SOME COMMENTS ON THE RESTATEMENT OF AGENCY; PART II

BASIL H. POLLITT

RIGHT OF REVIEW BY CERTIORARI TO THE SUPREME COURT

FRANK D. MOORE

SOME IDEAS AS TO THE RIGHTS OF THE PREFERRED STOCKHOLDER

RICHARD S. HARVEY

CORRECTION OF ERRONEOUS VERDICTS

WILLIAM RENWICK RIDDELL

and

NOTES RECENT DECISIONS BOOK REVIEWS

Complete Table of Contents of This Issue on Page i

Published Quarterly During Academic Year
Annual Subscription $2.50 Single Copy 75 Cents

Entered as Second-Class Matter January 24, 1922, at the Post Office at Washington, D. C., Under the Act of March 3, 1879

Copyright, 1929, by the Georgetown Law Journal Association
Words & Phrases
Third Series

brings to date a work which has been proclaimed by thousands of lawyers and judges as the most unique, the most valuable and the most used legal reference work ever published.

‖ It covers a 15-year period, during which the courts have been called upon to explain and define thousands of new legal and non-legal terms.

‖ It contains over 67,000 definitions of new words and phrases, or later interpretations of terms contained in the 1st and 2d Series.

‖ Words & Phrases makes possible the selection of the right word or term when drawing wills, deeds, contracts, and all sorts of other agreements which require the exact use of either legal or non-legal terms.

‖ It is the cheapest insurance against mistakes that a lawyer can buy.

- - Order Now - -

WEST PUBLISHING CO., St. Paul, Minn.

On acceptance of this order you may send WORDS & PHRASES, THIRD SERIES, seven volumes, buckram binding, at $52.50 delivered, title to books to remain in West Publishing Company until paid for.

TERMS: $10.00 cash herewith; balance $5.00 per month, beginning thirty days from date; payable at St. Paul, Minn., with interest at the rate of six per cent. per annum after maturity.

Name...............................Address...............................
# Table of Contents

## ARTICLES

### SOME COMMENTS ON THE RESTATEMENT OF AGENCY

- **Part II** Basil H. Pollitt 283

### RIGHT OF REVIEW BY CERTIORARI TO THE SUPREME COURT

Frank D. Moore 307

### SOME IDEAS AS TO THE RIGHTS OF THE PREFERRED STOCKHOLDER

Richard S. Harvey 314

### CORRECTION OF ERRONEOUS VERDICTS

William Renwick Riddell 323

## NOTES

- CRIMINAL LAW—Seduction—Shotgun Marriage a Defense to Prosecution J. B. H., Jr. 329
- EMINENT DOMAIN—Private Ways of Necessity J. B. H., Jr. 392
- MASTER AND SERVANT—Independent Contractor—Dangerous Instrumentality J. H. W. 336
- RADIO—Federal Jurisdiction and Regulatory Power over Radio Communication C. F. O'S. 339

## RECENT DECISIONS

- BANKRUPTCY—Revocation of Discharge on Grounds other than Fraud C. F. O'S. 348
- CONFLICT OF LAWS—Enforcement of Property Taxes by One State in Federal Courts of Non-Resident's State L. H. S. 351
- DAMAGES—Recovery for a Permanent Nuisance against a Subsequent Vendee W. G. McG. 352
- EVIDENCE—Presumption of Obtaining “Right Number” in Telephone Calls F. J. O. 353
- EVIDENCE—Silence as an Admission of Guilt L. T. D. 355
- INSURANCE—Failure of Applicant to Volunteer Information W. G. McG. 357
- MASTER AND SERVANT—INDEPENDENT CONTRACTOR—Dangerous Instrumentality J. H. W. 358
- MORTGAGES—Constructive Notice of Recorded Assignment of Mortgage J. M. 358
- QUASI-CONTRACTS—Patient's Financial Standing as an Element in Determining the Reasonableness of Physician's Fee L. T. D. 356
- RADIO—Federal Jurisdiction and Regulatory Power over Radio Communication C. F. O'S. 362
- SPECIFIC PERFORMANCE—Contracts Fixing Liability for Breach of Contract—Want of Mutuality M. B. W. 362
- TORTS—Inducing Breach of Unforceable Contract E. J. C. 363

## BOOK REVIEWS

- Nims, Harry D.: *The Law of Unfair Competition and Trade Marks* Karl Fenning 373
- Norton, Thomas James: *Losing Liberty Judicially* Robert A. Maurer 369

*Copyright, 1929, by Georgetown Law Journal Association.*
Contributors To This Issue

ARTICLES

POLLITT, BASIL H., A.B., LL.B., Professor of Law, New Jersey Law School; member of New Jersey and New York Bars; director New Jersey Bar quizz course; author of Cases on Agency, Cases on Real Property.

MOORE, FRANK D., M.A., M.S., LL.M.; member of New York Bar.

HARVEY, RICHARD S., Ph.B., LL.B., Professor of Law, Georgetown University School of Law; author of Handbook of Corporation Law, Rights of Minority Stockholders, Manual of Federal Trade Commission, and American Foreign Trade.


BOOK REVIEWS

ALEXANDER, ARTHUR A., A.B., LL.B., Georgetown University, Professor of Law, Georgetown University School of Law; Faculty Adviser of Georgetown Law Journal; author of various legal articles.

MAURER, ROBERT A., A.B., LL.M., Professor of Law, Georgetown University School of Law; co-author with George J. Jones of the textbook, The Constitution of the United States.

FENNING, KARL, M.A., LL.B., Professor of Law, Georgetown University School of Law; formerly Assistant United States Commissioner of Patents; Special Assistant to the Attorney General.
SOME COMMENTS ON THE RESTATEMENT
OF AGENCY
By BASIL H. POLLITT

PART II*

Revocation

The rule is that the agency must be antecedently given or subsequently “adopted”. Where the unauthorized act of the agent, so-called, is thus subsequently “adopted”, we say there has been ratification, which term is defined in the Restatement, as follows: “Section 86. (1) Ratification, in the Law of Agency, is the subsequent affirmance by one person, under the conditions stated in this Chapter—(a) of an act which another, without authority or apparent authority, has previously done while purporting to act as agent, . . .”. Definitions of ratification taken from New Jersey cases and those of other jurisdictions will be found in the footnotes.

* Part I appeared in (1929) 17 Geo. L. J. 177. These comments are in respect to the Restatement of Agency (Am. L. Inst.).

106 Blanchard Bros., Inc. v. Berendge, 85 N. J. Law 532, 89 Atl. 992 (1914). Of course the word “adopted” is technically open to criticism, since there is a distinction between “ratification” and “adoption”. See McArthur v. Times Printing Co., 48 Minn. 319, 51 N. W. 216, 31 Am. St. Rep. 653 (1892).

107 Looschen Piano Case Co. v. Steinberg, 76 N. J. Law 130, 68 Atl. 1072 (1908): “The rule is that a subsequent ratification of an act done by another, assuming to act in the capacity of an agent, though without any precedent authority, creates the relation of principal and agent; and after such ratification, with full knowledge of all the material facts and circumstances, the principal is bound by the act to the same extent, as if it had been done by his previous authority.” Russell v. Erie R. R. Co., 70 N. J. Law 808, 59 Atl. 150, 67 L. R. A. 433 (1904).

It is said that ratification "requires no change of position by the third party or threatened prejudice to him to make it operative." 109 An old case in New Jersey, perhaps, held differently,110 but it would appear quite doubtful whether this case is any longer respectable authority on this particular point. It is also said that "there must be an intent to do the acts which constitute affirmance, but it is not necessary that there shall be actual willingness to assume the consequences of the affirmance." 111 It is believed that the foregoing quotation states the law of New Jersey, although the language used in a leading case is capable of a different interpretation. 112

Section 105 of the Restatement 113 states the well settled rule of Blinn v. Schwarz. 114 Where an agent is authorized to delegate his authority or to appoint another agent to do the act in question, he may ratify for his principal the unauthorized act of such sub-agent or "secondary" agent.116 Since an agent who demands possession of premises occupied by his principal's tenant must have authority to make such demand at the time of making it, subsequent assent on the part of the landlord will not validate a notice originally

109 Restatement § 86, Comment (e).
110 Doughaday v. Crowell, 11 N. J. Eq. 201 (1856): "Shotwell, not having been authorized to act as the agent of the defendant, the act or acts upon which the complainant relies to establish the ratification of what Shotwell had done in the defendant's name, must be something by which the complainant, upon placing reliance, has been prejudiced."
111 Restatement § 86, Comment (g).
113 "After the restoration of his mental capacity, a person, who, at the time the act was done, was lacking in mental capacity, can ratify an act done on his account during his incapacity, wherever the act, if done by him personally, would not have been void, but only voidable."
114 Supra note 24.
115 Restatement § 111: "An agent, who, at the time of affirmance, is authorized to do a delegable act, or to appoint another to do the act, can ratify for his principal the previous unauthorized doing of the act by himself or by any person to whom he could delegate it, or whom he could appoint to do it." Spencer Heater Co. v. Abbott, 91 N. J. Law 594, 104 Atl. 91 (1918).
given without authority. This rule is part of the larger doctrine laid down in the Restatement; and appears to be exactly stated in Section 115, Illustration (a).

It seems that by the weight of authority, in order for there to be a ratification, the agent must act as such in the transaction involved, and if he acts as a principal himself in the transaction, without authority from the principal he had in mind, such principal cannot ratify his act. The leading case laying down this doctrine is Keighley v. Durant. The Restatement has adopted this view, which is also law in New Jersey but not in all other jurisdictions. This problem is sometimes treated of as that of "Ratification by an undisclosed principal." But, Query: Is this really a problem of ratification by an undisclosed principal, or does the doctrine of undisclosed principal presuppose actual authority on the part of the agent to do the act in question at the time he acts?


117 Section 112: "The act of affirmance must occur before such a change in the law or in the existence or competency of the purported principal or the other party as makes ratification impossible under the rules stated in Sections 92, 101 and 108."

118 Section 115: "The affirmance of an unauthorized demand or notice must occur before the time and at the place at which such demand or notice, if authorized would be effective. Illustrations: (a) A, unauthorized by P on June 26, notifies T, a tenant from month to month of P's house, to vacate by August 1. T remains. On August 2, P affirms. There is no ratification."

119 Supra note 108.

120 Section 118: "In order to make ratification of an Act of negotiation, bargaining or representation possible, the person who did the act must, at the time, have purported to act as agent for another and not for himself."

121 Schlessinger v. Forest Products Co., supra note 69: "The doctrine of ratification is not applicable to a case where the person who makes the contract was not at the time and had not been previously acting on behalf of a principal."


123 See article by Professor Goddard under this title in (1904) 2 Mich. L. Rev. 25 and also a note in (1902) 15 Harv. L. Rev. 221.
It is also said that the agent must have acted in behalf of the very person ratifying. \(^\text{124}\) Wilson \textit{v. Tumman \& Freston} has been followed in New Jersey, \(^\text{125}\) but in New York the case has been distinguished, \(^\text{126}\) the court holding that an act done under an authority conferred by law, may be adopted by the person for whose benefit it was done. The question raised by the New York court does not appear to be touched upon by the Restatement.

Closely akin to the problem just discussed, is that of ratification of a forgery. Section 118 of the \textit{Restatement}, Comment (d) says that “Since a forger does not purport to act as agent, there can be no ratification of forgery.” This view appears to be supported by the weight of authority. \(^\text{127}\) In view of the fact that the rule in Massachusetts is \textit{contra} to the case of Keighley \textit{v. Durant}, we would naturally expect Massachusetts to hold that there may be ratification of a forgery, and such we find is the case. \(^\text{128}\) The Massachusetts view is followed in a number of jurisdictions, such as Illinois. \(^\text{129}\) New Jersey appears to have no clear cut decision covering the point, but the case of \textit{Gluck-}


\textit{Restatement} § 119: “In order to make ratification possible, the person affirming must be the person named or described as the principal, at the time the act was done, if any is so named or described; otherwise, he must be the person for whom the agent intends to act.”


\(^{126}\) The Farmers' Loan \& Trust Co. \textit{v. Walworth}, 1 N. Y. 433 (1848).


man v. Darling is in accord with the RESTATEMENT as to the effect of an estoppel to deny a forgery.

The question of knowledge is one of the most important in the subject of ratification. Section 120 of the RESTATEMENT is as follows: "To incur liability by ratification, the person affirming must, at the time of the affirmance, either—(a) have knowledge of the act, and of all the material facts relating to it, or—(b) be willing to take the risk as to the completeness and accuracy of such information as he has." Numerous cases in New Jersey illustrate sub-heading (a) of Section 120. Of course the knowledge of the agent who does the act, the ratification of which is in dispute, should not be imputed to the principal who is denying ratification. It is also said in the RESTATEMENT that the "requirement of knowledge may be satisfied by the knowledge of some other agent of the same principal." It would

---

130 Section 118, Comment (e): "If the one whose name is forged, by words or conduct, causes another reasonably to believe that the instrument forged was made by him, and the other person changes his position to his detriment because of such belief, there is liability upon the instrument as if it were originally executed by him." Note (1926) 26 Col. L. Rev. 1026.


133 RESTATEMENT, § 120, Comment (d): "The principal is not ordinarily affected by the knowledge of the one who acted . . ." Clement v. Young-McShea Amusement Co., supra note 80: "Finally, it is urged that the knowledge of Young and of Shackelford should be imputed to the company. Assuming that Young, in executing the lease, was attempting or appearing to act for the company, notwithstanding the form of the instrument, then, if his knowledge that he was overstepping the bounds of his authority is to be deemed notice thereof to his principal, no effective limitation can be imposed upon the power of an agent. By the very act of transgressing the limits of his authority, the agent would generally for all practical purposes enlarge them to the full extent of his transgression. Nothing short of immediate personal investigation on the part of the principal would, in most instances, protect his rights. An examination of the cases already cited will show that such a doctrine has no place in either legal or equitable jurisprudence." Compare Bodine v. Berg, supra note 18, apparently contra.

134 Section 120, Comment (d).
appear doubtful whether this proposition is law in its entirety at present in New Jersey.\textsuperscript{135}

Knowledge may be imputed to a principal for the purposes of ratification, from his failure to exercise ordinary care with respect to the following up of other facts within his knowledge, particularly where he has been put on inquiry by such other facts.\textsuperscript{136} But failure to discover an act which an inspection with ordinary care would not have discovered, will not work a ratification.\textsuperscript{137}

Ordinarily, where one affirms in part, he must affirm the whole of the transaction.\textsuperscript{138}

"If any particular formalities are requisite for the authorization of an act, ratification of its unauthorized doing must be by the same formalities." \textsuperscript{139} New Jersey follows

\textsuperscript{135} Compare Thompson v. Central Pass. Ry. Co., 80 N. J. Law 328, 78 Atl. 152 (1910): "Applying this instruction to the facts that might legitimately be found from the testimony, it authorized the jury to impute to the corporation the knowledge of the agreement possessed by the legal counsel to whom the president had imparted such information. The instruction therefore amounted to this: that the information possessed by the president did not bind the corporation, but if he imparted such information to the legal counsel of the company then the information so imparted became binding upon the corporation." But this case is distinguishable, as the quotation itself shows.

\textsuperscript{136} Restatement § 120, Comments (g) and (h).

\textsuperscript{137} Campbell v. Mfrs. Natl. Bank, 67 N. J. Law 301, 51 Atl. 497 (1902), holding by a divided court, that if a bank ratifies its cashier's acts in known transactions which he openly conducts, honestly or dishonestly, it will not be permitted to say that similar transactions which he secretly conducts, do not bind it. Here, all the transactions of the cashier were concealed and it is only the acquiescence of the principal in open transactions of a similar nature that may work a ratification of the dishonest act in question.

\textsuperscript{138} Restatement, § 122. The Farmers' Loan & Trust Co. v. Walworth, supra note 126; Bodine v. Berg, supra note 18: "By accepting and retaining the beneficial result of an unauthorized act of his agent, the principal, having knowledge of the facts, ratifies such act, and cannot repudiate the consequences of a particular act of the same agent in the identical transaction which produces the contract, the fruits of which are retained."

\textsuperscript{139} Restatement, § 124.
COMMENTS ON AGENCY RESTATEMENT

this rule.140 "Other conditions of ratification being satisfied, the affirmance by the purported principal is effective as ratification as to all parties to the transaction—(a) when communicated or made known to the person who acted as agent . . ." 141 An interesting case touching upon this point in New Jersey is Doughaday v. Crowell.142 Here the alleged principal manifested what appears to have been a mental determination to affirm the act, yet it was held not to amount to a ratification. The case fails to reveal to whom the alleged principal communicated his apparent affirmance.

Usually the voluntary receipt and retention by the purported principal, he having the requisite knowledge, of the benefits of an act to which he would not be entitled unless the act was affirmed, constitutes a ratification of that act.143 But of course, this is not so in the absence of the requisite knowledge.144 Merely taking advantage of the situation to accomplish some purpose of one's own, accompanied by an express repudiation of the act, is not the equivalent of ratification.145 And mere silence in itself, is insufficient to amount to a ratification,146 But dissent on the part of the principal should be fairly prompt, after he comes into full knowledge of the agent's unauthorized act; so where the principal remained silent for thirteen months after the agent had informed him of the unauthorized act, it was held

141 RESTATEMENT, § 126, Comment (a) of which reads as follows: "The essence of ratification is the manifestation of a mental determination by the purported principal to affirm the act . . ."
142 Supra note 110.
144 Gulick & Holmes v. Grover, supra note 21.
145 Section 128, Comment (a) of the Restatement; analogously, Phoenix Pottery Co. v. Perkins Co., 79 N. J. Law 78, 74 Atl. 258 (1909).
that such silence amounted to ratification.\textsuperscript{147} Acquiescence, however, may constitute ratification, particularly where it is accompanied by something in the nature of an estoppel.\textsuperscript{148} These New Jersey cases substantially reflect the view of the \textsc{Restatement}.\textsuperscript{149} The problem of the necessity for a fresh act of assent on the part of the third party after affirmance by the purported principal, and the related problem of the right of the third party to withdraw after such affirmance,\textsuperscript{150} does not appear to have been raised in New Jersey.

\textit{Termination of Authority}

A considerable portion of \textsc{Restatement} No. 2, dealing with this subject, is taken up with propositions which would be self-evident even to a layman. Although this matter may be essential to a code such as the \textsc{Restatement}, nevertheless it requires no attention in an article of this type. Indeed, the courts usually assume the truth of such propositions and do not discuss them.

The New Jersey case of \textit{Kelly v. Brennan}\textsuperscript{151} is referred to in Illustration (a) of Section 164 (o) of the \textsc{Restatement}. A number of students have recognized the analogy between this case and the well known contracts case of \textit{Dickinson v. Dodds}.\textsuperscript{152} It would appear to the writer that the view of these cases is sounder than that adopted by the Reporter of the \textsc{Restatement}.

\begin{footnotes}
\textsuperscript{147} Chetwood v. Berrian, 39 N. J. Eq. 203 (1884). See also Insurance Co. v. McCain, 96 U. S. 84, 24 L. ed. 653 (1877).

\textsuperscript{148} Tooker v. Sloan, 30 N. J. Eq. 394 (1879).

\textsuperscript{149} Section 136: "Silence concerning, or failure to repudiate, an unauthorized act, is not alone enough to constitute ratification, but silence or failure to repudiate under such circumstances, that, according to the ordinary experience and habits of mankind, a reasonable man may fairly draw the inference of affirmance, constitutes sufficient evidence of ratification."

\textsuperscript{150} \textsc{Restatement}, §§ 127 and 148.

\textsuperscript{151} Kelly v. Brennan, 55 N. J. Eq. 423, 37 Atl. 137 (1897). Section 187 also illustrates the rule of Kelly v. Brennan, supr\textit{a}.

\textsuperscript{152} (1876) 2 Ch. Div. 463, \textsc{Williston, Cases on Contracts}, (2d ed. 1920) 56.
\end{footnotes}
Of course, from the lapse of a considerable period of time after the conferring of the authority upon the agent, the circumstances may be such as to imply that such authority has terminated.\(^{153}\)

An interesting theory, apparently not discussed in the Restatement, is that brought out by the case of Milne v. Kleb.\(^{154}\)

The outbreak of war between the country of the principal and that of his agent may terminate\(^{155}\) the authority of the agent, but more usually appears merely to suspend\(^ {156}\) such authority.

Section 180 lays down a proposition so well settled as to

\(^{153}\) Restatement, § 169. Peabody v. Hoard, supra note 90: “When, however, the whole of the letter is considered, it is apparent that Henry contemplated a speedy sale, and only intended to empower his brother to sell in a short time from its date. He did not contemplate a sale years afterwards, or even many months. This is apparent from the fact that he says that he ‘wants all the money he can scrape together to pay his way through.’ He speaks in the present tense. He says he then wants it; not that he shall want it at some future time. It, however, appears that the sale was not made until two years and five months after he received the authority.”

\(^{154}\) 44 N. J. Eq. 378, 14 Atl. 646 (1888): “Moreover, where power to sell land is given by parol, it is usually given to serve a temporary purpose, with an exception on the part of the donor that it will be speedily exercised; and it would therefore seem entirely reasonable that the rule, prescribed by the statute of frauds concerning parol contracts not to be performed within a year from the time they are made, should, by analogy, be adopted as the rule limiting the duration of such powers. Especially should this be so where it appears that neither party to the power had, for more than a year after it was granted, done anything which would indicate to the other that he regretted it as still subsisting.”

\(^{155}\) Restatement, § 173: “The outbreak of war may be a change in conditions requiring an inference of termination or suspension of authority under the rule stated in Section 167.” Section 207: “War between two countries terminates the authority of an agent or a servant located in one of the belligerent countries to do an act for a principal or master located in the other, if such an act is made void either by the general principles of law or by special legislation.”

\(^{156}\) Hubbard v. Matthews, 54 N. Y. 43 (1873); Kepplemann v. Kepplemann, supra note 40.
require no citation of authority:—"The principal or master may, at any time, suspend, or by revocation, terminate any authority not yet executed." Of course, although the principal or master may have power to terminate the authority of his agent or servant, there are numerous instances of the corollary proposition that he does not always have the right so to act, and may render himself liable for breach of contract. 157

The question of the effect of the death of the principal or master upon the termination of any authority not yet executed, is so well and exhaustively treated in the Commentaries to Section 200 of the Restatement, that any discussion of the subject by the present writer would be presumptuous. It is pointed out, however, that Section 34 of the Uniform Partnership Act, drafted by the present director of the American Law Institute, takes the opposite view to that laid down in Section 200; and that the Commissioners say in their note to Section 34 of the Uniform Partnership Act, that "the rule of the common law has been modified as to the law of agency."

The rules with respect to termination of authority by reason of insanity of the principal, are analogous to those with respect to the competency of an insane or partially insane principal to appoint an agent. 158 The general rule


158 Restatement, § 205: "The authority of an agent or servant is terminated by (a) the judicial determination of the incompetency of the principal or master, (b) the mental disease or derangement of the principal or master which renders him completely incompetent as to the business in question and which would justify a judicial determination of his incompetency." The case of Blake v. Garwood, 42 N. J. Eq. 276, 10 Atl. 874 (1886), illustrates the second part of this rule. See also Yonge v. Toynbee (1910) 1 K. B. 215, in accord with this proposition; although in this case the solicitors were chargeable with notice because they had the means of knowledge. Section 205, Comment (c) is exactly in accord with the holding of Matthiessen & Weichers Refining Co. v. McMahon's Admr., supra note 29. See, further, Johnson v. National Bank of Mattoon, 320 Ill. 389, 151 N. E. 321 (1926), commented on in (1927) 21 Ill. L. Rev. 494 (power coupled with an interest not revoked by insanity of principal.)
appears to be that notice to the third party is necessary to complete a termination of the agency by the voluntary act of the principal.\textsuperscript{159} This proposition is discussed in the RESTATEMENT, Sections 212 to 227; and particularly Sections 220 and 221, which have been so ably annotated by the Reporter in his Commentaries to RESTATEMENT No. 2.

With respect to the subject of termination of power given as security,\textsuperscript{160} the courts of New Jersey give “word homage” to the great case of Hunt \textit{v. Rousmanier},\textsuperscript{161} as is revealed by Dubrow \textit{v. Eppens}.\textsuperscript{162}

As one reads the RESTATEMENT, one delights to run across illustrations taken from the old familiar landmarks of the law; and the writer took pleasure, therefore, when he saw in Illustration (a) of Section 232, the well known Terwilliger case.\textsuperscript{163}

\textit{Interpretation of Manifestations Respecting the Agent's Authority}

This problem is dealt with in RESTATEMENT No. 3. The first problem taken up is the question of general rules of construction with respect to interpretation of manifestations, \textit{i.e.}, authority, granted to the agent. One of the first rules laid down in the RESTATEMENT is that “Manifestations of consent are interpreted in the light of all the surrounding circumstances."\textsuperscript{165} Section 246 of the RESTATEMENT covers in detail the question of the effect of usage upon the con-

\textsuperscript{159} Barkley \textit{v. Rensselaer} & Saratoga R. R. Co., 71 N. Y. 205 (1877); and Insurance Co. \textit{v. McCain}, \textit{supra} note 147.

\textsuperscript{160} RESTATEMENT, §§ 230 to 235.

\textsuperscript{161} 8 Wheat. 174, 5 L. ed. 589 (1823).

\textsuperscript{162} 65 N. J. Law 10, 46 Atl. 582 (1900); See further on this subject Miller \textit{v. Home Ins. Co.}, 71 N. J. Law 175, 58 Atl. 98 (1904); and Walker \textit{v. John Hancock Mutual Life Ins. Co.}, 80 N. J. Law 342, 79 Atl. 354, 35 L. R. A. (N. S.) 153 (1911).

\textsuperscript{163} Terwilliger \textit{v. Ontario C.} & S. R. Co., 149 N. Y. 86, 43 N. E. 432 (1896).

\textsuperscript{164} This heading deals with the question of liability of the principal as affected by contracts made by the agent. Compare the title of Pollitt, \textit{Cases on Problems in Agency}, ch. 8.

\textsuperscript{165} RESTATEMENT, § 245: “A great case on the construction of a
struction of an authority. This proposition appears to be well settled law. 166

Sections 247, 248 and 249 are applications of that great doctrine of construction that "specifics overrule generals." The leading case on this proposition is Rossiter v. Rossiter, 167 which is recognized and followed in New Jersey. 168 This rule was followed recently in a leading case in Pennsylvania. 169

Section 250 lays down the equally well known rule that ordinarily the agent's authority extends only to acts beneficial to the principal. 170 New Jersey decisions are in ac-

written authority, is LeRoy v. Beard, 8 How. 451 (1850), which will be frequently referred to hereafter, and which the court held in part as follows: "... the extent of the power is to be settled by the language employed in the whole instrument, aided by the situation of the parties and of the property, the usages of the country on such subjects, the acts of the parties themselves, and any other circumstances having a legal bearing and throwing light on the question." Compare, Globe & Rutgers Fire Ins. Co. of N. Y. v. McGinnis, 29 F. (2d) 357 (C. C. A. 9th. 1928).

166 Lowenstein v. Lombard, Ayres & Co., 164 N. Y. 324, 58 N. E. 44 (1900): "The evidence shows that the other transportation lines doing business between Mobile and New York gave free insurance without requiring declaration of value to shippers of freight over those lines, and had done so for a long period. 'Where the principal confers upon his agent an authority of a kind, or empowers him to transact business of a nature, in reference to which there is a well-defined and publicly known usage, it is the presumption of law, in the absence of anything to indicate a contrary intent, that the authority was conferred in contemplation of the usage, and third persons, therefore, who deal with the agent in good faith and in the exercise of reasonable prudence, will be protected against limitations upon the usual authority, of which they had no notice! 1 Mechem, AGENCY (2nd ed. 1914) 281.'"

167 8 Wend. 495 (N. Y. 1832).


170 Section 250: "In the absence of anything indicating a different meaning, a manifestation of consent that another may act as agent
Joint authority is nearly always to be jointly performed. Section 254 is really a part of the "specifics overruling generals" doctrine heretofore enunciated. The case of Rathburn v. Snow is analagous. Section 256 states the "two possible interpretations" rule, which is, of course, the weight of authority. Another equally well

is, notwithstanding general terms, interpreted as meaning only acts on account of and for the benefit of the proposed principal."

Camden Safe Deposit & Trust Co. v. Abbott, 44 N. J. Law 257 (1882); Chetwood v. Berrian, supra note 147; Dowden v. Cryder, 55 N. J. Law 329, 26 Atl. 941 (1893). (Special Note: The problem of North River Bank v. Aymar, 3 Hill. 262 (N. Y. 1842), has not yet been reached in the Restatement.)

RESTATEMENT, § 252: "In the absence of anything indicating a different meaning, a manifestation of consent by one person that two or more other persons (not a partnership) may act as his agents, is interpreted as requiring joint performance by such other persons." Unterberg v. Elder, 211 N. Y. 499, 105 N. E. 834 (1914), analagously Moore v. Ewing, 1 N. J. Law (1792).

Section 254: "In the absence of anything indicating a different meaning, a manifestation of consent which in terms refers only to a future date, is interpreted as not including consent to any acts to be done before that date except such as are reasonable and necessary acts of preparation for the performance of the act as the date specified."

123 N. Y. 342, 25 N. E. 379 (1890).

Section 256: "If the manifestation of the proposed principal to the proposed agent in the light of all the surrounding circumstances proves to be fairly susceptible of two or more interpretations, and the proposed agent, reasonably believing that he is acting in accordance with the proposed principal's instructions, acts in accordance with one interpretation, that interpretation applies to the transaction."

LeRoy v. Beard, supra note 165: "Again, if a construction be in some doubt, not only may usage be resorted to for explanation, Story, Agency (2nd ed. 1843) 73; Clifton v. Walmsley, 5 T. R. 564 (1794) but the agent may do what seems from the instrument plausible and correct; and though it turn out in the end to be wrong, as understood by the principal, the latter is still bound by the conduct of the agent. * * * * Because the person who deals with the agent is required like him to look to the instrument to see the extent of the power (7 Barn. & C. 278 (1827); 1 Pet. 290); and if it be ambiguous, so as to mislead them, the injurious consequences should
settled rule of construction in the law of contracts and of agency is that of Section 257.\textsuperscript{177} Probably all the courts would agree on this proposition, although they would undoubtedly disagree as to its application.\textsuperscript{175} Section 260 deals with the implications arising from the principal’s knowing acquiescence in the acts of the agent.\textsuperscript{179}

Section 261 deals with the extension of the authority of the agent by reason of a sudden emergency. It will be noted that this problem has two phases—first: the extension of the authority of an agent already existing; and second: the creation of an agency where none theretofore existed. The first phase of the problem has already been dealt with in part, in connection with the power of one agent to appoint others on behalf of his principal.\textsuperscript{180} This is also illustrated

fall on the principal, for not employing clearer terms. Baring v. Corrie, 2 Barn. & Ald. 143 (1834); 1 Pet. 290; Courcier v. Ritter, 4 Wash. C. C., 551 (1825).” Chetwood v. Berrian, \textit{supra} note 147: “When a principal confers power by terms so uncertain as to be susceptible of two different constructions, and the agent in good faith adopts the one least favorable to his principal, the principal cannot repudiate the acts of his agent as unauthorized because he meant the terms to be read in the other sense.”

\textsuperscript{177} Section 257: “If the parties have by their own acts put a certain interpretation upon a manifestation of consent, such interpretation thereafter governs as to them.”

\textsuperscript{178} LeRoy v. Beard, \textit{supra} note 165: “In the next place, the acts of the parties themselves tend here to strengthen the construction of the words in the power, so as to authorize a warranty, and these acts, it is competent to consider in order to remove doubt.” Compare Lyon v. Pollock, \textit{supra} note 90. LeRoy v. Beard also states the doctrine of Section 259: “Nor is the power confined merely to ‘usual modes and means’, but whether the agency be special or general, the attorney may use appropriate modes and reasonable modes; such are considered within the scope of his authority.”

\textsuperscript{179} Section 260: “Acquiescence, with knowledge of the facts, by the one who made the manifestation, in the manner in which the one acting as agent is interpreting the manifestation in acting, is evidence that such is the interpretation which the one making the manifestation intends.” See Dierkes v. Hauxhurst Land Co., \textit{supra} note 66.

\textsuperscript{180} See \textit{supra} note 96 (Louisville & Nashville R. Co. v. Ginley).
by the case of Barletti v. Sparkman\(^{181}\) and of Texas Building Co. v. Albert & Edgar;\(^{182}\) and also by the recent English case of Prager v. Blatspiel, Stamp & Heacock, Ltd.,\(^{183}\) which has greatly liberalized the doctrine of emergency agencies, and appears destined to be the leading case on this point for some time. Sections 263 and 264 deal with the applicability of the so-called "parol evidence" rule. Query: Whether these sections cover the problem raised by the great case of Kean v. Davis?\(^{184}\) Here a bill was drawn payable to the order of X Railway and signed "J. K., President, X Railway", although indorsed, "X Railway, by J. K., President." Held, (by the Supreme Court) that the indorsement was the act of the company, by its officer, but the signature of the drawer was the act of the individual officer, parol evidence being inadmissible to release him.

The case was appealed to the Court of Errors & Appeals, where it was held, it was doubtful whether J. K. or the Railway Company was the drawer, hence, parol evidence was admissible, not to relieve a party who had executed the instrument, but to show who the contracting party really was.

**Interpretation of Manifestation Respecting Particular Acts**

(a) To Make Contracts

Where the principal defines with exactness the authority of the agent to make a contract, the agent is limited to that very type of contract which the principal has authorized.\(^{185}\) Thus, authority given to the superintendent of a water company to make *ordinary* contracts for the supply of water to users for general purposes, does not include an authority to guarantee a supply of water for fire purposes.\(^{186}\) And

\(^{181}\) 95 Mo. 136 (1888).


\(^{183}\) 93 L. J. R. 410 (K. B. 1924). See comment on this case in 2 CAMB. L. J. 241 (1925); and see further 37 YALE L. J. 379

\(^{184}\) 20 N. J. Law 425 (1845); rev'd in 21 N. J. Law 683, 47 Am. Dec. 182 (1847).

\(^{185}\) \textit{Restatement}, § 267.

an attorney employed to represent his client at the closing of a title, has no implied authority to extend the time for such closing where the contract of sale expressly makes time of the essence.  

(b) To Sell Land.

We learn from the RESTATEMENT that authority "to sell land" may be one of three different things: (1) the finding of a ready, able and willing purchaser; (2) authority to make a contract to convey; and (3) authority to make the conveyance itself. It is believed that all these three different interpretations of an authority to sell, are illustrated by New Jersey cases hereinafter discussed.

It is a familiar rule to students of Agency that an authority to "sell" given to a real estate broker, usually does not permit the inference that the authority extends to the making of a written contract of sale by the broker, in the name of the owner, so as to bind the latter. But, where, however, the design and terms of the power manifest an intent to give the agent authority to effect a sale and conveyance, and the instrument assumes to ratify the "bargain he may make, it will be held, at least, that he had authority to bind his principal to convey."  

The third possible phase of authority to sell real estate, is illustrated by the case of Howe v. Harrington & Van Winkle.

Does an agent with authority to contract to sell, or to sell and convey, have authority to insert the covenants and/or warranties that are usually inserted in similar sales of such property in that particular neighborhood? By the weight of the decisions, it appears that he does have such

187 Strauss v. Rabe, 97 N. J. Eq. 208, 127 Atl. 188 (1925), aff'd, 98 N. J. Eq. 700, 130 Atl. 920 (1926).
188 RESTATEMENT § 270.
189 RESTATEMENT § 271. Yadwin v. Arnold, 94 N. J. Law 500, 110 Atl. 903 (1920); Milne v. Kleb, supra note 154: "Authority to make or sign a written contract is not conferred, where the thing to be sold is land, by giving an agent power, by parol, to sell."
191 18 N. J. Eq. 495 (1842); See also RESTATEMENT § 273.
COMMENTS ON AGENCY RESTATEMENT

authority. New Jersey appears to be one of the few states at variance with this rule. But today in New Jersey, the usual form of deed is no longer the deed of bargain and sale, but the statutory short form, in which it is customary to insert warranties. Query: as to whether the rule of Stengel v. Sergeant is applicable to present day conditions.

The power to sell land at a fixed price implies no power to alter the terms of the contract so made, by the agent, as by giving an abatement in price corresponding to a deficiency in the acreage. If the agent has authority to contract to convey, or to convey land, he may usually receive so much of the purchase price as, by the terms of the sale, is to be paid at or before the conclusion of the transaction. Authority to sell land does not imply authority to sell for a consideration which is not payable in money, is not payable at the time of sale, or is not a present consideration.

192 LeRoy v. Beard, supra note 165. RESTATEMENT § 274.
193 Stengel v. Sergeant, 74 N. J. Eq. 20, 68 Atl. 1106 (1908): "But the contract signed by the agent, in two important particulars, exceeds any authority given by the principal: First, it binds her to the delivery of a warranty deed, free of all incumbrances. This was unauthorized, inasmuch as a purchaser, under an agreement to convey, while he is entitled to a clear title, is not entitled to covenants of warranty, unless the vendor has so stipulated. Lounsberry v. Locander, 25 N. J. Eq. 564, Errors & Appeals (1874)."
195 Peck v. Harriott, 6 S. & R. 146 (Pa. 1820). See further McAlpin v. Cassidy, 17 Tex. 449 (1856); Huntley v. Mathias, 90 N. C. 101 (1884); and Channell Bros. v. W. Va. Pulp Co., 77 W. Va. 494 (1916). RESTATEMENT § 289 (1): "A manifestation of consent by one person that another, as his agent, may contract for the sale or sell and convey land is, in the absence of anything to indicate a different meaning, interpreted as including consent that the proposed agent may receive so much of the purchase price as by the terms of the sale is to be paid at or before the time of concluding the transaction. (2) Such a manifestation of consent is interpreted as not including consent that the proposed agent may receive deferred payments unless the subject-matter is, at the time such payments are due, under such agent's management."
196 RESTATEMENT, § 283 (h). Hann v. Freestone, 99 N. J. Law
(c) Authority to Lease Land.

This topic is covered in the RESTATEMENT §§ 297 to 303. There is, however, a preliminary question which does not appear to be dealt with in the Restatement. This problem is, whether the mere listing of property for rent with a broker, gives an authority to the broker to make a lease. In this situation New Jersey applies, by analogy, the rule of Yadwin v. Arnold and Section 271 of the RESTATEMENT.

(d) Authority to Sell Personal Property

Here, again, we find that the word “sell” is susceptible of several different meanings. May an agent, to sell personal property, give such express warranties as are usually given on such a sale in that neighborhood? By the weight of authority it is held that the agent, to sell does have such power. New Jersey does not follow the rule of the Restatement on this point. In a case which may now, perhaps, be considered obsolete, it was held that “although a general agent to sell personal property may have authority to warrant the article, nevertheless, a special agent should be more

257, 123 Atl. 701 (1924): “A power to sell real estate presumptively authorized a sale for money only. 2 C. J., p. 560, § 202; Id. p. 618, § 253. Judson Green had no authority to accept anything in payment of the farm except cash, and this the defendant Arthur Free- stone knew, and if he did not know it he was bound at his peril to ascertain the facts.” Stengel v. Sergeant, supra note 198: “In the second place the authority was to sell for $10,500. This did not authorize an agreement to sell for $4,500, as the balance to be represented by a mortgage on the premises.”

197 Supra note 189; Shauinger v. Apter, 96 N. J. Eq. 302, 125 Atl. 31 (1924): “The authority of a real estate broker into whose hands an owner places real estate to be ‘listed for rent’ is merely to find a tenant who is ready, able and willing to enter into a lease on the terms specified by, and acceptable to, the principal, and, in the absence of special authorization to complete the contract of letting, has no authority to enter into a lease binding upon the owner.” “An inference that a real estate broker has been endowed by his principal with authority to bind him in a written lease cannot be drawn from circumstances entirely consistent with his employment as a mere broker, nor without other circumstances clearly indicating the grant of such greater authority.”

restricted in the scope of his powers, and should not be allowed to make such a contract.” 199 But the agent to sell personal property does have authority to make representations as part of the negotiations leading up to the sale, 200 and perhaps even up to the time of completion of delivery. 201 Of course, authority to sell usually means a sale by private negotiations and not a forced sale, 202 as by auction. Authority to sell does not imply authority to mortgage, 203 neither does it imply authority to give away the property of the principal. 204


200 Restatement § 310. Doyle v. Loft, Inc., 98 N. J. Law 516, 120 Atl. 2 (1923): “Lastly, it is urged and argued that it was error to admit proof of plaintiff's conversation with Geiser. This contention is manifestly untenable. The conversations with Geiser, and which were objected to, were in relation to negotiations between him and plaintiffs for the sale to them of defendant's candy. The manager having been employed for the very purpose of making sales, what was said by him in the ordinary course of conducting business affairs, as this appears to have been, and within his apparent authority as a manager in full charge, in order to induce the plaintiffs to buy in larger quantities, was binding upon his principal, and therefore may be properly received in evidence.” Compare A. B. Leach v. Pierson, 275 U. S. 120, 48 S. Ct. Rep. 57, 72 L. ed. 75 (1927).


202 Restatement § 312: “A manifestation of consent by one person that another, as his agent, may sell personal property is, in the absence of anything indicating a different meaning, interpreted as meaning a sale by private negotiation and not a sale by auction. If a sale by auction is specified, a sale by private negotiation is excluded.” Towle v. Leavitt, 23 N. H. 360 (1851): “A sale at auction implies a sale at any price that may be offered. It is ordinarily the last resort to reduce property into money, and we should be slow to ratify the doings of an agent clothed with the usual powers to sell who should pursue such a course.”


The remaining rules of the Restatement with respect to authority to sell personalty are, in the main, closely parallel to those laid down with respect to authority to sell realty.

(e) Authority to Possess a Chattel

As has been previously pointed out, authority to possess a chattel of the principal never implies authority to sell or otherwise dispose of it.\(^{205}\)

(f) Authority to Receive Payments

In New Jersey it has been held that “a mortgagor is warranted in paying the debt to the conveyancer who negotiated the loan, who had been authorized by the mortgagee to receive the interest and had received it repeatedly, and who produced and surrendered the bond and mortgage when the mortgagor desired to pay them off.” But the holding of the learned Vice-Chancellor was reversed, sub nom. Lawson v. Nicholson.\(^{207}\) The Court said, in the last-named case, that “the mere possession of a bond and mortgage by a person, not the obligee, will not warrant the payment thereof to such possessor.” In later cases, the view of the Court of Errors & Appeals in Lawson v. Nicholson was reaffirmed.\(^{208}\) The view of the Restatement appears to be somewhat different from that of the Jersey courts.\(^{209}\)

\(^{205}\) Workman v. Eyler et ux, 94 N. J. Eq. 526, 121 Atl. 515 (1923); Lawson v. Carson, 50 N. J. Eq. 370, 25 Atl. 191 (1892).

\(^{207}\) 52 N. J. Eq. 821, 31 Atl. 386 (1895).


\(^{209}\) Workman v. Eyler et ux, 94 N. J. Eq. 526, 121 Atl. 515 (1923); also Belcher v. Manchester Bldg. Assn., 74 N. J. Law 833, 67 Atl. 399 (1907); compare Land v. Reese, 136 S. C. 267, 134 S. E. 252 (1926), with comment by Prof. Mechem in 21 Ill. L. Rev. 722 (1927). Restatement § 338: “An owner of securities who, at the time when the payment of any sum is falling due thereon, entrusts them to the possession of the one who, as agent, made the sale or negotiated the loan out of which the right to payment arises, thereby manifests no consent that the person so having possession may receive such payment, except as to a third person who—(a) having no knowledge, reason to know, or notice of the absence of consent; and (b) knowing that the person so in possession is the one who, as
A fortiori, it follows that the authority to collect interest in the person who negotiated the loan but who does not have possession of the securities, implies no authority to collect the principal.  

But the agent of the borrower, for the purpose of procuring the loan, is authorized to receive payment of the loan where he is entrusted with the bond and mortgage for purposes of delivery to the mortgagee. Generally, authority to collect payment means authority to collect in money only. But if the principal knows of the receipt of merchandise by the agent in payment of money, the presumption arises, in the absence of dissent by the principal, that the agent is authorized to receive such merchandise in lieu of cash. An agent to sell, even though he has power to sell on credit, has no authority to take a note payable to himself, particularly where there is nothing on the note to indicate his agency.

It is a familiar rule of law that a salesman who is entrusted with goods merely for the purpose of delivery, or who is not making an "over-the-counter" sale, has no authority subsequently to collect the price and thereby discharge the debt.

agent, negotiated the transaction, makes the payment believing that the person so in possession has the owner's consent that he may receive it. As to such third person, there is apparent authority in the one having possession to receive the payment." Compare Williams v. Cook, 289 Pa. 207, 137 Atl. 232 (1927).

Cox v. Cutter, 28 N. J. Eq. 13 (1877). Restatement § 342.


Restatement § 347: "A manifestation by one person that another, as his agent, may receive payment is, in the absence of anything indicating a different meaning, interpreted as meaning payment in money only."

Fidelity & Deposit Co. of Md. v. Brocks Garage, 92 N. J. Law 239, 104 Atl. 132 (1918).


(g) Authority as Manager of a Business

The authority to employ others frequently implies authority to fix the rate of wages of those so employed.\textsuperscript{216} General authority to manage a business in the absence of the principal implies an authority to conduct it in the way in which the principal usually conducts it.\textsuperscript{217} The president of a corporation does not have authority to lease its lands \textit{ex officio}, but such authority may be inferred from its acquiescence in his acts.\textsuperscript{218} The president of a corporation is its general agent and has power to borrow money for it, on its credit, but the power to contract such a debt does not carry with it the power to encumber the property of the corporation by a mortgage, or a judgment confessed as a security for its repayment.\textsuperscript{219} Nor is an agreement by the president of a motor sales corporation on behalf of the corporation, to pay a physician for treatment of an employee suffering from diabetes, within the scope of his power and duty as president. Such agreement was accordingly held not to be binding on the corporation.\textsuperscript{220}

---

Clark v. Murphy, 164 Mass. 492, 41 N. E. 674 (1895): "The case is the simple one of a payment made to a person who has authority to make sales, and who is not shown to have any other authority. In such a case, if the purchaser sees fit to make a payment to him, he does so at his own risk." Kornemann v. Monaghan, 24 Mich 36 (1871); Butwick v. Grant (1924) 2 K. B. 483, 93 L. R. J. 972, commented on in 2 CAMB. L. J. 228 (1925).

\textsuperscript{214} Kelly v. Jersey City Water Supply Co., 74 N. J. Law 735, 67 Atl. 108 (1907).


\textsuperscript{218} Brahn v. Jersey City Forge Co., supra note 20.

\textsuperscript{219} Stokes v. New Jersey Pottery Company, 46 N. J. Law 237, (1884): compare \textit{Restatement} § 363: "A manifestation of consent by one person that another, as his agent, may borrow money in the name of the proposed principal is, in the absence of anything indicating a different meaning interpreted as including consent that the proposed agent may execute and deliver, in the name of the proposed principal, such a note, bond, or other instrument as is usually given in similar borrowings at that time and place."

Various problems connected with the authority of an agent to manage a hotel are discussed and decided in Brockway v. Mullin\(^\text{221}\) and in Calhoon v. Buhre.\(^\text{222}\) The general rules with respect to authority to manage a business or enterprise are laid down in the RESTATEMENT.\(^\text{223}\)

\(\text{(h)}\) Authority to Make Negotiable Instruments

This problem is the last one treated in Restatement number 3, which brings us down to date.\(^\text{224}\)

Authority to make negotiable paper is never to be lightly or easily inferred,\(^\text{225}\) and the instrument made by the agent must be substantially identical with the authority given.\(^\text{226}\) A third principle of construction of an authority to make negotiable instruments is that the authority must be used for the benefit of the proposed principal.\(^\text{227}\)

CONCLUSION

There are numerous problems in the law of Agency upon which the Reporter of the RESTATEMENT and his advisors have not as yet given us their ideas. What will the RE-

\(^{221}\) 46 N. J. Law 448, 50 Am. Rep. 448 (1884). This case, incidentally, appears to have been used by the Reporter in Illustration (1) under Section 358.

\(^{222}\) Supra note 100.

\(^{223}\) Sections 356, 357 and 358.

\(^{224}\) Restatement §§ 366, 367, and 368.


\(^{226}\) Blackwell v. Ketcham, 53 Ind. 184 (1876); Batty v. Carswell, 2 Johns 48 (N. Y. 1806). (This case is used as Illustration (1) to Restatement § 367, which reads as follows: "P manifests that A is his agent to sign his name to a promissory note for $250 payable in six months. A signs P's name to a note for that amount payable in sixty days. A's act is not within the manifestation."

\(^{227}\) Camden Safe Deposit & Trust Co. v. Abbott, supra note 171, Gulick & Holmes v. Grover, supra note 21. Restatement § 368: "A manifestation of consent by one person that another, as his agent, may draw, accept, sign or endorse negotiable instruments for the payment of money is, in the absence of anything indicating a different meaning, interpreted as confined to those made in the business of the proposed principal and on his account."

(As previously indicated, the problem of cases such as North River Bank v. Aymar, supra note 171, has not been reached in the RESTATEMENT.)
STATEMENT say on the question of North River Bank v. Aymar,228 on the subject of Lloyd v. Grace, Smith & Company,229 or with respect to Higgins v. Senior,230 and the contrary line of cases in New Jersey? 231 Will the RESTATEMENT follow the rule of Sooy v. State232 and Vulcan Detinning Co. v. American Can Co.233 with respect to the liability of the principal as affected by the knowledge of the agent? On all these and many other problems, we confidently and expectantly await light.

225 Supra note 171.
227 8 M. & W. 834 (1841).
229 41 N. J. Law 394 (1879).
230 72 N. J. Eq. 387, 67 Atl. 339 (1907).
RIGHT OF REVIEW BY CERTIORARI TO THE SUPREME COURT

By FRANK D. MOORE

At the beginning of the October Term 1928 of the Supreme Court of the United States, the Chief Justice announced, as part of an order, that:

"It will have been noted that since the close of last term there have been filed petitions for certiorari to the number of 244. This has thrown something of a burden upon the court, an anticipated result of the Act of February 13, 1925, in the orderly accomplishment of its purpose. The members of the court have, therefore, during the vacation, as opportunity offered, devoted much time to the consideration of the records and briefs filed with these petitions, in order that they may be disposed of in the early days of this term." ¹

In disposing of these 244 petitions, the court granted only forty, denying all the rest and, of course, without opinion. Notwithstanding this note of complaint, it must be remembered that it was at the earnest recommendation of the Supreme Court itself that the present act of February 13, 1925 ² was passed. Mr. Justice Van Devanter appeared before the Committee on the Judiciary of the Senate and advised legislation that would lessen the number of cases in which there is an appeal or writ of error as of right to the Supreme Court, and increase those that could be taken to that court only by certiorari. Mr. Justice Van Devanter pointed out to the committee that discretionary jurisdiction in regard to petitions for certiorari simply means that they are to be "granted or denied according to a sound judicial discretion"; that every justice studies the papers and gives his view, and that the petition is always granted "when as many as four think that it should be granted and sometimes when as many as three think that way." ³

³ Hearings (1924) 10, on S. 2060 and 2061, 68th Cong. 1st Sess.,
It will occur to many that after all this careful consideration, the court should assign briefly its reasons for its denial.

If the court is dissatisfied with the present state of affairs, it is believed that the bar is no less so, for it is a matter of common knowledge amongst members of the profession that the chances of having a writ of certiorari granted are woefully slim and to the vanishing point. If the denial of the writ settled the law of the case the situation might be more tolerable, but we know that such is not the case, although many inferior courts have said so.

In *Cleveland Provision Co. v. Weiss,* the District Judge said:

"The refusal of the Supreme Court to take jurisdiction by certiorari cannot be regarded as perfunctory. If error had been committed below, it is highly probable that a writ of certiorari would have issued."

The same unbounded confidence has been expressed by other courts in such action by the Supreme Court, although it was said in *Talcott v. United States,* that the denial of a writ of certiorari by the Supreme Court of the United States is not equivalent to an affirmance of the judgment, whatever that may mean.

In *Haberle Crystal Springs Brewing Co. v. Clarke,* Judge Swan said that the Supreme Court of the United States "have often warned no inference is to be drawn" from a

before Subcommittee of the Committee on the Judiciary of the United States Senate.

* 4 F. (2d) 408, 411 (D. C. N. D. Ohio, 1925).
* United States v. Morse et al., 161 Fed. 429, 426 (C. C. N. D. N. Y 1908); Rodrigues v. Transmarine Corporation, 215 N. Y. Supp. 123, 125 (1926): "An application was then made to the United States Supreme Court for a writ of certiorari to review, and the application was denied (266 U. S. 627). . . . So I think it is fair to assume that the question of jurisdiction was passed upon by the Supreme Court of the United States."
* 23 F. (2d) 897, 899 (C. C. A. 9th, 1928).
* 30 F. (2d) 219, 222 (C. C. A. 2nd, 1929).
refusal of a writ of certiorari. But in United States v. Morse, Judge Hough said that "the refusal of the writ is certainly an authority demonstrating the willingness of the highest tribunal to let the law alone."

In the face of such statements as these, we submit that no one can determine what weight, if any, is to be attached to the denial of a writ of certiorari by the Supreme Court, although most lawyers in the preparation of briefs, derive great comfort from the fact that a Circuit Court of Appeals case upon which they are relying was thrown out of the Supreme Court on petition for writ of certiorari.

We know, as a matter of fact, that it may signify nothing, for in the case of Horman v. United States a writ of certiorari was denied to the Circuit Court of Appeals composed of Circuit Judges Day, Lurton & Severens, and yet when the question involved in that case again came before the Court the Horman case was overruled. We mention the Horman case particularly because of the distinction of the judges of the Circuit Court of Appeals at the time.

In Lupipparu v. United States, the Court after referring to the Horman case, supra, pointed out that the opinion in that case was written by Mr. Justice Day and concurred in by Mr. Justice Lurton; that a writ of certiorari was denied by the Supreme Court, and then said:

"What effect should be given to the denial of a writ of certiorari by the Supreme Court we are not prepared to say, but it would seem that if the Circuit Court of Appeals misconstrued a federal statute and affirmed the conviction of a person innocent of the crime, the supreme court would undoubtedly review its decision." (Italics, author's).

Nevertheless we know that Horman was never legally guilty of the crime for which he stood indicted and for

---

8 Supra note 5, at 436.
10 187 U. S. 641 (1902).
12 5 F. (2d) 504 (C. C. A. 9th, 1925).
which he was finally punished. Many other similar instances could be mentioned.

Accordingly, it is manifest that neither the bench nor the bar knows what weight or significance to attach to the denial of a writ of *certiorari*.

The Supreme Court has already said that it would not write opinions in such cases, which practice of course, would be a great aid to the bar, for in *Gaines v. State of Washington*, the Chief Justice said:

"It has not been the practice of the court to write opinions and state its reasons for denying writs of certiorari, and this opinion is not to be regarded as indicating an intention to adopt that practice, but in view of the fact that the court has deemed it wise to initiate a practice for speedily disposing of criminal cases in which there is no real basis for jurisdiction in this court, it was thought proper to make an exception here, not to be repeated, and write an opinion."

From this it certainly appears that the court is determined, at all hazards, to keep up with the docket, and decline to inform petitioners of their reasons for denying their petitions.

The late Chief Justice White in the *National Prohibition Cases,* was so shocked at the action of the majority of the court in delivering its conclusions in such a case as that in the form of eleven head notes without discussion or reasoning, that he delivered a concurring opinion rebuking his brethren, but in his usual dignified, temperate language. At page 388 he said:

"I profoundly regret that in a case of this magnitude, affecting as it does an amendment to the Constitution dealing with the powers and duties of the national and state governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached.

---


14 253 U. S. 350 (1920).
I appreciate the difficulties which a solution of the cases involves and the solicitude with which the court has approached them, but it seems to my mind that the greater the perplexities the greater the duty devolving upon me to express the reasons which have led me to the conclusion."

Such language as that was worthy of the greatest days of John Marshall, but there are growing evidences of the fact that the court does not propose to hearken to such counsel but, on the contrary, they intend to keep abreast of the docket and deny about three-fourths of the petitions for writs of certiorari presented to them, without giving any reasons whatsoever for so doing.

The court lays the blame at the door of the attorneys who practice before it, and charges them with a woeful lack of knowledge of elementary principles; for in Magnum Import Co. Inc. v. Coty, the Chief Justice said:

"The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this Court of last resort. The jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. Our experience shows that eighty per cent. of those who petition for certiorari do not appreciate these necessary limitations upon our issue of the writ." (Italics, author's).

As the "necessary limitations" referred to are as old as the Circuit Court of Appeals Act, and are axiomatic in federal appellate procedure, such a statement as that is tantamount to saying that eighty per cent of the federal bar is ignorant of elementary principles of federal practice and procedure.

Furthermore it should not be lost sight of that a member of the Supreme Court bar must certify on his professional honor that "the petition is well founded as to matters of fact and as to matters of law," and it is not to be presumed that such a certificate is merely perfunctory.

15 262 U. S. 159, 163 (1922).
Indeed it has been intimated that the Supreme Court itself does not always recognize the rules laid down in the *Coty* case.\textsuperscript{16}

As Professors Frankfurter and Landis have well said: \textsuperscript{17}

"Although the increased role played by certiorari has greatly enlarged the Court's power of preventing cases without a real public interest from reaching it, in several instances during the last term the court assumed jurisdiction in cases where a public or general interest is hardly discernible. Special mention may be made of several cases under the Employers' Liability presenting unique circumstances rather than occasions for the formulation of general rules." (Italics, author's).

If there is danger of the court again falling behind the docket, or if the burden of litigation has become too great for the court as presently constituted, it would seem that the proper remedy would be to increase its membership as has been done several times since its establishment.

It has been facetiously suggested that one way of relief is to deny the petitions for certiorari.

In the number of the *Harvard Law Review* \textsuperscript{18} above referred to it was said:

"Undoubtedly, the 1925 Act has relieved the Court of some needless burdens for the more effective discharge of its great duties. No less true is it that the enlargement of the area of discretionary jurisdiction opened the door to new difficulties. Certioraries have been granted sparingly enough—102 out of 587 petitions is a fair index to the present law of probabilities governing this exercise of the Supreme Court's discretion. The greater the denials the less the load of adjudication. This is one way of relief. But the whole operation of the device of certiorari will be seriously affected if selection is determined not by the intrinsic importance of legal issues but by the arbitrary exactions of the size of the docket." (Italics, author's).

This expresses exactly the fears of many members of the Supreme Court bar, i.e. lest the "arbitrary exactions" of

\textsuperscript{16} Supra note 15.

\textsuperscript{17} Frankfurter and Landis, *The Judiciary Act of 1925* (1928) 42 HAB. L. REV. 18.

\textsuperscript{18} Supra note 17, at 11.
the Court's determination to keep abreast of the docket may be a determining factor in its denial of some of these petitions.

When we consider that in the last five or six years some of the members of the court have not dissented a single time, and others only once or twice, it would seem to indicate that the court is either overworked or else little collective deliberation is being practised by the court.

The desire on the part of the court to clear the docket of all pending petitions for certiorari is very laudable, but there are other considerations more weighty. At any rate the federal bar is not very well satisfied with the workings of the present system, due to the precarious status of the present right of review, and it is well known that many would like to see Section 238 of the Judicial Code restored as it stood prior to its repeal by the Act of February 13, 1925, which, at least, gave assurance of a right of appeal in cases involving the construction and application of treaties and the constitution, whereas under the present rule it is usually very doubtful whether such cases will ever go higher than the Circuit Court of Appeals.
SOME IDEAS AS TO THE RIGHTS OF THE PREFERRED STOCKHOLDER

By RICHARD S. HARVEY

ONE approaches with diffidence a subject so frequently dealt with as any topic connected with Corporation Law, but perhaps it may be possible to discover some phase of this important theme that will afford us information other than that which has become trite because so generally known.

Our modern business corporation is of very ancient origin. Presumably the collectors of taxes who sat at the receipt of custom in Judea in the year 32 B. C. when Rome decreed "that all the world should be taxed,"—probably these men were agents of the corporations which undertook collection of the taxes which were farmed out to them by the Government of the Caesars. But more nearly related to our present-day corporations are the examples contained in the Royal British East India and Hudson Bay Companies. The success they attained was no doubt in large measure due to elimination of the "joint stock" principle so that every stockholder shared in the profits or losses of all voyages instead of in one particular voyage; the right to transfer shares freely by will as well as inter vivos; and reduction of risk until it covered only the money or other property actually invested in the enterprise.

The opinion may be ventured that these three elements: (a) common interest by all stockholders in all profits and all losses, (b) ready means for transfer of shares, (c) limitation of liability of investor—are the basic ideas upon which have been erected the modern business corporation.

History is full of surprises, as when the Tory party in England under Disraeli greatly extended the voting franchise; and the same measure of surprise attends recognition of the fact that early British charters frequently contained a provision which prevented abuse by the control. This provision required that stockholders when assembled at corporate meetings should vote as individuals regardless of the number of shares each particular stockholder possessed.
Such conservatism is founded upon just valuation of fair dealing as an element upon which permanent success can be built; and in justification of this beneficial conservatism when compared with the more democratic tendency of our time the British may point to the Hudson Bay Company, which was founded in 1670 under the title “Governor and Company of Adventurers trading into Hudson Bay” and is still a powerful factor in Canadian trade. Contrast such beneficent conservatism with the spectacle of the situation as it exists in the United States today, where possession of the majority-control is the key-note in business; and the minority stockholder too often is assumed to be only a mere passenger upon the enterprise which his capital has helped to finance.

But to return to the particular subject before us, it may be said that persons investing in corporate securities in general are either common stockholders, holders of preferred stock or owners of bonds. The holder of preference shares does in fact occupy a position that is mid-way between the other classes, for he is not completely a stockholder nor is he a creditor of the corporation. His rights are indeed mixed; for those “rights” cannot be correctly construed until his certificate has been “read in connection with the provisions of the charter or articles of incorporation, the general law, the by-laws at the time the stock was issued except in so far as they may have been excluded, and the vote of proceedings under which the stock was issued. All these enter into and form a part of the contract.”

While it is the common view that the capital of a corporation is the fund or source provided to supply goods, machinery, and working capital necessary for the business, there is still another important use in which the word “capital” is employed. In this second sense, the term designates the fund to which every investor must look for the return of his investment. Needless to say every stockholder,

---

whether common or preferred, and every bond owner expects, or at least hopes, that the property with which the corporation is endowed at the beginning of its career, or which it accumulates, will pay back to him one hundred percent at time of liquidation, when from any cause whatsoever the enterprise shall draw to its close.

This "liquidation" and the subsequent return of capital may not take the form of the transfer of cash from the treasury of the corporation into the waiting pockets of the individual investor; his interests may be equally served through merger with some larger company upon just terms which will yield him full return of his investment.

As has been noted, this expectation of a return of capital in turn is based upon the assumption of honest administration and distribution of corporate assets; and all stockholders are entitled to have the corporation's capital remain unimpaired for the purpose of carrying on the corporate business, and also to provide a guarantee-fund for return of investment. Where the corporation is in danger of being wrecked by faulty administration, "any stockholder may invoke the aid of the courts to prevent such a consummation."2

This right to protect his interests pertains to the preferred stockholder equally with the owner of common shares; and this situation of parity of rights is plainly disclosed when a dissolution is decreed,—for in that event, unless the contract of subscription requires otherwise, the common and preferred stock share alike upon the division of the assets.3

Those to whom is entrusted the power to draft the incorporating papers have long been accustomed to substitute the preferred stockholder in the place and stead of the "silent partner,"—a familiar figure in the old-time partnership. By eliminating voting power, the similarity is essentially complete; for the special partner's immunity from unlimited

---


liability exists only so long as he refrains from taking an active share in partnership affairs. It really suggests a survival of a practice that was in common use prior to the adoption of the corporation as the approved form for conducting general business of every description,—the partnership because of its obvious defects having almost become relegated to the class of business "antiques."

The practitioner who conducts a suit in equity to protect the rights of a client who owns shares of preferred stock will readily see he is not so circumstanced as to be entitled to prosecute which is technically "a minority stockholder's suit." Since his client has no vote he is incapable of alleging wrongs which were committed when a majority outvoted him at a stockholders' meeting. In truth, because he has no vote at all, neither in law nor in logic can he base a complaint upon the exercise by others of a power which he willingly surrendered when receiving in its stead the guarantee of a fixed return at stated intervals. But while the preferred stockholder is thus debarred from enforcing rights which pertain to voting shares, as an investor his rights are continuing and unimpaired; to the extent of the capital represented by his shares he is a sharer in the enterprise and, as in old shipping days, may demand that the captain and officers use prudence, skill and energy, to bring the ship safely into port, with a goodly profit for all concerned. Indeed, the preferred stockholder (who is in statu naturae as to ability to interpose any effectual defense) presents a clearer case for equitable relief than does the common stockholder with his voting power or the bond owner who may look to the security behind the mortgage as his ultimate source of payment.4

Thus, a preferred stockholder may enjoin a consolidation that will injuriously affect his stock.5

Again, preferred stockholders may file a bill to enjoin the

---

5 Colgate v. United States Leather Co., 73 N. J. Eq. 72, 67 Atl. 657 (1907).
corporation from obeying a statute which in effect amounts to taking corporate property without due process of law.6

Where the management persists in being recalcitrant and the preferred stockholder is compelled to go all lengths in preserving and enforcing his rights,—dissolution of the corporation and distribution of its assets will be his ultimate goal. Like the ascent into Heaven, however, this cannot be achieved "all at a single bound."

Three stages upon this somewhat prolonged and oft-times wearisome journey should be observed:—

(a) An accounting, to ascertain the exact condition of the company's affairs. This is a convenient entering wedge, since the stockholder, as a part-owner, is clearly entitled to a statement of the financial condition of the joint enterprise.

(b) If the statement discloses a hazardous condition due to maladministration or insolvency, the court may be asked to appoint a receiver to reform the company's affairs, or to otherwise bring order out of chaos.

(c) If and when this recourse fails, the petition for dissolution may be filed. The applicant, however, must point out some statutory authority for this step. Equity will not assume it possesses an inherent power to destroy corporate existence. This is the general rule.7

Advancement of art or science is rapid in comparison with the onward movement of the Law. Like an old-fashioned stagecoach, it has so many trappings, so many guards and so many directing personages connected with its progress that the carrying capacity is small and the rate of progress is slow.

Fortunately, in the field of the orderly administration of transportation affairs the onward and upward sweep has been steady and heartening. When, in 1920, Congress amended the Interstate Commerce Act8 and gave to the

---

7 Fletcher, op. cit. supra note 1, at 9152.
Commission an extensive grant of judicial authority in addition to those administrative and legislative powers already conferred upon or delegated to that Board,—a new era in railroad management began almost over-night. As an alternative to adoption of the Government ownership policy so general in Europe and so much employed in recent railroad construction in Canada, Congress decreed that our railroads, while privately owned and operated, should be publicly supervised per the agency provided by creation of the Interstate Commerce Commission.

This Board is required, "as soon as practicable" to consolidate the railways of the Continental United States, and to proceed in such manner that the resultant amalgamations of railroad properties will constitute competing lines.\(^9\)

With the Commission's consent, merger, not amounting to consolidation, may be carried out; but without that approval such unification is not permitted.\(^10\)

The securities of the consolidated lines at par shall not exceed the value of the property as officially appraised; and no issue of securities shall be marketed unless like prior approval has been received.\(^11\)

Throughout this Federal legislation the expression "in the public interest" will be noted. From the employment of this significant term, and from the general tenor of the language used everywhere in the Act, the inference will be drawn this is a reformatory law; and it is equally plain Congress intended thereby to serve notice upon our railway corporations operating under broad charters, often endowed with very extensive grants of public money and public lands and uniformly equipped with the power of eminent domain,—that corporations thus circumstanced must henceforth recognize the fact that management of vast carrier properties and exercise of wide privileges and quasi-governmental powers \textit{ipse facto} constitute a trust in which the American people stands to those managers in the relationship of \textit{cestui qui trust}.

\begin{itemize}
  \item \textit{Ibid.}, §5, par. 4.
  \item \textit{Ibid.}, §5, par. 2.
  \item \textit{Ibid.}, §5, par. 6 (b); also §20a, par. 2.
\end{itemize}
But even this is not all. The Commission when operating in its judicial capacity is handing down decisions that make it plain to be seen that hereafter the investor as well as the public shall receive a degree of consideration which railroad magnates in times past too frequently have arbitrarily denied to all who were outside the favored circle of the majority—the "control." This courageous and beneficial course the Commission can now follow without let or hindrance, since there resides in that Board "exclusive initial jurisdiction" in railroad cases.\textsuperscript{12}

There is presented in the official reports of the Interstate Commerce Commission a leading railroad decision, \textit{Nickel Plate Unification} \textsuperscript{13} which contains a ruling vitally affecting the interests of owners of preferred railway shares, and which in fact expresses a constructive and forward-looking sentiment. It seems strange our courts have left this principle to be enunciated by a body comprised for the most part of laymen—not of attorneys "learned in law." In this important case, decided March 2, 1926, the Commission commented favorably upon the custom of granting the voting franchise to holders of shares of railway preferred stock, and noted with disapproval the fact that such voting power had been withheld in the particular instance then before the Commission.

The case concerned a proposed merger; and this defect and other evidences of an anti-minority attitude disclosed upon the argument caused the applicant's petition to fail. In its decision, the Commission expresses in pointed terms its views upon the inherent unfairness to the railroad holders of shares of railway preferred stock, and the risk incurred by the railway enterprise itself, when voting power was withheld from owners of the preferred stock, saying: "It is inimical to the public interest to strip stockholders of their voting power, thus rendering it so much easier to

\textsuperscript{12} Director General v. Viscose, 254 U. S. 498, 504, 65 L. Ed. 372, 375 (1920).

\textsuperscript{13} 105 I. C. C. 425.
control a great transportation system by a comparatively limited amount of investment." 14

But, if there is truth in the principle so ably and forcibly stated above—a recapitulation of the "taxation without representation" issue of the era of the American Revolution,—why should the legitimate practical application of that salutary vote-participation principle be confined to the affairs of carrier corporations? Why does not the vote-denying provision thus denounced constitute a damnatory feature in any stock certificate, even though pertaining to ownership of preference shares in a corporation engaged in the ordinary business of trade and commerce? And, if we may venture upon an enquiry particularly pertinent to members of the legal profession,—if law-logic points in that direction—why was it reserved for a lay Board, with its jurisdiction confined to transportation cases, to discover and proclaim this correct principle of corporation law?

But whatever the solution of this juridical riddle, it will prove of practical advantage to the holder of railroad securities of every class that henceforth in railroad cases, the issues will be decided by a Board composed of Members with actual experience as operators and men of affairs in the railway world. Perchance it may upon occasion even occur that one or more of the members of the Interstate Commerce Commission engaged in deciding the particular case may have participated in similar devices in the unregenerate days prior to the Amendatory Act of 1920,15 and from such experiences there will be developed ability to detect the presence of practices which the existing statute disallowances because of the policy of governmental supervision it has installed in the place of the old system of majority-control. Should such a not-impossible situation occur, it might transpire that a condition would arise in the realm of transportation adjudications similar to that reputed to exist in the world of verse:

"Wise poets who wrapt truth in tales,
Know her themselves through all her veils."

14 Ibid.
15 Supra notes 8, 9, 10 and 11.
When a writer wanders outside the regions of the actual and enters upon the misty precincts of prophesy, it is time his labors were terminated, in consideration for the time, attention and patience of the reader. But even in the face of such an appalling prospect, the opinion may be ventured that as the result of the ruling in that leading transportation decision, *The Nickel Plate Unification* case, *supra*, and, in view of the effectual guarantee by government that hereafter American railway securities—"bonds at par" and "outstanding capital stock at par"—shall not in their total issue "exceed the value of the consolidated properties as determined by the Commission"—in view of that official ruling and of those statutory safeguards, may it not occur that railway preference stock, Othello-like, will find "its occupation gone"? For—if we may employ a query to close this expression of certain ideas *in re* preferred stock,—what "preference" can be asked or given that will exceed official assurances that the securities shall not exceed the fair value of the assets, and that the preferred stockholders, and indeed all security holders, will receive just treatment upon judicial questions by the same Commission that in its administrative capacity fixes such "a just and reasonable" rate as will yield an adequate return upon investments in carrier properties? And, is it a too-remote conclusion to presume that at some not very remote time the vote-preserving principle will be adopted and applied in *court* decisions, and to that extent the rule enunciated by the Interstate Commerce Commission will redound to the advantage of all investors in preference shares?

*supra* notes 13 and 14.

*supra* notes 8, 9, 10, 11 and 15, at §5, par. 5(b).
CORRECTION OF ERRONEOUS VERDICTS

By WILLIAM RENWICK RIDDELL

"T"HE only modes known to the common law to re-
examine facts tried by a jury are the granting of a
new trial by the court where the issue was tried, or to which
the record was properly returnable; or the award of a
venire facias de novo, by an appellate court, for some error
of law which intervened in the proceedings."1

This may be quite accurate for some countries if lower
case initials are used (as they are here) in the words "com-
mon law"; it is erroneous if the words are printed with
capitals, thus, "Common Law". After more than half a
century of effort, I have never succeeded in persuading a
printer—and few editors—that there is a radical differ-
ence between "the common law" and "the Common Law";
between "the civil law" and "the Civil Law". It is, of
course, possible that the state of the type-box may have
something to do with this obtuseness, but it certainly does
exist.

The "common law" of any country is the basic law of
that country; "the Common Law" is the basic law of Eng-
land, "the Common Law of England". So the "civil law"
of any country is the law in civil matters as distinguished
from criminal law. The "Civil Law" is the law of Rome
and its daughters. It has been said by the courts, more
than once and with perfect accuracy, that the "common law
of the Province of Quebec is the Civil Law". The same has
been said of Scotland, and might be said of France, Spain
and other countries. I am not sure of the terminology
which would be employed by the courts of more than one
state of the Union in reference to their state's "common
law", and do not venture to guess. In like manner, in the
old Province of Quebec for a time, the "civil law" was the
"Common Law", equally with and in the same way as the
criminal law.

1 Moore, Voir Dire Examination of Jurors: II The Federal Practice
(1928) 17 GEORGETOWN LAW JOURNAL 14 n.
In the Province of Upper Canada, for a time, the "civil law" was the "Civil Law", while the criminal law was the "Common Law"; the "common law" was, in part, the "Civil Law" and, in part, the "Common Law".

If, in the passage quoted supra, "common law" means the basic, i.e., common law in the ordinary colloquial sense, it may be right in some countries; but if the "Common Law" is meant, the statement is erroneous.

A distinction must be made between civil and criminal cases.

Civil Cases

At the Common Law, the remedy of a litigant who complained of a wrongful verdict was the Writ of Attaint, by virtue of which the offending jury and its verdict were tried by a jury of twentyfour.\(^2\) Originally, an adverse finding by this jury (often called a Grand Jury, but quite distinct in its functions from the ordinary Grand Jury) was followed by the most serious consequences. The convicted twelve jurors lost their "law" and became infamous; they forfeited their goods and the produce of their lands; they were imprisoned and their wives and children thrust out of doors; their houses were razed, their trees extirpated, and their meadows plowed up. The successful Attaintor was reimbursed out of their property for all that he had lost by their false verdict. This punishment was too atrocious for even the hardy Englishman, and it got reduced to a comparatively mild chastisement,—a reasonable fine, half to the king and half to the injured litigant.\(^3\)

The Writ of Attaint continued in use as late as the seventeenth century; the latest case which I have found being *Brook v. Montague*.\(^4\) A little after the middle of the succeeding century, Lord Mansfield was able to say: "The Writ of Attaint is now a mere sound in every case; in

\(^2\) For the form of this Common Law Writ, see Fitzherbert's *Natura Brevium*, 241, 243.

\(^3\) See the author's *Paper Before the Royal Society of Canada, A Day in Old Niagra* (1928) §II.

\(^4\) *Cro. Jac.* 90 (1606).
many, it does not pretend to be a remedy".5 I have not been able to find any instance of the Writ on this Continent, although, like the action of *Scandalum Magnatum*, it was available theoretically; even in England it was theoretically in force until 1836, when it was abolished with other rubbish.6

The desuetude of the Writ of Attaint was undoubtedly due to the practice of granting a new trial, which was wholly unknown to the Common Law, and which seems to have begun in 1350. Amos, in his very valuable edition of old Sir John Fortescue’s *De Laudibus Legum Angliae* 7 (which some “cranks” like me still read), says that the practice of granting a new trial “may be traced as high as the year A. D. 1665”. For our present purpose, the date of the beginning of the practice is immaterial, but I am confident that Amos has placed the date too late.

*Criminal Cases*

At the Common Law, there never was power to grant a new trial,—subject to a statement to be made later. If the accused was convicted, that was the end of it. If he was acquitted, there was a sort of revengeful remedy in some cases. In such cases, as to which Blackstone will supply sufficient information, not quite accurate, indeed, but the errors are insignificant, the injured person, or, in case of death, certain of his folk might take an “Appeal” and have a “Battel” or duel. This very imperfect remedy grew practically obsolete, and its being utilized in 1818 by William Ashford, eldest brother and heir-at-law of Mary Ashford, for the murder of whom Abraham Thornton had been tried and acquitted, led to its abolition by the Act of 1819.8 This statute abolished all right to Trial by Battel as well in civil as in criminal cases.

There was no power to grant a new trial in strictly criminal cases, but in certain cases called criminal but really

---

6 Bright v. Eynon, 1 Burr. 391, 393 (1757).
7 *6 Geo. IV, c. 30* (1836).
8 "At p. 98.
8 59 Geo. III, c. 46 (1819).
civil, as for example, trespassing upon the highway and the like, the courts, when the practice of granting a new trial in civil cases obtained, sometimes granted a new trial. This, however, was confined to quasi-criminal misdemeanors and was not extended to felony.

It is true that in one case this was done: in Reg. v. Scaife, the Court of Queen's Bench granted a new trial to a prisoner convicted of robbery at York Assizes before Creswell, J., but this has been authoratively disapproved and the power denied.

Those who read the State Trials (and those who do not miss a rare pleasure, intellectually as well as professionally) will remember the case of Ashley and Simons the Jew, of which Ashley, the complainant in the trial says that it "is the first precedent of the kind to any person who had been convicted of a criminal offense". This was mixed up with a case of perjury in which Ashley had apprehended Simons the Jew, as he was always called, his first name being Henry. Simons was tried and acquitted; thereupon Ashley charged Simons with a misdemeanor in placing coins in his (Ashley's) pocket to be used as evidence against him. On this trial of Simons, the judge understood the jury to find a verdict of guilty; and the Court of King's Bench was applied to for a new trial. It was established that the judge had misapprehended the jury's meaning, and that there was no intention expressed or in fact that the finding of the jury was one of guilty. Accordingly, a Venire de Novo was granted, simply on the ground that there had been no verdict.

That a new trial, or Venire de Novo, was not to be granted where there had been a verdict, however much dissatisfied some of the jury might be with it, so long as they did not ex-

9 17 Ad. & Ed. (N. S. 1851).


11 The Indictment is given at full length in 20 Howell's State Trials 682-3.
press their dissent when the verdict was being given in, became manifest in one of the most interesting cases ever tried: that of Elizabeth Canning, which, a puzzle to her contemporaries, continues to the present time, nearly a century and a three-quarters afterward, to be a subject of dispute among equally qualified writers who have formed and express diametrically opposite and utterly irreconcilable opinions upon it. Elizabeth Canning, a young girl of about eighteen, told an extraordinary story of kidnapping and robbery, and brought about the conviction of two women, who just escaped hanging through the efforts of some who were convinced of the falsity of the charge. They were pardoned, and the girl placed on trial for perjury in May, 1874. The jury first brought in a verdict which plainly meant that she had sworn to what was in fact untrue but she believed to be true,—“Guilty of perjury, but not wilful and corrupt”. No judge at the present-day would act as the Recorder, William Moreton did. The proper course was to tell the jury that their finding was equivalent to an acquittal, but Moreton sent them back instructions on the crucial point,—to “find her guilty of the whole indictment, or else acquit her”. The jury returned within sixteen minutes with a verdict: “Guilty of Wilful and Corrupt Perjury.” Two of the jurors afterwards made affidavit that they did not intend to find her guilty of “deliberate, wilful and intended perjury in swearing facts which she knew to be false”. An application was made to the Court of King’s Bench, and the case of Simons the Jew was relied on. But here there was no question of mistake on the part of the judge, there was no doubt of the verdict actually given by the jury, there was no pretense that the non-concurring jurors had expressed any dissent when the verdict was returned, so the application failed. If there ever was a case for executive clemency, surely this was one, but hearts were hard in those days, and Elizabeth Canning was banished to America for several years, to be hanged out of hand if she returned during that period. She went to Connecticut, married a respectable man there, and there ended, the mistake of identification made by her.12

12 20 Howell’s State Trials 262-692.
It is not without interest to know that last year we had in Ontario a similar case of jurymen not appreciating, as they said, the effect of their verdict. There was no new trial, but executive clemency was exercised and the sentence of death commuted to life imprisonment.

I have, in the above, said nothing of the right which existed in theory to "appeal to the Foot of the Throne" in every case of alleged injustice. This was never done in criminal, and seldom in civil cases, and it disappeared even in theory in 1641, being destroyed, so far as England is concerned, by the Star Chamber Act of that year. The exercise of the right in the American Colonies before 1776, and in Canada and other parts of the British Empire before and since, up to the present time, forms a tempting subject for discussion, but, strong as the temptation, strong as it is, must be resisted for the time being.
NOTES

CRIMINAL LAW—Seduction—Shotgun Marriage a Defense to Prosecution.

In the absence of statutory provision, subsequent marriage is not a defense to a prosecution for seduction.\(^1\) But statutes in several states provide that a person cannot be prosecuted for seduction after marrying the injured party even though the marriage be contracted to avoid prosecution.\(^2\) And if the marriage takes place, the good

\(^1\) In re Lewis, 67 Kan. 562, 63 L. R. A. 281 (1903).

or bad faith or motive of the man in going through the ceremony or his subsequent abandonment of the female is immaterial, unless the statute provides otherwise. In some states, such subsequent abandonment is made criminal, and in Georgia the offender must post a bond for the support of the injured party and must marry her and live with her for five years. In some cases it has been held that a bona fide offer to marry the injured party is sufficient to absolve the defendant of the crime even though the offer is not accepted. But only one case has gone so far as to hold that an annulled marriage constitutes a bar to the prosecution.

S. D. Rev. Code (1919) § 4104; Va. Code (1924) § 4413; Tex. Penal Code § 506 (Vernon's Ann. Penal Code, 1925, Art. 506). By a prior Texas statute, providing that subsequent marriage should suspend prosecution but that the indictment should remain on the docket for two years and that prosecution should be revived if, within that time, the defendant deserted his wife without cause or gave her grounds for divorce, was held subservive of the constitutional guaranty of speedy public trial, in Waldon v. State, 50 Tex. Crim. App. 512 (1908). Cf. Arkansas statute, supra, and infra note 4.

In Arkansas it is provided that if any man against whom a prosecution for seduction has been begun shall marry the female, the prosecution shall not be terminated, but shall be suspended, and if at any time the accused shall willfully and without such cause as now constitutes a legal cause for divorce, desert and abandon such female, the prosecution shall proceed as though no marriage had taken place between the female and the accused. Ark. Dig. Stat. (Crawford & Moses, 1921) § 2415.


Wallings v. Commonwealth, 276 S. W. 1071 (Ky. 1925); Banks v. State, 150 Ga. 73, 102 S. E. 519 (1920).

The defendant seduced the prosecutrix. He was later abducted and compelled to marry her under threats of death. The defendant immediately left his wife. The marriage was subsequently annulled on the ground of duress. Marriage subsequent to seduction constitutes a bar to prosecution in Texas by statute, supra note 2. The defendant was then indicted for seduction on the theory that the marriage must be valid in order to comply with the statute. From a verdict of guilty the defendant appeals. Held, the subsequent marriage, though later annulled, presented a bar to the prosecution for seduction. Verdict reversed. Burney v. State, 13 S. W. (2d) 375 (Tex. Crim. App. 1929).
the court seemed content to dismiss the subject with a mere state-
ment that the marriage was not void* and that the "plain terms
of the statute" had been complied with.

Notwithstanding the nature of the objection to a marriage entered
into under duress, the weight of authority probably is to the effect
that such a marriage is voidable only.10 Thus, it has been expressly
held that a marriage obtained under duress is not void, but merely
voidable, and therefore is valid and binding upon the parties until
annulled by a court of competent jurisdiction.11 And a similar con-
clusion is inferable from the decisions which lay down the rule that
a marriage effected by duress is subject to ratification by the injured
party upon being freed from the duress.12 And an annulled marriage
may have certain legal effects, such as the legitimation of issue of
the marriage.13

It has been said: "The idea which is the basis of all legislation of
this sort—which is very common throughout the Union—is that the
marriage of a seducer to a previously chaste woman whom he has
induced to consent to have sexual intercourse with him under a prom-
ise to marry her, even when such marriage is entered into under
compulsion of the law, comes nearer to constituting reparation for
the wrong which the man has done the woman than any other re-
dress which can be devised.14

Support, protection or cohabitation is not part of the contemplated
reparation,15 and even a valid marriage could not purge the woman's
reputation of having submitted to the act of inter-
course. Thus, the court might well be justified in saying that the
legitimation of the child and any other legal effects which the an-
nullled marriage might have would be adequate reparation for the
woman's undoing.

J. B. H., JR.

10 L. R. A. 1916 C 706, note.
11 Bostick v. State, 1 Ala. App. 302, 55 So. 260 (1911), holding that
the fact that a marriage was obtained under duress was unavailable
as a defense to an abandonment proceeding where the annulment of
the marriage had not been decreed. But see Taylor v. White, 160
N. C. 38, 75 S. E. 941 (1912), holding that a marriage procured by
duress could be avoided, either by judicial decree or by the acts of the
parties.
12 Supra note 10.
13 Hayworth v. Williams, 51 Tex. Civ. App. 146, 120 S. W. 1138
(1909), based on VERNON'S ANN. TEX. STAT. § 2581.
14 Williard Bartlett, J., in People v. Frost, 198 N. Y. 110, 91 N. E.
376, 377 (1910).
15 Supra note 3.
EMINENT DOMAIN—Private Ways of Necessity.

One of the recognized powers of eminent domain is the right of taking of property by a private individual to enable him to cultivate his land or to carry on his business to better advantage in a community so situated that public sentiment approves of such takings, either because they are sanctioned by ancient custom, or because the natural prosperity of the state would be seriously retarded if eminent domain could not be employed for such purposes.¹

In respect to this class of undertakings, there are two well-defined and conflicting lines of decisions.² One, represented by Brown v. Gerald,³ draws a sharp distinction between public use and public benefit, and guards the private rights of property against the assertion of the power of eminent domain for public benefits as distinguished from public use. It expressly repudiated the doctrine that any enterprise which indirectly promotes the public prosperity is necessarily a public use.⁴ The opposing view, represented by Clark v. Nash,⁵ holds that public use means public advantage, and that anything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new resources for the employment of capital and labor, contributes to the general welfare and the prosperity of the whole community, and, giving the constitution a broad and comprehensive interpretation, constitutes a public use.⁶

As a general proposition it may be stated that a private road or way cannot be laid out without the consent of the owner of the land over which it passes, and a statute which purports to give authority to do so, is unconstitutional and void.⁷ But, employing this liberal view enunciated in Clark v. Nash⁸ as a predicate, there has devel-

¹ See collection of cases, 10 R. C. L. § 22 n. 5 (1915).
² See Potlach Lumbr. Co. v. Peterson, 12 Idaho 769, 784, 88 Pac. 426 (1906).
³ 100 Me. 351, 61 Atl. 785 (1905).
⁴ In Brown v. Gerald, supra, the court stated, by way of dictum, that distribution of electricity for public lighting was a public use but held that the mere creation and distribution of power for manufacturing enterprises was not a public use which would justify an exercise of the power of eminent domain.
⁵ 198 U. S. 361 (1905).
⁷ Cooley, Constitutional Limitations (5th ed. 1883) 657.
⁸ Supra note 5.
oped a doctrine that the taking of private property, under a statute or constitutional provision expressly conferring the right, for use by a single or a few private individuals and for a purpose not open to the public generally, may, under proper circumstances, constitute a taking for a public use. This doctrine seems to have been asserted more especially in the following classes of cases.

The reclamation of land by irrigation has been held to be such a public purpose that the legislature might rightfully authorize the condemnation of right of ways over private property, or through the ditches of private individuals, to convey water for that purpose onto land belonging to a private individual. Of course there must be a statute expressly or impliedly conferring the right of eminent domain in order that the power may exist to expropriate right of ways for such purposes and that statute must be strictly construed. Nevertheless, by weight of authority, such statutes are not violative of the federal constitution.

In the earlier times when steam as a motive power was unknown and capital was small, the erection of dams and the flowage of land for mill purposes and to create waterpower was considered to be for a public use and the acts authorizing them were assumed to be valid. And, although these reasons no longer exist, such acts are in many jurisdictions now upheld for any kind of mills, either on the ground that such mills are a great public benefit, or on the ground of long acquiescence and usage, although their constitutionality is sometimes seriously questioned.

9 In Clark v. Nash, 198 U. S. 361 (1905), supra, the court sustained the validity of a statute of the state of Utah authorizing the condemnation by one person for his individual use a right of way over the lands of another for the construction of an irrigation ditch.

10 San Joaquin & K. River Canal & Irrigation Co. v. Stevinson, 164 Cal. 221, 128 Pac. 924 (1912).

11 Statutes similar to the one in the leading case of Clark v. Nash, supra, have been upheld in the Federal courts of Alaska, Arizona, California, Idaho, Kansas, Montana, Nebraska, New Mexico, Oregon, Utah, Washington and Wyoming. 9 A. L. R. 584 (1920).

12 Supra note 9.

13 See Andover v. Sutton, 12 Metc. 182, 185 (Mass. 1878): "Originally when the inhabitants were few and their means of erecting expensive works were small, the erection of a mill was a great public benefit, and those who were willing to incur the expense were considered as public benefactors. Those who undertook the erection of a mill were permitted to select a site and flow the land necessary for that purpose."


15 See Harding v. Funk, 8 Kan. 315, 324 (1871).
In *Strickley v. Highland Boy Mining Co.*, the Supreme Court of the United States sustained a statute of Utah authorizing the condemnation of a right of way for an aerial bucket line over the land of another to enable a private owner to gain access to and operate his mine. But in the latest case involving identical facts and a similar statute, the court declined to pass on the constitutionality of the statute but merely held that such expropriation was not authorized by that particular statute. From this we may perhaps infer that such statutes are to be construed strictly.

A branch or lateral road or spur track necessary to the operation of the main line of a railroad, or which may be necessary to connect important industries or even a single industry with the main line, is a public use for which private property may be taken under the power of eminent domain. The fact that it is suited to be used by only one industrial concern is not a valid objection to the procedure, but if it can be used to accommodate others, they cannot be precluded from using it.

Statutes allowing expropriation of land for private right of ways by confined property owners who had a right to ways of necessity have been upheld as constitutional. In some states, statutes have been enacted declaring certain non-navigable streams to be navigable, thus permitting logs to pass through the property of riparian owners without providing compensation therefor. Such statutes have been uniformly held to be unconstitutional.

This brings us to a discussion of the Washington statute authorizing the condemnation of private property for a private logging road. The validity of this statute has been repeatedly upheld by

18 200 U. S. 527 (1906).
15 Notes, 20 L. R. A. 434 (1892); 22 L. R. A. (N. S.) 181 (1909).
14 Derryberry v. Beck, 280 S. W. 1014 (Tenn. 1926); Snyder v. Warford, 11 Mo. 513 (1848). In Maine, a statute providing that whoever enters or crosses any tract of land outside the thickly settled portion of any town, with men, teams or log haulers, for purposes of hauling supplies, wood, bark, logs or lumber, shall not be held liable for trespass, was held to be subversive of constitutional guaranties. Paine v. Savage, 126 Me. 121, 51 A. L. R. 1194 (1927).
12 Olive v. State, 86 Ala. 88, 5 So. 53 (1889); People ex rel. Ricks Co. v. Elk River Lumber Co., 107 Cal. 221, 40 Pac. 531 (1895); Morgan v. King, 35 N. Y. 454 (1866); Allison v. Davidson, 39 S. W. 905 (Tenn. Ch. 1896).
22 The laws of the State of Washington provide that any owner
the Supreme Court of Washington. And in the recent case of *Ruddock v. Bloedel Donovan Lumber Mills*, the statute was presented to the Circuit Court of Appeals, Ninth Circuit, for consideration and the court held it did not violate the Fourteenth Amendment of the Constitution of the United States. The petitioning Lumber Company was permitted to condemn private land for a private logging road.

Statutes practically identical with the Washington statute, allowing condemnation of private way of necessity for hauling logs were held unconstitutional in Oregon, and Virginia but were upheld in Idaho and Kentucky. The courts which have upheld the constitutionality of such statutes have been influenced and guided by the policy of the state to foster and protect its most important industries.

of land which is so situated with respect to the land of another that it is necessary for its proper use and enjoyment to have and maintain a private way of necessity, or to construct and maintain any drain, flume or ditch, on, across, over, or through the land of such other, for agricultural, domestic, or sanitary purposes, may condemn and take lands of such other sufficient in area for the construction and maintenance of such drain, flume, or ditch, as the case may be, and that the term "private way of necessity," as used in the act, shall mean and include a right of way on, across, over, or through, the land of another, for means of ingress and egress, and the construction and maintenance thereon of roads, logging roads, flumes, canals, ditches, tunnels, tramways, and other structures upon, over, and through which timber, stone, minerals, or other valuable materials and products may be transported and carried.

23 State ex rel. Mountain Timber v. Superior Court, 77 Wash. 585, 137 Pac. 994 (1914); State ex rel. Grays Harbor Logging Co. v. Superior Ct., 82 Wash. 503, 144 Pac. 722 (1919); State ex rel. Eastern Ry. & Lumbr. Co. v. Superior Ct., 127 Wash. 30, 219 Pac. 857 (1923); State ex rel. White Pine Sash Co. v. Superior Ct., 143 Wash. 687, 255 Pac. 1025 (1927); State ex rel. Woodruff v. Superior Ct., 145 Wash. 129, 259 Pac. 379 (1927).

24 28 F. (2d) 684 (1928).

25 Anderson v. Smith-Powers Logging Co., 71 Ore. 276, 139 Pac. 736 (1914).


In Hairston v. Danville & Western Railway Co., the court said: "But when we come to inquire what are public uses for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the use, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union, that different results might be expected."

Consequently, it seems safe to say that if it is the declared public policy of the state to foster developing industries and to assist in the progress of its more important industries because of the relation those industries bear to the general welfare, a statute conferring the power of eminent domain upon a person engaged in such an industry, enabling him to condemn a private right of way across land of another where necessary for the proper development of his project, will be upheld as constitutional.

J. B. H., Jr.

MASTER AND SERVANT—INDEPENDENT CONTRACTOR—DANGEROUS INSTRUMENTALITY.

A master may be held liable for an injury to a third person only when it is shown that the injury was caused by the servant while acting within the scope of his employment. The master is not liable when the servant who caused the injury was engaged in a "frolic of his own". The key to the relation of master and servant is the control exercised by the master.

Where the one performing work is not under the control of the master, this relationship does not exist, even though the work may be done at the request and for the benefit of another. This type of

---

2 Supra note 18.

1 Joel v. Morison, 6 C. & P. 501 (Eng. 1834); Cosgrove v. Ogden, 49 N. Y. 265, 10 Am. Rep. 361 (1872); 2 Meachem, Agency (2d ed. 1914) § 1874 et seq.

person is known as an "independent contractor". An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the names by which the result is to be accomplished. Since no control is exercised over as independent contractor, the rule has been well established that the employer is not liable for the acts of the contractor, in general, since it would be unjust to impose liability for another's wrong where there has been no choice in respect of the actions of the wrongdoer.

There are well defined exceptions to this rule of the non-liability of the employer. First, where the work is wrongful of itself, unlawful, or would result in a nuisance. This is based upon the principle that if one contracts with another to commit a nuisance, he is a co-trespasser by reason of his directing or participating in the work. Second, if the employer owes a duty to the plaintiff he cannot avoid responsibility by delegating its performance. An illustration of this duty arises from a duty imposed by statute upon the employer. Third, where the work contracted for is of an inherently dangerous character.

If the work is inherently dangerous it is not essential to the employer's liability that the particular injury was forseen or authorized. However, the work must be so dangerous that injury probably will and not merely may, result to third persons unless precautions are taken. So if the danger lies solely in the possibility

---


8 Ellis v. Sheffield Gas Consumers Co., 2 E. & B. 767 (Eng. 1852); Woodman v. Metropolitan R. R. Co., 149 Mass. 335, 21 N. E. 482 (1889); 2 Thomp., Neg. 903.

St. Paul Water Co. v. Ware, 16 Wall. 566 (1872).

Gray v. Pullen, 5 B. & S. 970 (Eng. 1864).

Bower v. Peate, 1 Q. B. D. 321 (1876); Joliet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17 (1877); Chicago v. Murdock, 212 Ill. 9, 72 N. E. 46 (1904); note (1909) 17 L. R. A. (N. S.) 758.


of some one doing an indefinite number of careless acts, the work will not be deemed intrinsically perilous. Modern expediency, together with scientific findings, has led courts to hold that the handling of dynamite is not inherently dangerous.

Where dangerous work is to be done along the public highway, the employer owes the public the duty of an insurer against the contractor's negligence. The owner or occupier of premises is liable where an independent contractor is employed to perform inherently dangerous work on the premises. The occupier of land where fire breaks out is liable for the ensuing damage, the employment of an independent contract or being no defence. Where water, artificially contained, as in reservoirs, escapes, the person liable is the one who caused the water to be brought upon the land and not the independent contractor who personally may have done the work.

The chief difficulty which confronts courts is to decide whether, in a particular case, the tort-feasor is an independent contractor or not. In the recent case of Montgomery v. Gulf Refining Co. of La., the court discussed the dangerous instrumentality doctrine between master and servant, and the same rule as applied between an employer and independent contractor. Under both rules the result reached was the same, namely, the master or employer would be liable for injuries to third persons caused by a dangerous instrument. Without clearly holding the tort-feasor to be either a servant or an independent contractor, the court held the master or employer liable.

---

14 See, Findley, Property Owner's and Occupiers' Liability (1929) ch. 24.
17 168 La. —, 121 So. 578 (1929). See Recent Decisions, infra p. 357.
NOTES 339

It is submitted that courts in discussing this question of liability cite the principle that a master is liable for the torts of his servants committed in the course of his employment. They further point out the rule that generally an employer is not liable for injuries to third persons which are caused by an independent contractor, except where the work done is inherently dangerous. The courts impose liability, predicated on these two principles, without affirmatively holding either one of the principles to apply to the given facts in a particular case.

J. H. W.


Few of the powers granted by the Constitution to Congress have been given as broad application and extension as the Commerce Clause. The word "commerce" has been given an elastic significance probably far beyond the most fantastic visions of our forefathers. It has broadened as new businesses, means of transportation and new inventions have been discovered. In recent times the Commerce Clause has been extended to the telegraph, telephone and aeroplane.


4 Western Union Tel. Co. v. Texas, 105 U. S. 464, 26 L. Ed. 1067 (1882). Aeroplane, see Air Commerce Act of 1926. No case has been found where telephone lines were expressed declared to be subject to interstate commerce, and in Richmond v. Southern Bell Telephone Co., 174 U. S. 761, 777, 43 L. Ed. 1162 (1899), it was said that the Act to Regulate Commerce (Act of July 24, 1866, c. 230 § 1, 14 Stat. 221, R. S. 5263) did not apply to telephones. However,
The latest extension of this power is to radio. In radio alone is commerce entirely intangible, the communication of intelligence from one state to another without physical substance connecting the states. While there have been few decided cases involving radio, particularly the interstate commerce aspect, certain fundamental concepts have been decided, and a tremendous field has opened to the lawyer and writer. It is well established that the communication of intelligence between countries or states is the subject of governmental regulation under the Commerce Clause. In telephonic and telegraphic communications, while nothing visible and tangible is transported, the difficulty of conceiving that as commerce it is subject to the power of Congress is aided by the necessity of wires and physical property in order to transmit the ideas and messages. But in radio the problem becomes more difficult because there is no material connection between the states, not even air waves, merely the indefinable ether waves permeating everything. However, the fact remains that ideas and intelligence are carried from state to state by some sort of energy. This transmission is intercourse between states, and hence is commerce. It is now generally accepted that radio transmission and reception are interstate commerce.

by amendment in 1910 the Act was extended to telephone companies, and it is now generally held that they are interstate commerce.


6 An exception, also intangible, is to light waves. Thus, the projection of light rays across the Canadian border into New York was held to be a bringing into the United States of a prize fight-film in violation of an Act of Congress prohibiting such transportation. Pantomimic Corporation v. Malone et al., 233 Fed. 135 (C. C. A. 2d, 1916).

7 The Law of Radio Communication, by Judge Stephen Davis (1927). This is the only book that has been written on the law of radio. See Book Review (1928) 16 Georgetown Law Journal 258.


6 Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23 (1824); Western Union Telegraph Co. v. Pendleton, 122 U. S. 347, 356, 30 L. Ed. 1187 (1887).

and trans-oceanic communication are undoubtedly subject to federal regulation. As to amateur "sending", it probably depends on whether the messages sent reach the borders of another state. Broadcasting has been held to be subject to the power of Congress.

As interstate commerce radio, telephony or telegraphy, between states and foreign countries is, of course, subject to the regulatory power of Congress in the interests of the public. Like the police powers of a state, this power cannot be bargained away and is subject to the exclusive jurisdiction of Congress. A brief outline of the history of the federal legislation on radio may perhaps give us a better understanding of the subject. On June 24, 1910, Congress passed its first law, which is still in force, relating to radio. It was amended on July 23, 1912, and required steam vessels to have radio transmitting and receiving apparatus in case of a disaster at sea. On August 13, 1912, the Act to Regulate Radio Communic-


11 Davis, op. cit. supra note 7, at 24, 25.
12 See infra.
13 35 Op. Atty. Gen. 126 (1926); White v. Federal Radio Commission, 29 F. (2d) 113, 114 (N. D. Ill. 1928). This case has been certified by the Seventh Circuit Court of Appeals to the Supreme Court of the United States and involves the questions of (1) whether broadcasting is interstate commerce, (2) whether the act is unconstitutional as allowing the government to take personal property for public use without compensation or (3) due process of law, (4) whether the Act involves a delegation of legislative power by saying "public interest, convenience or necessity" should guide the decisions of the Commission. Due to the importance of this question it is probably that the Supreme Court will consider some of these questions; U. S. v. American Bond & Mortgage Co., 31 F. (2d) 448 (N. D. Ill. 1929. (This case directly said broadcasting was interstate commerce); see RECENT DECISIONS, infra, p. 362.
16 36 Stat. 629, 46 U. S. C. 3484. Since this time, and before there have been a number of International conventions and treaties in which the United States was a party regarding radio. See W. J. Davis, International Radio Relations, 16 Georgetown Law Journal 400 (1928); The Radio-Telegraphic Convention, 47 L. J. 437 (1912).
18 37 Stat. 302, 47 U. S. C. A. § 51-63, (1926), as amended Mar. 4,
tion was enacted, and it, too, related principally to marine transmission, radio telephony and broadcasting being then in their formative states. The Act required a federal license before a person could engage in radio communication involving interstate or foreign commerce. It was broad enough to include radio telephony, and later broadcasting was included under the words "commercial intercourse." In the matter of licensing radio operations, the Attorney General decided soon after the Act of 1912 that the Secretary of Commerce had no discretion, except in granting certain wave lengths, to withhold a license. No serious difficulties were involved in this sort of regulation for a number of years, marine and amateur wave-length channels being available for all. In 1921 the art of broadcasting was discovered, and with the increase of radio stations, there was a scramble for the desirable wave lengths. With several hundred stations operating at the same time on the two wave lengths assigned, there was much interference in communications. In 1923 the case of Hoover v. Intercity Radio Company, definitely affirmed the former opinion of the Attorney General as to the licensing power of the Secretary of Commerce. The hours of broadcasting could not be fixed. Secretary Hoover, after a conference with radio interests, allocated wave lengths to each broadcasting station. But in 1926 in a case to enforce the penalty of Section 1 of the Act for violating the conditions of wave length and time in the license, the court in U. S. v. Zenith Radio Corporation, held the act unconstitu-

1913, 37 STAT. 736; June 5, 1920, 41 STAT. 1061; Apr. 14, 1922, 42 STAT. 495; Feb. 28, 1925, 43 STAT. 1091.


23 286 Fed. 1003, 52 APP. D. C. 339 (1923), writ of error was allowed by the Supreme Court of the United States, but the abandonment of the station caused the question to become moot so the appeal was dismissed in 266 U. S. 636, 69 L. Ed. 481 (1924). This case also decided that the Secretary of Commerce could assign a certain wave length determined by statute. Acc. 29 Op. Atty. Gen. 579 (1912).


25 12 F. (2d) 614, (D. C. Ill. 1926). This case is, of course, directly opposed to the Intercity case, supra note 24. See (1927)
Notes 343

Tional in that it was a delegation of federal power to the Secretary since it was "too general, indefinite and ambiguous". This and other opinions,28 caused the Secretary of Commerce to cease assigning licenses altogether, and broadcasting stations did as they pleased with resulting confusion in radio communication among the 671 broadcasting stations on January 1, 1927. President Coolidge in his Message to Congress in December, 1926,27 recommended adequate radio legislation, with the result that on December 8, 1926, the Congress passed a Joint Resolution 28 limiting license periods and requiring waiver of wavelength claims as conditions precedent to obtaining a license. On February 23 the Radio Act of 1927 29 was passed providing for governmental control of interstate radio, radio zoning, the creation of the Radio Commission with powers to license radio operations as to hours, wave lengths, renewal and revocation of licenses, and for the punishment of violations of the Act.

This Act has been held constitutional on the several points so far raised.30 The tendency of the courts, realizing the necessity of proper

15 Georgetown Law Journal 475 and 466. This case arose by a station "jumping" its wavelength and time assignments. The court held the criminal prosecution was wrongly brought under Section 1 of the Act.

28 Carmichael v. Anderson, 14 F. (2d) 166 (D. C. Mo. 1926) : two stations agreed on a division of time and licenses were granted by the Secretary of Commerce. An injunction was granted for breach of this agreement, the court holding the Secretary had power to grant licenses subject to restrictions the parties might agree upon. This seems wrong as conferring power on the Secretary through individuals and not by law.

Tribune Co. v. Oak Leaves Broadcasting Station (Circuit Court, Cook County, Ill. No. B-136264, Nov. 17, 1926, Unreported), quoted in 68 Cong. Rec. Part 1, p. 216-219, one station sought an injunction against another for interference, held injunction granted since "under the circumstances of this case priority of time creates a superior right", but not against the United States. For discussion of both these cases see Rowley, Problems in the Law of Radio Communication (1927) 1 U. of Cinn. L. Rev. 1.


28 44 Stat. 917.

29 Supra note 5.

30 White v. Federal Radio Commission, supra note 13 (upholding the right of congress to regulate radios; sustaining as valid the standard of "public interest, convenience or necessity as valid for the commission in issuing licenses; sustaining as valid the waiver clause of the Act.); U. S. v. Am. Bond & Mortgage Co., supra note 13 (af-
federal regulation of radio, is to sustain the Act where possible.\textsuperscript{31} The right to radio communication, transmitting and receiving, is an inherent right.\textsuperscript{32} But like all rights one cannot use them to the detriment of another’s rights or enjoyment.\textsuperscript{33} Thus, his “loudspeaker” may cause a nuisance which may be restrained by judicial action.\textsuperscript{34} His transmitting set may be so dangerous or vibratory as to constitute a nuisance.\textsuperscript{35} Interference with proper reception of radio programs by non-radio devices may cause a nuisance.\textsuperscript{36} This inherent right is also subject to reasonable state police power regulations.\textsuperscript{37} And to federal regulations under the Commerce Clause. It is not necessary for the radio communication to be for profit before Congress has power to regulate.\textsuperscript{38} However, most broadcasting stations are conducted for profit, at least the advertising element seems to be the basis for all radio. Whether broadcasting is a public utility is a point now in controversy.\textsuperscript{39} This would seem to depend entirely on the character of the station. “Point-to-point” stations and those selling broadcasting privileges to anyone who wishes to pay are

firming the points in the White case, and sustaining as valid the requirement of licenses and limiting the number of broadcasting stations; sustaining as valid the right of the Radio Commission as an administrative board to use its discretion in regulating stations.


\textsuperscript{32} DAVIS, op. cit. supra note 7, at 14 et seq.

\textsuperscript{33} AUSTIN, Jurisprudence (10th ed. 1906) 83 et seq.

\textsuperscript{34} Stodder v. Rosen Talking Machine Co., 247 Mass. 60, 141 N. E. 569 (1923); Oakland, Cal. (Ordinance No. 2199 N. S., Dec. 1, 1921) and Detroit, Mich. (Ordinance No. 243 B, sec. 6, June 8, 1926) have municipal ordinances controlling loud-speakers.


\textsuperscript{36} SEGAL, op. cit. supra note 35, at 11 et seq.; DAVIS, op. cit. supra note 7, at 115 et seq.

\textsuperscript{37} DAVIS, op. cit. supra note 7, at 87 et seq.; Contra: SEGAL, op. cit. supra note 35, at 4 (very limited state control).

\textsuperscript{38} Am. Express Co. v. United States, 212 U. S. 522, 53 L. Ed. 635 (1908); DAVIS, op. cit. supra, note 7, at 26.

undoubtedly public utilities. Other radio communication is probably not in the category of public utilities. However, from the standpoint of reception any broadcasting is, of course, a public utility.

As a public utility how far the state may go in regulating radio, or broadcasting rates, is a difficult question. It is probable that even under the present law any such legislation would be invalid. The reason for this lies in the practical impossibility of having intrastate radio communication without it interfering with interstate communication. Radio stations also can be common carriers.

By taking control of radio communication Congress has power to fix rates for individual messages and for broadcasting. It can provide for censorship, and probably complete supervision of programs. Several interesting cases have already arisen regarding broadcasting of copyright matter, and the government undoubtedly has power to make necessary regulations of this matter. The Federal Radio Commission has been given power to regulate all radio stations, in regard to the time of their operation and their power of

"Ibid.

Ibid: "Broadcasting stations are licensed to serve the public and not for the purposes of furthering the private interests of individuals." This is the question in the pending cases of Technical Radio Laboratory v. Federal Radio Commission (No. 4835) and Carrell v. Fed. Radio Com. (No. 4899) Court of Appeals, District of Columbia, and the Commission's decisions in decided cases (Annual Report, Oct. 1, 1928, pp. 157, 158, 159, 169).


Under the word "common carrier" in the Interstate Commerce Act "wireless" was included. The Interstate Commerce Commission has never had occasion to deal with radio. The Radio Act of 1927 does not take away with this jurisdiction of the Commission, and if it desired it could fix just and non-discriminatory rates.

During the Joint Resolution of July 16, 1918 (40 STAT. 904) the President took possession of all means of communication including radio, and it was often held he had power to fix rates. State v. Tristate Tel. Co., 143 Minn. 141, 173 N. W. 856 (1919);


Note (1927) 75 U. of Pa. L. Rev. 549; Remick v. General Electric Co., 16 F. (2d) 829 (D. C. N. Y. 1926), (where the defendant picked up and broadcasted an unauthorized performance in a hotel of a copyright piece, and were held liable for contributory infringement); See (1927) 11 MINN. L. REV. 556. In Buck v. Duncan, 32
transmission.46 Whether radio stations have a vested right by reason of their license under the Act of 1912 is a matter now in the courts.48 However, in White v. Federal Radio Commission and United States v. American Bond & Mortgage Co.,49 this right of priority was denied. The right to regulate radio stations also involves the right to prohibit them. It seems that in doing so just compensation should be made, since it is taking property for the public benefit.50

As to the matter of libel and slander there is no federal legislation, and to do so would undoubtedly raise some interesting points of venue, publication, process and procedure.51 Little regulation has been made in the matter of reception of radio. From the listener's standpoint many questions of reception interference, licensing and taxing reception by the government or the broadcaster, and right to be heard in radio cases, may sometime arise.52

The law of radio is in the making. It is generally held that the Radio Act of 1927 is inadequate, perhaps unconstituitonal, in many points.53 There are several bills now pending in Congress for fur-

F. (2d) 366 (W. D. Mo. 1929), the defendant hotel was not liable for infringement of a copyright musical composition being played unauthorizedly, when its receiving set in the lobby of the hotel picked up the composition.

47 Supra note 5. See General Orders of the Federal Radio Commission, No. 40, etc.


49 Supra note 13.


51 Davis, op. cit. supra note 7, at 156 et seq.; see Defamation by Radio, 30 Law Notes 3.

52 See Rowley, op. cit. supra note 26 at 1 et seq.; 100 Cent. L. J. 158 (1927); Unlawful Wireless Apparatus, 49 Law Journal 561 (1914); Offense of Receiving Broadcasted Wireless Without a License (1924) 88 Justice of the Peace 43.

How far governmental regulation should go is a matter of legislative policy. In any event, radio is primarily a public interest and right, and the legislature and courts should always seek to protect this interest. It does seem, however, that radio itself is in its infancy, and until engineering has solved such problems as television, synchronization and directional communication, the legislature and the courts will be wise in not acting too hastily.\textsuperscript{55} The law made by the legislature or courts today may become obsolete or fallacious by the engineering discoveries of tomorrow.

\textsuperscript{54} Senate Bill No. 6 to establish a commission on communication (Hearings have been held on this bill, and it regulates adequately add transmission of intelligence by wire or wireless, May, 1929). House Bills introduced by Crowther, Huddleston and Darrow (70th Cong. 2nd Sess.). See Hearings on H. R. 15430, at 1.

\textsuperscript{56} SEGAL, \textit{opp. cit. supra} note 35, at 15.
RECENT DECISIONS

BANKRUPTCY—Revocation of Discharge on Grounds Other Than Fraud.

The bankrupt applied for a discharge, and on formal proof of notice to creditors it was granted. Notices of the application, as required by Section 58a of the Bankruptcy Act, had not been addressed to the creditors at their street numbers, but merely to the city where they resided. In consequence, a large portion of the creditors did not receive these notices. The plaintiff, a creditor, promptly petitioned to revoke the discharge. The Bankruptcy Act provides that the judge may revoke a discharge obtained through the fraud of the bankrupt. No other grounds are specified. Act of July 1, 1898, c. 541, § 15; 30 STAT. 550; 11 U. S. C. A. § 33 (1926). The bankrupt contended the court was without jurisdiction to revoke the discharge unless it was obtained by fraud, and no fraud was shown here. Petition granted. Held, a court of bankruptcy being an equity court having control over its own judgments and orders may revoke an order granting a discharge where equitable grounds, sufficient to prevent a discharge, other than fraud existed when the discharge was granted. Judgment affirmed. Rash v. Metzger, 31 F. (2d) 424 (C. C. A. 3d, 1929).

Courts of record have inherent control, independent of statute, over their own judgments and orders, and may amend, revise or revoke them, in the furtherance of justice, if obtained by mistake, inadvertance, surprise or excusable neglect. Goddard v. Ordway, 101 U. S. 745, 752, 25 L. Ed. 1040, 1042 (1879); 1 Freeman, Judgments (6th ed. 1925) §§ 140, 194. This power is possessed by courts of equity. Winslow v. Staab, 242 Fed. 420 (C. C. A. 2d, 1917); Keigwin, Cases in Equity Pleading (1924) 618: Summary of Rehearing and Review. Probate courts have this power. Waters v. Stickney, 12 Allen 1, 90 Am. Dec. 122 (1866). As have criminal courts. Ex parte Lange, 18 Wall. 163, 167, 21 L. Ed. 872, 876 (1873). Admiralty courts. Benedict, Admiralty (5th ed. 1925) § 355. And even appellate courts. Converse v. Langshaw, 81 Tex. 275, 16 S. W. 1031 (1891). It is difficult to see why the same rule should not apply in bankruptcy. The better decided cases, in accord with the principal case, hold it is applicable in the case of revocation of discharges aside from the ground of fraud. In re Bimberg, 121 Fed. 942 (S. D. N. Y. 1903); In re Dupree, Fed. Cas. No. 4183 (D. C. Mass. 1871); In re Louisville Nat. Bank Co., 158 Fed. 403 (C. C. A. 1908); In re Goldenberg & Halberg, 286 Fed. 292 (D. C. Pa. 1923); In re Applegate, 235 Fed. 271 (D. C. N. Y. 1916); John B. Ellison v. Weintrub, 272 Fed. 466 (C. C. A. 4th, 1921); In re Lansley, 15 F. (2d) 471.
RECENT DECISIONS

(C. C. A. 2d, 1926). The leading writers are in accord that Section 15 does not take away this inherent right of the court. 7 REMINGTON, BANKRUPTCY (3d ed. 1924) § 3622; 1 COLLIER, BANKRUPTCY (13th ed. 1923) 579; BRANDENBERG, BANKRUPTCY, (4th ed. 1917) § 1510. However, the discharge will not be set aside after the bankrupt has acted on the faith of it. In re Buckstein, Fed. Cas. No. 2076 (S. D. N. Y. 1877). Nor because a creditor with notice of the proceedings failed to file his claim. In re Matthews, 132 Fed. 274 (D. C. N. C. 1904). Nor because the objecting creditor did not receive notice of the application for discharge, which was duly mailed. In re Downing, 199 Fed. 329 (N. D. N. Y. 1912); In re Walsh, 213 Fed. 643 (N. D. N. Y. 1914). Nor if the creditor is guilty of laches. In re Upson, 124 Fed. 980 (N. D. N. Y. 1903). The discharge will not be revoked unless it is shown that the actual facts did not warrant the discharge. In re Oliver, 133 Fed. 832 (D. C. N. J. 1905). This last statement seems the real governing principle as to whether the discharge should be revoked. See Note (1901) 1 Col. L. Rev. 260.

There are, however, cases which strongly contend the discharge cannot be revoked unless fraud is shown, and that this ground is exclusive. In re Aasand, 7 F. (2d) 135 (C. D. N. C. 1925); In re Fritz, 173 Fed. 560 (E. D. N. Y. 1909); In re Shaffer, 104 Fed. 982 (E. D. N. C. 1900) (fraud was found in this case, and the statement seems dictum); In re Hoover, 105 Fed. 354 (E. D. Pa. 1900). The contention in the Aasand case, supra, that the cases revoking a discharge where no fraud is shown are wrong because based on In re Dupree, supra, decided under the Act of 1867, § 5120, 14 Stat. 511, which is different from the present Act, is untenable. Many of these cases do not rely or cite the Dupree case. In re Bimberg, supra; John B. Ellison v. Weintrob, supra. Also, in the Dupree case, Section 34, regarding revocation of a discharge, of the Act of 1867, did not apply since the creditors had knowledge of the application for discharge. Yet the court based its decision revoking the discharge solely on its inherent power to revoke its own orders erroneously granted. The cases contrary to the majority rule are based on two theories. (1) By analogy to the interpretation given Section 13 of the Act regarding setting aside compositions which is phrased like Section 15. Cf. In re Ruddick, 93 Fed. 787 (D. C. Mass. 1899); In re Abrams & Rubins, 173 Fed. 430 (S. D. N. Y. 1909); In re Siff, 295 Fed. 761 (S. D. N. Y. 1923). This analogy is fallacious because there are important distinctions between these two sections so they are not similar in fact. 7 REMINGTON, BANKRUPTCY (3d ed. 1924) § 3146. Also, the judge retains power to set aside orders confirming compositions, and to reinstate the cases, as he does in other matters. 7 REMINGTON, supra, § 3089; cf. City Nat. Bank v. Doolittle, 107 Fed. 226, 240 (C. C. A. 5th, 1901). Furthermore, the construction of a specific provision of a statute by analogy to unrelated though
similarly phrased provisions is not a safe rule of statutory construction. (2) The other theory is based on statutory interpretation. Section 2 (12) of the Act is general and gives the court of bankruptcy power to grant or set aside discharges; while Section 15 particularly says a discharge may be revoked when obtained by fraud. It is contended that if Section 15 does not limit Section 2 (12) it is useless and meaningless. In re Aasand, supra. Section 2 of the Act is merely a general enumeration of the jurisdiction of the bankruptcy court, and in such a case it is not reasonable to argue that Section 2 (12) was intended to have a different meaning from Section 15. In re Howard, 201 Fed. 576 (N. D. W. Va. 1913), held that Section 15 was intended as a limitation on the equitable powers of the bankruptcy court. This is not true because the courts will not construe a statute as taking powers from a court if another construction is reasonably possible. Cf. State v. County Court of St. Louis, 33 Mo. 403 (1866.) The power must be expressly taken away. Balfour v. Malcolm, 8 Cl. & F. 485, 500 (1842); Sutherland, Statutory Construction (2d ed. 1904) § 331, 332.

The instant case is correct according to the purpose of the Bankruptcy Act and the decided cases. It may also be supported by a sound theory of statutory interpretation. The Bankruptcy Act is remedial, and should be construed liberally to promote justice. Bottis v. Hammond, 99 Fed. 916 (D. C. Md. 1900). This particularly applies to those provisions which confer jurisdiction and power on the courts of bankruptcy. Murray v. Beal, 97 Fed. 587 (D. C. Utah 1899). Section 15, therefore, should be liberally construed. In re Scott, 126 Fed. 981 (D. C. Del. 1904). Now the bankruptcy court is distinctly a court of equity. In re Judith Gap Commercial Co., 5 F. (2d) 307 (C. C. A. 9th, 1925). Hence, any construction of a statute which takes from a court of equity its inherent powers should not be favored for it would be in derogation of the common law. Beat, Cardinal Rules of Legal Interpretation (3d ed. 1924) 453.

A repealing effect should not be given Section 15, because repeals of statutes or common law powers by implication are never favored. Knollenberger v. People, 9 Colo. 233, 11 Pac. 101 (1886); Loker v. Brookline, 13 Pick. (Mass.) 343, 348 (1832). It must be expressly provided that this power is taken away, and even then it abrogates the prior law no further than its actual words require. Ely v. Cash, 15 M. & W. 617 (Eng. 1846); Gooch v. Stephenson, 13 Me. 371 (1836). Section 15 is an affirmative provision stating that a discharge may be revoked for fraud. But it does not contain words expressly negating the inherent power of the court to rectify its own decrees granted by mistake or inadvertance, and the court in the instant case was fully justified on these considerations in not making such an unnecessary and harmful interpretation.

C. F. O'S.
RECENT DECISIONS

CONFLICT OF LAWS — Enforcement of Property Taxes by One State in Federal Courts of Non-resident's State.

Breed, a resident of Indiana for twenty years, moved to New York with all his property, acquired a domicile and shortly afterwards died there. While a resident of Indiana he failed to make returns on his property as required by statute. (Sess. Laws Ind. 1903, c. 29, No. 29 [Burns Rev. Stat. Ind. 1926, 14288.].) An assessment was made after his death for the delinquent taxes. The county treasurer of the Indiana county commenced suit against Breed's executors in the Federal Court in New York to enforce this assessment. The action was based on the theory of personal liability of indebtedness of the deceased and the unjust enrichment of the executors for failure to pay the tax. From a judgment dismissing the complaint the plaintiff appealed. Held, a state has no jurisdiction to impose a property tax, where neither the property nor the deceased were within its jurisdiction at the time; and a foreign state cannot collect a tax, even though lawfully imposed, by suit in a federal court sitting in another state. Judgment affirmed. Moore, Treasurer of Grant County, Ind. v. Mitchell et al., 30 F. (2d) 600 (C. C. A. 2d, 1929).

The inherent taxing power of a state is coterminous with the boundaries of that state, and is limited to persons and property within its jurisdiction. Wisconsin v. Pelican Ins. Co., 127 U. S. 266, 32 L. Ed. 239 (1888); Walker v. Treasurer & Receiver General, 221 Mass. 600, 109 N. E. 647 (1915). The essential characteristic of a tax is that it is an enforced contribution toward the support of the government. De Clercq v. Barber Asphalt Paving Co., 167 Ill. 215, 218, 47 N. E. 367 (1897). In the instant case, since Breed was not a resident of Indiana at the time of the assessment and the property was not there, no contractual or quasi-contractual obligation to pay the tax arose. Assuming he was a resident of Indiana at the time, still the tax could not be valid because, being a personal property tax, it was assessed after he died, and a lien cannot arise before liability. 3 Cooley, Taxation (4th ed. 1924) 2456.

However, this last supposition might be supported on the theory that the assessment was merely a liquidation of a preexisting liability.

Ordinarily obligations created by one state will be enforced by another. There are well-defined exceptions to this rule, as where the enforcement of the obligation contravenes the statute law, public policy or interests of the law of the forum. Minor, Conflict of Laws (1901) § 4, 6 et seq. Or in the case of criminal and penal liabilities. Blaine v. Curtis, 59 Vt. 120, 7 Atl. 708 (1887). And the uniform rule is that the tax or revenue laws of one state cannot be enforced by a sister state. State of Colorado v. Harbeck, 232 N. Y. 71, 133
N. E. 357 (1921); Municipal Council of Sydney v. Bull, (1909) 1 K. B. 7; Maryland v. Turner, 75 Misc. Rep. 9, 132 N. Y. Supp. 173 (1911). This is so because the enforcement of revenue laws depends, not on consent but on force and authority. State of Colorado v. Harbeck, supra. A judgment obtained for pecuniary penalties for violation of the revenue laws cannot be sued on in a sister state. Wisconsin v. Pelican Ins. Co., supra; Louisiana v. New Orleans, 109 U. S. 285, 288, 27 L. Ed. 937 (1883). In New York, an action for debt cannot be maintained to collect a tax. Matter of Maltbie v. Lobsitz Mills Co., 223 N. Y. 227, 119 N. E. 389 (1918). Whether a valid personal obligation was created against the decedent in Indiana is immaterial since the federal court in New York certainly is not administering the law of Indiana. Regardless if it be the law of New York or the "federal common law," the District Court of New York was justified in refusing to be a tax collector for another state. While the instant case seems to be the first decision establishing this principle for the Federal Courts, it is submitted that the growing tendency today toward larger comity between states may sometime reach the point when sister states may enforce the tax liabilities and judgments of each other. Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918); cf. Beach, Uniform Interstate Enforcement of Vested Rights (1918) 27 Yale L. J. 656.

L. H. S.

DAMAGES—Recovery for a Permanent Nuisance Against a Subsequent Vendee.

The A company constructed and operated an electric plant for a period of six months until June, 1923. The plant was then conveyed to the B company which operated it for two months and then sold it to C, the defendant company. In 1926, the plaintiff, as administrator, sued the defendant for damage to his intestate's dwelling house, 450 feet distant, resulting from vibration caused by the operation of the plant. It was alleged that the vibrations made the house uninhabitable for dwelling purposes, preventing sleep and repose. From a judgment for the plaintiff, the defendant appealed. Held, since the damages were permanent and original, a right of action accrued to the owner of the dwelling when the plant was constructed and operations commenced for all damages past and future; but the vendee of the plant after the injury and right of action accrued was not liable for the permanent injury. Judgment reversed. Byrne v. Monongahela West Penn Public Service Co., 146 S. E. 522 (W. Va. 1929).

In ascertaining whether, in an action for injury to property, the damages are permanent or recurrent the character of the wrong must be considered. Hargreaves v. Kimberley, 26 W. Va. 787, 57
Am. Rep. 121 (1885). If the injury is of a permanent character that will continue without change from any cause except human labor, or any contingency of which the law can take notice, then the damages are original and permanent, and, according to the weight of authority, a right of action at once exists to recover the entire damages past and future, and one recovery will bar all subsequent actions. Guinn v. Ohio River Ry. Co., 46 W. Va. 151, 33 S. E. 87 (1899); Harvey v. Mason City & Ft. D. Ry. Co., 129 Iowa 465, 105 N. W. 958 (1906). The original owner and operator who causes the damage is alone responsible, and not the vendee who does no act other than to properly maintain and operate the plant as originally constructed. Bizer v. Ottumwa Hydraulic Power Co., 70 Iowa 145, 30 N. W. 172 (1886). The statute of limitations in such cases begins to run when the plant is constructed and operations commenced which cause the damage. Chicago & E. I. Ry. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460 (1884).

In the instant case the defendant and its two predecessors were public service corporations furnishing light and power to the public. They could not abandon their public service without the consent of the public utility commission. The power plant costing thousands of dollars was permanently located. The injury was not abatable except by discontinuing operations. The injury to the adjacent property was consequently of a permanent character for which the corporation constructing and first operating the plant was liable. Bunte v. Chicago Ry. Co., 50 Mo. App. 414 (1892).

W. G. McG.

EVIDENCE—Presumption of Obtaining “Right Number” in Telephone Calls.

An automobile dealer sued to recover a car alleged to have been wrongfully sold to the defendant by one claiming to be the dealer’s agent. Whether this person was the plaintiff’s agent depended on whether he was in the city where the defendant lived with the knowledge and by the direction of the plaintiff at the time of the sale. Telephone operators testified that the alleged agent made long distant calls from their station in the defendant’s city to the plaintiff in another city. This evidence was objected to by the plaintiff. From a judgment for the defendant the plaintiff appeals. Held, there is a rebuttable presumption that a person asking to be connected by telephone with another in a distant city, with whom he is connected without objection, was in telephonic communication with the party he asked to be connected with. Judgment affirmed. L. A. McKean Auto Co. v. O’Marro, 223 N. W. 354 (S. D. 1929).

If a letter or telegram is properly addressed, charges for transmission prepaid and placed in a post office receptacle, or to the tel-
raph company, there is a disputable presumption of fact, arising
from the almost invariable result, that it has been transmitted and
delivered to the person addressed. Epping er Scott, 112 Cal. 371,
44 Pac. 723 (1896); I Elliott, Evidence § 107. The modern de-
velopment of the telephone has caused a like presumption that the
response to a telephone call comes from the party called, or from
his agent. Lenox v. Harrison, 88 Mo. 491 (1885). The basis for
this rule is found in the reliable service rendered by the modern tel-
ephone system, and the small number of mistakes made as compared
to the whole number of calls transmitted. Trapp v. Rockford Elec-
tric Co., 186 Ill. App. 379 (1914). In Fidelity Oil Co. v. Janse Drill-
ing Co., 27 D. L. R. 651 (Can. 1916), the presumption was applied to
the automatic telephone. With the growing development of radio
the rule will undoubtedly apply to aerograms and wireless com-
munications. 2 Jones, Evidence (2d ed. 1926) § 806.

The application of this presumption involves the problem of iden-
tification. Evidence of the identity of the speaker is a question of
the weight of the evidence, but not of its admissibility. Missouri
trend of decisions is to deal with the problem liberally. See cases
cited in 2 Jones, op. cit. supra § 810, n. 3. A sufficient identifica-
tion of the speaker at the other end of the line is made when "central"
calls the speaker at his office and a response is received in the usual
258 (1898); Campbell v. Willis, 290 Fed. 271 (Ct. of App. D. C.
1923). Of course, some identification is necessary. See note to
Planter's Cotton Oil Co., v. Western Union Tel. Co., 6 L. R. A.
the weight of such evidence depends on the circumstances of each
case, and hence is a question for the jury. Union Construction Co.
v. Western Union Tel. Co., 163 Cal. 298, 125 Pac. 242 (1912); Globe
Printing Co. v. Stahl, 23 Mo. App 451 (1886). If the call is not
one in the usual routine of business, but one to a particular indi-
vidual, the courts usually require some identification of the individ-
ual in addition to that necessary to identify his office or place of
business. Oberman Brewing Co. v. Adams, 35 Ill. App. 540 (1888);
Murphy v. Jank, 142 N. Y. 215, 36 N. E. 882 (1894). Recognition of
the voice at the end of the wire is sufficient. Shauger v. Cham-
berlain, 113 Iowa 742, 84 N. W. 661 (1900); Wolfe v. Missouri Pac. Ry.
Co., 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539 (1889) (not necessary
as it affects weight, not admissibility). Details of the conversation
may be sufficient to identify. Holshauber v. Sherry, 127 Ky. 28, 104
S. W. 1034 (1907).

The admissibility of telephone conversations stands on the same
footing as other conversations. Sullivan v. Kuykendall, 82 Ky. 483,
56 Am. Rep. 901 (1885). The general adoption of the telephone in
business world requires that the law of evidence view telephones as business men do. Rock Island Ry. Co. v. Potter, 36 Ill. App. 590 (1889). Thus, presentment of a promissory note may be waived by telephone. Moll v. Roth Co., 77 Ore. 593, 152 Pac. 235 (1915). But presentment for payment by telephone has been held insufficient. Gilpin v. Savage, 201 N. Y. 167, 94 N. E. 656 (1911); but see Note (1921) 7 Va. L. Rev. 308, favoring sufficiency of telephonic demand when exhibition of instrument can be made in a short time if requested. Contracts may be made by telephone. St. Louis Flooring Co. v. Knost, 143 Mo. App. 563, 128 S. W. 532 (1910). The courts should deal with these telephone cases liberally and accord to the telephone the same presumptions they do to letters and telegrams, because of the increasing efficiency in the operation of this device and the widespread confidence business men place in it in their commercial transactions.

F. J. O.

EVIDENCE—Silence as an Admission of Guilt.

The defendant was indicted for voluntary manslaughter. The deceased, in the hearing and presence of the defendant, who was in the custody of police officers, accused the defendant of firing the fatal shot. At the trial the accusation of the deceased along with the defendant’s silence during the accusation were offered in evidence by one of the police officers as a tacit admission of guilt on the part of the defendant. This evidence was admitted under objection. From a verdict of guilty the defendant appealed. Held, silence under an accusation of crime is admissible as a circumstance from which guilt may be inferred, provided the accusation was made under circumstances which allowed him an opportunity to reply, and under which persons similarly situated would ordinarily deny the imputation. Verdict affirmed. People v. Kessler, 164 N. E. 840 (Ill. 1928).

In every person there is inborn a spontaneous impulse to deny false imputations of crime. This inherent quality asserts itself, under proper conditions, whether the character of the accused be of the spotless or of the bespotted species. If the character is of the spotless genus its possessor desires to keep it in that category; while if it be of the bespotted variety the addition of further spots will by no means be looked upon as an asset. Hence, when such false accusations are made under circumstances that the person is conscious of no restraining force, such as an indictment or an arrest for a criminal offense, upon his power of speech, they are instantly denied. If this natural impulse fails to assert itself when the person is free to speak, there is an inference that the accusation is true. This is the theory behind the old inquisitorial maxim, *Qui tacet consentire videtur*, or silence gives consent. "Nothing can be more dangerous
than this kind of evidence" for it is a shrewd way of causing a man
to give evidence against himself. Moore v. Smith, 14 Serg. & R. 388
(Pa. 1826). In consequence, the admissibility of this kind of evi-
dence is necessarily limited by qualifications that render it effective
only on certain conditions.

In order for an admission to be implied from the silence of the
accused, the following conditions must first be shown to exist: (1) The
accusation must be made within his hearing and with knowledge
that he was the party accused of the crime. People v. Kennedy, 164
N. Y. 456, 58 N. E. 652 (1900); Commonwealth v. Sloney, 126 Mass.
49 (1878). (2) It must have been made under circumstances where-
in he was conscious of no restraint upon his right to speak and deny
the accusation. State v. Hale, 156 Mo. 102, 56 S. W. 881 (1900); Flanagan v. State, 25 Ark. 92 (1887). Thus, if the statements are
made during a judicial proceedings where he is not at liberty to
interpose and contradict them, his silence is not an admission. Rex
Cas. No. 14, 660 (C. C. Dist. Col. 1835). Nor if he is under the cus-
tody of the police at the time when he has a right to remain silent,
and he is not called upon to deny the statements. Commonwealth v.
McDermott, 123 Mass. 440, 25 Am. Rep. 120 (1877). Nor where he is
silent through fear, or under threats, or promise of silence, or ad-
vice of his counsel, or where he believes his best security is by saying
(Mass. 1847); Jones v. State, 2 Ga. App. 433, 58 S. E. 559 (1907); People v. Cascone, 185 N. Y. 317, 78 N. E. 287 (1906). (3) The cir-
cumstances under which the accusation is made and the party mak-
ing the same must be such that a duty is imposed upon the accused
to deny the statements. People v. Koerner, 154 N. Y. 355, 48 N. E.
730 (1897). The statements must be addressed to and intended to
affect the accused, and not arise in conversation between third par-
must relate to the particular offense charged. State v. Baruth, 47
Wash. 283, 91 Pac. 977 (1907). Such silence is not deemed an as-
sent to the accusation when they are explicable on other grounds than
those of consciousness of guilt. Donnelly v. State, 26 N. J. L. 601
(1857).

The preponderance of authority is in accord with the ruling laid
Pac. 101 (1915); Thurman v. State, 14 Ga. App. 543, 81 S. E. 796
(1915) (accusation by a bystander); Lyon v. Commonwealth, 29 Ky.
L. Rep. 1020, 96 S. W. 857 (1906). Such accusations are not admit-
ted in evidence to show that they were made, or as evidence of the
truth of the accusation, but because the accused by his silence im-
pliedly ratified and adopted it as his own statement. Watt v. People,
126 Ill. 9, 18 N. E. 340, 1 L. R. A. 403 (1888); 2 Wharton, Criminal
Evidence (10th ed. 1912) 1405. In admitting such statements in evidence, the court should carefully instruct the jury that the accusations are limited to the purpose of showing the accused acquiesced in them, but not as evidence of the facts stated or their truth. People v. Cascone, supra; People v. Mallon, 103 Cal. 513, 37 Pac. 512 (1894). The general rule in the great majority of jurisdictions is that whatever the accused says in reply to accusations is not evidence in his favor, and his denials are rejected as hearsay assertions. United States v. Cross, 9 Mackey 365, 376 (Ct. of App. D. C. 1892); State v. Toby, 31 La. Ann. 756 (1879). It is submitted that because of this discrepancy, evidence of the silence of the accused when charged with a crime should not be admitted unless the conditions set forth, supra, are all complied with beyond a reasonable doubt, and then only under accurate instructions to the jury showing its proper purpose in evidence.

L. T. D.

Insurance—Failure of Applicant to Volunteer Information.

Plaintiff applied for an accident insurance policy with the defendant company. Among other questions in the application was, "What accident or health insurance have you now"? The plaintiff answered, "Mutual Benefit Health & Accident". The policy was issued to plaintiff on July 16, 1927. On July 27 the plaintiff met with an accident. His claim under the policy was rejected on the ground that at the time plaintiff made the application, he had, in addition to the policy he mentioned, a policy in the Southern Surety Company of Des Moines. It appeared that on July 11, plaintiff applied for an accident policy with the Southern Surety Company which was issued by that company on July 12, but was not delivered to plaintiff until July 23. This policy was to become effective when delivered to the applicant. Defendant insists that plaintiff should have disclosed the fact of the Southern Surety Co. policy when applying for the policy in suit. Held, The Southern Surety Company policy was a conditional delivery policy and did not become effective until delivery to plaintiff; that the defendant having propounded questions to the plaintiff, to which he made full and true answers, the plaintiff was not obliged to mention the existence of other facts about which no inquiry was made of him, though they may have turned out to be material. Judgment for plaintiff. Ellis v. Standard Accident Insurance Co., 27 F. (2d) 544 (S. D. Tex. 1928).

It is well settled in accident and life insurance that a policy will not be avoided by reason of a failure of the applicant to give voluntarily information concerning a fact which in his mind is not material to the risk. Thus, in Mallory v. Travelers Ins. Co., 47 N. Y. 52, 7 Am. R. 410, (1871), where the applicant for an accident policy
did not disclose the fact of his former insanity, but stated there were no circumstances rendering him peculiarly liable to accident, it was held, on appeal, that if the applicant did not conceal any facts which in his own mind were material in making the application, the policy was not void. So in Penn. Ins. Co. v. Mechanics Bank & Trust Co., 37 U. S. App. 692 (1896), it was held that failure to disclose a fact material to the risk not inquired about will not avoid the policy, unless such non-disclosure was with intent to conceal from the insurer a fact believed to be material, that is, unless the non-disclosure was fraudulent. Rawls v. American Mutual Life Ins. Co., 27 N. Y. 282 (1863).

The instant case is well in line with the current of authorities. Where an insurer propounds a series of questions to an applicant which he fully and truthfully answers, it would be a perversion of justice to allow the insurer, when a claim is made under the policy, to set up as a defense that the applicant, in addition to answering the questions, should have volunteered what he expected would occur at a future time. The applicant may rightfully assume that the range of the examination has covered all matters deemed material by the insurer, and that he is not required to rack his memory for circumstances of possible materiality not inquired about and to volunteer them.

W. G. McG.

MASTER AND SERVANT—INDEPENDENT CONTRACTOR—Dangerous Instrumentality.

Jones was agent for the oil company. By the terms of the contract, he furnished trucks and men at his own expense to sell gasoline and oils to filling stations in the county. One of his men delivered gas to the plaintiff and while the driver was in the store, a fourteen year old boy, the helper on the truck, lit a match to light a cigarette. An explosion followed which destroyed the store and merchandise of the plaintiff. Suit for damages was brought against the defendant on the theory that the defendant was responsible for the negligence of its agent's employee. From a judgment for plaintiff, defendant appealed. Held, defendant was liable, whether Jones was a servant or an independent contractor, since gasoline is a dangerous instrumentality. Judgment affirmed. Montgomery v. Gulf Refining Co., 121 So. 578 (La. 1929). For a discussion of the principles involved, see Notes, supra p. 336.

J. H. W.

MORTGAGES—Constructive Notice of Recorded Assignment of Mortgage.

A executed a mortgage for $3000 to B. B assigned his interest to
C, who recorded the assignment but failed to notify A. A, in ignorance of the assignment paid $1200 of the principal to B. A then sought to redeem his mortgage. B had misappropriated the $1200, and C demanded that A pay the $3000 in full contending that A had constructive notice of the assignment by the fact that it was recorded. In a suit by A to redeem his mortgage, judgment for defendant Held, a mortgagor, making payments to the mortgagee after assignment of the mortgage is recorded, must bear any loss resulting from the mortgagee's misappropriation. Judgment for plaintiff. *Cade v. Dukes*, 145 Atl. 222 (Md. 1929).

The ruling in this case seems to be in accord with former Maryland decisions. *Methodist Episcopal Church v. MacNabb*, 145 Md. 105, 125 Atl. 526 (1924). In *Bower v. Kelbaugh*, 147 Md. 364, 128 Atl. 37 (1925), a similar result was reached in an identical case. This case makes specific reference to the Maryland Code (Art. 66, § 25) which directs the mortgagor to look up the record as showing conclusively to whom the debt is owing. The Kansas cases seem to support the Maryland decisions. *White v. Kimberling*, 114 Kan. 112, 216 Pac. 1087 (1923); *Jacobs v. Hester*, 119 Kan. 661, 240 Pac. 952 (1925), where it was held that the mortgagor is protected only if the assignment is unrecorded. This seems to imply that if recorded the loss would fall upon him. The Oklahoma court in *Chase v. Commerce Trust Co.*, 101 Okla. 182, 224 Pac. 148 (1924), decided that the assignee is not estopped to deny the mortgagee's agency to collect the debt even though he failed to record. This is an extension of the doctrine of the principal case since both Maryland and Kansas require the assignment to be recorded before the assignee is protected.

On the other hand a number of cases hold that the record of the assignment is not constructive notice to the mortgagor since the latter's interest antedates the assignment, and consequently the mortgagor may make payments on the mortgage to the mortgagee so long as he is without actual notice of the assignment. Thus, in Pennsylvania, an assignee of a mortgage must give actual notice to the mortgagor in order to protect himself. *Foster v. Carson*, 159 Pa. St. 447, 39 Am. St. Rep. 696 (1894). Down to the moment of notice any contract which the debtor makes with the creditor who has assigned his claim is valid against the assignee. *Gaulagher v. Caldwell*, 22 Pa. St. 300, 60 Am. Dec. 85 (1853). In *O'Maley v. Pugliese*, 272 Pa. 356, 116 Atl. 308 (1922), payments made to a mortgagee without notice of an assignment were valid. Judge Miller in *Van Keuren v. Corkens*, 66 N. Y. 77 (1876), stated that it is a well established rule that the assignee of a bond and mortgage, if he wishes to protect himself against bona fide payments by the mortgagor to mortgagee, must notify the mortgagor. See also, *Reed v. Marble*, 10 Paige 409 (N. Y. 1843); *James v. More*, 2 Cow. 247 (N. Y. 1823); *N. Y. Life
Insurance Co. v. Smith, 2 Barb. Ch. 82 (N. Y. 1847). Recent Illinois decisions also hold that the mortgagor is entitled to notification. Doster v. Oulsey, 233 Ill. App. 468 (1924); Daniels v. Carr, 233 Ill. App. 531 (1924). The Minnesota courts have reached similar results. Johnson v. Carpenter, 7 Minn. 17 (1862); Olson v. N. W. Guaranty Loan Co., 65 Minn. 475, 68 N. W. 100 (1896). The Minnesota Statute specifically states that recording of an assignment of a mortgage shall not in itself be deemed notice of such assignment to the mortgagor, his heirs or personal representatives. Gen. Stat. § 4183 (1894). In California, the record of a mortgage assignment operates as notice to all persons subsequently deriving title to the mortgage from the assignor and the statute further provides that the record of the assignment of the mortgage is not notice to a mortgagor so as to invalidate any payment made to the person holding the note originally given as evidence of the debt. Cal. Civ. Code (Deering, 1923) § 2934, 2935; Rodgers v. Peckham, 120 Cal. 238, 52 Pac. 483 (1898).

The decision of the principal case seems open to serious criticism. It leads to the absurd result that a mortgagor must look up the public records or employ counsel to do so every time he desires to pay off any part of the principal debt or interest. This great expense and hardship upon the mortgagor is unwarranted. It seems easier and fairer to make it incumbent on the assignee to notify the mortgagor of the assignment rather than placing the duty of scanning the record every time he pays part of the debt on the mortgagor.

J. M.

QUASI-CONTRACTS—Patient’s Financial Standing as an Element in Determining the Reasonableness of Physician’s Fee.

The plaintiff, a physician, was called in by the defendant to perform a dangerous operation on his wife. No express contract was made as to the cost of the operation. The plaintiff performed the operation and sent his bill for $3000. The price of the plaintiff’s services were admittedly based on the defendant’s financial ability to pay, rather than on the actual value of the services rendered. The defendant refused to pay the bill, claiming that the physician’s fees for all persons should be determined solely from the nature of the services performed. From a judgment for the plaintiff the defendant appealed. Held, in determining reasonable value of a physician’s services the fee may be based by the patient’s ability to pay on a scale charged by doctors of repute. Judgment affirmed. Pfefifer v. Dyer, 145 Atl. 284 (Pa. 1929).

The majority of jurisdictions which have passed on this question hold that the financial ability of a patient cannot be considered as a
factor in determining reasonableness of a physician's charges for services. 3 SUTHERLAND, DAMAGES (4th ed. 1916) 2463. These jurisdictions contend that the value of the service depends upon the difficulty of rendering it, the skill required in its performance and sometimes upon the results accomplished, but not upon the riches or poverty of the patient. Robinson v. Campbell, 47 Iowa 625 (1878); Morrell v. Lawerence, 203 Mo. 363, 120 Am. St. Rep. 660 (1907); Morrisette v. Wood, 123 Ala. 384, 26 So. 307 (1899). When a doctor is called to attend a patient, a contract to pay a reasonable fee is inferred from these circumstances, without an express agreement. Emblen v. Bicksler, 34 Colo. 496, 83 Pac. 636 (1905). Some courts have held that as part of this implied agreement to pay a reasonable fee is the custom and general practice of physicians to graduate their charges according to the financial status of the patient. Succession of Haley, 50 La. Ann. 840, 24 So. 285 (1898); Succession of Levitan, 143 La. 1025, 79 So. 829 (1918). Contra: Swift v. Kelly, 13 Tex. Civ. App. 270, 133 S. W. 901 (1910), where evidence of this custom and of the defendant's wealth were inadmissible. The Arkansas Court in Cotnam v. Wisdom, 83 Ark. 601, 104 S. W. 164 (1907), held that while the patient's ability to pay was a proper element to consider where there was an implied contract, yet it was not applicable where there was a quasi-contract.

In New York and Louisiana it is well settled that the pecuniary condition of the patient or his estate is one of the elements to be considered in determining the reasonableness of the physician's charges. Lange v. Kearney, 54 Hun 640, 4 N. Y. Supp. 14 (1889); Schoenberg v. Rose, 145 N. Y. Supp. 381 (1914); Matter of Agnew's Estate, 132 Misc. 811, 231 N. Y. Supp. 4 (1928); Czanowski v. Zeyer, 35 La. Ann. 796 (1883); Succession of Levitan, supra; Young Bros. v. Succession of Von Schoeler, 151 La. Ann. 73, 91 So. 551 (1922). The instant case settles for the first time the rule in Pennsylvania. Up to this time the question had arisen but twice in the lower Pennsylvania courts, and each court held contrary to the other. Mortimer's Estate, 29 Pa. Co. Ct. 537 (1904), held the patient's ability to pay was not a factor in determining a reasonable fee. Meyer's Estate, 49 Pa. Super. Ct. 187 (1912), reached the opposite conclusion. The rule in the principal case, supported by a small minority of jurisdictions, is a modern innovation in the law of quasi-contracts. It is peculiarly adapted and suited to the calling of a physician in which the human element comes so strongly into play. The doctor is allowed to make minimum charges for the poor man and recuperate his losses from the rich. This is a desired sociological advantage to the poor. Such a social policy the law should recognize by granting a general dispensation from the rigidity of the law of contracts because of the unique nature of the physician's services.

L. T. D.

The defendant broadcasting station was refused a federal operating license by the Federal Radio Commission. They threatened to transmit their radio programs in violation of the Radio Act of 1927 (47 U. S. C. A. § 81 et seq.) and in such a manner as to interfere with transmission and reception by other authorized stations. The United States applied for an injunction to restrain the defendants from broadcasting. Injunction granted. Held, that Congress has power to regulate radio as interstate commerce and in so doing they may delegate to the Radio Commission the authority to grant or refuse broadcasting licenses if the “public convenience, interest and necessity” may thereby be served. United States v. American Bond & Mortgage Company et al., 31 F. (2d) 448 (N. D. Ill. 1929).

For further discussion of the principles involved, see Notes, supra, p. 339.

C. F. O’S.

SPECIFIC PERFORMANCE—Contracts Fixing Liability for Breach of Contract—Want of Mutuality.

A contract for the sale of land was embodied in the receipt for earnest money, which the vendor alone signed. It provided that the vendor was to retain the earnest money if the vendee refused to accept title, but if the vendor failed to give a good and merchantable title as agreed, then the earnest money was to be returned to the vendee. From a decree awarding specific performance the defendant vendor appealed. Held, specific performance will not be granted where the contract fixes the liability for breach of contract, or where the contract lacks mutuality. Decree reversed. Hollitorf v. Walker, 121 So. 553 (Fla. 1929).

That each party to a contract must be able to command specific performance before the other party may claim it, is well settled as a general proposition. Marble Co. v. Ripley, 10 Wall. 339, 19 L. Ed. 355 (1870); Boston & Worcester St. Ry. v. Rose, 194 Mass. 142, 80 N. E. 498 (1907). But the exceptions to the rule to a great extent emasculate it. By the great weight of authority in the United States the vendee may claim specific performance though he has not signed the contract. Clason v. Bailey, 14 Johns. 484 (N. Y. 1817); Forman v. Gadouas, 247 Mass. 207, 142 N. E. 87 (1924); Hensel v. Calder, 135 Md. 483, 109 Atl. 195 (1920); Broatch et al. v. Boysen et al., 175 Fed. 702 (1910). These decisions either arbitrarily follow the decisions immediately after the passage of the Statute of Frauds, or hold that by instituting suit the requisite mutuality ensues. A few courts as well as some eminent writers question the logic of these decisions. Lawrence v. Butler, 1 Sch. & Lef. 13 (Eng. 1802)
(a criticism by Lord Redesdale); Davis v. Shields, 26 Wend. 341, 362 (N. Y. 1841), (where Chancellor Kent doubts the logic of the rule, but bows to precedent); Pomeroy, Specific Performance of Contracts (3d ed.) 439 et seq.

The further rule involved in this case is that where the parties contract that either certain acts will be done, or a certain sum of money paid, as damages and not as a penalty, equity will leave them to the remedies set out in the contract. This is also well established. Davis v. Isenstein, 257 Ill. 260, 100 N. E. 940 (1913), 45 L. R. A. (N. S.) 52; Amanda Gold Mining Co. v. Peoples Mining Co., 28 Colo. 251, 64 Pac. 218 (1901); 1 Pomeroy, Equity Jurisprudence § 447. The court in the instant case follows the minority rule as to mutuality, refusing to recognize the exception so well established, and probably justly so.

It is submitted that the dissenting opinion of Judge Strum is the true rule as to alternative contracts. The contract must show an intent that either the contract may be performed, or the money paid, otherwise specific performance should not be denied. Koch v. Streuter, 218 Ill. 546, 75 N. E. 1049 (1905); O'Connor v. Tyrell, 53 N. J. Eq. 15, 30 Atl. 1061 (1895); Phoenix Ins. Co. v. Continental Ins. Co., 87 N. Y. 400 (1882).

M. B. W.

TORTS—Inducing Breach of Unenforceable Contract.

The B corporation agreed to sell its entire output of automobile whistles to the plaintiff for five years for a specified price subject to change if the cost of materials and labor should increase to such an extent that the product could not be manufactured profitably. This contract was unenforceable against the corporation because of the uncertainty of price, and because the corporation was under no obligation to manufacture whistles. The stockholders of the corporation in order to prevent further performance of the contract took possession of the plant, and instituted insolvency proceedings with the result that an order was made restraining the company from further carrying on its business. For this interference the plaintiff brought a tort action against the stockholders. From a judgment of nonsuit the plaintiff appealed. Heid, although a contract may be unenforceable between the parties, third parties are liable in tort for maliciously preventing its performance. Judgment reversed. Aalf Co., Inc. v. Kinney et al., 144 Atl. 715 (N. J. 1929).

As to whether an action lies against a stranger to an enforceable contract for inducing one of the parties thereto not to carry out his agreement, there is a contrariety of opinion. 4 Page, Contracts (2d ed. 1920) § 2412 et seq. In those jurisdictions allowing such tort actions, the third party interfering with contractual relations
of the contracting parties must have been actuated by malice before recovery is allowed. *Legris v. Marcotte*, 129 Ill. App. 67 (1906); *cf. Lumley v. Gye*, 2 E. & B. 216 (Eng. 1853); Freund, *Malice and Unlawful Interferences* (1898) 11 HABV. L. REV. 449. By "malicious" is not meant personal ill will, but merely a wrongful purpose to injure, or to gain some advantage at the plaintiff’s expense. *Lewis v. Bloede*, 202 Fed. 7 (C. C. A. 4th, 1912). In these cases if the tort action is inadequate, equitable relief may be granted. *Bitterman v. Louisville & N. Ry.*, 207 U. S. 205, 28 Sup. Ct. 91 (1907).

Whether such an action can be maintained against one who induces the breach of an unenforceable contract, the authorities are more in conflict. In *Davidson v. Oakes*, 60 Tex. Civ. App. 269, 128 S. W. 944 (1910), it was held that a stranger who knowingly induces another to breach an unenforceable contract is guilty of no actionable wrong. *Roberts v. Clark*, 103 S. W. 417 (1907); see (1907) 7 Col. L. REV. 628. In the famous Anti-Trust case of *Dr. Miles Med. Co. v. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376 (1911), the plaintiff was not entitled to relief as the broken contract was invalid as a restraint of trade. The basis behind these cases seems to be that since the parties to the contract had no enforceable legal rights under the contract, the third party violated no rights of the parties.

The Supreme Court of the United States in *Cumberland Glass Mfg. Co. v. DeWitt*, 237 U. S. 447 (1915), on the contrary, held that "the fact that a contract was not enforceable against a buyer under the Statute of Frauds is not a defense to an action for tortious interference causing a breach of the contract.” To the same effect is *Peerless Pattern Co. v. Pictorial Review Co.*, 132 N. Y. Supp. (1911). Even though the parties to the unenforceable contract could not maintain an action at law or in equity on the contract, they may if they wish each perform their agreements; and it seems best to hold that he who maliciously prevents performance of this voluntary action should be subject to liability in tort. *Chispley v. Atkinson*, 23 Fla. 206, 1 So. 934 (1887). If the contract would have been performed but for the wrongful interference of the third person, a tort action should lie against him. *Lucke v. Clothing Assembly*, 77 Md. 396 (1893). Thousands of legally unenforceable contracts are made and performed solely on moral obligations and confidence of business men in each other, and it would seriously hinder credit and commercial transactions if third persons to such contracts could maliciously induce their breach with impunity.

E. J. C.
BOOK REVIEWS


This little volume, recently published and attractively bound in red cloth and buckram, combines the four lectures delivered by Professor Holdsworth before the Law School of Yale University in 1927 on

“I. The Courts and the Dwellings of Lawyers;
II. The Lawyers, Lawyers’ Clerks, and Other Satellites of the Law;
III. Bleak House and the Procedure of the Court of Chancery; and
IV. Pickwick and the Procedure of the Common Law.”

Its collective title “Charles Dickens as a Legal Historian” is correct aptly, because the materials woven into the four addresses are taken from or suggested by Dickens’s novels—as the lecturer says:

“Many of Charles Dickens’s novels touch upon the law and lawyers, in some of them the law and lawyers play a considerable part, and in one of them, Bleak House, the legal atmosphere is all pervading”;

and particularly also because “Legal Historian” is applicable truly to Dickens—as the tribute to him in the first lecture sums up accurately:

“There are two main reasons why Dickens’s pictures of the courts, the lawyers, and the law of his day have this unique value (as a legal history). In the first place they give us information which we can get nowhere else. In the second place, these pictures were painted by a man with extraordinary powers of observation, who had first-hand information.”

Some of the legal fraternity have read and still read Dickens and know his pages with intimate knowledge;
others have read much or little of those pages only in youth or before or during the first studies of the law and since have turned those pages only occasionally; others know his works only by hearsay; but the assertion is ventured that many in this country opine—ranging from positiveness to nebulous thought—that to Dickens in large measure is due the reform of the nineteenth century in English law and procedure, especially in the court of Chancery.

Such opinion is analogous—closely at least in the degrees varying from firm belief to hazy idea—to that prevailing in respect to Uncle Tom's Cabin having been responsible largely for the abolition of slavery in this country. In their respective fields both writers in some ways were contributing, but never the proximate causes—merely winds flaring up intensively the fires of reform already lit and steadily burning, and thus throwing the brighter lights of criticism on then deplorable conditions.

Professor Holdsworth does not state in precise terms his own opinion of Dickens as the moving or contributing cause of that judicial reform, but his comparative dates help greatly to clarify the opinions of his readers; he shows when the need of such reform was suggested, actively agitated, and, when accomplished, and when Dickens wrote, and when his various novels were published and the times of the actions thereof—those speaking loudly in effect for law reform, if not ostensibly so written.¹

But the question of such judicial reform consumes only a comparatively small portion of the lectures. The charac-

¹In this connection, Professor Holdsworth's conclusion may be gleaned from some of his extracted sentences, such as, e. g.:
"when he (Dickens) began to write, it (the era of reform) had only just begun"; p. 2.
"At the time when Dickens wrote his later works the Legislature had begun, tentatively and cautiously, to make those reforms in the machinery of the law, and in the law itself, which were long overdue. But much still remained to be done. Bleak House was written in 1852-1853; and, though some of the abuses there described had been remedied, there was still much which needed reform"; p. 2.
"When Dickens wrote, and indeed till the opening of the Royal
ters in Dickens's novels having to do with various phases of the law make their appearance in Professor Holdsworth's book for the great enjoyment of the reader, particularly so since some of them are introduced not as fictitious but as actual persons living in the times of the actions of the various novels and transplanted by Dickens, *mutantis nominis*, to play their parts for him.²

² "The original of Serjeant Buzfuz, Mrs. Bardell's counsel, was Mr. Seejeant Bompas, who was made a serjeant in 1827"; p. 67.

"The Bar in general is described in the party given by Mr. Merdle in *Little Dorrit*; and it is said that Fitzroy was the original"; p. 72.

"Stryver's cross-examination in the trial scene in *A Tale of Two Cities* is said to have been suggested by Wetherall's cross-examination of Castle in the trials arising out of the Spa Fields riots"; p. 75.

"The two members of the junior bar in *Bardwell v. Pickwick* were Skimpin and Phunky. It has been suggested that Skimpin, Buzfuz's junior, and a very able young man, was one Wilkins, who later became a serjeant"; p. 75-6.

"The only portrait of a judge is Starleigh, J.—a thin disguise for Gaslee, J.—who tried the case of *Bardwell v. Pickwick*. . . . It is noteworthy that he (Gaslee, J.) resigned in the Hilary Term, 1837—shortly after the appearance (1836) of the trial scene in *Pickwick*"; p. 76.
The collected descriptions of the various courts, court-rooms, lawyers' offices, and other haunts of those dealing with the law in Dickens's time provide interesting knowledge. The present day students of our law schools can recall with interest Dickens's reference to the "students' box". As Holdsworth explains:

"It may be noted that the box for the accommodation of the students was an old and familiar feature of the courts. From the reign of Edward I onwards, attendance at court had been an essential feature of the education of the law student."

Another valuable feature is the explanation of procedure and evidence in the common-law and chancery courts of those times, clearing up many of the perplexities arising in a lawyer's mind on now reading Dickens and wondering how such things could be.3

The explanations of the various grades, classes or branches of the English bar (attorneys, solicitors, barristers, proctors, advocates, serjeants-at-law, King's counsel, etc.) are

"Of Lord Lyndhurst, the only chancellor in whose court Dickens reported, we have a sketch in the third chapter of Bleak House"; p. 77.

"If it be true that the Lord Chancellor described in the third chapter of Bleak House is Lord Lyndhurst"; p. 79.

"For a lawyer, the reading of Dickens' novels must raise a multitude of questions which only the legal historian can answer. For example, why could a chancery action be so protracted over a period of years to include several generations of parties to the suit? How was it possible for a simple action in equity to consume the whole of a large estate in costs? Why could Pickwick, a man of means, be arrested and sent to prison as a result of a civil action? Why should Dodson and Fogg elect to arrest a man of Pickwick's resources rather than resort to the writ of fieri facias, levari facies or elegit? How could both parties to a civil (law) action be held for costs? These and countless other perplexing situations are made clear in a manner that is fascinating to the general reader and highly instructive to the lawyer"; Book Review (1928) 8 Ore. L. Rev. 94.

"Even a trained lawyer, however, is puzzled by some of the legal points brought up by Dickens, because they have fortunately passed forever out of the realms of living law. Professor Holdsworth has performed a valuable service to lawyers and laymen alike in explaining these obscurities"; Book Review (1928), 42 Harv. L. Rev. 286.
woven in with the references to Dickens's numerous lawyers and the courts mentioned by him, in such a lucid and readable way, that the differentials marking the separations of those grades, their titles, duties, rights and perquisites, cling in the reader's memory more tenaciously than would a mere enumeration of the same couched in technical language.

To the admirer of Dickens, particularly to the lawyer, perhaps the most valuable part of Professor Holdsworth book is its appended Index, giving the English courts, legal customs or statutes, the names of any of Dickens's judges, lawyers, clerks, or any of his characters or episodes, etc., touching upon the law. It is accordingly a legal index of Dickens's works, as Professor Holdsworth's book is annotated with footnotes giving references to the title and page of the pertinent novel.

"Charles Dickens as a Legal Historian" is a worthwhile addition to semi-legal literature, and should be read, and can be read, by every lawyer and law student with great enjoyment and profit.

ARTHUR A. ALEXANDER.

Georgetown University School of Law.


This book is written by an author who is both vigorous and unafraid. He feels, with evident sincerity, that legislative action in this country has too often and too far invaded the rights of person and of property. He believes that the courts have failed in many instances to perform properly their duties as guardians of constitutional liberty. This work, consisting of about two hundred pages of text matter, is in effect a brief in support of his views.

The preliminary chapter is an exposition of American theories of government with particular relation to the struggle between liberty and authority, the meaning of personal liberty and the American "invention" of judicial safeguard. The author's liberality of views is indicated in the statement he makes that "there is no 'agreement' in our
Government by which, as there was in Rousseau's scheme, a General Will can be evolved to force men to be free. Nothing is surrendered under our Constitution by the Man to the Government. On the contrary, the Constitution is to secure his pre-existing rights: that is what the Declaration of Independence says."

In the main, the author's attack is aimed at the prohibition laws and the prohibition amendment. These are all alike held to be contrary to sound principles of constitutional law. The laws and the amendment have of course been upheld by the Supreme Court. The argument is that they should not have been sustained. Mugler v. Kansas, the Boston Beer Company case and later cases were wrongly decided. Prohibition, as distinguished from regulation of the liquor traffic, is not and never was properly within the police power of the states. The acts of Congress in aid of the state prohibition laws should not have been sustained because the power given to Congress to 'regulate' interstate commerce does not include the power to 'prohibit'. The Webb-Kenyon bill "was a plain stoppage of commerce, which Congress has no constitutional power to accomplish. The Commerce Clause of the Constitution empowers it 'to regulate Commerce . . . among the several States', but not to stop it." Unfortunately the author seeks to establish his thesis in part as follows:—"Congress has not 'plenary power over interstate commerce'. It has only partial power. The Constitution empowers it to 'regulate' only. What regulate means has been defined by forty years of practice under 'An Act to Regulate Commerce' which became effective in 1887. The very name of the law shows that Congress had no belief in the 'plenary power' which the Supreme Court has accorded it." It would seem rather to be obvious that Congress has never in the commerce acts given full exercise to its powers nor intended to do so. The author, in pursuing his thoughts further, holds the Prohibition Amendment unconstitutional because the two houses of the national legislature failed to propose it by a two-thirds vote of the full membership.

Having in mind that the author is not striving to eluci-
date the law as it has been developed, but that he is setting forth a view of what it should have been and should now be, the reader will find this book a stimulant to the revival of first principles. However the hands of time will need to be turned back many years if the views here presented are to be incorporated into the law of the land. The book's closing chapter contains an interesting analysis and criticism of such cases as Powell v. Pennsylvania, Noble State Bank v. Haskell, Erie Railroad v. Board of Railroad Commissioners of New Jersey, McGrain v. Daugherty, the Frothingham case, and others.

ROBERT A. MAURER.

Georgetown University School of Law.


Any edition of Hopkins New Federal Equity Rules Annotated is meritorious, especially at time of its publication because of its more recent annotations. And so, this Sixth edition containing annotations of later federal decisions construing, interpreting and enforcing the New Federal Equity Rules is, to the extent of such later cases, an improvement over the former editions—which is strong praise, as the worth of the previous editions is recognized universally. For the federal practitioner "Hopkins" is not only "a friend in need" but also should be his constant equity court-room companion. This holds true for the profession in the courts of the District of Columbia, where the rules of practice of the equity trial court are based on, and in many instances follow verbatim, the language of the New Federal Equity Rules. The Supreme Court of the District of Columbia, although a federal court, has the authority

1 D. C. Code of Law, §61, as amended by 32 Stat. 522 (1902); "The said court . . . shall be deemed a court of the United States."

Magruder v. Belt, 7 App. D. C. 303 (1895) holding that the Supreme Court of the District of Columbia is one of the courts mentioned in the words "any court of the United States" of §954 R. S. U. S.
(specifically bestowed) to promulgate its own rules of pleading, practice and procedure, but Congress in granting that authority placed upon it the limitation that such rules must not be "inconsistent with the rules in equity heretofore or hereafter adopted by the Supreme Court of the United States."² The Court of Appeals of the District of Columbia has held in several instances that the local courts are bound by the New Federal Equity Rules.³ Hence, as stated supra, "Hopkins" is as valuable help to the bar of the District of Columbia as to the bars of the various federal District courts and Circuit Courts of Appeals.

Newness also adds value to this Sixth edition, in that it contains the Revised Rules of the Supreme Court which were effective July 1, 1928.

As in the former editions, a very handy feature of the book is the reproduction of the prior federal equity rules and the connecting text of the annotator explaining the changes wrought by the New Rules. Of course, the most valuable—the distinguishing attribute—is that the New Rules are annotated, the citations being brought down to November, 1928.

ARTHUR A. ALEXANDER.

Georgetown University School of Law.

United States ex rel. Hine v. Morse, 218 U. S. 493 (1910): "The supreme court of the District ... possesses all of the powers which by statute are conferred upon the circuit and district courts of the United States."

² D. C. Code of Law, §65 as amended by 41 Stat. 555 (1920): The said Court "may establish written rules regulating pleading, practice and procedure ... And provided further that said court ... shall not have power to make or establish rules ... which are inconsistent with the rules in equity heretofore or hereafter adopted by the Supreme Court of the United States."

³ Shaw v. Lane, 47 App. D. C. 170 (1917): "This is a rule (New Fed. Eq. Rule No. 74) applicable generally to the Federal courts of the country, specially authorized by act of Congress, and is binding upon the courts of the District of Columbia."

In Bradley v. Davidson, 47 App. D. C. 266 (1918) the court in speaking of the New Federal Equity Rules, said that they "of course are controlling in this jurisdiction."

In Harrison v. Wash. Loan & Tr. Co., 49 App. D. C. 17 (1919),
THE LAW OF UNFAIR COMPETITION AND TRADE MARKS
York, pp. cliv, 1293.

The first edition of this book published twenty years ago
broke into a new field relating to business integrity and
common justice in commerce. That the law covered by the
book has been growing actively in recent years is indicated
by the fact that the 516 pages of text in the first edition are
expanded to 1078 pages in the present edition. The present
volume cites upwards of 2500 cases and is supplied with an
adequate finding index of 165 pages. There is a small
appendix containing the trade mark registration statutes
and the Patent Office rules and forms.

The author treats many phases of his subject in the twen-
ty-five chapters which include seventy-nine new sections
added since the second edition of 1917. Beginning with
some historical matter and definitions of unfair competition
and good will he takes up trade names and the like; con-
siders unlawful imitations of merchandise and its wrappers
and proceeds to set out the law with respect to trade secrets
and interference with business and contracts and disparage-
ment of rivals and their goods. Chapters are devoted to
the definition of trade marks and how they may be regis-
tered under the present United States laws. Legal actions
are then considered and the remedies and defences set out
with a chapter relating to the recovery of profits and dam-
ages. There are excellent lists of examples of registrable
and unregistrable marks and of infringing and non-infring-
ing marks.

The entire matter of trade mark registration is covered
in less than 100 pages with no reference to foreign pro-
tection. Nevertheless the main essentials of Patent Office
procedure are adequately indicated. The author comments
on the highly unsatisfactory condition maintained in the law
by adherence to the antiquated common law of trade marks.

the court evidently took it as matter of course that the new Federal
Equity Rules applied to the District of Columbia courts, as the case
was decided specifically on Federal Equity Rule 29, without any men-
tion or reference whatsoever to the District of Columbia Equity
Rule 32, which was similar but somewhat different.
as an incident to which there is no place in which there is a complete record of trade marks already in use. "This condition can be relieved only by Congressional legislation, making it mandatory for everyone who uses a trade mark in interstate commerce to notify the Government of that fact and thus make his use a matter of public record." He might have done better if he had insisted that Congress enact legislation providing for registration alone as the means to acquire a trade mark right in commerce over which Congress has jurisdiction.

The appendix and the text both follow the official Patent Office pamphlet in omitting any reference to the Act of June 7, 1924 amending the trade mark act to preclude the registration of the name or portrait of a deceased President without permission of his widow, if living. Since the book went to press the Act of March 2, 1929, amended the trade mark act and transferred jurisdiction of appeals from the Patent Office to the Court of Customs and Patent Appeals.

The book has almost no reference to the many magazine articles covering the legal and economic phases of the subject but the citation of cases is elaborately ample and covers substantially every statement in the book. No one having a case within the field of the present volume should dare omit reading what the author has to say on the subject.

Karl Fenning.

Washington, D. C.
FOR GENERAL INDEX OF ALL NUMBERS OF
THIS VOLUME 17, SEE NEXT PAGE
A minimum of two years of College work required for entrance.

Three-year course in the morning hours leading to the degree of Bachelor of Laws.

Four-year course in the late afternoons, leading to the degree of Bachelor of Laws.

One year post graduate course leading to the degree of Master of Laws or Master of Patent Law.

Sessions of classes commence at 9.00 o'clock A. M., and at 5.10 o'clock P. M.

For further information apply to

Geo. E. Hamilton, LL.D., Dean
GEORGETOWN LAW SCHOOL
Washington, D. C.
DODGE & ASCHER, Inc.
Manufacturing Jewelers
SPECIAL ORDER WORK OF EVERY DESCRIPTION
CLASS RINGS AND PINS — FRATERNITY JEWELRY — DANCE
PROGRAMS AND FAVORS—MEDALS—CUPS—TROPHIES—PLACQUES
William Dowding, Mgr.
35 E. Wacker Drive
Chicago

UNDIVIDED RESPONSIBILITY!

COMPLETE ADVERTISING

Copy
Plans
Idea
Layouts
Art Work
Typography
Engraving
Embossing
Printing
Folding
Binding
Mailing

Producers of This Publication!

Please mention the JOURNAL when dealing with our advertisers.
Outfits for Summer Sport

Send for our New Illustrated
GENERAL CATALOGUE

BOSTON PALM BEACH NEWPORT

EWELL'S BLACKSTONE
A New, Modern Edition of the Essentials of Blackstone's Commentaries
Price $4.50
MATTHEW BENDER & COMPANY
Incorporated
109 State St.
Albany, N. Y.

Modern Writing
is done with the Underwood Portable. It is an invaluable aid to students.
Any Underwood Representative or Dealer will be glad to give you a demonstration.

UNDERWOOD TYPEWRITER COMPANY
1413 New York Ave., N. W.
UNDERWOOD PORTABLE
with 4 Bank STANDARD KEYBOARD

THE STOCKETT-FISKE COMPANY
INCORPORATED
COMMERCIAL STATIONERS
919 E Street, N. W.
Washington, D. C.

Please mention the JOURNAL when dealing with our advertisers.
LAWRENCE ON EQUITY JURISPRUDENCE

Now ready for delivery

The most important publishing event in the field of equity in fifty years. The entire subject completely covered in two volumes. Write your address below and attach check for $20.00. If on receipt of the books you are not enthusiastic over them, return at our expense for full refund.

MATTHEW BENDER & CO., INC.,
ALBANY, N. Y.
PUBLICATIONS OF INTEREST TO THE LAW STUDENT

*Dunlap's Elementary Law*, $3.50
Students well versed in its contents can pass the most rigid examination of admission to the Bar.

*Lawson on Contracts*, $5.00
The clearness with which all the principles of the law of Contracts are stated makes it an ideal book for the student.

*Tiedman on Real Property*, $6.00
For more than forty years the leading one-volume work on this subject.

ARE YOU CONTEMPLATING THE PURCHASE OF A LAW LIBRARY?

If so, write us. We carry a large stock of Reports, Reporters, Digests, Encyclopedias and Text Books. Every law book that a lawyer needs when starting in the practice. Write for prices.

THOMAS LAW BOOK COMPANY
SAINT LOUIS

GEORGETOWN LAW STUDENTS

Are Provided With Their Books by Us

Students Everywhere
Find Our Service Efficient and Helpful At All Times

*May We Not Serve You?*

Ask for a copy of Helps for Law Students (FREE)

JOHN BYRNE & CO., Law Book Publishers

1324 EYE STREET N. W. WASHINGTON, D. C.

Please mention the JOURNAL when dealing with our advertisers.
This is the Age of Specialization

BANKRUPTCY LAW AND PRACTICE afford a splendid opportunity to make rapid strides in your chosen profession.

The growth and development of commercial law calls for an increasing number of specialists in this field.

The American Bankruptcy Review, the only publication on this important subject, is full of live, interesting information, and is not merely a reporter of cases. Subscription, $5.00 a year, covers 12 issues.

Published in conjunction with the American Bankruptcy Review, is the only Directory of Federal Practitioners. Representation is open to capable, high-grade federal practitioners. We publish Facts About Bankruptcy, a 348 page volume of useful bankruptcy law and information, indispensable to every student and practitioner interested in this subject. Clothbound, $5.00.

American Bankruptcy Review, Inc.
11 West 42d Street, New York City

Please mention the JOURNAL when dealing with our advertisers.
17 LOOSE LEAF LAW SERVICES

1. STANDARD FEDERAL TAX SERVICE
   Combines in one Service all features of two standard Services developed by years of experience of two leading Tax Service organizations for the convenience of their thousands of subscribers. The merging of similar features has naturally resulted in great improvement.
   Three Large Binders. Send for Free Trial Offer.

2. U. S. BOARD OF TAX APPEALS AND FEDERAL COURTS SERVICE
   Absolutely Unique. Four large volumes a year of strictly Current Service. Complete Text of all Court and Bankruptcy Court Decisions, Digests of all Federal Court Pleadings and B. T. A. Petitions.

3. STATE INHERITANCE TAX SERVICE

4. PUBLIC UTILITIES AND CARRIERS SERVICE
   Statutes, Commission Acts and Regulations, thoroughly annotated with digests of all Court Decisions and Commission Rulings, Special Supreme Court and Bibliography and Forms and Divisions.

5. FEDERAL TRADE REGULATION

6. CORPORATION TAX SERVICE—STATE AND LOCAL
   For Each State—Franchise or License Taxes, Income Taxes, General Property Taxes and any other taxes, state or local, applying to business corporations. For Each Tax—Of What Corporations Required.

7. LEGAL PERIODICAL DIGEST SERVICE
   Thorough Digests of all Articles in all Current Law Journals in the English Language. These digests, together with terse digests of Case Comments and list of book reviews, are made instantly accessible by Subject, by Author and by Case Title.

8. BUSINESS LAWS OF THE WORLD
   A fast reporting Service on important Decisions and Laws, under one index, for quickest reference. Makes available in instantly accessible form many Federal Statutes (text) and substance of laws of all states, annotated with leading cases. Saves much time by its "law clerk" service of high-class editors.

9. BUSINESS LAWS—UNITED STATES UNIT
   Official Organ of the New York Stock Transfer Association. Shows Procedure to be followed by—Individuals, Corporations, Receivers, Holders of Power of Attorney, Trustees, Executors, Administrators, etc. All States and Canadian Provinces.

10. STOCK TRANSFER GUIDE AND SERVICE

11. "STORY CASE" BUSINESS LAW
    Each example is set forth in a pointed story of an actual business transaction based on a leading court case. Thus each case is made a human interest story. You will read these with pleasure and remember the legal point in each because of its actual business application.

12. STOCKS AND BONDS LAW SERVICE

13. FEDERAL RESERVE ACT SERVICE
    Sets forth the Federal Reserve Act, Regulations, Rulings, Opinions and Amendments and includes Current Tables of discount rates and weekly statement of resources of each of the twelve Federal Reserve Banks.

14. REWRITE AND ILLUSTRATIVE CASE FEDERAL TAX SERVICE
    Includes the U. S. Income and War Tax Guide and Current Bulletins reporting important Rulings and Decisions and including much helpful comment, news, instructions, special treatises, illustrative cases, etc.

15. REWRITE AND CITATOR SERVICE
    Includes all No. 15, plus 224-page official citation index and Citator-Finding Lists (official citations).

16. NEW YORK TAX SERVICE
    All Laws and Regulations thoroughly annotated, and including Current Reports on all state taxes.

17. COMMERCE CLEARING HOUSE, INC.
    Loose Leaf Service Division of The Corporation Trust Company.

G12

Please mention the JOURNAL when dealing with our advertisers.
Ruling Case Law

DO YOU KNOW

That a special student arrangement is made for Ruling Case Law on terms to suit you—

That we have established a Law School Service for the purpose of helping you—

1. By giving you specific information in regard to Bar Examinations in different states—

2. By giving you the experience of certain successful students in plans of study—

3. By publishing a Law School Edition of "Case and Comment"—

4. By giving you booklets from time to time adapted to the subjects you are studying—

5. By donating prizes to your school to stimulate interest and friendly rivalry—

6. By having one of our representatives give lectures in your school and in addition give you personal instruction on the use of Law Books—

AND ALL THIS WITHOUT THE SLIGHTEST EXPENSE TO YOU OR OBLIGATION ON YOUR PART.

During the course of your school work we hope to serve you in many other ways and to do this, we want to keep in touch with you. If you want to get the most out of this service, please fill out the coupon fully and we will place you on our list.

THE LAWYERS CO-OPERATIVE PUBLISHING CO.,
Rochester, N. Y.

Please place my name upon your list for "Law School Service" and advise me from time to time of all the different helps you are giving. It is understood that all this is to be without expense or obligation on my part.

☐ Please send me your text treatment of "Proximate Cause."
☐ Please send me your text treatment of "Conflict of Laws."
☐ Please send me your Research Manual.

Phone........................................... Business Address..............................
Home........................................ School........................................
Business................................. Class......Year
Name...................................... [Morning]
Home Address........................ [Evening]

Please mention the JOURNAL when dealing with our advertisers.