the power to punish for such contempts, it was held that the House necessarily possessed “the least possible power adequate to the end proposed, which is the power of imprisonment.” As regards the duration of such imprisonment, it was said that the existence of the power that imprisons is indispensable to its continuance; and although the legislative power is perpetual, the legislative body ceases to exist on the moment of its adjournment or periodical dissolution. It was held, therefore, that imprisonment must terminate with adjournment. But the significant and dangerous thing decided was that the House has a general power of punishing for contempt, and that a judgment of contempt once pronounced is binding on the courts and precludes any inquiry as to whether the House exceeded its power.

This ruling stood as the law of the land for almost sixty years, including the most critical times in our history. It is remarkable that during the dark days when passions ran high there was no instance of serious abuse by either house of the unlimited power conceded to it. But in 1880, a case came to the Supreme Court which indicated the
dangerous possibilities of such unrestrained power, and the court wisely modified its former ruling. The House of Representatives had appointed a special committee to investigate a real estate pool in the District of Columbia. This pool, it was charged, was indebted to Jay Cooke & Company, debtors of the United States, who were insolvent and undergoing bankruptcy. The committee was directed to ascertain and report all the facts and was authorized to send for persons and papers. Kilbourne was summoned as a witness, but refused to testify, and under authority of a resolution was placed under arrest by Thompson, the sergeant-at-arms. He thereafter brought his action against Thompson, the Speaker of the House, and the members of the special committee for false imprisonment.

The Supreme Court, rejecting and overruling the reasoning in the opinion in Anderson v. Dunn, held that Congress had no power to examine into the private affairs of the real estate pool, and that the refusal of the witness to testify before the committee did not constitute a contempt of the House, and that there was no ground for the infliction of punishment upon him at its insistence, and that the sergeant-at-arms was not protected from liability by the order of the House directing him to place Kilbourne under arrest. The lengthy and learned opinion of Mr. Justice Miller holds that neither House of Congress has any general power to punish for contempt. The powers exercised by the House of Commons present no analogy, since those powers rest upon principles peculiar to that body and not upon any general rule applicable to all legislative bodies. The powers of Congress must be sought in some express grant in the Constitution, or be found necessary to carry into effect such powers as are there expressed. The power to punish for contempts can not, therefore, exist in a case where the House, attempting to exercise it, invokes its aid in a matter to which its authority does not extend.

The learned Justice admonished the Congress that the Constitution divides the powers of government into three

16 Kilbourne v. Thompson, 103 U. S., 168.
17 The other defendants having taken no part in the matter beyond participating in the proceedings on the floor of the House, they were discharged in view of the provision of the Constitution that "for any speech or debate in either House, the members shall not be questioned in any other place."
departments, and that it is essential to the successful working out of the system that the lines separating those departments shall be clearly defined and closely followed. The subject matter of the investigation, he declared, was judicial not legislative. It was then pending in the proper court. There was, therefore, no power in Congress, or in either House thereof, on the allegation that an insolvent debtor of the United States was interested in a private business partnership, to investigate the affairs of that partnership, and consequently no authority to compel a witness to testify on the subject.

In 1857 Congress enacted a law making it a misdemeanor for any person to fail or refuse to give testimony or produce papers before either House, or any committee of either House, when duly summoned. The act provided that in the event of contumacy on the part of any such witness, the President of the Senate, or the Speaker of the House, as the case may be, shall certify the fact under the seal of the Senate or House to the United States Attorney for the District of Columbia, whose duty it shall be to bring the matter before the grand jury for their action. While the Tariff Act of 1894 was under consideration in the Senate, certain amendments were offered to the sugar schedule the adoption or rejection of which would materially affect the value of the stock of the American Sugar Refining Company. Certain newspapers charged that members of the Senate were yielding to corrupt influences in the consideration of the legislation. The Senate thereupon adopted a resolution reciting in its preamble that the integrity of the Senate had been questioned in a manner calculated to destroy public confidence in the body, and in such respects as might subject the members to censure or expulsion, and providing in its body for the appointment of a committee to investigate the stated charges. The committee called one Chapman, a broker, and questioned him with reference to his dealings with senators. He declined to answer the questions and was indicted under the Act of 1857 and was taken in custody by the marshal of the District of Columbia.

Chapman then filed an original petition for a writ of

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18 Revised Statutes, S. 102-104.
habeas corpus in the Supreme Court of the United States, setting up the alleged unconstitutionality of the act.18 His principal contention was that the reference therein to "any" matter under inquiry rendered the act fatally defective because too broad and unlimited in its extent. But the court held that the statute must be given a sensible construction to avoid absurdity and that the word "any" must be held to refer to "matters within the jurisdiction of the two Houses of Congress, before them for consideration and proper for their action, to questions pertinent thereto, and to facts or papers bearing thereon." In that case, there was no serious question as to the power of the Senate to prosecute the inquiry for the reason that, by the Constitution, the Senate is authorized to "determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member." The court also held that the enactment of the statute did not constitute an unlawful delegation of constitutional powers and did not impair the power of the House in a proper case to punish for contempt. Moreover, it was indicated that under certain circumstances proceedings for contempt and for contumacy under the statute might both be pursued since in that case the same act would be an offense against both jurisdictions, the two being diverso intuito and capable of standing together.

The most interesting and instructive case on the subject is that of Marshall v. Gordon, decided in 1917.20 Marshall was the United States attorney of the Southern District of New York and had conducted a grand jury proceeding resulting in the indictment of a member of Congress. The member charged on the floor of the House that Marshall was guilty of many acts of misfeasance and nonfeasance. At his behest, a resolution was adopted directing the Judiciary Committee to inquire and report concerning the charges in so far as they constituted impeachable offenses. A subcommittee proceeded to New York to take testimony. The grand jury was considering certain charges against the member not included in the indictment already returned.

18 In re Chapman, 166 U. S. 661.
20 243 U. S. 521.
In a daily newspaper, an article appeared charging that the writer was informed that the subcommittee was endeavoring rather to frustrate the action of the grand jury than to investigate the conduct of the district attorney. An effort was made to extort from the writer the name of his informant. The district attorney thereupon addressed to the chairman of the subcommittee a letter avowing that he was the informant referred to in the article, averring that the charges were true, and repeating them with amplifications and embellishments. The letter was what might be termed a “scorcher.”

The Judiciary Committee reported to the House and a select committee was appointed to consider the subject. The district attorney was called before this committee, but was wholly unrepentent. He reasserted the charges made in the letter, averred that they were justified by the circumstances and stated that under the same circumstances they would be made again. Thereupon the select committee reported a resolution reciting that the letter in question tended to bring the House into public contempt and ridicule and that by reason thereof Marshall was guilty of a contempt of the House. Upon the adoption of the resolution, a warrant was issued to Gordon, the sergeant-at-arms, and its execution in New York was followed by an application for discharge on habeas corpus.

Chief Justice White, in one of the masterly opinions for which his memory will ever be revered, held that the power of Congress to punish for contempt does not extend to cases of this kind. He pointed out that the constitutions of Maryland and Massachusetts, in force at the time of the adoption of the Federal Constitution, expressly conferred on the respective legislatures power to punish for contempts only in so far as such power was essential to their self-preservation. The silence of the Federal Constitution on the subject indicates that a like power only is to be implied; that the limitations on the power expressly conferred on the state legislatures apply also to the powers impliedly conferred by the Constitution on the Federal Congress. This power of self-preservation clearly does not extend to the infliction of punishment as such. It is a
power to prevent acts which in and of themselves interfere with or obstruct the discharge of the legislative duty and to compel the doing of those things which are essential to the performance of the legislative function. This does not mean, however, that the authority ceases when the act complained of has been committed. It includes the right to determine how far, from the nature and character of the act, there is necessity for repression to prevent immediate recurrence. The act complained of in the particular case clearly did not fall within the power of the House to punish. The record disclosed that the contempt was deemed to result, not from any obstruction to the performance of the legislative duty, but from the mere writing of the letter. Marshall was accordingly discharged from custody.

The high purpose of the Chief Justice to bring into harmonious relation the apparently conflicting powers of the legislature and the judiciary, his exalted patriotism and divine sense of justice all appear in the following eloquent passage:

"The conclusions which we have stated bring about a concordant operation of all the powers of the legislative and judicial departments of the Government, express or implied, as contemplated by the Constitution. And as this is considered, the reverent thought may not be repressed that the result is due to the wise foresight of the fathers manifested in state constitutions even before the adoption of the Constitution of the United States by which they substituted for the intermingling of the legislative and judicial power to deal with contempt as it existed in the House of Commons a system permitting the dealing with that subject in such a way as to prevent the obstruction of the legislative powers granted and secure their free exertion and yet at the same time not substantially interfere with the great guarantees and limitations concerning the exertion of the power to criminally punish—a beneficent result which additionally arises from the golden silence by which the framers of the Constitu-
tion left the subject to be controlled by the implication of authority resulting from the powers granted."

3. The conclusions to be drawn from the foregoing precedents and authorities may be thus summarized:

Neither Congress as a whole nor either House thereof is vested with any general supervisory power over the President. In the consideration of this matter the head of an executive department may be regarded as an alter ego of the chief executive. The inquisitorial powers of Congress are strictly limited to subjects in regard to which it has a constitutional function to perform. Naturally, the enactment of legislation is the principal business of Congress. In the discharge of that duty Congress is entitled to receive any information in the possession of the executive bearing upon a particular measure. But Congress may not push its demands to a point which would interfere with the performance by the executive of its constitutional duties. The executive is justified, therefore, in resisting any demand when it is believed that compliance therewith would be incompatible with the public interest. The decision of the executive in such a case must necessarily be final. The question would not be justifiable and the infliction of punishment by one coordinate branch upon the other would be wholly repugnant to the constitutional scheme. The executive, no less than Congress, is accountable directly to the people, and ultimate decision in such matters must rest with the electorate.

The case of a subordinate officer of the executive whose contumacy did not have the support of the President would be different. The failure or refusal of such an officer to testify in regard to any subject within the constitutional competence of Congress would call for punishment. Such punishment might be inflicted by the outraged body as for violation of its privilege, or the matter might be referred to the district attorney for presentation to a grand jury. If treated as a contempt, imprisonment may not continue after recalcitrancy has ceased and can never extend beyond adjournment. Review of such conviction may be had on habeas corpus and release effected if it appears that the House in question has exceeded its constitutional authority.
Notwithstanding the broad wording of the statute, a witness may not be prosecuted for contumacy unless committed in the course of an inquiry which the particular body is authorized to conduct.

In the exercise of the power of impeachment the inquisitorial powers of Congress are not limited in the same degree. And in this connection a distinction is to be noted between the powers of the House and Senate. The House is vested with the sole power of impeachment, which is comparable with the presentment of a grand jury. The Senate is the trial body. The House, as the grand inquest of the nation, must have access to all information which will enable it to discharge its high function. The President, or any civil or judicial officer of the United States being charged with an impeachable offense, it is the right and duty of the House fully to investigate. Such investigation may be, and generally is, conducted by a duly authorized committee. The right of an accused officer to refuse information on the ground of incompatibility with the public interest is necessarily narrow. Only in a very clear case could such a claim be allowed; and here, it would seem, the House would be the judge. But such an investigation clearly must be in aid of the impeachment power; at least, the charges under investigation must be of an impeachable nature. Mere disapproval of the policies or acts of the executive will not support the investigation. For acts and policies not impeachable the executive is accountable otherwise than to Congress. Whether a resolution authorizing an investigation must expressly state that the proceeding is one looking to impeachment is an open question.

The Senate not being vested with the power of impeachment clearly is not authorized to investigate the conduct of executive officers. However violently the Senate may disagree with the acts and policies of the executive branch; however urgently the Senate may feel called upon to expose alleged delinquencies and malversations, the fact remains that its province does not extend to those subjects. Though founded upon the plainest principles, the proposition may seem startling, since the prosecution of such inquiries has
long been a popular pastime of the upper House. It sometimes happens that the issue is obscured and color of authority is lent to such proceedings by the claim that the ultimate object is the enactment of remedial legislation; but the real purpose, to exert an unwarranted control over affairs in the executive branch, more often appears. While such inquiries often lead to beneficent results, and the advocates thereof may contend that the end justifies the means, they nevertheless constitute a departure from the constitutional system and must be deprecated by all who are devoted to the orderly processes of government.
WHAT is the status of unlawfully possessed liquor seized under the above circumstances? Has the court authority to order its return, or is it to be regarded as contraband and hence not subject to an order of restitution?

Liquor possessed for use in violating the National Prohibition Act has been accorded a definite status by such act; it has been declared to be without property rights. It is, therefore, in effect contraband, and subject to forfeiture as such by the Government. (See Title II, sec. 25 NPA.)

Federal courts in passing upon cases wherein the question under treatment was involved, have ordered a return of the liquor without, in many instances, even considering provisions of the above-mentioned section of the prohibition act. The fact that the liquor might have had a status which, under existing law, would place it beyond the possibility of ownership by any power other than the Government did not seem to enter into the reasoning upon which these decisions were based. In most of the cases mentioned above, courts have concerned themselves exclusively with the search warrant element, omitting to place the status of the liquor at issue, and having arrived at a conclusion unfavorable to the validity of the warrant in question, ordered restitution of the liquor as a matter of course.

Whenever authorities are cited for such summary disposition of liquor the case of Weeks v. United States (232 U. S. 383); Boyd v. United States (116 U. S. 616); Silverthorne Lumber Co. v. United States (251 U. S. 385); and Gouled v. United States (255 U. S. 298) generally form the foundation for such action. By the above decisions the United States Supreme Court established the doctrine that since unreasonable seizures are prohibited by the Constitution all private property so seized must be returned.

It is difficult to perceive wherein the above cases apply to the question of the return of liquor seized for violation
of the National Prohibition Act. All of the said cases presented situations wherein the articles seized were not contraband or per se suspicious in character, but articles possessed of property rights.

It will be remembered that as stated above liquor unlawfully possessed has no property rights. How, therefore, can it be private property in the same sense with that discussed in the Boyd, etc., cases? How can the aforesaid decisions have any bearing upon the question of its disposition?

The most decisive authority that can be presented in support of a contention is obviously one that can be extracted from the very argument of the opposing forces. Attention is accordingly directed to the Boyd case, the forerunner of all of the above cited authorities. Mr. Justice Bradley, who delivered the opinion of the court in the above mentioned case, was most careful to distinguish between property of a private nature and property to which the Government has a possessory right.

"The search and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid payment thereof are totally different things," said Justice Bradley, "from a search for and seizure of a man's private papers for the purpose of obtaining information therein contained, or using them as evidence against him. The two things differ toto coelo. In the one case the Government is entitled to the possession of the property; in the other it is not." (Italics ours.)

The line of demarcation drawn by Justice Bradley is clear cut. It excludes the Boyd, Weeks, etc., cases, all of which apply to private property, as authorities governing the disposition of liquor seized for violation of the Prohibition Act. If such liquor is lawfully possessed the status of privacy attaches and it should be returned if the seizure was an unlawful one. Attention in the latter connection is, however, directed to the following provision of the Prohibition Act (Title II, sec. 33):

"and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."
The National Prohibition Act, as heretofore stated, makes possession of intoxicating liquor, under all except certain permitted circumstances, unlawful, designating it in such event to be without property rights, and, in effect, contraband. The court should determine whether the liquor or substance before it was unlawfully acquired, possessed and used. United States attorneys should see to it that forfeiture proceedings are instituted upon seizure of liquor so that the Government may have an opportunity immediately to place the status of the seized material at issue. Forfeiture proceedings afford the claimant ample opportunity to appear in court and prove the bona fide of his claim of ownership.

The object of the fourth amendment of the Constitution of the United States, upon which the doctrine enunciated by the Boyd, Weeks, etc., cases is based, was to protect the citizen from domestic disturbance by the disorderly intrusion of administrative officials. Such official misconduct is expressly prohibited by the amendment and both a civil and criminal action is implied against the erring officers. As far as prohibition is concerned, action and punishment against an agent making an unreasonable search is expressly provided for in the Act Supplemental to the National Prohibition Act.

So far as the phraseology of the above mentioned amendment is concerned, nothing is said regarding the nature of the documents or chattels possessed by the citizen, and certainly the merits of an article or substance for the recovery of which the claimant sets up a right to a remedial process should be brought into issue. Suppose, to borrow an illustration used by Prof. Wigmore in his article upon the subject under discussion published in the American Bar Association Journal, that officers engaged in an illegal search came across an infernal machine, designed and planned for the city's destruction, and impounded it, should its creator and owner be permitted to appear in court, brazenly demand process for its return, and be graciously accorded a writ of restitution, so that he might recover possession of his diabolical instrument and proceed to blow the city off the map?
The infernal machine, the counterfeiting tools, and liquor unlawfully possessed are all in the same category. So far as their possessory status is concerned, the law has declared them outlawed, without property rights, contraband. It is difficult to perceive, therefore, the applicability of the Boyd, Weeks, etc., doctrine to the question of the disposition of unlawfully seized liquors.

"Whether the search warrant is valid or not is not the determining factor in the case," said the United States Circuit Court of Appeals for the Third Circuit in its opinion rendered in connection with the case of Hawker v. Queck, the facts of which were briefly as follows:

Albert Queck ran a hotel and saloon business, using the premises only in part for such purposes. Liquor was taken therefrom by a prohibition agent under authority of a search warrant. Queck died before trial. The information filed against him was subsequently nol prossed. His executor, Elmer Queck, later petitioned for the return of the liquor seized as described above. This petition was granted by the District Court which held the search warrant invalid. The order of the latter tribunal was, however, overruled by the Circuit Court of Appeals as cited above.

"If he legally possessed such liquor when it was taken from him his estate is entitled to its return, whatever the means of seizure may have been; if otherwise, having no legal title to the same rule is to be dismissed. * * * That a person may lawfully possess liquor where such was lawfully acquired, prior to the effective date of the National Prohibition Act is not doubted. * * * On the other hand, it is equally clear that no property rights exist in intoxicating liquor fit for beverage purposes acquired subsequent to the effective date of such act. * * * No man can have any property right in contraband liquor. As soon as it comes into existence it is forfeited." Eldor v. Moss (278 Fed. 123-129). (Italics ours.)
Judge Westenhaver, in rendering the opinion in *United States v. O'Dowd* (273 Fed. 600), referred to liquor seized under the circumstances under discussion as “like stolen property. No title or property in it can exist in the defendant.”

The United States Circuit Court of Appeals, Seventh Circuit, in the celebrated case of *Haywood v. United States* (268 Fed. 803), had the following to say relative to the return of unlawfully seized property:

“Not all searches and seizures are forbidden. Consider first the character of the property that may be seized. It has never been deemed unreasonable to hunt for and take stolen property, smuggled goods, implements of crime, and the like. Inasmuch as the documents in question were the tools by means of which the defendants were committing the felonies, there was no immunity in the nature of the property.”

Again, in the case of *Elrod v. Moss* (278 Fed. 129), the Circuit Court of Appeals, this time for the Fourth Circuit, distinguished between private property unlawfully seized and property to be regarded as contraband.

“The provisions of Federal and state constitutions forbidding unreasonable searches must be construed in the light of the constitutional provision against the sale, manufacture, and transportation of intoxicating liquors,” said the court. “No man can have any right of property in contraband liquor, or any right to transport it. As soon as it comes into existence it is forfeited. * * * In warrants for search and seizure of stolen goods *particularity of description is necessary to the protection of the citizen from the seizure of other goods of the same general character, his lawful property. The protection of the rights of the accused does not require that the constitution be construed to exact the same degree of particularity of description in search warrants for contraband liquors, because there is no right of property in contraband liquor, and hence there can be no danger to the citizen
of being deprived of property which he is lawfully entitled to hold against the state.” (Italics ours.)

Attention is also directed to a statement made by Judge Loman in his opinion delivered in the case of United States v. Catherine Ashworth, which was tried in the District Court for the Territory of Alaska, second division, on June 23, 1923:

“The defendant does not claim any ownership or interest in the intoxicating liquor seized or the containers thereof. Both under the Volstead Act and the Bone Dry Law such property is forfeited to the United States as soon as it comes into existence, and neither the facts stated in the petition for the return of the property, nor the invalidity of the search warrant would entitle the defendant to a return of the property. * * * Nor, can we follow the decisions which hold that intoxicating liquors, forfeited to the United States the moment of their existence, can be held, when seized and introduced in evidence, to come within the purview of the Fifth Amendment, under the rule that ‘no person shall be compelled to be a witness against himself in a criminal action.’ Such evidence has no relation to the defendant except as an instrument or ingredient of the crime, and such evidence, to that extent, ‘speaks for itself,’ and cannot be said to be a part of the testimony of the defendant, or ‘testimonial compulsion.’” (Italics ours.)

State courts, with but few exceptions, have refused to recognize the Boyd, Weeks, Silverthorne Lumber Company and Gouled decisions as authority for the return of unlawfully seized contraband liquor.

The Supreme Court of Ohio, in the case of Mike Rosani v. State (reported Jan. 8, 1923), referred to the present day wholesale invocation of constitutional rights by liquor violators in the following language:

“There has been a great deal of misguided sentiment foisted upon a patient people during these latter days about the constitutional rights and privileges of crimi-
nal classes. If all the doctrines which are being urged by attorneys representing liquor law violators should be adopted by the courts as the true interpretation of our sacred bill of rights, it would no longer be recognized as a charter of government and as a guaranty of protection of the weak against the aggressions of the strong, but rather as a charter of unbridled license and a certificate of character to the criminal classes."

State courts carefully differentiate between intoxicating liquors which are the corpus delicti and in which the law declares no property rights shall exist when possessed or used in violation of the law, and property or papers possessing evidential character only. This distinction is clearly brought out in a recent California case, that of People v. Mayor (205 Pacific), where the court said:

"But it does not seem to us that if the article illegally seized was something in which the suspect could have no right or property, its possession was unlawful, and it constituted in fact, as was said in the case of Comm. v. Dana (Mass.), the corpus delicti, it should not be returned or destroyed. Whether the article seized is or is not of such character could be determined in the 'collateral' proceeding before the trial. * * * In none of the United States Supreme Court cases was the article taken ordered to be destroyed, and in all of them the articles ordered to be returned were the property of the accused. * * * It will be noted that in the Amos case (255 U. S. 313), the whiskey was described as the private property of the defendant, and it came within the ruling of the preceding Federal cases. The indictment was not for the unlawful possession of the liquor, as in the present case."

"Liquor is not lawful property and is not the subject of larceny," said the court in People v. Spencer (201 Pac. 130), "and hence it is not burglary to enter a building with intent to take therefrom liquor manufactured for unlawful sale after the enactment of the Volstead Act." (Italics ours.)
Again in South Dakota where the Supreme Court in the case of City of Sioux Falls v. Walser (187 N.W., 821) presented its views as follows:

“There is a wide distinction between the seizure of property lawfully in the possession of a person and the seizure of property which is being held and used in violation of law, and in and to which property, because of such violation of law, the person in possession can claim no property rights.”

The Court of Criminal Appeals of Texas in the case of Welchek v. State (247 W. 524, 525) said:

“The cases of Boyd v. United States, 116 U. S. 616, 6 Sup. Ct., 524, 29 L. Ed. 746, and Weeks v. New York, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A., 1915 B, 834, Ann. Cas. 1915 C 1177, and Gouled v. United States, 255 U. S. 298, 41 Sup. Ct. 261, 65 L. Ed. 647, go no further than to decide that in Federal practice private papers of the accused obtained by Federal officers by search and seizure without warrant will, upon motion made, be returned to the owner, and that testimony relative thereto be rejected or suppressed. In our judgment, there is nothing involved in the instant case upon principle analogous to any of the cases named. * * * We can see no possible parity or analogy of principle existing between the law governing the taking of private papers, the undeniable property of the owner, and the law governing a case in which the article seized is intoxicating liquor in which no property right inures under the express laws of this state. The case of Amos v. United States, 255 U. S. 313, 41 Sup. Ct. 266, 65 L. Ed. 654, advances no reasons applicable to a prosecution under out state laws and procedure, but, inasmuch as the subject-matter of that decision is similar to that of the case now before us, we respectfully state that we think the opinion in said case rests upon a misapprehension of the purpose of the Fourth Amendment to the Federal Constitution which is substantially the same as section 9, article 1, of our state constitution, and that the learned court
was not justified in applying to the decision of the facts before it in the Amos Case, supra, the principles announced in the Weeks and Boyd Cases, supra. This court can in no event follow such an extension of the principle involved in said cases as appears in the attempted application thereof in the Amos Case, supra."

See also *State v. Simmons* (110 S. E. 591); *Banks v. State* (93 So. 293); *Pasch v. People* (209 Pac. 639).

A recapitulation of authorities discussed above, both Federal and State, indicate a clear unanimity upon one point, namely, that contraband liquor, that is, liquor possessed for use in violation of the National Prohibition Act, is without property rights, and hence not controlled by the doctrine established by the United States Supreme Court in the Boyd, Weeks, Gouled and Silverthorne Lumber Company opinions, all of which have reference to seized articles susceptible of ownership. A return of intoxicating liquor used for violation of the prohibition act would, therefore, in view of the above circumstances, appear to be without authority of law.

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THE ACTION OF DEBT

CHARLES A. KEIGWIN

PART II

THE NATURE OF THE OBLIGATION

As we have seen, a real action asserts the plaintiff's right to the res; it does not go for damages as reparation for a tort, nor does it proceed upon any promise of the defendant to give up the property sued for. The action of Debt retains this characteristic of its original, and is an essentially proprietary proceeding. In either case, the thing sought—a parcel of land, a sum of money, a body of goods—is demanded because it belongs to the plaintiff and is wrongfully withheld from him. In Debt, therefore, some kind of title must be shown as the ground of the action, and the plaintiff's right to recover must stand clear of any claim based upon a tort and independent of any promise, or what we should call a contract, on the part of the defendant.

Now, a man may be entitled to something in the possession of another in either of two predicaments. The article may have originally been the property of the demandant and he may reclaim it in virtue of a previously vested title; as in the case of a bailment or a tortious taking. Or the thing may have been the property of the present possessor, but by reason of supervening facts he may be so affected that he ought, debet, to render it to the other person, who has become entitled to have it; of which case the forfeiture before instanced may serve as an illustration. The ground, then, upon which a thing—land or personality—is demanded may be either the plaintiff's prior title in the thing, a jus in re, or the plaintiff's right to have the thing, a jus ad rem.

Whether in the original real actions a jus ad rem was valid title to sue upon, and if so how far, we need not trouble now to inquire. In the personal action as at first
defined, and which on the best authority we name Debt-
Detinue, both forms of title were available: the plaintiff
might recover either because the money or the goods were
his or because in some way he had acquired a right to
demand them—they were wrongfully deforced from him.
In more mature differentiation there was developed a dis-
tinction between things originally in the possession and
ownership of the plaintiff, and afterwards coming into the
possession of the defendant, and things which the plaintiff
had never owned or had but to which he had become en-
titled by reason of some recent occurrence. Accordingly,
the parent action divided into two forms: Detinue for
goods subject to the plaintiff’s previously vested title, his
\textit{jus in re}; and Debt for goods—including money—which
he had a right to demand in virtue of an accruing title, a
\textit{jus ad rem}.

Debt for goods not pecuniary may be briefly disposed of.
Theoretically such an action may still be brought upon an
executed contract whereby the plaintiff has become entitled
to a certain quantity of specified merchandise; the last
instance of so suing which I have found was in 1828, where
the plaintiff demanded as a debt a certain number of fishes
claimed as due him by way of toll for the use by the fishing
boats of a capstan maintained on the shore by the plain-
tiff.\footnote{Earl of Falmouth v. George, 5 Bingham, 286. A slightly earlier case of the same
case was by the Earl of Falmouth v. Penrose, 6 B. & C. 385. A still
earlier instance of this action was Mayor v. Clarke, 4 B. & Ald. 268.}
In his use of the action there was no averment that
the defendant \textit{debit}, but only that he \textit{detinet}; where it was
called Debt in the \textit{detinet}. Sir William Blackstone, writing
in 1769, declared that this form of Debt was “neither
more nor less than a mere writ of Detinue,” insisting that
nothing but money can be a debt; and some American
cases have quoted and accepted this dogmatic assertion.\footnote{3 Bl. Com. 158; Watson v. McNairy, 1 Bibb. 356; Mix v. Nettleton, 29 Ill. 246.}
As a matter of historical fact, however, Detinue and Debt
for goods have always been distinct, the former lying for
goods previously the property of the plaintiff, and going
upon his \textit{jus in re}, while Debt in the \textit{detinet} went for a
body of goods to which, as to a sum of money, the plaintiff was entitled, proceeding upon his *jus ad rem.*

Here we need concern ourselves only with that use of Debt wherein money is sought, Debt in the *debit et detinet.* This form of action, like the real action from which it is descended, seeks the recovery of a sum of money in virtue of a right thereto accruing to the plaintiff by reason of the defendant's legal duty to pay that specific sum—going upon a *jus ad rem* of the plaintiff.

In order, therefore, to succeed in the action of Debt, the plaintiff must show in himself a right to the thing demanded; and this right must arise from some matter which is not a promise or other form of voluntary assumption—in other words, it must be independent of what we now call a contractual obligation. Such a matter, creating in one person a right to something possessed by another, was called in the ancient law, a *causa debendi,* a ground of indebtedness, a basis of the duty to deliver, the origin of an obligation to pay. Of such a matter we may again cite as an example the fact of a forfeiture, an occurrence which divests the offender of his anterior title to the article for-

22 "Save for obscure hints in Bracton [ca. 1250] and Fleta [ca. 1290], there seems to be no reference to this division [between Debt and Detinue] in the early legal writers, though it appears as well established in the Year Books of Edward 1. It was based, not as often said on the distinction between money and chattels, but apparently on that between obligation and property. Detinue was an action for the recovery of money or chattels of which the plaintiff had the ownership; Debt for the recovery of money or chattels over which the plaintiff's right was merely in *persona.*" Salmond, History of Contract, 3 Law Quarterly Review, 166. In 1841, Maule, J., said: "Debt will lie not only for money but for specific things: as in The Earl of Falmouth v. George, 5 Bing. 286, where it was held that Debt lay for the toll of fish in *specie*; and if the action had also been for certain specific fish, there can be no doubt that Detinue might have been joined with Debt": Walker v. Needham, 3 M. & Gr. 557.

23 Where one of the original parties has died, the averment is, not that the defendant *debit et detinet,* but only that he *detinet;* so that in this case also the form of the action in Debt in the *detinet.* These distinctions in respect to the word *debit* were held substantial as late as 1619: Reynell v. Langcastle, Cro. Jac. 545. After the Stat. 4 Anne (1705) an error in this matter of wording was available only on special demurrer: Childress v. Emory, 8 Whtn. 642, citing several English cases. By Mr. Chitty's time an improper insertion of *debit* was disregarded as surplusage and so not the subject of even special demurrer; 1 Chitty Pl. 284, Note b.

24 "It enters no one's head that a promise is the ground of this action. No pleader propounding such an action will think of beginning his declaration with 'whereas the defendant promised to pay,' he will begin with 'whereas the plaintiff lent or (as the case may) sold or leased to the defendant.' In short, he will mention some *causa debendi,* and that cause will not be a promise": 2 P. & M. Hist. Eng. Law 212.
feited and clothes the informer with the right to demand it as accruing to himself—the *jus ad rem* of the latter being correlative to the other party's duty to pay.

Suppose now, for the sake of another example, that in a certain action the plaintiff proves that he and the defendant entered into an agreement—or, as we now say, a contract—for the exchange of their chattels, whereby the plaintiff engaged to sell his horse to the defendant for two oxen of the latter; that the plaintiff has delivered his horse, which is now in the having and use of the defendant; and that the defendant refuses to deliver the oxen, but still has them in his possession. Manifestly, the plaintiff is entitled to the oxen; but why? Because, as we should feel first prompted to say, the defendant has promised to deliver them, has made a valid contract obligating him to such delivery. But when the action of Debt attained its maturity, a parol promise was of no legal obligation; and if our plaintiff had sued only upon the promise, and shown no more than what we call the contract, he would have been told that he deserved to lose his horse for his folly in trusting to another man's word, and would have been chidden for vexing the court with a matter of mere morality wholly without the domain of the law—or, in presently current phrase, not justiciable.

But if the complete case were stated, another and a legally efficient element would appear. The defendant has gotten the plaintiff's property and is benefited at the expense of the latter. In point of elementary ethics one who profits by the act of another ought, *debit* to make to that other equivalent benefit, to render compensation commensurate with the emolument. To this extent the law is moral; it recognizes this duty to render adequate return for what one gets of another's property. But not, let us remark, upon any theory that men should be made to perform their promises; such a consummation of jurisprudence would have impressed the mediaeval judiciary as an iridescent dream—we know those judges might say, from Holy Writ, confirmed by worldly experience, that all men are liars; and if once mere mendacity, like a broken promise, were recognized as justiciable in the secular courts, we should
undertake a hopeless grapple with all the measureless sin of humanity. But in the case now in contemplation, the defendant has received the plaintiff’s horse, and is the richer thereby; he ought, debet, to make correspondent enrichment to the plaintiff—to render quid pro quo, something to balance the thing obtained; the oxen are the designated equivalent of the horse, the proper pointed quid for the plaintiff’s executed benefit; to these the plaintiff is entitled and they are to become his property, to the extent at least of a jus ad rem; and this property the defendant must deliver to the plaintiff because it is his. Even the most secular of courts may safely enforce the duty suum cuique tribuere; indeed, the civil courts exist primarily to enforce property rights, to redress the wrongful occupancy of property.

Some such course of reasoning may be ascribed to the ancient judges. If the effect of a completed transaction is to vest in one person the right to property held by another, and to charge the latter with a duty to surrender it, the jus ad rem of the former is a title which may be asserted in an action of Debt. And we may generalize to this effect; where an agreement—or as we now say, a simple contract—has been executed on one side in such wise as to inure to the emolument of the other party, that emolument creates a duty to render equivalent benefit, engenders an element of oughtness, which may be taken as an example of causa debendi.

These causae debendi, perhaps at first not very distinctly defined in professional thought, were ultimately, as the law crystallized, recognized as referable to three sources, records, specialties and the execution of what we now call simply contracts. Although a statute is a record, it is customary for convenient consideration to distinguish between statutes and other records; and so we say that the action of Debt lies upon statutes, records, specialties and simple contracts.

I. Where a statute prescribes that one person shall be entitled to demand an article or a sum of money from another, the latter is manifestly under a legal duty to deliver the article or to pay the sum. In such a case, the statute
itself, or the statute cooperating with some state of facts in the legislative contemplation, is readily recognizable as a causa debendi.

II. The judgment of a court of record runs in a formulary of immemorial use, “it is considered that the plaintiff do have and recover of the defendant so much money or such an article.” The phraseology imports, not that the plaintiff is to acquire a new possession, but that he is to recover, regain, or get back, what is already his. The underlying theory is a demonstrated title, which makes it the duty of the defendant to restore the thing sued for:—the payment of money, if that is recovered, is in the discharge of an obligation suum cuique tribuere. When, now, action is brought on such a judgment, the proceeding is manifestly one to enforce something which the defendant ought, debet, to do: the judgment is a causa debendi, a source of oughtness.

III. A specialty may take either of two forms: it may declare an indebtedness as an existing fact, or it may embody a purpose to pay money in the future. Thus, a bond acknowledges that the obligor is indebted to the obligee. Of course, such a condition may result from a great diversity of antecedent facts; and it is possible that there is in truth no existing debt at all, but only the present assumption of an obligation to pay. But, whatever be the fact, the obligor is estopped by the solemnity of sealing to deny his admission of indebtedness. It is, therefore, of no consequence how he became indebted, and it would not alter the case if it should prove that the bond was actually but a voluntary promise. As the specialty is conclusive evidence of a preexisting causa debendi, there is no reason to inquire what that cause was or how the duty accrued.

In this and in the preceding cases mentioned, the obligation of the debtor manifestly stands clear of anything like what we should call a contract. In the instances of the statute and the judgment, not only is the indebtedness independent of any promise or voluntary assumption, but the obligation is usually created contrary to the debtor’s wish and intention. The bond may or may not be of
promissory origin; but in either case the obligation is due not to a promise but to the solemn estoppel.

Where a specialty embodies an engagement to do something in future—and for the present purpose we consider only an assurance of money to be paid—it seems to our modern minds that the duty is created by a promise; and it does not readily occur to us that there is any causa debendi upon which the creditor might recover independently of the expressly assumed obligation.

An inherent difference no doubt exists between title in a thing and a right to a thing. The distinction seems to us obvious, if not indeed necessary; and it is certainly desirable that in our present-day treatment of legal subjects the dichotomy should not be lost or ignored. Yet there is reason to believe that the recognition of the two things as distinct is the result of a gradual clarification of ideas which came only with slowly maturing reflection. It would seem that in the mediaeval modes of thought, the difference between a man's title to a thing which he had always owned and his right to a thing to which he had become entitled was, if not obscure, at least not necessary to be insisted upon. As we have seen the action of Debt-Detinue, which persisted long before its fission, combined if it did not confuse recovery based upon jus in re with recovery upon jus ad rem.

Suppose, now, that our ancestors in the law thought of an undertaking to deliver an article or to pay a sum of money, in the future—especially such an engagement when clothed with the solemnities of a grant—as equivalent in legal effect to a transfer of the title, a transfer to become operative when the time designated should arrive or the contingency specified should occur. That is hardly, if at all, different from what we ourselves do in the contemporary law of sales, as in Tarling v. Baxter, Rohde v. Thwaites, and many other cases which readily recur to recent students of that subject; when the event occurs whereon the title is to pass, the buyer may maintain Trover, Detinue, or Replevin for the goods, and the seller may sue in Debt or General Assumpsit for the price. So a statute which enacts that so many acres of public land shall be granted to a certain person becomes a completed grant when the
land is selected, and does not remain executory until some further act to perfect the title.36 And, so lately as 1914, the Supreme Court of the United States, holding that a contract to pay a fee from a fund to be recovered gave the promisee a vested title to his share upon the recovery, said:

“But in a speculation of this sort the parties naturally turned their eyes toward the future and aimed at the fruits when they should be gained. They therefore used words of contract rather than of conveyance; but the important thing is, not whether they use the present or the future tense, but the scope of the contract. It is an ancient principle, even of the common law, that words of covenant may be construed as a grant when they concern a present right.” 37

At any rate, the moulders of the mediaeval law found no difficulty in thinking of a promise to pay in future as a present grant of the amount to be paid, a grant which made the amount a debt, a thing debitum in praesenti solvendum in futuro—which phraseology is not unfamiliar to ears of our own time. The covenant to pay, what we should call a contract by specialty, was not known as a contract, but as a grant; and its promissory feature, which to us seems its dominant characteristic, was lost in the conception of the instrument as a presently operating conveyance of title.

When, therefore, action was brought upon a specialty obligating the defendant to a future payment, the plaintiff did not sue to enforce performance of an executory engagement, but to recover a specific sum to which the title had become vested in him; he sought, not damages for breach of an executory promise, but possession of an identical res, demanded as the proper object of a real action, one which had been made his property by the antecedent grant.

IV. When we read in the books that Debt lies for any sum certain due upon any simple contract, we must take the dogma as so worded with an important allowance for the vicissitudes of our vocabulary. It is manifest that many simple contracts—as we understand contracts—do not, when unperformed, result in emolument to either party

36 Rutherford v. Greene's Heirs, 2 Whtn. 196.
and do not fix in either the right to demand any specific property in the possession of the other. If, for instance, I refuse to accept goods which I have contracted to buy, it cannot be said that I have gotten something of the vendor’s by which I am enriched and for which a duty to render equivalent may be predicated. In such cases it is impossible to discover anything which can be called a *causa debendi*.

When, therefore, it is laid down that Debt lies upon any simple contract, this venerable conventionality of legal speech is not only perplexing to those who study law in current phraseology but apt to mislead the learner, as it has occasionally misled more learned courts. Let us then distinguish between contracts and contracts, and say that upon some simple contracts this action may be maintained, upon others not so. We observe that—in a terminology of recent, if not altogether of contemporary, acceptance—a contract may be executory or executed. In the two cases, if both are broken, the right of the aggrieved parties to redress rests upon essentially diverse grounds. If I agree to buy goods but refuse to take them when tendered, the disappointed vendor may justly hold me liable for any loss he has sustained by the breaking of my promise to accept and pay for the goods. But that is because solely of my promise, and not at all because I have gotten anything of his for which I ought to make equivalent recompense. This right is to recover proper damages for the wrong done to him; but such damages do not represent any thing of value coming from him to me, and usually bear little or no proportion to the worth of the goods bargained for. It is evident that here his only hold upon me is the promise. If, now, I accept the goods but fail to pay for them, the seller’s position, both in morals and in modern law, is palpably much stronger. Here as before is a broken promise; and for that, as before, I am liable in damages. But there is an additional ground—and another form—of responsibility: I have the man’s property, and for that, as a matter of manifest morality, I ought to pay. And this latter obligation is, be it observed, wholly independent of the promise—or as we say, the contract to pay—and would
operate with equal efficacy if I had made no promise at all—as if I had gotten the goods by finding, by mistake, by larceny.

Now, let us remember that in the not very ancient law a parol promise created no legal obligation, and gave to the promisee no right of action for a breach thereof. It was not until about four hundred years ago that my vendor could, if I refused to take his goods, make me pay him for his loss of profit. But at no time would the old law suffer a buyer, or anybody else, to take another person's property and not compensate for it. On the contrary, in accordance with a conception to be presently the subject of closer consideration, the acceptance of goods, or of any other means of emolument, was held to constitute a causa debendi, upon which would lie the action of Debt. And it was this kind of a contract—these contracts executed to the benefit of the defendant—which supported the action.

And it was only this kind of contract to which the name of contract was given at all, what we call—or I have called—an executory contract was, when it was of sufficient solemnity to be recognized, denominated a grant, a convention, or an obligation, but never until quite modern days a contract. Within the memory of men still living it was not uncommon to find in judicial deliverances this antithetical aphorism, “Debt lies on the contract, Assumpsit on the promise.” In Comyn's Digest, written about 1740, and published in 1762 after the author's death, it is laid down that “Debt lies upon every contract in deed or in law”; and the instance given to illustrate the doctrine is a use of the action to recover a statutory penalty, the unlawful act being the contract. So in 1677, in the fourth section of the Statute of Frauds, provision is made concerning, not any contract for the sale of lands, but any contract or sale of lands, apparently distinguishing between an executed transaction and an executory agreement. Not to multiply examples of this ancient usage, let us fix in our minds a case decided in 1630, which will serve both to demonstrate what was until lately understood by a contract and also to impress us with a very significant limitation of the action of Debt which is due to this distinction.
Sands v. Trevilian, Croke’s Car. 193, was case wherein Sands requested Trevilian, an attorney, to defend a friend of Sands, one Worlich, who had been sued in the Common Pleas, and Sands promised to pay the attorney’s fees for the service. Thevilian did as he was desired; Worlich failed to pay him; and Sands refused to do so; whereupon Trevilian sued Sands in Debt upon the engagement of the latter.

“But all the court conceived that no action of Debt lies here, but an action upon the case only [id est Assumpsit]: for the retainer being for another man, and he being attorney for another man who agreed to that retainer, there is no cause of debt between him who retained and the attorney, and no contract nor consideration to ground this action: and he who is so retained may well have debt for his fees against him for whom he was retained... but against the defendant, who is a stranger to the suit, and at whose request he took upon him to be attorney, Debt lies not.”

The moral deducible from this case is two fold: first, in the speech of the early 1600’s, a contract was only what we should call an executed contract, some accomplished transaction or fact the effect of which was an emolument moving from one party to the other—as here from the attorney to his client; and, second, a debt was the result only of such emolument, and could not be created by a promise, though it were a promise to pay a debt chargeable to another than the promisor. The only contract was the rendition by Trevilian of valuable service to Worlich; this created a debt due from Worlich, because it imposed upon him a duty to make recompense for what he had gotten. But there was no contract between Trevilian and Sands, for the latter had not benefited by the services of the former: as to Sands no causa debendi existed, but only an assumpsit, an undertaking or promise unconnected with any emolument to the promisor—a promise for the breach of which damages might be recovered, but of which the breach did not fix upon Sands the obligation to render any specific sum.

Having in mind the limitation of the term contract to transactions operating to transfer something of value from
one party to the other, we are prepared to discern how Debt is applicable in such a case. The meritorious performance of the plaintiff produces an enrichment of the defendant, and this advantage so gained is a causa debendi, a thing for which the recipient ought, debet, to render a correspondent recompense, a quid pro quo. This compensatory quid in the actual or assumed possession of the defendant is held by him subject to the obligation to render it to the plaintiff, and is conceived as specific sum of money, an identifiable res to which the plaintiff has a fixed jus, and which therefore is recoverable as in a real action.

In the light of the same definition, we may also discern what is meant by saying that Debt lies upon a contract, Assumpsit upon a promise. Where there is a contract in the sense of that term as here limited, there is an executed transaction which involves meritorious performance by one party to the benefit of the other. In any such case there may be a promise to pay for what the recipient obtains, perhaps in most instances such a promise is made somewhere in the course of dealing. But the action of Debt does not go upon the promise, though there be one, and could not be maintained if there were only a promise without the meritorious action of the plaintiff. In the comparatively modern development of the law, as we are hereafter to learn, the action of Assumpsit was enlarged in its scope, and made available as a means to recover damages for the breach of a parol engagement; and in a transaction involving the sale of goods, the loan of money, the rendition of services or other passage of value to the defendant, for which he has promised to pay, the plaintiff may sue in Assumpsit upon that promise. Therefore, the two forms are frequently concurrent, while Assumpsit lies in many circumstances upon promises where there are no debts. But in the situation where both may be used, the theory of each is distinct from that of the other. Assumpsit goes for damages sought by way of reparation for the wrongful breaking of a promise; Debt lies upon the contract, the fact which makes emolument to the defendant; it goes to recover the equivalent of the benefit inuring to the defendant; and it proceeds, not upon any promise or other engagement of the defendant to pay, but independently of
any such possible promise, and solely upon the moral obligation of the recipient to make commensurate recompense for the advantage he has obtained.

Whence it follows that Debt can not be maintained except where something of value has gone to the defendant for which the plaintiff is entitled to credit. The ground of recovery is always some deserving action of the plaintiff, and never as in Assumpsit some delinquency of the defendant. Such delinquency, say a broken promise, may exist and appear in the cause; but Debt can not succeed if a promise must be disclosed as a necessary basis of recovery. Thus upon an unsealed policy of insurance against fire, Debt cannot be sustained for the loss; the destruction of the building is no means of emolument to the insurer; and the liability rests upon no other ground than the assumption of risk made by the policy.38 So in the case of a wager, the winner has done nothing whereby the loser is enriched; the sole remedy, therefore, if the law recognizes any remedy in a case, is by an action upon the promise. Again, for a breach of warranty Debt can not be used, since the defect or default which constitutes the breach is not a source of profit to the warrantor. And in the case before put of a refusal to accept goods bargained for,39 or in the cognate case of a failure to deliver bought goods to the vendee, there being nothing of value proceeding to the defaulting party, there is no debt, no causa debendi making it his duty to pay; but in such circumstances the remedy must be by Assumpsit to recover damages for the breaking of a promise.

It follows also that Debt lies not upon a collateral contract. The plaintiff lends money or sells goods to A. upon the engagement of B. to be responsible for the price. Here is a debt created against the recipient of the value, and as to him an abundant causa debendi; and it is plain that he may be sued in Debt. As against the surety, however, there is no causa debendi at all; he is under no moral obli-

38 Hersey v. Ins. Co., 75 Vt. 441.
39 Atkinson v. Bell, 8 B. & C. 277; a case of Indebitatus Assumpsit, wherein a debt must be shown as consideration for the promise imputed by the law to the defendant; the plaintiff failed because he could not show a transfer of title to the defendant which would constitute a debt, but only the breach of a promise to accept the goods, for which his remedy was by special Assumpsit.
gation arising from emolument obtained. His sole liability results from his promise, which does not impart any profit to himself. If the promise is upon proper consideration and clothed with the requisite formalities, Assumpsit goes against him for his failure to keep that promise. But, if one should bring Debt upon such a collateral engagement, one is met by the unanswerable objection that the borrower or the vendee who got the money or the goods is the debtor, and the same fact cannot create two debts.\(^40\) Even a promise under seal to pay the debt of another will not support this form of action; the only debt is that of the principal debtor, and a covenant to pay it will not make it recoverable as a debt of the covenantor.\(^41\) And although one may promise—by a writing not under seal—to pay a sum of money which the promisor declares to be a debt of his own, an action of Debt upon the contract may be defeated if the defendant proves that he did not owe the money but only guaranteed the debt of another.\(^42\)

The nature of the obligation to pay what is justly due on account of an executed contract it is not difficult to perceive. How and why the amount due should be conceived as a corporeal chattel and made recoverable as a res in the real action of Debt may not be so clear to the vision of our day. What has heretofore been said upon the psychological processes of our ancestors ought, however, to go far toward enabling us to see as they did. The underlying idea seems to have been that, in exchange for what passes from the lender or the vendor, the equivalent price or value which is, or ought to be, in the possession of the borrower or vendee becomes ipso facto the property of him who has parted with his former property. Our money in bank, if not the identical cash we deposited, is at least an equal amount in currency which we naturally conceive as lying somewhere in the banking house and awaiting reclamation. As said by Pollock and Maitland:

“\text{The bold crudity of archaic thought equates the repay-}
ment of an equivalent sum of money to the restitution of specific land or goods. To all appearances, our ancestors could not conceive credit in any other form. The claimant of a debt asks for what is his own. * * * The gulf that we see between mutuum and commodatum is slurred. If we would rethink the thoughts of our forefathers, we must hold that the action of Debt is proprietary.” 43

So in 1441, Fortescue, C. J., thus laid down the law:

“If I buy a horse of you, the property is straightway in me; and for this you shall have a writ of Debt for the money and I shall have Detinue for the horse on this bargain.” 44

Very mediaeval this sounds, and it looks very like the bold crudity of archaic thought. Yet in 1916, a year not yet gone into ancient history, Holmes, J., in the Supreme Court of the United States thus reproduced the same conception.

“When a man sells a horse, what he does from the point of view of the law is to transfer a right; and a right, being regarded by the law as a thing, even though a res incorporeal is, it is not illogical to apply the same rule to a debt that would be applied to a horse.” 45

To summarize on this point; a meritorious consideration moving from the plaintiff to the defendant and inuring to the emolument of the latter imposes upon the defendant a moral obligation to render an equivalent; this equivalent is conceived as in the debtor’s possession but transmuted by the transaction of the plaintiff’s property; and this conceptional pecuniary entity is so far individualized and made concrete that it is thought of as a specific res, recover-able eo nomine et in numeso by an action of Debt.

44 Y. B. 20 Henry 6, 85.
MOST book reviewers seem to be animated with the feeling that a review will not be accepted as judicious and discriminative, unless something at least of criticism of the work reviewed appears.

It was rather remarkable that when the first edition of what is popularly known as “Wigmore on Evidence” appeared in 1904, there was only a modicum of criticism of any merit. Such as it was referred mostly to incidentals. “When we come to the subject matter,” said one reviewer, in the Harvard Law Review, “we find it admirable in every way. The historical discussions are illuminating, the statement of doctrine is clear and sufficiently precise, and the argument is always enlightening and usually convincing.

This is unquestionably one of the most important treatises on a legal subject published during the last generation. It is hardly too much to say that this is the most complete and exhaustive treatise on a single branch of our law that has ever been written.”

The first edition has had the practical test applied of nearly twenty years of use by judge and practitioner, professor and student. No greater tribute to it could be paid than the ever-increasing reference to and quotation of it by the highest courts, including the Supreme Court of the United States. Canada and Great Britain also have not been wanting in their citations.

The new edition just recently issued presents these impressive results of detailed reference labor: The inclusion of some 800 new citations of statutes after reviewing the revisions, which have taken place in all of the states and territories since the first edition, except two or three, of their Codes and Compilations, making a total citation from statutes approximating 15,000; the addition of nearly 15,000 citations from judicial decisions, making a total of about 55,000 from this source. “Use has been made,” says
the author, "of the two invaluable series of trial reports recently added to our annals—the Notable British Trials series and the American State Trials series." The revised title with the added adjective, "Anglo-American," is at once appropriate and justified.

A few of the new topics treated of, and most of whose baptismal names are as modern as the events giving them birth, are as follows:

- Rules of Evidence Before Industrial, Public Utilities and Other Administrative Officials;
- Rules of Evidence in Juvenile and Commercial Courts;
- Rules of Evidence in Social Case-work;
- Altering the Rules of Evidence by Contract;
- Fingerprints and Foot Marks;
- Information Obtained by Dictagraph;
- Moving Picture Photographs in Evidence;
- "Sweat Box" and "Third Degree" Interrogation;
- Evidence Obtained by Illegal Search for Liquor;
- Privilege Against Self-Crimination for Books and Reports of Druggists, Motorists, &c.;
- Privilege for Business Reports of Taxes, Industrial Accidents, &c.;
- Same for Physician's Certificates of Death;
- Burden of Proof of Ownership of Automobile.

The author asserts that every word of the text has been scrutinized; that alteration has been made in nearly every section.

However, that better world and its thoroughly perfect works might be thought to have come down to earth and the helpful striving after the attainment of the unattainable might suffer anaesthesia could no lapse be found in those things here seemingly approaching perfection. So, let us in passing point to one at any rate in Wigmore. In his first edition, Prof. Wigmore in his treatment of the burden of proof in will contests, when the issue is as to the sanity of the testator, took the position, contrary to that of, perhaps, most other writers on evidence, that the proponent of the will, according to the "general" holding of the authorities, has the burden of proof, as distinguished
from the burden of procedure—"the risk of non-persuasion when the case goes to the jury"—on this issue. In his second edition he presents section 2500 intact as in the first edition beginning with: "It seems to be generally conceded that the burden of proof as to a testator's sanity is on the proponent of the will, &c.," and the section bears evidence of having had reconsideration by virtue of matter from the notes of the first edition being added to the text in the second and by the citation of a number of later decisions in the notes. Among these decisions Leach vs. Burr, 188 U. S. 510, is cited again, as in the first edition, and, properly as a Supreme Court opinion, as the first listed U. S. decision under this section of his text. Yet the Supreme Court of the United States in Brosnan vs. Brosnan, decided in November of this year, took particular occasion to point out that Leach vs. Burr specifically held the burden of proof mentioned on such an issue to be upon the party alleging insanity—the caveator, contestant, or plaintiff, as he is variously designated.

"The questions as to the burden of proof under a caveat challenging the mental capacity of the testator, before or after the probate of a will," says Justice Sanford in the opinion delivered in Brosnan vs. Brosnan, "have given rise to much conflict of opinion in different jurisdictions."

* * * "This is a specific decision (referring to Leach vs. Burr) that in the District of Columbia under a caveat filed in opposition to the probate of a will the burden of proof on an issue as to the mental capacity of the testator is upon the caveator."

* * * Apart from any question of pleading as to the burden of allegation, this rule as to the burden of proof rests upon the ancient presumption in reference to sanity. Higgins vs. Carlton, 28 Maryland 115. And viewed from a practical rather than an academic standpoint it gives effective weight to the presumption of the testator's sanity and obviates the difficulty which would arise if such presumption were treated as one which merely established a prima facie case in favor of the proponent of the will but did not relieve him from the ultimate burden of persuasion on the question of the testator's mental capacity, involving a nice distinction tending to confusion in a jury trial. And for
this reason, as well as upon the principle of stare decisis, we have no disposition to modify or change the law of the District as settled in Leach vs. Burr.

It is true that Prof. Wigmore uses the adjective, "general," and not the adjectives, "uniform" or "unanimous," and that he does not list the case of Leach vs. Burr otherwise than in a general list as pertinent to the section of the text, yet considered in connection with the treatment in section 2502, and the failure to list such other later cases in his notes as one in Kentucky, Gernert vs. Straeffers, Extr 172 S. W. 1044, which specifically, also, placed the burden on the contestant on such an issue, it would appear at least as inaccurate treatment, particularly when the conflict of authority on the proposition is seemingly properly characterized by the Supreme Court as being much.

However, equally much is it true that, as Prof. Chafee states in a recent reference in the Harvard Law Review to Prof. Wigmore's first edition that, perhaps, no work on law is really making law and good law to the extent that Wigmore on Evidence is doing, as shown by its influence on the courts generally and more and more in the conclusions given forth by their opinions.

Dean Wigmore is veritably one never content with "following the rivers, but seeks the springs from which rivers flow." History and logic will be found here. Equally, too, psychology, dialectics, satirical and constructive criticism, and philosophy and even prophecy. He tells you what the law of evidence was and is and what it ought to be. As for the law of evidence, these five volumes constitute both a pantheon and succedaneum.

The amount of energy, research and painstaking labor involved in the production of a work of this kind impresses one in going through its pages as colossal, and the versatility and brilliancy evident at the turn of every page more and more impel the conviction that he who has written here writes the scintillating and penetrating thoughts of a genius.

There may never be surpassed the charm of style of Greenleaf or the convincing and satisfying expression of statement of Thayer, but as for Wigmore he is unequalled
for depth of thought, tireless, all-pervasive detail of research, keenness of logic, warmth of reason and all-inclusive exposition of abstract and concrete rule of law, when these are combined.

The first edition of Wigmore was awarded the Ames prize before its publication. On the twenty-fifth anniversary of his professorship, a few years since, leading authors, teachers and jurists from all over the world joined in what became known as the Wigmore Celebration, paying tribute to his masterliness of mind and to his superb service to the legal profession. The legal essays contributed to the event by learned men from London to Peking; from Edinburgh to Cairo on the subjects of Theory and Philosophy of Law; Comparative Law; Criminology; Legal Education; Legislation; Analytical Jurisprudence; Legal History; International Law; Public and Private Law, covered a wide range, it has been said, but, as said further, for that very reason they were most appropriate, "since Prof. Wigmore in his remarkably active and productive career has on his part made valuable contributions to all these great fields of legal research with, perhaps, not more than one exception as to the whole list."

The covers of the five volumes of the new edition of Wigmore on Evidence inclose a veritable law-book Coliseum of Vespasian for history, logic, philosophy, psychology, satire and staid, ponderous, forceful law to parade, disport, assert and prove themselves with a grace and charm and skill and convincing impressiveness indescribable.

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NOTES AND COMMENTS

CORPORATIONS: POWER OF MAJORITY STOCKHOLDERS TO DISPOSE OF CORPORATE PROPERTY.

While the management of the general business and policy of a corporation is entrusted to the majority stockholders,¹ and, as stated by Judge Wallace,² "it can not be denied that minority stockholders are bound hand and foot to the majority in all matters of legitimate administration of the corporate affairs"; it is well settled that this power can not be used in such a manner as to oppress the minority, or change or destroy the original purposes of the corporation.* Where this is attempted to be done, the courts will interfere, upon the application of the minority; and the present tendency is to recognize in an ever greater degree the rights of the minority against the majority. As stated in one case:* "This devolution of unlimited power imposes on * * * a majority of the stock a correlative duty—the duty of a fiduciary or agent to the holders of the minority of the stock who can act only through him, the duty to exercise good faith, care and diligence to make the property of the corporation produce the largest

amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property. Any sale of the property of the corporation by him to himself for less than he could obtain for it from another, or any other act in his interest to the detriment of the minority of the stock, becomes a breach of duty and of trust, renders the sale or act voidable at the election of the minority stockholders, and invokes plenary relief from a court of chancery."

But although a court of equity is ready to interfere whenever actual fraud or breach of trust is proven, no relief will be afforded unless a case is made out which plainly shows that the action of the majority "is so far opposed to the true interests of the corporation as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interest, but that he must have acted with the intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests."¹

An interesting question has often arisen when an attempt has been made by those in control of a corporation, to put an end to the corporation by selling or otherwise disposing of all of its property. This question first arose in the case of Abbot v. American Hard Rubber Co.,¹ which is a leading authority on the subject. In that case a majority of the trustees of a business corporation, without the consent of some of the stockholders, transferred all its personal property to two persons, who at once caused another corporation to be formed, and transferred the property to it. It was held that, as such transfer practically terminated the corporation by taking from it the power to fulfill the object of its organization, it was a violation of that object, not within the power of the trustees, and hence ultra vires and void.

This case has been followed by the courts of most of the states; and it is now settled beyond any possible doubt, that, in the absence of statutory or charter provisions, neither the directors nor the majority of the stockholders of a prosperous, going concern, have any authority, as against the protest of even a single stockholder, to dispose of all of the corporate property or so much thereof as will prevent the continuance of the business.¹ The theory upon which this ruling is based is that the majority interests, in so controlling the corporate powers as to defeat the corporate purposes, are betraying a trust imposed upon them to exercise their power for the benefit of the corporation itself.

The doctrine has often been applied in cases where the sale was to another corporation, stock of the latter being taken in payment, to

be distributed among the shareholders of the selling corporation. The same rule prevents a lease, as well as a sale, of the corporate property.

But while this rule is no longer disputed in the case of a prosperous, going corporation, it is equally well settled that the majority stockholders of a company established for manufacturing or trading purposes may wind up its affairs and dispose of its assets, even against the objection of the minority stockholders, whenever it appears that the business can no longer be advantageously carried on. As stated by the Iowa court: "It is unquestionably true that a private corporation holds its property as a trust fund for the stockholders, and that, when a majority of the stockholders act together, they are in a sense the corporation, and must act with due regard to the right of the minority. If the majority decide arbitrarily, and without just cause, to sell the property of the corporation to the prejudice of the minority, and thereby compel the winding up of the business of the corporation, it is a fraud on the minority, and courts of equity will interfere. If, however, just cause exists for selling the property, as when the corporation is insolvent, and the sale is necessary to pay debts, or where, from any cause, the business is a failure, and an unprofitable one, and the best interests of all require it, the majority have clearly power to order the sale, and in such case their acts are not ultra vires."

Such a power, it has been said, to dispose of all the property of a losing corporation, "is in furtherance of the purpose of the corporation, and arises ex necessitate. When the further prosecution of the business of the corporation would be unprofitable, it is the duty, as well as the right, of the majority to dispose of its property and take action towards the liquidation of its affairs."

So it has been held that when the corporation is without capital or means of obtaining it, or the term for which it was formed is at an end, or the further prosecution of business would be unprofitable, or the company is insolvent or incapable otherwise of paying its debts, the property may be distributed among the shareholders.
debts, or where the plant has been operated at a loss and there is no prospect of improved conditions, the majority stockholders may dispose of the property in spite of the protests of the minority.

This question as to the right of the majority stockholders to dispose of the assets of a corporation received careful consideration by the Supreme Court of Washington in the recent case of Cardiff v. Johnson, decided on September 14, 1923. In this case the facts were, briefly, as follows: The plaintiff and the three defendants were the sole stockholders of the Washington Dehydrated Food Company, a corporation organized in 1918 for the purpose of operating an evaporating plant. The venture was not profitable; a heavy loss was sustained in 1919 as a result of the large quantities of surplus goods turned back upon the market by the government after the war; and all that was done in 1920 was to dispose of the stocks accumulated during the previous year. No evaporating was done, the buildings being used only for storage purposes. In 1921 the company, having become indebted in excess of $100,000, ceased operations and turned the entire plant over to the plaintiff at an annual rental scarcely sufficient to pay for the taxes and upkeep of the property. There were no incumbrances on the property, the debt being represented by notes maturing on August 4, 1922, and endorsed by the defendant stockholders. In the spring of that year, the holders of the notes notified the company that the debt must be paid when due. There were no assets with which to meet the indebtedness except the plant itself; and after several unsuccessful attempts to dispose of the property, Johnson, one of the defendants, entered into an arrangement with the Perham Fruit Company, whereby the latter was to purchase the building and other real estate for $30,000. At meetings of the stockholders and board of trustees called for the purpose, 75 per cent of the stock and four of the five trustees voted to ratify this agreement. The plaintiff voted, both as a shareholder and as a director, against the ratification, and brought this action to enjoin the execution of the contract.

The court, however, held that the sale should be sustained. In its opinion the court recognized the general rule as stated above, that "neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition." But, the court said, this case was distinguished from those cited in support of the proposition by the fact that in those cases the corporation was a solvent, going concern. "Here the concern appeared not to be a going concern, and had not been for about two years. While it was solvent in the sense that its current obligations had been paid off,

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12 218 Pac. 269.
yet its credit was largely sustained by the indorsement of the indebtedness owing to it by the appellants. The outstanding fact is that it was not a going concern. It had been unsuccessful from shortly after the time it was organized until the time of the sale."

But even when the corporation is insolvent, this qualification must be placed on the right of the majority stockholders to dispose of the corporation's property and thus wind up its business: they must act in good faith. If they act oppressively, or if they purchase the property for themselves at an inadequate price, or otherwise act against the interests of the corporation, the transaction will not be permitted to stand. And even though the corporation is actually insolvent, if the purpose is not the bona fide winding up of its business, but is the continuance thereof in another corporation, a dissenting stockholder may interfere and prevent the sale.

The courts are generally agreed that the majority stockholders can not take advantage of their position to purchase the property of the corporation for themselves at a low price and to the detriment of the interests of the minority; and it has been held that a purchase by a majority stockholder from the corporation may be set aside, even when made at a fair price, if that price is less than could be obtained from some other purchaser. The question most frequently arises when the sale is made to another corporation whose stock is owned by the majority shareholders of the selling company, for the purpose, usually, of squeezing out the minority, or otherwise obtaining an advantage for themselves at the expense of the corporation or the minority stockholders.

In the principal case under consideration, the court distinguished these cases, holding that under such circumstances the sale could not be upheld; saying: "We do not think that a sale of the corporate property for a grossly inadequate price by a majority of the stockholders or by a majority of the trustees, where any secret interest or advantage was retained or obtained by them to the disadvantage of the minority stockholders, should ever be permitted over the protest of the minority stockholders. Nor do we think that a sale of all or the principal part of the capital assets of a manufacturing or trading corporation, without the consent and against the protests of a minority stockholder, and in disregard of his rights, to the majority

18 Cardiff v. Johnson, 218 Pac. 269 (Wash.).
stockholders themselves, should ever be sustained. We do not con-
sider this to be any such case."

The rule forbidding a sale of corporate property without the unani-
mous consent of the stockholders is sometimes made inapplicable by
statutory or charter provisions giving such a right either to the
officers or to a majority of the shareholders; and where a sale or
transfer is made in good faith and in compliance with the terms of
such a provision, it is valid.26 Where a corporation is authorized
by its charter to buy, sell and deal in lands, it may sell its entire
property, although not insolvent, and notwithstanding the dissent of
individual stockholders; for such a sale is not contrary to the pur-
pose for which the corporation was formed and is but fulfilling one
of its objects.29

The reasons for legislation authorizing sales by the majority is the
injustice to the great bulk of the stockholders which frequently
results from the ability of, perhaps, the owner of a single share to
prevent the corporation from disposing of its property on terms
deemed advantageous by the rest. But even under these statutes,
the sale must be made in good faith, and if fraudulent, equity will
give relief. The majority will not be permitted to so exercise their
power as to oppress the minority; nor will they be permitted to sell
the property to themselves and deprive the minority of the just
proceeds of the sale.31

—H. C. B.

ELECTRICITY—LIABILITY FOR FALLING WIRES AND POLES
IN CITY STREETS.

The case of Loomis v. Toledo Rys. and Light Co.,1 recently decided
by the Supreme Court of Ohio, is interesting as an exposition of the
liability in tort of public utility corporations following their locating
electric pole lines in city streets. The syllabus for the case reads:
"Where the proof raises a probability that the fall of such poles and
wires was caused by a *vis major*, a presumption of negligence does
not arise. In such case the plaintiff must sustain his specific alle-
gations of negligence by a preponderance of the evidence."

The case was decided on March 6, 1923, Justice Wanamaker dis-
senting. The facts, as reported in the Northeastern Reporter, may
be summarized as follows:

The action was for personal injuries; a general verdict was re-
turned for the defendant, the railways and light company, and a

26 Metcalfe v. American School Furniture Co., 122 Fed. 115; Union Trust Co. v.
St. Rep. 1024.
29 Lang v. Reservation Min. & Smelting Co., 48 Wash. 167, 93 Pac. 208; Maben v.
1 140 N. E. 639.
NOTES AND COMMENTS

judgment entered. On error to the Court of Appeals, the judgment of the common-pleas was affirmed; whereupon proceedings in error were instituted in the Supreme Court, and that court affirmed the judgment.

In his petition for damages the plaintiff alleged that on the afternoon of March 28, 1920, he was driving his automobile on Summit St., a public thoroughfare in the city of Toledo; that about midway between certain street intersections, two poles and the attaching wire of the defendant fell upon his automobile and damaged it to the extent of $421.72. It was further alleged that the defendant company maintained these poles and wires, and electric current of high voltage was conducted over them; that the defendant was careless of the safety of those using the public thoroughfare in that it negligently maintained such poles and wires; and that the poles were rotten, decayed and in an unsafe condition.

The defendant, answering, admitted that it owned the wires and poles, and that they fell as alleged; but it denied that the falling of the poles was due to any negligence on its part. The defendant alleged that at the time stated in the petition there occurred a severe wind and rain storm "of an unusual and extraordinary character, and of such severity that it caused the wires and poles to fall as aforesaid, without notice or warning to this defendant and without the possibility of this defendant doing anything to avoid or prevent any damage which may have been occasioned thereby; that said storm * * * was an act of God for which this defendant is not responsible."

The affirmative allegations of the defendant characterizing the storm as unusual, extraordinary and an act of God, were denied by the plaintiff. The case went to trial before a jury on the two main issues; whether the falling of the poles was due to their being negligently maintained by the defendant in a decayed and unsafe condition; or due to an extraordinary storm, resulting from an act of God. There was conflict in the evidence on both issues.

Relating to the character of the storm, the testimony of the chief of the Toledo weather bureau, called as a witness by the plaintiff, is noteworthy. He produced the records of the bureau to show that the wind velocity at the time when the poles fell was 51 miles an hour; that during the ten-year period immediately preceding there were not 15 days when that velocity was attained or exceeded; and that during two of those years there was not one day in which that velocity was attained or exceeded. Asked for an opinion, he said the storm was "above the ordinary."

In its general charge the court confined the plaintiff's recovery to proof of negligence in maintaining poles that were rotten, decayed or not of sufficient strength; and charged the jury that mere proof of the falling of the poles was not sufficient to entitle the plaintiff to a recovery; but that if ordinary care had not been used by the defendant under the circumstances, then the plaintiff could recover.

On the issue, act of God, the court said: "When damages result by
reason of the happening of an event or series of events, which are inevitable, or where the damage is the result of an inevitable or unavoidable accident, without the intervention of the human agency of negligence, then there can be no recovery of damages from the resultant injury. In other words, where damage results from the happening of extraordinary floods, storms, or fires, or other events of such an unusual nature, or of such severity that human foresight could not or would not reasonably anticipate as would probably occur, the event is classed in law as an act of God; and if the damages resulting are due solely to such an event, there is then in law no right of recovery." The trial judge refused a request of the plaintiff to apply the doctrine of *res ipsa loquitur*. The rulings of the trial judge were affirmed by the Supreme Court on appeal.

The foregoing report of this case, at perhaps unnecessary length, has, it is hoped, served to illustrate the principles which it is the object of these notes to bring out. It seems clear, so far as this case is representative, that no extraordinary liability in tort accrues from the maintenance of pole lines in the public streets by public utility companies, either as though such use of the highways were a special privilege or an intrusion, or as though such structures imposed an unreasonable hazard upon those who travel the highways affected. There is an initial presumption of negligence when the line breaks down, which is dissipated by proof of due care, or by evidence tending to show conditions amounting to *vis major*. The case of Loomis v. Toledo Rys. & Light Co. is in accord with the settled law of this subject, as a review of the leading cases will show.

The syllabus for the case of Borell v. Cumberland Telegraph & Telephone Co. reads: "In an action against an electric light company

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* But, while the owner of the wires is liable only in case of negligence on his part, he is, of course held to a high degree of care. As said in Walter V. Baltimore Electric Co., 109 Md. 515, 71 Atl. 955, 22 L. R. A. (N. S.) 1178, "the courts agree that, outside of any contractual relation, the very nature of the business of transmitting such currents along highways imposes upon those engaged in it the legal duty to exercise, for the protection of all persons lawfully using the highways, the high degree of care commensurate with the danger incident to the proximity thereto of the wires charged with their invisible but deadly power"; citing numerous cases, including Western U. Teleg. Co. v. State, 32 Md. 293, 33 Atl. 763, 31 L. R. A. 572, 51 Am. St. Rep. 464; Brown v. Edison Electric Illuminating Co., 90 Md. 400, 45 Atl. 132, 46 L. R. A. 745, 78 Am. St. Rep. 442; Newark Electric Light & P. Co. v. Ruddy, 62 N. J. L. 505, 41 Atl. 712, 57 L. R. A. 624; Mangan v. Louisville Electric Light Co., 122 Ky. 476, 91 S. W. 763, 6 L. R. A. (N. S.) 459.


* Borell v. Cumberland Telegraph & Telephone Co., 135 La. 630, 63 So. 247.
for injuries from its wires being brought in contact with telephone wires by a storm, the burden is on the plaintiff to prove either that the poles were rotten, or the insulation defective, or that the company was guilty of laches in discovering that the wires were down, or in shutting off the electricity after making such discovery."

In the case of Rocap v. Bell Telephone Co., it was held that a telephone company is not liable for injury to a patron by lightning when he is attempting to use a telephone during a thunderstorm, when it has equipped the line with the most effective device known for the prevention of such accidents, and the device is in good order at the time of the injury.

In the absence of vis major, res ipsa loquitur applies, if the circumstances require it; not otherwise. In a West Virginia case in which the question of liability for fallen wires was involved, the court said: "Suppose there is no evidence of negligence on the part of the defendant, does not the mere fact that the wire fell create a prima facie presumption of negligence, sufficient, in the absence of something appearing in the case to repel that presumption, to support the action? This involves the rule or principle of res ipsa loquitur, —the thing speaks for itself. A wire charged with a deadly current of electricity falls from its proper place of elevation above the street to the surface of the street, and there, by contact with a man lawfully passing along the highway, kills him with its current. Are we to presume that its fall came from some negligence of the owner, unless the circumstances of the case of facts shown by him shall show that its fall is not attributable to his negligence, but from some defect which that reasonable care and prudence proper in the case of such deadly wire was unable to discover, or some accident beyond his control; in other words, from inevitable accident? I answer that the law raises a prima facie presumption of negligence. But juries must understand that this presumption is by no means final or conclusive. Uniformly careful, prudent management, commensurate with the dangerous character of the works, adequate to the safety of the public, in the absence of specific neglect connected with the accident, will repel such presumption. We must not forget that misfortunes do occur from inevitable accident. A wire may have some defect which the most astute care will not discern. A wire originally good may come to be defective, and break, when no human skill could detect its defect. Time and wear deteriorate man and all the means and instruments he uses to gain a living. Paralysis and failure may come upon them at any moment. Whether there is culpable blame is a question for a fair-minded jury under all the circumstances."

1 230 Pa. 597, 36 L. R. A. (N. S.) —.


*Snyder v. Wheeling Electrical Co., supra.
In Brown v. Consolidated Light, Power & Ice Co., the rule was laid down that in an action for the death of plaintiff's husband by coming in contact with a broken telephone wire heavily charged with electricity and hanging about five feet above the sidewalk, the proof of such facts was sufficient to require the defendant to show that it was free from negligence. In Boyd v. Portland General Electric Co., it was held that an electric light company is not relieved from liability for damage by wires broken by a storm, unless it was one which could not reasonably have been anticipated. And the syllabus for the case of Gannon v. Laclede Gaslight Co. reads: "An allegation in a suit for damages for injuries caused by a live wire grounded in a public alley, that its owner permitted it to become broken and remain down a long time, when it knew or ought to have known its condition, does not shift the burden of proof as to care of the wire from defendant to plaintiff."

It may be fairly deduced from all the cases bearing on the subject that the law, in the absence of statutes, regards the use of the streets for maintaining electric pole lines by public utility corporations as reasonable and proper. There is nothing in any of the cases opposed to the reasonable view that the use of the public highways for the transmission of electricity is as natural a function of these avenues as is the movement of other commodities. The underground conduit is a better and safer vehicle for the transmission of electricity; but the use of pole lines for this purpose, for reasons of economy, is generally approved, at least for the present.

—J. V. W.

NEGLIGENCE—NEGLIGENCE OF DRIVER OF AUTOMOBILE NOT IMPUTED TO GUEST.

A guest in an automobile is ordinarily not affected by any negligence of the owner or driver in connection with the operation of the automobile. However, where several parties use an automobile in a joint enterprise, the negligence of one is imputed to each of the others—but in the absence of any relation of master and servant or principal and agent, there can be no imputed negligence. This is the substance of the rule announced in the case of Myers v. Southern Pacific Company, et al, 218 Pac. 284, in which the plaintiff and another accepted the invitation of Torry to ride in his (Torry's) automobile to the home of a relative of the plaintiff's to attend a party to which all three were invited. Torry, unaided, drove the car, and in conjunction with negligence on his part and established negligence on the part of the defendant, the plaintiff was injured.

The facts above cited bring under review and discussion the several legal concepts surrounding imputable negligence, joint enterprise, and the measure of negligence exercised by an act or failure to act.

10 145 Mo. App. 718, 109 S. W. 1032.
11 37 Or. 567, 52 L. R. A. 509, and 41 Or. 336, 68 Pac. 810.
12 146 Mo. 502, 45 L. R. A. 505.
on the part of a guest which of itself precludes such invitee from recovering for injuries sustained as the result of admitted negligence of another. In the absence of any negligence, direct or imputed, the plaintiff is entitled, in the instant case, to recover.

The consideration of the principles involved in these primary doctrines is essential to an understanding of the general rule hereinabove given, of which they constitute elements. Necessarily if these identical elements are permitted to have several meanings and variations in scope and context, the rule containing them as descriptive prerequisites is quite as changeable as its component parts—and in the absence of substantial uniformity, ceases to be a rule. The object of this short review is to indicate the reasonably safe interpretation of the terms of the rule as adduced from the decided cases.

As a preliminary to a review of the principal issues here involved, it is necessary to briefly survey those special types of negligence on the part of an invitee which of themselves would preclude recovery. While these factors were not stressed in the instant case, they are so truly a part of the action that, if for no other purpose than to insure a complete consideration of the issue, it is deemed expedient to at least mention their existence, character and effect.

The conditions surrounding the presence and acquiescence of the guest are often such as to indicate a direct contributory negligence on his part such as will bar a recovery for injury negligently caused him. Thus, if a driver were intoxicated to a degree such as would render him incapable of skillful and diligent operation of the car, and the condition of the driver was known to the guest, or plainly evident, it would be such a degree of direct negligence to enter or remain in the car as would bar recovery for negligent injury caused by another. As an illustration of the application of this principle, in a carefully considered case it was decided that when, with full knowledge of the fact that the driver was traversing a strange road with insufficient lights, the guest remained in the car, he was as guilty of negligence as the driver himself. In explanation of the independence and absence of responsibility which must exist before the passenger may ordinarily be relieved of imputation of driver's negligence—or of a direct negligence on his part it is stated with approval that he be required to have been without opportunity to discover danger and to inform the driver of it and have been seated away from the driver by a separate enclosure. While this is perhaps a stringent and too narrow limitation, the rule is admirably contained in the succeeding words of the opinion that "It is no less the

1 Lynn v. Goodwin, 170 Cal. 112.
Cunningham v. Erie R. Co., 121 N. Y. S. 706.
Davis v. Chicago R. I. & P. R. Co., 159 Fed. 10.
duty of a passenger, where he has the opportunity to do so, than of the driver, to learn of the danger and avoid it if practicable." This tersely states the law, and a review of representative cases in which it has been found that there was no direct negligence on the part of the guest discloses that for varying reasons no opportunity was afforded him to learn of the danger or apprise the driver of it. The statement of this rule in the instant case was, "It is only where the guest as such fails to exercise ordinary care for his own safety—that is, when he does something or fails to do something, which an ordinarily careful person situated as the guest was situated would either have done or would have failed to do—that any question of negligence on the part of the guest can arise; etc."

The general doctrine of imputable negligence excludes all parties except in relation to those connected by a representative status. Whether this be of an inferior grade as in master and servant, of an intermediate degree as in principal and agent, or special and general types as in case of partners or universal agents, there is essential as a preliminary requirement some representative capacity before negligence is imputable. Negligence in the conduct of another will not be imputed to a person if he neither authorized such conduct, nor participated therein, nor had the right or power to control it. This relationship or representative capacity does not exist between co-servants (unless to one is delegated the master's authority over the other), husband and wife, or, by the weight of authority, parent and child; and as a consequence the negligence of the one is not imputed to the other. It is evident that a mere guest is not a servant or agent of the driver, and therefore, the cases uniformly hold "that the relation between them must be something more than that of host and guest." and suggest that in the absence of a representative capacity of "master and servant or principal and agent the parties must be engaged in a joint enterprise whereby responsibility for each others' acts exists." At first blush this latter might

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11 Withey v. Fowler, 146 N. Y. 928.
seem to extend the parties to whom negligence may be imputed beyond those in a representative capacity, and therefore this classification is discussed below to explain its co-ordination with the rule first given.

It has been laid down with approval that "parties cannot be said to be engaged in a joint enterprise, within the meaning of the law of negligence, unless there be a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movements and conduct of each other with respect thereto. Each must have some voice and right to be heard in its control or management." 13 To satisfy this requirement it is necessary to show a joint prosecution of a common purpose with express or implied authority in each to act for all in respect to control of the means or agencies employed to execute the common purpose. 14 Where these facts are established the negligence of one is imputed to the others. 15 But when this condition prevails a distinct type of representation arises—it being "conceded that persons of mutual purpose and equal privileges of direction and control, who travel in the same vehicle in pursuit of a common object, are agents of each other in the sense that the negligent act of one, in furtherance of the common scheme, is imputable to all." 16 In other words, when a joint enterprise exists a type of agency exists, which simply brings such relationships within the general rule that negligence is only imputed to those in representative capacities.

The foregoing would indicate the necessity of mutuality of right of control and a consequent responsibility in each for the acts of the others as the prerequisite to a joint enterprise, and it is to be noted that the courts have uniformly applied to specific facts this criterion in the determination of whether or not such facts constitute the particular relation one of joint enterprise. In the segregation into the elements of mutual control and common purpose as the essentials of a joint enterprise, it is significant that neither of the terms presuppose the existence of the other, and that both must be present to cause any set of facts to come within the purview of the definition. While a great number of circumstances might satisfy the common purpose requisite, and as a consequence this constituent is very indefinite, it follows that the establishing of a mutual control of the agencies used in accomplishing the common purpose is the most usual test of the existence of a joint enterprise. Thus it is held that it cannot be that one who merely secures from another the favor of transportation in a private vehicle takes upon himself all risk of the driver's negligence en route. 16

While comment is made in the decisions of one state that the doctrine of implied negligence finds small favor with the courts and is infrequently applied, 16 this is somewhat counterbalanced by the hold-

14 Beaucage v. Mercer, 92 N. E. 774.
16 Van Horn v. Simpson, 153 N. W. 883 (35 S. Dak. 640), and note 13 supra.
17 Reading Twp. v. Telfer, 57 Kan. 798-803.
ings of the courts of a few other states to the effect that under all circumstances negligence is to be imputed to a guest. However, the great weight of authority is that the negligence of a driver cannot be imputed to a passenger who in fact has no control over him, and specifically hold that mere identity of purpose such as riding with the driver for mutual pleasure is of no effect. Thus a joint enterprise in the law of negligence only exists where a mutuality of control and identity of purpose concur, so that to all practical purposes the result is that an agency is created by which each is responsible for the acts of the others. The doctrine of the instant case is, therefore, in accord with the weight of authority and might well be tested by a rule holding that negligence may only be imputed to those situated in representative capacities.

—J. K. P.

PEND AND CHILD—LIABILITY OF PARENT FOR TORTS OF CHILD—NEGLECTFUL DRIVING OF AUTOMOBILE.

It is a settled principle of law that a parent is not liable for the torts committed by his children, it being held in practically every decision that a child is liable for his own torts, whether they be by way of negligence, trespass or any other wrong in the nature of a tort. From this general rule there has sprung an exception recognized in many states, which holds a parent liable for the negligence of his minor son (or daughter) in the operation of an automobile belonging to the parent. The real theory from which this doctrine is derived is that of master and servant.

A recent decision handed down by the Supreme Court of Oklahoma on May 15, 1923, in the case of Dillingham v. Teeter, 216 Pac. 463, brings out this new doctrine very clearly. The facts in the case are as follows:

The Defendant owned an automobile which was used for pleasure

18 Michigan, Wisconsin and possibly Montana.
Mullen v. Owosso, 100 Mich. 163.
Lausen v. Fond du Lac, 141 Wis. 57.
Whittaker v. Helena, 14 Mont. 124.

Bresce v. Los Angeles Traction Co., 149 Cal. 131.
Christie v. Elliott, 216 Ill. 81.
Indian Union Traction Co. v. Love, 99 N. E. 1005.

as well as business, his son being authorized and permitted to use it at any time. At the time in question he had taken his father to a meeting, and then left to go to a young lady's house. His father had knowledge of this fact. On the way he struck and injured the Plaintiff, due to his (the son's) negligence.

The court held that, although using the car for his personal pleasure, the son was within the scope of his authority, and the Defendant was liable for his son's negligence. The court said, in discussing the proposition, that the mere fact that the Defendant was owner of the vehicle would not make him primarily liable, but stated that it must be proved, by a preponderance of evidence, that the driver was the servant or agent of the Defendant.

This is not, however, a new doctrine, but rather a new application of an old one. From the beginning of the era of automobiles, this problem has been discussed and was first brought out in the cases of Maher v. Benedict, 108 N. Y. S. 228, and Doran v. Thompson, 76 N. J. L. 754, both decided in 1908.

Maher v. Benedict held that, where a parent had given authority on several occasions, but in the particular instance from which the action was derived the automobile was taken without his consent, no agency existed, and the Defendant was held not liable. The New York courts seem to follow Maher v. Benedict to the present time, the doctrine of that case being followed by the cases of Hassenbuttel v. Meagher, 116 N. E. 1060, which held that where a son was authorized to run the automobile for pleasure, but did so without the Defendant in the car, Defendant was not liable for his son's negligence; and Shultz v. Morrison, 172 App. Div. 940, which held the general rule to be that an owner of an automobile is not liable for the negligence of another in operating his car, even though such person is a member of the owner's family.

Doran v. Thompsen, supra, the other early case on this subject, was grounded on these conditions: The owner's daughter, nineteen years of age, was given permission on several occasions to take the automobile out. At other times she took it without permission, as was done on this occasion. Under these circumstances the New Jersey court ruled that there was no evidence to show that she was actually the servant of her father (the Defendant), and therefore it held for the Defendant. In this case the court said that to base the relation of master and servant upon the purpose which the parent had in mind in acquiring ownership of the vehicle and its permissive use by the child for that purpose, would be to ignore the essential element in the creation of the master and servant status as to third parties, that the use of the vehicle must be in furtherance of, and not apart from, the master's service and control; and that such a course of reasoning would fail to distinguish between mere permission to use the automobile and permission for a use of it subject to the control of the master and connected with his affairs.

A later decision given by the Oklahoma Supreme Court in 1912 in the case of McNeal v. McKain, 126 Pac. 742, held that a father was
liable when his son took the family automobile with permission, express or implied, and, due to the son's negligence, the Plaintiff was injured. In its opinion the court entered into a thorough discussion of Doran v. Thompson, supra; and after referring to the holding of that case, and quoting from the opinion, Williams, J., said that "the syllabus would indicate that the New Jersey case was against the rule announced above by this court, but it seems to go further than the opinion in the case justifies. If the daughter had had the machine out for the pleasure of the members of her father's family, that would have been a different case from that decided by said court."

On the ground that, in this case, the son was using the car, with permission, for the pleasure of the family, the purpose for which the car was bought, he was held to be acting as his father's servant, and the Defendant was held liable.

Although the decision of Doran V. Thompson opposed that of McNeal v. McKain, nevertheless it started the courts working on the present doctrine as we have it today in the majority of jurisdictions.

The mere existence of the relationship of parent and child is not the principle under which a parent is held liable for his son's tort; liability is grounded on the basis of authority. Authority must exist from the parent to the child. This authority may be express, or it may be implied from attendant circumstances, such as the previous course of conduct of the parent in allowing the child the use of the car for that purpose; or when the child is under the parent's direction. The parent may also be held liable if the son acts within his authority, although the specific thing done was not within the knowledge of the parent, and even though it was contrary to his directions.

The questions of "implied authority" and "the scope of the employment" are the serious stumbling blocks in most cases, as is shown by some of the cases cited. These questions vary as to the facts and circumstances surrounding each individual case, and no set rule can be laid down which will govern in all cases.

In Stowe v. Morris, 144 S. W. 52, a son who took his sister with him on a pleasure ride, as he was authorized to do at any time, was held to be an agent performing his duty, and the parent was held liable for an injury to a third party.

Winn v. Haliday, 69 So. 685, held that, by putting the son in charge of the automobile to drive it at any time, the parent became liable for the son's negligence when he took the car out for a pleasure ride. Heroux v. Baum, 137 Wis. 197, also held the parent liable on the basis of an implied authority, when the automobile was bought at the instance of the son, and the son always operated it. Hays v. Hagen, 165 S. W. 1125, goes on the theory that, although consent was to be given whenever the automobile was taken out, the fact that the son had never been refused permission gave him an implied authority, and the parent was held liable.

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When a machine is bought for family pleasure and the son runs it, the parent is liable on an implied authority (Birch v. Abercrombie, 74 Wash. 486); and the case of Marshall v. Taylor, 168 Mo. App. 240, holds that even though the son took the car for his own pleasure, such a use would be considered as being for the pleasure of the family; and as this was construed as coming under the scope of the son's employment the parent was held liable.

House v. Fry, 30 Calif. App. 157, held that the parent is liable for the negligence of a child when the automobile is taken without his knowledge or consent, if it was customary for the child to do this. The child's action was held, in such a case, to be within the general scope of his authority.

It is, however, a well established rule of law that when the parent is in the car with the son who is driving at the time of the accident, he cannot escape liability.3

Dozens of cases have been decided on the same grounds as the foregoing, thus showing that the courts will go a long way to establish the relationship of master and servant between parent and child.

Of course one always meets with a few exceptions to the general rule, and cases of strict doctrines are found in the reports. There are some cases that hold that actual authority for the particular instance must be given,4 and others hold that, to change the relation of parent and minor child to that of master and servant, there must be unequivocal acts clearly proving an agreement to that effect. The better view, however, and the one being adopted in most jurisdictions, is the one which holds that a minor child who has authority to drive an automobile and does so negligently makes the parent liable to answer in damages. The relationship of master and servant must be proved, however, in order that the Plaintiff may recover.4

The effect of all this tends to show that the vision of the law is expanding by leaps and bounds to meet the changing economic conditions of the world. As the automobile problem grows, so must the law grow to meet it. It has grown in many states, in such a way as to place the responsibility for the negligence of a minor on his parent, by introducing the doctrine of master and servant and applying it to parent and child. It was necessary that this responsibility be placed on competent shoulders; and that is what has been accomplished.

The doctrine of respondeat superior has been justly applied to the law of parent and child in relation to the problem of the child's negligence when under the control of the parent. This is just one

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2 Johnson v. Cornelius, 159 N. W. 318.
3 Swartz v. Hazlett, 8 Calif. 118.
4 Dougherty v. Woodward, 94 S. E. 636; Knight v. Cossett, 172 Pac. 533.
of the many great strides being made by present-day jurists in adapting the common law to present-day conditions.

—H. P. G.

PARENT AND CHILD—LIABILITY OF PARENT FOR TORTS OF CHILD—Ownership of Automobile Coupled with Permissive Use Does not Establish Liability of Father for Acts of Son.

The liability of the master for the torts of the servant has long been a subject of great importance in the history of our law.

From an absolute responsibility in earlier English times, when "this liability was evolved from the social status created by the feudal system," which conceded to the master a species of proprietary or chattel ownership in servant, as an incident to the freehold," this theory has advanced through various stages of development, affected in no small degree by the evolution in social institutions," till at pres-

[1] With reference to this and the following article, the reader's attention is invited to an exhaustive note on this subject in 5 A. L. R. at page 226, in which are collected many cases concerning a parent's liability for the negligence of his son in the operation of an automobile. After explaining the nature of the so-called "family-purpose" doctrine, which "holds the owner of an automobile, which was purchased and maintained for the pleasure of his or her family, liable for injuries inflicted by the machine while it is being used by members of the family for their own pleasure, on the theory that the car is being used for the purpose or business for which it was kept, and that the person operating it is, therefore, acting as the owner's agent or servant in using it," the writer of the article says: "A direct conflict exists among the courts concerning the doctrine under consideration; some have squarely rejected it, while others have as unqualifiedly approved and adopted it. The doctrine undoubtedly involves a novel application of the rule of respondeat superior, and may, perhaps, be regarded as straining that rule unduly. There are, however, undoubted practical considerations in favor of the doctrine, since it puts the financial responsibility of the owner behind the car, while it is being used by a member of the family, who is likely to be financially irresponsible, in pursuit and furtherance of the purpose for which the car is kept; and relieves the injured person from the difficult task of meeting the owner's claim that, upon the occasion in question, the car was not being used for his business or pleasure." Cases are cited from the following jurisdictions in which the doctrine has been applied: Arizona, California, Georgia, Minnesota, Montana, South Carolina, Tennessee, Texas and Washington. On the other hand, cases from Illinois, Kansas, Missouri, New Jersey, New York and Virginia, are cited, in which the court refused to hold the owner liable on the "family-purpose" doctrine.

—H. C. B.

1 The theory upon which this doctrine of vicarious responsibility is predicated is representation in a certain field of service, and is based primarily upon the philosophy involved in the maxim of the Roman law, "Qui facit per alium per se," involving manifestly the contractual conception of consent by one party, and representation by the other. Hunter, Roman Law, 531.

"Thus," said William the Conqueror, "all who have servants are to be their pledges. If any such are accused, the masters are to bring him before the hundred for trial. If in the meantime he flees the master shall pay the money due." Leges' Will, 1 Ch. 52.

2 Poli. & Malt. History English Law, 529.

ent it is well established on a basis of representation actual or implied.  

The legal conception of the liability which is now the consensus of American and English law was stated thus by Blackstone in his Commentaries: "If a servant by his negligence does any damage to a stranger, the master shall answer for his neglect. But in these cases the damage must be done while he is actually employed in the master's services; otherwise the servant shall answer for his own misbehavior."

Within recent years, however, with the invention and subsequent development in the use of automobiles and the increasing amount of damage caused by negligence in operating them, it has been sought to extend this liability.

Many actions have been brought to hold a parent liable as master for the negligence of his child where an automobile owned by the parent has been used by the child, for his own business or pleasure, with the permission of the parent.

These actions have been sustained in some instances in judicial decisions where the liability has been predicated, not on the fact of any representation or agency, but on the mere acquiescence or consent of the parent. The soundness of this doctrine, however, has been very much assailed and the weight of authorities deny the legal sufficiency of these facts to establish the liability of the parent.

That the liability in such cases is not an exception to the general rule already stated is shown in the case of Mount v. Naert, 253 S. W. 966, recently decided by the Supreme Court of Missouri. The facts in the case are as follows: The defendant had a family consisting of wife and seven children, all living at home with him; he purchased and owned an automobile which he kept at home in his garage, and on which he paid all taxes and repairs; all the members of the family who knew how to drive did so, with the acquiescence, if not consent, of the father whenever they saw proper, for their own business and pleasure; on the night that the accident occurred the son took two of his sisters to a dance in the southern part of the city of St. Louis, using the automobile, with the consent of the father, for that purpose; the night was rather dark and the son while driving negligently ran against the plaintiff and injured her; the plaintiff brought an action to recover $10,000 damage for the injury thus sustained, seeking to hold the father liable for the tort of his son.

The trial court nonsuited the plaintiff, thus deciding as a matter of law that the liability did not exist, there being no evidence that the son was the agent of the father or was transacting any business for him. The case went to the Supreme Court of Missouri on appeal. That court affirmed the ruling of the trial court. It found, after a review of the authorities in this country, that it has been held in

8 Y. B. 27, Assizes 133.
9 1 Blackstone Com. 430.
1 Mount v. Naert et al., Supreme Court of Missouri, July 21, 1923.
similar cases that the son was not the agent of the father and that the father was not liable for his torts.

In the case of Hays v. Hogan, et al., the court also decided against such liability. Justice Woodson in rendering the opinion of the court gave careful consideration to all the authorities cited and after a very elaborate discussion of the subject concluded by saying, "* * * that the mere ownership of an automobile purchased by a father for the use and pleasure of himself and family does not render him liable in damages to a third party for injuries sustained thereby, through the negligence of his minor son while operating the same on a public highway, in furtherance of his own business or pleasure; and the fact that he had his father's special or general permission to so use the car is wholly immaterial."

It is to be seen from these and similar cases that there must be something more than mere permission or acquiescence upon which to predicate the father's liability; that there must be some facts which show, that at the time the accident happened, the car was either expressly or constructively in the use and services of the father, and that the son was acting as the father's agent.

To sustain the liability of the father without a showing of such facts would be to fail to distinguish between a mere permission to use and a subject to the control of the father and connected with his affairs, and would be to ignore one of the essential elements in the creation of the status of master as to third parties; that is, that such use must be in furtherance of his services and subject to his control.

A few courts, however, have taken a different view of these cases. They hold that where a car is purchased by the parent and kept for general family use, the parent is liable for the negligence of the son, on the theory that it was being used by the son as agent of his father, for one of the purposes for which it was kept by him.

This doctrine is unsound in principle and unsupported by the authorities. The mistake in this doctrine is seen in applying it to the ordinary affairs of life. Assume that a parent purchases a baseball or a golf stick which he permits his son to use. Under this doctrine the parent would be liable for the negligence of the son on the grounds that the son, while using them for the purpose for which they were kept, is acting as the agent of his father. It is to be seen that such a doctrine would lead to a universal liability of the father for the child's acts and would be a price on the generosity and consideration of the father for the welfare of his child.

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8 Hays v. Hogan et al., 200 S. W. 286.
On the other hand it may be argued that a distinction should be made between an automobile and other vehicles or instrumentalities, but, in that event, such distinction, as has been said in one case13 "should be made by the legislature, the law making power, not by the courts, who merely declare the law as they find it."

In an article in Case and Comment14 by Joseph T. Winslow of the Massachusetts bar, treating of the liability of a parent, much was said in rebuttal of the doctrine just stated. Mr. Winslow reviewed a great many of the authorities, especially the text writers, and deliberated much on the question of the proper basis of liability in such cases. He found that there must be agency if there is to be any liability. Exception was taken by him to the theory advanced by a few courts. He denied that, merely because the son used the car for one of the purposes for which it was kept, the father was liable thereby. The use of the car for such purpose by the son does not constitute an agency, for the son is not representing the father, the use being for his own business or pleasure and the father merely giving his consent. In concluding his remarks Mr. Winslow said, "a father cannot be held liable for the negligent operation of his car by his son merely because he owned the car or because he permitted the son to drive it whenever he wished, or because the driver was his son."

It may be suggested that public interest requires that mere ownership coupled with the permissive use should be a basis of liability.15 If such is the case then it is a proper subject for the legislative bodies, and not the judicial; for any attempt to extend this liability by judicial decision can be made only at the cost of a departure from the established law of agency. To so extend the liability would be, as has been said, to transform the ancient maxim to read: "Qui Facit per auto facit per se."

—G. L. M.

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RECENT CASES

STATE v. MURPHREY, 118 S. E. 894

EVIDENCE—Weight of Uncontroverted Testimony.

In the recent case of State v. Murphrey (N. C.), 118 S. E. 894, Murphrey was tried for unlawfully selling spirituous liquors. The state had only one witness. He testified that he bought one quart of whiskey from the defendant. The defendant offered no evidence. The jury were instructed: "If you believe the evidence in this case, you will return a verdict of guilty." Upon conviction, Murphrey appealed.

The Supreme Court of North Carolina affirmed the conviction, holding that where in any aspect of the testimony the defendant's guilt is manifest, there is no error in instructing the jury in the above-stated manner. However, the court added that even in these cases it would be more satisfactory if the court's instructions followed the usual formula of "reasonable doubt." It will be noted that the question of the credibility of the witness was left entirely in the hands of the jury.

The weight of uncontroverted testimony of an unimpeached witness has been discussed in a number of cases. In Kavanagh v. Wilson, 70 N. Y. 177, it was said: "It is undoubtedly the general rule that when a disinterested witness, who is in no way discredited, testifies to a fact within his own knowledge, which is not of itself improbable, or in conflict with other evidence, the witness is to be believed, and the fact is to be taken as legally established, so that it cannot be disregarded by court or jury." The Supreme Court of the United States, in a case arising under the immigration laws, said: "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontroverted by any one, should control the decision of the court, but that rule admits of many exceptions."

These exceptions include cases of inherent impossibility of testimony, interest of witness testifying, contradiction by circumstances, etc. "In such cases," says the New York court, "courts and juries are not bound to refrain from exercising their judgment and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and the character of the witness is

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1 See also Koehler v. Adler, 78 N. Y. 287.
2 Quock Ting v. United States, 140 U. S. 417.
4 See also Cotner v. State (Ind.), 89 N. E. 847, where the court said, "The rule that uncontroverted evidence cannot be ignored applies only to written instruments, and not to oral evidence." The actual decision, however, does not seem to be contrary to the general rule.
not impeached."9 "But," says the Illinois court, admitting exceptions to the rule, "neither court nor jury can wilfully or through mere caprice disregard the testimony of an unimpeached witness." And the lack of corroboration should not, as a usual thing, affect the credibility of such a witness.9

HENNING v. HILL, APPELLATE COURT OF INDIANA, 141 N. E. 66 (OCTOBER 5, 1923)

ENFORCEMENT OF A PAROL CONTRACT, VALID IN THE LEX LOCI CONTRACTUS, IN A JURISDICTION REQUIRING SUCH CONTRACTS TO BE IN WRITING.

In the above-entitled action the plaintiff sought to recover commissions alleged to be due him by virtue of a parol contract wherein he agreed to sell, and in fact did consummate the agreement by selling, the defendant's farm. The contract was made in Illinois and pertained to land there situated. Subsequent to the sale the defendant moved to Indiana, refusing during the while to pay the plaintiff his due on the contract.

The court took judicial notice that such a contract is valid by the common law of Illinois. The difficulty arose by reason that in Indiana such a contract must be in writing and signed by the owner of the property or his duly appointed representative.

In reviewing past decisions of the court, a case involving the same facts which held that a contract of this kind was unenforceable was discussed at great length. The case was that of Price v. Walker, 43 Indiana Appeals 519, wherein an action was brought for the recovery of commissions due on an oral contract made in Kentucky whereby the plaintiff was to sell lands located in Kentucky belonging to the defendant, and for which service the plaintiff was to receive a commission. The court held in that case that to enforce the contract would be to violate a positive statute (adverted to above) requiring such contracts be in writing.

The court was constrained to disagree with the principle adduced in Price v. Walker on the theory that it was an unwarranted limitation of the doctrine of comity, and further that the statute, in its proper application, did not have extraterritorial consequence. For this reason the court took occasion to overrule Price v. Walker and to hold that a parol contract valid in the jurisdiction where it was made would be enforced in Indiana, even though such a contract is required by the law of Indiana to be in writing, of course excepting contracts contra bonos mores.

The weight of authority is against the latter interpretation of the Statute of Frauds indulged in by the Indiana Court of Appeals. It has been held generally in both this country and in England, follow-

9 Elwood v. Western Union Telegraph Co., 45 N. Y. 549.
9 People v. Davis, 269 Ill. 256.
9 In re Stranch, 208 Fed. 842.
ing Leroux v. Brown, 12 C. B. 801, that the Statute of Frauds did not effect the substantive rights of the contracting parties, but that it was merely a rule of remedial procedure relating to the proof of contractual relationship.

The Indiana court had adopted and followed this theory in the past, and held that the word “void” or “invalid” referred to the remedy and not to the right. Doney v. Laughlin, 50 Ind. App. 38. As a result, this decision should tend to confuse the law not only in regard to the parties to the contract but as to strangers to the contract as well, for prior to this decision it was held that the effect of the Statute of Frauds was to make oral contracts unenforceable upon direct attack by the contracting parties, but that such contracts could not be attacked by outsiders to the contract. Jackson v. Stanfield, 137 Ind. 592, citing other cases.

Professor Williston, in his monumental work on Contracts, says: “That though (these) decisions applying the lex loci contractus may be difficult to justify in theory, they produce a satisfactory result.”

It is questionable that the social interests are better served by the alleged benefits accruing from such a spurious interpretation of statute, in view of the fact that such an interpretation involves the undermining of a well-developed and far-reaching theory of contract obligation existing in Indiana. R. G. F.

HARRISBURG TRUST COMPANY v. MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, 122 ATLANTIC 292 (Supreme Court of Pa., June 23, 1923)

INSURANCE—Delivery of policy to agent with directions to collect premium held not to be a delivery to the insured.

Action by the Harrisburg Trust Co., administrator of the estate of James Magee, deceased, against the Mutual Life Insurance Co. of New York. Judgment for the defendant was affirmed by the Appellate Court and the case comes before the Supreme Court of Pennsylvania.

The insured, Magee, authorized one Wickersham to procure insurance for him in the defendant company; Wickersham was not an agent of that company, but of another. In pursuance of this end, Wickersham opened negotiations with the general agent of the defendant company. As a result, the policy was written and the general agent handed the policy to Wickersham with direction to get the check for the first premium and to see that the insured was in good health at the time of the delivery of the policy. Magee went on a journey and Wickersham held the policy until Magee should return, but Magee died before the premium was paid and Wickersham, to get his percentage, sent a check for the first premium. The administrator of Magee now seeks to collect on the policy, claiming that the delivery to Wickersham was an unconditional delivery to the insured because Wickersham was an agent of Magee and that prepayment of the premium was waived.

The court in affirming the judgment for the defendant said that
whether Wickersham be regarded as the agent of the defendant or of the claimant, he was charged to collect the premium. Since the premium had not been paid and this was a condition of the delivery, there was no valid policy. The administrator has brought forward no evidence that payment had been waived by the defendant, unless it is embodied in what took place between the general agent of the defendant and Wickersham. From this conversation prepayment was a condition to delivery as much as was the good health of the insured. Wickersham understood it as a condition, since he waited for the return of Magee to deliver the policy to him. This is also proven from the fact that when Wickersham heard of Magee's death he hastened to pay the premium.

In Pennsylvania, by statute, the payment of the first premium is necessary to make a policy effective. In any event, it is only in those cases where there has been an unconditional delivery of the policy that the policy becomes effective without payment of the first premium. The unconditional delivery must be set out to a certainty.

In 71 Pa. 393, it was held that by giving the policy to an insurance broker, the company gave him no authority to deliver without payment of the premium.

The receipt of the policy by Wickersham was for the purpose of delivering it to Magee if he paid the premium and was in good health. Payment not having been made, there was no contract of insurance entered into between the parties.

Judgment is affirmed for defendant. J. T. S.

EDELSTEIN v. COOK—140 Ohio State—765.

Proof of Sale by mistake of Citric Acid instead of Epson Salts held prima facie to show negligence.

This was an action for damages brought by Claude H. Cook against the Edelsteins, who operated a drug store. The plaintiff alleged that he had gone to defendant's place of business and asked the clerk for a pound of Epson Salts; that by the negligence of the defendant's clerk, he was given citric acid instead of Epson salts; that he, believing that he had obtained Epson salts, swallowed a large tablespoonful, causing serious burns in his mouth, throat, and stomach, followed by severe hemorrhages. For these injuries, resulting from the negligence of the defendant, their servants and employees, the plaintiff sought to recover damages. The trial court left the question of negligence to the jury, and a verdict for the plaintiff was returned. Defendant appeals.

It was the contention of the plaintiff in error that the plaintiff below had failed to prove the negligence requisite to sustain the action, relying on the case of Howes v. Rose, 13 Ind. App. 674, which held that "the mere sale of a poisonous drug to one who asked for a harmless one is insufficient to show negligence of the druggists making the sale."

In affirming the judgment for the plaintiff, the Supreme Court
said, "that proof of a mistake upon the part of the druggist furnishes an inference sufficient to establish a prima facie case of negligence, and that in cases of this character the doctrine of res ipsa loquitur would apply," citing Knaefel v. Atkins, 40 Ind. App. 428, overruling Howes v. Rose, supra, and Butterfield v. Snelling, 231 Pa. 88.

The court further said, that although there was no error committed by the trial court in leaving the question of negligence to the jury, the court might well have charged that the mere sale of a harmful drug when a harmless one was called for, would constitute negligence prima facie, which, unless rebutted by the defendant, would entitle the plaintiff to recover. A. L. H.

TORT ACTION FOR WRONGFUL DEATH—Under death acts and Statute of Distribution, the parents of decedent are not entitled to share in any recovery for his wrongful death where his wife or children are living.

STAGG v. McCANN ET AL., COURT OF CHANCERY, NEW JERSEY
(DECIDED OCTOBER 3, 1923)

Bill by Ella Stagg, in the Court of Chancery of New Jersey, against Kathryn F. McCann, individually and as administratrix ad prosequendum of L. Lloyd McCann and the New York, Susquehanna and Western Railroad Co. Decree for the defendants.

On January 1, 1922, L. Lloyd McCann was killed while riding in an automobile which was struck at the River Street crossing in Paterson by a train of the New York, Susquehanna and Western Railroad Co. His wife, Kathryn F. McCann, who was riding with him at the time, was injured, but survived. She was appointed administratrix ad prosequendum of her deceased husband, pursuant to the statute (P. L. 1917, p. 531), and brought suit as such against the railroad company to recover damages under the "Death Act." In that suit she claimed that, as the widow, she alone is entitled to damages under the statute. The complainant in this bill, however, who is the mother of L. Lloyd McCann, the decedent, claims that she is also entitled to recover damages for his death, under the statute; and prays that the administratrix be decreed to amend the complaint to the suit at law, which was brought in the New Jersey Supreme Court, so as to show that she is one of the next of kin of the decedent; and restrain the parties to that suit from compromising or settling the controversy in disregard of the complainant's rights.

It appears that the administratrix refused to make the necessary amendment so as to include the mother of the decedent as a party plaintiff in the suit at law; and the mother, Ella Stagg, the present complainant, thereupon applied to Mr. Justice Minturn for an order directing such amendment. Mr. Justice Minturn, however, refused to grant the order, holding that the statute had been complied with
by bringing the suit in the name of the personal representative; and that the respective rights of claimants on the estate must be settled upon the administration of the estate, or upon a bill in equity, and not in that proceeding.

Thereupon the complaint filed the present bill. The defendant, the administratrix, moves to dismiss the bill for want of equity; and the defendant railroad company has answered, setting up that the widow alone is entitled to take the decedent's estate; upon which complainant has joined issue by appropriate replication. At common law the maxim was "actio personalis moritur ure cum persona"; that is, a personal action died with the person.

In New Jersey the original death act was passed in 1848. (P. L. 1848, p. 151.) It has been amended from time to time since, but in substance remains as originally enacted.

Among other things the act provides (P. L. 1917, p. 531), in effect, that the amount recovered in every such action shall be for the exclusive benefit of the widow, surviving husband, and next of kin of such deceased person, and shall be distributed to such survivor and next of kin in proportion provided by law in relation to the distribution of personal property left by person dying intestate—and further provides that where such deceased person leaves a surviving widow or husband, but no children or parents, the surviving widow or husband shall be entitled to all the damages recovered in any such action.

By the statute of distribution, in effect at the time of the death of the decedent (P. L. 1908, p. 644), where a man died intestate leaving a widow and no children, the widow took all his personal property, to the exclusion of his parents and next of kin.

Complainant contends, that because of the language of the "Death Act" referred to particularly, the phrase "Provided that where such deceased person has left or shall leave him or her surviving a widow or husband but no children or descendent of any children and no parents," it was the intention of the Legislature, that if there were parents and a widow left surviving by the death of the husband, the parents should share in the distribution of that fund with the widow, notwithstanding the fact that under those circumstances the parents would not receive any part of the decedent's estate under the statute of distribution.

Based upon this construction of the act, the complainant, the mother of the decedent, L. Lloyd McCann, claims the right to share in any fund that may be recovered in the action instituted by the administratrix under the "Death Act."

In giving the decision, Vice Chancellor Lewis decided that the Statute of Distribution alone directs the method of distributing the fund resulting from an action brought by the administrator or executor under the "Death Act," and that the Statute of Distribution provides that the parents share in the deceased man's personal property only, when there is no widow or children.

Vice Chancellor Lewis said: "I cannot think that the Legislature
meant anything different in the phraseology of the proviso of the
"Death Act" above quoted, than is indicated clearly in the body of
the act; and I think it is clear that it intended that the parents should
share in the proceeds of such an action only when and to such extent
as they would otherwise share in the decedent's estate directly under
the provisions of the Statute of Distribution.

"My conclusion is that the mother of L Lloyd McCann, the com-
plainant in the present suit, is not entitled to share in the fund which
may result from the action instituted in the New Jersey Supreme
Court by the administratrix against the railroad company; and that
if a fund results from such suit, the widow, there being no children,
would take the whole amount. I am not unmindful of the force of
counsel's contention in favor of the natural equity of the parents,
whose pecuniary support from the decedent is cut off by his death, to
participate in the distribution of any fund recovered from the party
held to be responsible therefor; but, however unsatisfactory in that
respect the method of distribution provided by the statute may be,
the remedy for such a situation—which is in clear derogation of the
common-law rule—should be provided by the Legislature, and not by
any unwarranted interpretation or construction of the existing legis-
late enactment.

"In the present posture of the case, the bill, in my judgment,
discloses no equity; and this defendant's motion to dismiss should
prevail.

"I will therefore advise a decree in accordance with these views."

C. S. M.

U. S. v. Volk et al., 291 Fed. 479 (August, 1923)

CUSTOMS DUTIES—Internal Revenue Statutes not in direct con-
lict with National Prohibition Act, or Amending Act, are to be held
as still in force.

Where the United States seized an automobile "used in the removal
and for the deposit and concealment of liquor" with intent to defraud
"of the tax thereon," and the defendant owner of the automobile con-
tended that the State acts "of revenue and tariff" duties were repealed
by the National Prohibition Act; held the defense was overruled, and
that the United States had rightly confiscated the vehicle.

State acts imposing customs duty and internal revenue tax on the
production and importation of distilled spirits, and forfeiting vehicles
used to defeat such taxes, are not directly in conflict with the National
Prohibition Act.

In its early stages the contention of annulment in various appli-
cations had considerable judicial acceptance, though equal judicial
rejection. The rejection theory seemed more soundly based on prin-
ciple, as evidenced by the prompt congressional indorsement in Act,
November 23, 1921, C. 134 (42 Stat. 222). Congress asserts that the
administration of the new policy of prohibition shall have all the
sanction of the old laws, as well as of the new, in so far as not directly in conflict, by saying: "That all laws in regard to manufacture and traffic in intoxicating liquor, and all penalties for violation of such laws, that were in force when the National Prohibition Act was enacted, shall be and continue in force, except such provisions of such laws as are directly in conflict with any provision of the acts."

Hence, any statute, even if inconsistent, yet if not in direct conflict with the National Prohibition Act, nor with the Amendatory Act, is a law today and still applicable.

J. F. M.

U. S. v. Inaba, 291 Fed. 416 (May, 1923)

JURISDICTION—Federal Court jurisdiction to grant injunction to restrain action of a State Court.

The vital point in the case of United States v. Inaba et al. involves the right of a Federal Court to restrain an action in a State Court. The State Court of Washington was entertaining an action to foreclose a labor lien on crops growing on Indian lands. The Federal Court granted an injunction restraining the State Court action. The defendant filed a motion to dismiss the Federal action for want of jurisdiction, basing his ground on Section 265 of Judicial Code (Comp. Stat. 1242), limiting the Federal equitable interference by way of injunction "to proceedings in bankruptcy."

Section 265 (Comp. Stat. 1242) must be construed in connection with and is limited by Section 262 (Comp. Stat. 1239) which authorizes Federal Courts "to issue all writs necessary for the exercise of its respective jurisdiction," as in Kline v. Burke Construction Co., 260 U. S. 226.

Held that the United States has the right in its own courts to bring such suits as may be necessary and appropriate for the protection of its rights. The motion to dismiss raised by defendant is overruled. The Federal Court had jurisdiction to grant an injunction for the protection of its Indian wards, the title to their property is held in trust by the Government. Exclusive jurisdiction in any case involving such property is vested in the Federal Courts. The court, having such jurisdiction, it may, in aid and furtherance thereof, issue writs of injunction.

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