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Recent Cases

RECENT CASES

ADMINISTRATIVE LAW—POWER OF FEDERAL COURT UPON REMAND TO DETERMINE PROCEDURE OF ADMINISTRATIVE AGENCY. [United States Supreme Court]

A significant decision in the field of administrative law and procedure has recently been rendered by the United States Supreme Court. This case, *Federal Communications Commission v. Pottsville Broadcasting Co.*,[1] defines the scope of a remand from the United States Court of Appeals for the District of Columbia to the Federal Communications Commission after an appeal from the Commission's finding. The opinion, written by Mr. Justice Frankfurter, was for a unanimous court.[2]

The proceedings began in 1936 when the Pottsville Broadcasting Company sought a permit to build a station at Pottsville, Pennsylvania. The permit was refused by the Commission at that time, due to findings that the applicant company lacked financial responsibility and did not sufficiently represent local Pottsville interests. The applicant appealed to the Court of Appeals for the District of Columbia. That court reversed the decision of the Commission as to the financial qualification[3]—that finding being clearly based on an error in construing Pennsylvania law—and remanded the case to the Commission "for reconsideration in accordance with the views expressed."[4]

Prior to this decision of the Court of Appeals two other applications were made to the Commission for the facilities sought by the Pottsville Company, and hearings were held, but no disposition of the question was made. After the remand the Commission declared that all three applications should be considered together and "on a comparative basis." The Pottsville Company then sought and was granted a writ of mandamus from the same Court of Appeals ordering the Commission to consider and decide the application of the Pottsville Company "on the basis of the record as originally made" and not "on a comparative

[1]60 S. Ct. 437, 8 U. S. L. Week 198 (1940).

[2]Mr. Justice McReynolds concurred in the result.

[3]Pottsville Broadcasting Co. v. F. C. C., 69 App. D. C. 7, 98 F. (2d) 288 (1938). The court was composed of Groner, C. J., Miller and Edgerton, JJ.

[4]The court felt that the Commission's decision was based on the financial responsibility point rather than on the ground of insufficient local representation. But the decision of the Court of Appeals did not foreclose a finding by the Commission that this second ground alone was sufficient to disqualify the applicant. See 69 App. D. C. 7, 98 F. (2d) 288, 291 (1938).

basis" with the later applicants.[5] The Supreme Court granted certiorari "because important issues of administrative law are involved."[6] When the case was heard on the merits, the Court held that after a remand from the Court of Appeals, although the Commission is bound to act upon the court's correction of errors of law, it is not impliedly foreclosed by the court's mandate "from enforcing the legislative policy committed to its charge." Since the policy in question was to judge the applications in the light of "public convenience, interest, or necessity," consideration of the three applications on a comparative basis is permissible after the remand and regardless of the priority of the Pottsville Company's application.

The Federal Communications Commission was created by the Communications Act of 1934.[7] Among its duties are the granting and the renewal of licenses to applicants who desire to operate broadcasting stations, if "public convenience, interest, or necessity" will thereby be served.[8] In making its decision on these and other matters the Commission was granted by Congress a wide range of discretionary powers to formulate its own rules of procedure in investigations and hearings.[9] An appeal from a decision of the Commission by an applicant for a construction permit for a radio station is allowed to the United States Court of Appeals for the District of Columbia.[10] The court's review is limited to "questions of law"; and "findings of fact by the Commission, if supported by substantial evidence, are conclusive unless it shall clearly appear that the findings of the Commission are abitrary or capricious."[11] When the Commission's finding is reversed, the cause is remanded to the Commission to carry out the court's judgment.

When the principal case was before the Court of Appeals for the District of Columbia, Mr. Chief Justice Groner was of the opinion that

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[5]Pottsville Broadcasting Co. v. F. C. C., 70 App. D. C. 157, 105 F. (2d) 36 (1939). The court consisted of Groner, C. J., Stephens and Edgerton, JJ.

[6]48 Stat. 1094 (1934), 47 U. S. C. A. § 402 (e) (1939).

[7]48 Stat. 1064 (1934), as amended by 50 Stat. 189 (1937), 47 U. S. C. A. § 151 (1939).

[8]48 Stat. 1083 (1934), 47 U. S. C. A. § 307 (1939).

[9]48 Stat. 1068 (1934), 47 U. S. C. A. § 154(i)(j) (1939). A recent and very important paper based on investigation may be consulted for information regarding the inner workings of the Commission. See Federal Communications Commission, Monograph No. 3, Vol. 1, prepared by the Attorney General's Committee on Administrative Procedure. Also see Caldwell, Comments on the Procedure of Federal Administrative Tribunals with Particular Reference to the Federal Communications Commission (1939) 7 Geo. Wash. L. Rev. 740.

[10]48 Stat. 1093 (1934) as amended by 50 Stat. 197 (1937), 47 U. S. C. A. § 402(b) (1939).

[11]48 Stat. 1094 (1934), 47 U. S. C. A. § 402(e) (1939).

the remand was one which was conclusive of *all* questions, excepting only that of the possible insufficient representation of Pottsville interests by the applicant company.[12] His position was that "the order of the court entered on an appeal from the Commission ought to have the same effect and be governed by the same rules as apply in appeals from a lower federal court to an appellate federal court in an equity proceeding."[13] In such a case, matters determined by the appellate court cannot after the remand be again raised and retried in the lower federal court.[14] But the decision of the appellate court is only binding as to matters actually decided. The lower court is free to act on all other matters not mentioned in the remand.[15] Mr. Justice Frankfurter, in his opinion in the principal case, pointed out that even if the view be adopted that the remand to the Commission is governed by the same rules as a remand from upper to lower court, the present controversy is not solved. This was so, apparently, because the Supreme Court found that the Court of Appeals' remand to the Commission did not contain any specific direction as to whether the further proceedings should be on an individual or on a comparative basis.[16] But the actual ground of the Court's decision is found in broader considerations, for Mr. Justice Frankfurter denies that the analogy of the relation between court and court applies where court and administrative body are concerned. For here is in issue the interplay of authority granted to the Commission by Congress[17] under its power to control commerce, as opposed to the reviewing power as granted to the federal courts by Congress[18] under Article III of the Constitution. The Federal Communications Act, in the sections granting licensing powers to the Commission, does not include any express provision on the question of whether the Commission in any case is to pass upon applications on an indvidual or a comparative basis, nor does the judicial review section expressly provide

[12]Mr. Chief Justice Groner, it may be of interest to note, is one of the members of the Attorney General's Committee on Administrative Procedure, mentioned in note 9, supra.

[13]Pottsville Broadcasting Co. v. F. C. C., 70 App. D. C. 157, 105 F. (2d) 36, 39 (1939).

[14]Latta v. Granger, 167 U. S. 81, 17 S. Ct. 746, 42 L. ed. 85 (1897).

[15]Ex Parte Union Steamboat Co., 178 U. S. 317, 20 S. Ct. 904, 44 L. ed. 1084 (1900).

[16]See Federal Communications Commission v. Pottsville Broadcasting Co., 60 S. Ct. 437, 440 (1940): "The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot consider questions which the mandate has laid at rest. . . . That proposition is indisputable, but it does not tell us what issues were laid at rest."

[17]48 Stat. 1083 (1934), 47 U. S. C. A. § 307(a) (1939).

[18]48 Stat. 1093 (1934), as amended by 50 Stat. 197 (1937), 47 U. S. C. A. § 402(b) (1939).

that the Court of Appeals may upon remand instruct the Commission as to how it shall proceed in this respect. Consequently, the Supreme Court was compelled to determine the congressional intent upon implications drawn from the Act. And the Court found in the Commission's authority to pass on license applications on public convenience standards, the implication that the Commission should determine its methods of proceeding, preferring this conclusion to the contrary solution of broadening judicial control over the Commission's actions.[19]

The desirability of such a conclusion is demonstrated by the very case here under consideration. To have granted the application of the Pottsville Company without a consideration of the merits of the other applications would not have satisfied the requirements that the public convenience, interest, or necessity be the controlling factor. That the Commission made an error of law while refusing the application, could not tend to mean that after the correction of the error, the application must necessarily be granted without any further consideration.

The issue of the principal case does not fit neatly into the usual pattern of the problems of administrative law cases. It cannot be classified simply as involving a determination with respect to the proper scope of "judicial review", since that term is used to denote the power of a court to review administrative decisions upon the merits of the questions at issue.[20] Nor can the instant case be viewed merely as a determination relative to the internal procedure to be followed by a commission, since the recent cases dealing with that problem concerned "the procedure in the first instance of administrative agencies themselves."[21] Rather, the case defines the scope of judicial *control* over administrative procedure *after remand* from court to commission: whether

[19]See Morgan v. United States, 304 U. S. 1, 26, 58 S. Ct. 999, 1001, 82 L. ed. 1129 (1938). There after a remand to the Secretary of Agriculture, the court said: "What further proceedings the Secretary may see fit to take in the light of our decision . . ., are not matters which we should attempt to forecast or hypothetically to decide." See also F. R. C. v. Nelson Bros. Bond and M. Co., 289 U. S. 266, 277, 53 S. Ct. 627, 633, 77 L. ed. 1166 (1933).

[20]Thus in Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287, 40 S. Ct. 527, 64 L. ed. 908 (1920), it was held that where the constitutional question of a confiscatory rate was being considered "the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts."

[21]See Morgan v. United States, 304 U. S. 1, 58 S. Ct. 773, 82 L. ed. 1129 (1938) where the court spoke of the basic requirements of fair play in administrative procedure generally. For a general review of the problems confronting students and workers in the field of administrative law and procedure see Fuchs, Introductory Comment to a Symposium on Administrative Law (1919) 9 Am. L. School Rev. 139, 140.

the court could "write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors."[22] In answering, that "Only Congress could confer such a priority,"[23] the Supreme Court, although on a narrow point, seems definitely to have departed from its former attitude of mistrust[24] and to have adopted a viewpoint sympathetic toward the administrative process.[25] This is not too surprising in the light of the earlier opinions of Mr. Justice Brandeis while a member of the Court[26], and of the presence of Mr. Justice Frankfurter on the reconstituted Bench.[27]

JOHN E. PERRY

CHARITABLE INSTITUTIONS—LIABILITY IN TORT OF HOSPITAL TO PATIENT. [Colorado]

In *O'Connor v. Boulder Colorado Sanitarium Association*,[1] plaintiff brought an action against defendant for negligence in the care and medical treatment furnished her while a paying patient in defendant's sanitarium. To defendant's answer, alleging nonliability by reason of its being a charitable institution, plaintiff replied that a judgment would in no way affect the funds of the association used for charitable purposes, because it had secured a contract of insurance indemnifying it against all liability for the torts of its agents or servants in the conduct of the hospital business. To this replication demurrers were sustained in the trial court and judgment was entered dismissing the action. The Colorado Supreme Court reversed the judgment and remanded the case.

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[22]See Federal Communications Commission v. Pottsville Broadcasting Co., 60 S. Ct. 437, 443 (1940).

[23]See Federal Communications Commission v. Pottsville Broadcasting Co., 60 S. Ct. 437, 443 (1940).

[24]This mistrust of administrative bodies by the courts was dramatically shown by the case of Jones v. Securities and Exchange Commission, 298 U. S. 1, 23, 56 S. Ct. 654, 661, 80 L. ed. 1015 (1936).

[25]Such an attitude of friendliness toward the administrative is to be noted in the lectures of Dean James M. Landis. See Landis, The Administrative Process (1938) 135.

[26]See the dissent of Mr. Justice Brandeis in Crowell v. Benson, 285 U. S. 22, 65, 88-89, 52 S. Ct. 285, 298, 307, 76 L. ed. 598 (1932). That the function of courts toward administrative bodies was one of control rather than of review is the main thesis of the dissent. For other cases by Mr. Justice Brandeis see Frankfurter, Mr. Justice Brandeis and the Constitution (1931) 45 Harv. L. Rev. 33, 110.

[27]Mr. Justice Frankfurter's position during his years as teacher and authority on administrative law is shown in his article, The Task of Administrative Law (1927) 75 U. of Pa. L. Rev. 614. The author says at page 617: "It is idle to feel either blind resentment against 'government by Commission' or sterile longing for a golden past that never was."

[1]96 P. (2d) 835 (Colo. 1939).

The court was of the opinion that where the charitable institution has insured itself against liability for negligence the public policy requiring that such association be immune[2] from tort liability is not transgressed. The court said that while it was committed to the trust fund doctrine to protect the funds of the charitable association from being dissipated by judgments in tort actions, that doctrine did not bar a suit against a charitable institution based on the tort of its servant or agent, but only prevented the levying of execution on any property which was part of the charitable trust. It was held, therefore, that an action against such a defendant would be denied only where the testimony affirmatively disclosed that a charitable trust existed, and that a judgment against such trust, if satisfied, would deplete the trust fund.[3]

American courts have quite consistently held that charitable institutions are not liable to beneficiaries for the torts of their agents or servants so long as they have not been negligent in selecting or retaining such agents or servants.[4] The leading case, establishing this rule in England, turned on the so-called trust fund doctrine.[5] In that case an orphan alleged that he had been refused admittance to an orphanage contrary to the terms of its charter. The court held that to make the orphanage liable in damages would be a direct violation of the purposes of the trust under which it operated. It was said that the trust fund could not be made liable and that even though the action was in form against the trustee, if it appeared that it was in fact against the fund, it could not be sustained.

The leading exponent in America of this rule of immunity has been the Supreme Judicial Court of Massachusetts. In a comparatively early decision by that court, *McDonald v. Massachusetts General Hospital*,[6]

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[2]Following the language of most court opinions, the words "immunity" and "exemption" are used interchangeably in this discussion.

[3]Brown v. St. Luke's Hosp. Ass'n, 85 Colo. 167, 274 Pac. 740 (1929). See also St. Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22, 24 (1925): "The presumption is that they [charitable institutions] have power to hold other property. If they have there is no more reason to say that they are not liable for torts than to say that a natural person is not because he has no property not exempt from execution. We think that the judgment against these corporations is valid, but that no property which they hold in charitable trust can be taken under execution. . . ."

[4]10 Fletcher, Cyc. Corp. (Perm. Ed. 1931) § 4923.

[5]Feofees of Heriot's Hosp. v. Ross, 12 C. & F. 507, 8 Eng. Rep. 1508 (H. L. 1846).

[6]120 Mass. 432, 436, 21 Am. Rep. 529, 533 (1876): "The funds entrusted . . . are not to be diminished by such casualties, if those immediately controlling them have done their whole duty in reference to those who have sought to obtain the benefit of them." The court here relies to a certain extent on Holliday v. St. Leonard's Vestry, S. C. 30 L. J. C. P. 361, 142 Eng. Rep. 769 (1861) (the Vestry gratuitously dis-

it was held that if there had been no neglect on the part of those administering the trust and if due care had been used by them in the selection of their inferior agents, there could be no liability. This case also adopted the trust fund doctrine.

Another basis for disallowing an action by a beneficiary against a charitable institution which has been adopted in various American jurisdictions from time to time is the "waiver theory."[7] In *Schloendorff v. Society of New York Hospital*,[8] Judge Cardozo, while denying liability on the ground that the tort was that of a physician acting in the capacity of an independent contractor, expressly approved a previous New York decision,[9] no longer followed in the state,[10] that one becoming a patient in a charitable institution impliedly waived his right to recover for the negligence of the servants or agents of the institution by accepting the charity, even though he might pay to help defray the expenses.

Other cases hold that there can be no liability in the type of case under consideration, because the doctrine of respondeat superior will not apply when the master is receiving no pecuniary profit or other benefit from the employment of the servant or agent.[11]

Finally, the most common basis for the rule of exemption is said to be the public policy which fosters such charities and will not allow anything to be done to hinder their creation, maintenance, or efficient operation.[12] Essentially this is the real reason in all of the cases upholding

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charged the duty of surveying the public highways and was held not responsible for the negligence of its employees in the performance of a public function); accord, Schumacher v. Evangelical Deaconess Society, 218 Wis. 169, 260 N. W. 476 (1935). But see Cohen v. General Hospital Society of Connecticut, 113 Conn. 188, 154 Atl. 435, 436 (1931): "A charitable institution is not a state institution acting as an agency of the sovereign. It is not immune because of the public character of the charity."

[7]Powers v. Massachusetts Homoeopathic Hosp., 109 Fed. 294 (C. C. A. 1st, 1901), cert. denied, 183 U. S. 695, 22 S. Ct. 932, 46 L. ed. 394 (1901); Burdell v. St. Luke's Hosp., 37 Cal. App. 310, 173 Pac. 1008 (1918); Mikota v. Sisters of Mercy, 183 Iowa 1378, 168 N. W. 219 (1918); Cook v. Norton Infirmary, 180 Ky. 331, 202 S. W. 874 1918); Pepke v. Grace Hosp., 130 Mich. 493, 90 N. W. 278 (1902).

[8]211 N. Y. 125, 105 N. E. 92 (1914).

[9]Hordern v. Salvation Army, 199 N. Y. 233, 92 N. E. 626 (1910); accord, Barr v. Brooklyn Children's Aid Society, 190 N. Y. Supp. 296 (N. Y. Sup. Ct. 1921).

[10]Sheehan v. North Country Community Hosp., 273 N. Y. 163, 7 N. E. (2d) 28 (1937).

[11]Union Pacific Ry. v. Artist, 60 Fed. 365 (C. C. A. 8th, 1894); Fordyce v. Woman's Christian Nat. Library Ass'n, 79 Ark. 550, 96 S. W. 155 (1906); Hogan v. Chicago Lying-in Hosp. & Dispensary, 335 Ill. 42, 166 N. E. 461 (1929); Roberts v. Kirksville College of Osteopathy & Surgery, 16 S. W. (2d) 625 (Mo. App. 1929); Baylor Univ. v. Boyd, 18 S. W. (2d) 700 (Tex. Civ. App. 1929).

[12]Ettlinger v. Trustees of Randolph-Macon College, 31 F. (2d) 869 (C. C. A. 4th,

the nonliability rule—a reason which embraces all of the others. Whether the courts admit it or not, it is this public policy which has led to the formulation of the other principles.[13]

All of these reasons for nonliability have been severely criticised on occasion, many of the criticisms coming from courts repudiating one basis in favor of another, and others from courts repudiating the rule altogether. The result has been mass of confused and conflicting opinions. And further, the extent of the immunity—whether it exists in actions brought by servants or strangers as well as by patients—has varied considerably in different jurisdictions, depending upon which theory the particular case has turned.[14]

Perhaps the earliest complete repudiation of the rule was in *Glavin v. Rhode Island Hospital*.[15] Plaintiff sued for damages for personal injuries suffered while a paying patient in defendant's hospital, the injuries being due to the negligence of defendant's servant. The court stated that the corporation owed patients the duty of due care in the selection of competent agents and servants; that when such agents or servants acted negligently, their negligence was that of the corporation

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1929); Emery v. Jewish Hosp. Ass'n, 193 Ky. 400, 236 S. W. 577 (1921); Duncan v. Nebraska Sanitarium, 92 Neb. 162, 137 N. W. 1120 (1912); D'Amato v. Orange Memorial Hosp., 101 N. J. L. 61, 127 Atl. 340 (1925); Schumacher v. Evangelical Deaconess Society, 218 Wis. 169, 260 N. W. 476 (1935). But see Basabo v. Salvation Army, 35 R. I. 22, 85 Atl. 120, 129 (1912): "Public policy does not require that a charitable corporation be held exempt, but, on the other hand, to relieve it from liability would be contrary to true public policy. . . . Just as such a servant has a lawful right to recover his stipulated wages . . . and to recover damages for breach of his contract . . . so also would he be entitled to recover for injuries due to the negligence of his master and so also would his master be liable for his torts and negligence while in the service of the master, as in any other case. There is no reason nor logic in the attempted distinction between the servant of the defendant and the servant of any other person or corporation."

[13]Weston's Adm'x v. Hosp. of St. Vincent of Paul, 131 Va. 587, 600, 107 S. E. 785, 789 (1921): "Indeed the trust fund doctrine is simply a rule of public policy."

[14]Kellogg v. Church Charity Foundation, 128 App. Div. 214, 218, 112 N. Y. Supp. 566 (2nd Dep't 1911), aff'd, 203 N. Y. 191, 96 N. E. 406 (1911): "The law may imply an intention on the part of the donors of the charitable funds that such funds shall be used for the charitable purposes only, and then imply an acquiescence in this intention by all persons who accept the benefits. . . . But no such acquiescence or waiver can be attributed to an outsider." Enman v. Trustees of Boston Univ., 170 N. E. 43 (Mass. 1930) (trust fund doctrine followed to its logical conclusion; recovery denied to strangers as well as beneficiaries); Bruce v. Central Methodist Episcopal Church, 147 Mich. 230, 110 N. W. 951 (1907) (nonliability on trust fund doctrine limited to beneficiaries); Daniels v. Rahway Hosp., 160 Atl. 644 (N. J. 1932) (nonliability on public policy limited to beneficiaries); Schumacher v. Evangelical Deaconess Society, 218 Wis. 169, 260 N. W. 476 (1935) (nonliability on public policy extended to strangers).

[15]12 R. I. 411, 34 Am. Rep. 675 (1879).

itself, inasmuch as they were the representatives of the corporation. It was expressly denied that there is any logical foundation for the doctrine of generally immunity from tort liability on the ground of a public policy against the diversion of trust funds from the purposes of the trust. For, where a charitable corporation has funds available for general purposes it may apply such funds to pay damages for which it is held liable, inasmuch as this liability is incurred in carrying out the trust and is incident to it. In short, a charitable institution is liable in tort on the same basis as any other corporation.[16]

The Rhode Island decision was followed in Alabama in 1915 in *Tucker v. Mobile Infirmary Association.*[17] The court in the latter case noted that the trust fund doctrine had been abandoned in England[18] and in Canada.[19] It was pointed out that to follow the trust fund theory to its logical conclusion, it would be necessary to grant absolute nonliability to charitable institutions in tort, when in fact the majority rule in America is definitely opposed to nonliability as to strangers and servants.[20] The court delivered a sound and compelling criticism of the trust fund doctrine.[21] On the question of the application of the rule of respondeat superior, it was said that it is entirely immaterial to its operation whether the master receives any pecuniary profit or other benefit from the employment of the servant or agent.[22] It was further said

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[16]This case is no longer controlling in Rhode Island, a statute having been passed exempting charitable hospitals from liability for the torts of any "of its officers, agents or employees in the management of, or for the care of treatment of, any of the patients or inmates of such hospital." Public Laws 1930, c. 1612, amending General Laws 1909, c. 213.

[17]191 Ala. 572, 68 So. 4 (1915).

[18]Mersey Docks v. Gibbs, 11 H. L. Cas. 686, 11 Eng. Rep. 1500 (1866).

[19]Lavere v. Smith's Falls Public Hosp., 35 Ont. L. R. 98, 9 B. R. C. 13 (1915).

[20]Regarding liability to servants and strangers, see 10 Fletcher, Cyc. Corp. (Perm. Ed. 1931) § 4924.

[21]191 Ala. 572, 68 So. 4, 8 (1915): "The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust."

[22]But see Southern Methodist Hosp. v. Wilson, 45 Ariz. 507, 46 P. (2d) 118, 125 (1935): "The rule of respondeat superior . . . was originally founded solely on reasons of public policy. . . . We think there are circumstances under which the application of that rule should, for the reasons of public policy also, be limited, and we are of the opinion that while it may do an injustice in individual cases, yet upon the whole, it is for the best interests of the public to encourage the establishment and maintenance of charitable institutions by advising the donors thereto that their funds will not be diverted from their original purpose of charity to pay for the negligence of the employees of such an institution. . . ."

that the soundness of the rule of exemption on the ground of public policy should be determined by the legislature and not by the judiciary. The court did not decide whether a non-paying patient could be held to have waived any right of action against the association, but refused to apply the waiver theory in the case of a paying patient. Nonliability on the waiver theory, said the court "if held to be sound, must rest upon the fact that it is the giving and receiving of charity that creates the exemption, and not the nature of the institution administering it."[23]

An increasing number of American jurisdictions have adopted the rule of the *Glavin* and *Tucker* cases.[24] However, the great weight of authority holds to the rule of the *Massachusetts General Hospital* case,[25] that a charitable institution is not liable for the torts of its agents or servants if due care has been used in their selection and maintenance.[26] A smaller number of jurisdictions grant absolute immunity in tort to charitable institutions, whether the action be brought by beneficiary, servant, or stranger.[27]

In comparatively recent years, the courts of some jurisdictions have apparently begun to recognize the harshness of the majority rule and have made more or less successful attempts to limit without definitely

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[23]191 Ala. 572, 68 So. 4, 11 (1915).

[24]Geiger v. Simpson Methodist Episcopal Church, 174 Minn. 389, 219 N. W. 463 (1928); Bruce v. Y. M. C. A., 51 Nev. 372, 277 Pac. 798 (1929); Hewett v. Woman's Hosp. Aid Ass'n, 73 N. H. 556, 64 Atl. 190 (1906); City of Shawnee v. Roush, 101 Okla. 60, 223 Pac. 354 (1923); O'Neill v. Odd Fellows Home, 89 Ore. 382, 174 Pac. 148 (1918).

[25]McDonald v. Massachusetts General Hosp., 120 Mass. 432, 21 Am. Rep. 529 (1876).

[26]Some courts refuse to distinguish between a tort by an agent or servant and one by the management itself. Bodenheimer v. Confederate Memorial Ass'n, 68 F. (2d) 507 (C. C. A. 4th, 1934), cert. denied, 292 U. S. 629, 54 S. Ct. 643, 78 L. ed. 1483 (1934); Adams v. University Hosp., 122 Mo. App. 675, 99 S. W. 453 (1907); Schumacher v. Evangelical Deaconess Society, 218 Wis. 169, 260 N. W. 476 (1935).

Most of these cases follow the example of Massachusetts. Although the Massachusetts General Hospital case seemed to make it a requisite of exemption that the officers or management be without negligence, it was later stated by the court in Roosen v. Peter Bent Brigham Hosp., 235 Mass. 66, 126 N. E. 392, 394 (1920) that the phrase "provided due case has been used in their selection" was "merely precautionary" and should not be "seized upon as a basis for the argument that such a charitable corporation as a hospital should be held liable for the negligence of its managing officers in selecting incompetent subordinate agents." Thus the Massachusetts rule has been extended so that at the present time in that jurisdiction a charitable institution is absolutely exempt from all tort liability. Enman v. Trustees of Boston Univ., 170 N. E. 43 (Mass. 1930).

[27]As to liability to strangers and servants, see 10 Fletcher, Cyc. Corp. (Perm. Ed. 1931) §§ 4922, 4924.

abolishing it.[28] The method of the Colorado court is commendable, although not entirely satisfactory. There, under the rule of qualified immunity, no exemption from liability will be recognized unless the entire assets of the institution are held for the benefit of the charity. Thus, the court allows the action to be prosecuted to judgment and execution to be levied on all property other than that held for the charitable purposes.[29] The disadvantage of this rule is that it is only applicable in those jurisdictions which grant immunity on either public policy or the trust fund doctrine. Obviously, the decision includes no answer to the implied waiver theory, nor to those cases refusing to

[28]England v. Hosp. of Good Smaritan, 88 P. (2d) 227 (Cal. App. 1939) (patient paid $25 per week, this amount being less than the average cost; court held for plaintiff because no charity was extended to plaintiff, and further plaintiff had no knowledge of alleged charitable nature of institution); Morton v. Savannah Hosp., 148 Ga. 438, 96 S. E. 887 (1918) (if a charitable hospital treats patients for pay it is liable to the extent of the income derived from the treatment of the paying patients); Medical College v. Rushing, 1 Ga. App. 475, 57 S. E. 1083 (1907) (liable for the mutilation of the corpse of a charity patient); Sessions v. Thomas Dee Memorial Hosp., 51 P. (2d) 229 (Utah 1935) (a charity receiving patient for pay owes the duty of due care and is liable for the failure to exercise that care).

Some of the later cases, especially in England, have determined the question of liability upon the principle of what the hospital actually undertakes to do. Under this principle the question in each case would be (1) whether or not there is an express contract which can furnish the measure of duty and liability; (2) if not, what the hospital holds itself out as undertaking to perform. In the latter event liability will depend on whether or not the medical staff are paid attendants furnished by the hospital, or whether they are merely attached to the hospital as consultants. Hillyer v. St. Bartholomew's Hosp., [1909] 2 K. B. 820, 829, 9 B. R. C. 1, 10: "The governors of a public hospital, by their admission of the patient to enjoy gratuitous benefit . . . undertake that the patient shall be treated only by experts . . . and further, that those experts shall have at their disposal fit and proper apparatus and appliances. .. ." Hamburger v. Cornell Univ., 240 N. Y. 328, 148 N. E. 539, 542 (1923): "With us a hospital or university owes to patients or to students whatever duty of care and diligence is attached to the relation as reasonably implicit in the nature of the undertaking and the purpose of the charity."

[29]St. Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22 (1925). The Supreme Court of Tennessee has also adopted the rule of the Colorado courts. McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S. W. (2d) 917, 919 (1936): "The exemption and protection afforded to a charitable institution is not immunity from suit, not nonliability for a tort, but that the protection actually given is to the trust funds themselves. It is a recognition that such funds cannot be seized upon by execution, nor appropriated to the satisfaction of a tort liability. And certainly it is no defense to a tort action, that the defendant has no property subject to execution." This case was followed by Vanderbilt Univ. v. Henderson, 127 S. W. (2d) 284, 287 (Tenn. App. 1938): ". . . this [McLeod case] . . . is a recognition that a charitable institution is liable for a tort of its agent and may be pursued to judgment; but that the institution's trust property cannot be taken to satisfy such judgment; and that where such institution has liability insurance, such insurance is not trust property of the institution and may be appropriated to the satisfaction of such judgment."

apply respondeat superior to charitable institutions. Furthermore, in most cases all of the property of the institution is used for the purposes of the charity. Only in a rare instance will property exist which a court can hold to be free from an imposition in the nature of a trust.[30]

The one form of property that would be free from such an imposition is liability insurance. Unfortunately, under the rule of the majority of jurisdictions such insurance is ineffectual. The ordinary liability insurance policy is an indemnity policy limiting payment by the insurer to those instances in which there has been a judgment against the insured. Therefore, if the institution is not liable in tort to a beneficiary, the mere fact that it is the owner of a policy of liability insurance will not make it so.[31] This is an entirely reasonable and logical conclusion in those jurisdictions which hold to the rule of absolute nonliability to beneficiaries. It is entirely unreasonable in those jurisdictions which hold to the rule of qualified liability, and has been so recognized.[32] Thus, if the rule of the Colorado case is adopted, that a charitable institution is liable in tort as any other institution or corporation, but that the liability may not be satified from the trust property, there is no reason why the judgment may not be satisfied from the liability insurance policy. Under such a rule the injured beneficiary is recompensed, the trust property is saved harmless, and the insurer is not escaping the risk which it has been paid to bear.

Of course the Colorado rule is of temporary value only. It is a simple matter to write insurance policies excluding beneficiaries of the insured charities. Nevertheless, it is a step in what is submitted to be the proper direction—the complete abolition of the rule of nonliability. The rule was established for reasons of policy which no longer exist. In an earlier day, benevolence of this type was administered almost entirely by private individuals and institutions. They were few and they were poor, and it was entirely just that they be given such an exemption

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[30]In Gamble v. Vanderbilt Univ., 138 Tenn. 616, 200 S. W. 510 (1918), where a building owned by defendant was operated at a profit, the profits being used for the charitable purpose, plaintiff was allowed to recover from the rents and profits, such liability being incident to the operation of the building.

[31]Levy v. Superior Court, 74 Cal. App. 171, 239 Pac. 1100 (1925); William's Adm'x v. Church Home for Females, 223 Ky. 355, 3 S. W. (2d) 753 (1928); Enman v. Trustees of Boston Univ., 170 N. E. 43 (Mass. 1930); Mississippi Baptist Hosp. v. Moore, 156 Miss. 676, 126 So. 465 (1930); Greatrex v. Evangelical Deaconess Hosp., 261 Mich. 327, 246 N. W. 137 (1933).

[32]O'Connor v. Boulder Colorado Sanitarium Ass'n, 96 P. (2d) 835 (Colo. 1939); Brown v. St. Luke's Hosp. Ass'n, 85 Colo. 167, 274 Pac. 740 (1929); St. Mary's Academy v. Solomon, 77 Colo. 463, 238 Pac. 22 (1925); McLeod v. St. Thomas Hosp., 170 Tenn. 423, 95 S. W. (2d) 917 (1936).

as an aid and an encouragement. But today, a quickened moral and social sense and an increased national wealth have led to a tremendous expansion of endowed charitable institutions, to government subsidies to such institutions, and to outright government operation and maintenance of such institutions. Furthermore, the steadily advancing trend has been to spread the normal risks present in every activity among as great a number of people as possible, the most obvious manifestation of this trend being the growth of the large insurance companies. In view of these facts the exemption of charitable institutions from tort liability stands as an anachronism in Anglo-American law, peculiarly vicious in that it thrusts the entire risk of harm on those persons least able to bear it—those forced to accept charity.[33]

BRYCE REA, JR.

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT "PRIVILEGES OR IMMUNITIES" CLAUSE AS A LIMITATION UPON STATE TAXING POWER. [United States Supreme Court]

The protection afforded a federal citizen by the Fourteenth Amendment "privileges or immunities" clause,[1] extended by the 1935 decision of *Colgate v. Harvey*,[2] has again been restricted by the Supreme Court in the case of *Madden v. Kentucky*[3] to accord with the interpretation first given that clause in 1873 by the *Slaughter-House Cases*.[4]

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[33]Harper, Law of Torts (1933) § 294: "The policy of the law requiring individuals to be just before generous seems equally applicable to charitable corporations. To require an injured individual to forego compensation for harm when he is otherwise entitled thereto, because the injury was committed by the servants of the charity, is to require him to make an unreasonable contribution to the charity against his will, and a rule of law imposing such burdens cannot be regarded as socially desirable nor consistent with sound policy." The recent trend to liability is shown by Sheehan v. North Country Community Hosp., 273 N. Y. 163, 7 N. E. (2d) 28, 29 (1937). After rejecting the waiver theory as a fiction the court says: "To impose liability is to beget careful management. . . . No conception of justice demands that an exception to the rule of respondeat superior be made." And see Note, Tort Liability of Charitable Institutions in New York (1939) 9 Brooklyn L. Rev. 78.

[1]U. S. Const. Amend. 14, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of *citizens of the United States*. . . ." It is to be noted that Art. 4, § 2 of the original Constitution reads: "The *Citizens of each State* shall be entitled to all Privileges and Immunities of Citizens in the several States." (Italics supplied.)

[2]295 U. S. 404, 56 S. Ct. 252, 80 L. ed. 299, 102 A. L. R. 54 (1935).

[3]60 S. Ct. 406, 8 U. S. L. Week 201 (1940). The case has been discussed in (1940) 53 Harv. L. Rev. 874; (1940) 38 Mich. L. Rev. 720; (1940) 24 Minn. L. Rev. 691; (1940) 88 U. of Pa. L. Rev. 621.

[4]16 Wall. 36 (U. S. 1873).

A Kentucky statute [5] imposed on its citizens an annual ad valorem tax on deposits in banks outside of the state at the rate of fifty cents per hundred dollars and at the same time imposed on deposits in banks located within the state a similar ad valorem tax at the rate of ten cents per hundred dollars. A Kentucky citizen and resident maintained deposits in New York banks, but had not reported these deposits on several prior assessment dates for the purposes of taxation. At his death and when the estate was settled, the state brought suit to have these deposits assessed as omitted property and to recover the tax. The taxpayer (estate) attacked the constitutionality of the tax on the grounds that it violated the due process, equal protection, and privileges or immunities clauses of the Fourteenth Amendment. The Court of Appeals of Kentucky sustained the legislation, and on appeal, the United States Supreme Court, speaking through Mr. Justice Reed, affirmed the decision. The due process and equal protection objections were dismissed on the grounds that the classification for the imposition of the tax was not hostile to or oppressively discriminating against particular persons and classes.[6] On the privileges and immunities objection, the Court held that the right to carry on business beyond the lines of the state of residence was not a federal privilege or immunity protected by the Fourteenth Amendment.

The decision in the *Madden* case will probably put an end to the controversy provoked by *Colgate v. Harvey*.[7] In that case a Vermont statute,[8] imposing income taxes on interest bearing securities, exempted from the tax, income from money loaned within the state at less than 5% interest. In an action attacking the constitutionality of the statute brought by a citizen of Vermont, the Supreme Court held the tax invalid seemingly on two grounds: first, that the exemption of money loaned within the state was a denial of equal protection because the classification had no reasonable relation to the purpose of the tax—the raising of revenue; and secondly, that aside from this, the discrimination against loans made outside the state was an infringement of the

[5] Carroll's Kentucky Statutes, Baldwin's Revision (1930) § 4019a-10.

[6] As stated by the Court, a state tax statute is presumed constitutional unless it is proved that there is no conceivable basis to support it. Here the classification "may have been founded in the purposes and policy of taxation . . . may have resulted from the differences in the difficulties and expenses of tax collection." 60 S. Ct. 406, 409, 8 U. S. L. Week 201, 202 (1940).

[7] 296 U. S. 404, 56 S. Ct. 252, 80 L. ed. 299, 102 A. L. R. 54 (1935).

[8] Pub. Laws of Vt. (1933) § 872 et seq.

federal privileges or immunities clause of the Fourteenth Amendment.[9] Mr. Justice Sutherland, speaking for the majority, held as falling among federal privileges or immunities, "the right of a citizen to engage in business . . . or to make a lawful loan of money in any state other than that in which the citizen . . . resides."[10] To this opinion Mr. Justice Reed in the principal case makes dynamic reply: "We think it quite clear that the right to carry out an incident to a trade, business or calling such as the deposit of money in banks is not a privilege of national citizenship."[11] The "right to carry on business beyond the lines of the State of . . . residence" is not a privilege or immunity appertaining to national citizenship. "In view of our conclusions, we look upon the decision in . . . [*Colgate v. Harvey*] as repugnant to the line of reasoning adopted here. As a consequence, *Colgate v. Harvey* must be and is overruled."[12]

It had been supposed, prior to the case of *Colgate v. Harvey* in 1935, that the federal privileges or immunities clause had lost significance as a method of federal control over state action.[13] This was a

[9]At least one writer felt that the case was not decided on the equal protection clause at all, but on the privileges or immunities clause alone. See Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 273 note 56. The overruling of Colgate v. Harvey by Madden v. Kentucky, as the Court explained in the latter case, was to the extent that it was repugnant to the line of reasoning adopted in the Madden case. If the Colgate case was decided on the equal protection objection as well as the privileges and immunities objection, certainly the result on the equal protection point in the two cases differs. It seems apparent in both cases, however, that the Justices agree on the fundamental issue that a tax does not have to be imposed equally on all if the classification is one bearing a reasonable relation to the purpose for which the tax is imposed. See 296 U. S. 404, 423, 56 S. Ct. 252, 256, 102 A. L. R. 54, 61, and 60 S. Ct. 406, 408, 8. U. S. L. Week 201, 202. The deciding of this question is in a large degree subjective, and not too much significance can be given to the final determination in each case. (1936) 45 Yale L. J. 926, 927, 928; Sutherland, J.'s dissent in State Bd. of Tax Commissioners v. Jackson, 283 U. S. 527, 550, 51 S. Ct. 540, 548 (1931). The Court in the instant case, however, by emphasizing the "hands-off" policy of presuming the validity of the legislation, seems to arrive at the more desirable conclusion.

It is felt that the real significance of the Colgate v. Harvey-Madden v. Kentucky controversy lies in the disposition of the privileges or immunities clause. This aspect of the case alone is considered in the present discussion.

[10]Colgate v. Harvey, 296 U. S. 404, 430, 56 S. Ct. 252, 259, 102 A. L. R. 54, 66 (1935).

[11]Madden v. Kentucky, 60 S. Ct. 406, 410, 8 U. S. L. Week 201, 203 (1940).

[12]Madden v. Kentucky, 60 S. Ct. 406, 411, 8 U. S. L. Week 201, 203 (1940). Mr. Justice Roberts, joined by Mr. Justice McReynolds, dissented, adhering to the rule of Colgate v. Harvey. Mr. Justice Hughes concurred in the result on the ground that the classification was on a reasonable basis.

[13]See dissent of Stone, J., in Colgate v. Harvey, 296 U. S. 404, 443, 56 S. Ct. 252, 265, 102 A. L. R. 54, 73 (1935); and in Hague v. CIO, 307 U. S. 496, 520, 59 S. Ct. 954, 966 (1939); Brannon. The Fourteenth Amendment (1901) 56 et seq.; Cooley, Gen-

direct result of its first interpretation in the *Slaughter-House Cases*.[14] It was there held that the chief purpose of the Fourteenth Amendment was to give the negro national citizenship and to insure his rights as a national citizen,[15] but not to vary "the delicate balance" between state and national powers. Mr. Justice Miller, speaking for the majority, observed that in spite of the "excited feeling growing out of the War" and the sentiment for a strong national government it was essential that the states should have "powers for domestic and local government, including the regulation of civil rights—the rights of person and of property," rights not inherent in national citizenship, but in state citizenship.[16] As rights of state citizenship, they could not be given federal protection by the privileges or immunities clause of the Fourteenth Amendment.[17] This clause was subsequently held to protect only those privileges and

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eral Principles of Constitutional Law (1880) 245 et seq.; 1 Willoughby, The Constitutional Law of the United States (2d ed. 1929) 241, 248; Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 267 et seq.; Morris, What Are the Privileges and Immunities of Citizens of the United States? (1921) 28 W. Va. L. Q. 38.

[14]16 Wall. 36 (U. S. 1873).

[15]In this case white citizens in the slaughter-house industry were attacking a Louisiana statute which affected the place and manner of conducting their business.

[16]It appears that the privileges or immunities clause is now understood as not having been intended to create new rights in federal citizens, but to secure existing federal citizenship rights to the newly-made citizens. See the language of Mr. Justice Roberts in Hague v. CIO, 307 U. S. 496, 512 ,59 S. Ct. 954, 962 (1939); Orr v. Gilman, 183 U. S. 278, 286, 22 S. Ct. 213, 216 (1902); In re Kemmler, 136 U. S. 436, 448, 10 S. Ct. 930, 934 (1890); Ex parte Virginia, 100 U. S. 339, 365 (1879); Minor v. Hapersett, 21 Wall. 162, 171 (1874). The dissents in the Slaughter-House Cases indicate a strong feeling that it was really this issue over which the War had been fought, and that it was the intent of the framers of the Amendment to create a much stronger national government with greater power of control over state governments. Slaughter-House Cases, 16 Wall. 36, 97, 100-101, 129 (U. S. 1873); Burdick, Law of the American Constitution (1922) § 116; Corwin, The Constitution and What It Means Today (6th ed. 1938) 171; (1936) 49 Harv. L. Rev. 935, 936. The rights, privileges and immunities held to be protected by the Fourteenth Amendment were, therefore, those considered "fundamental," those belonging "of right to every free citizen of a civilized government." Slaughter-House Cases dissent, 16 Wall. 36, 97 (1873); 1 Willoughby, The Constitutional Law of the United States (2d ed. 1929) 239; Morris, What Are the Privileges and Immunities of Citizens of the United States? (1921) 28 W. Va. L. Q. 38. This idea continued in the dissents of the privileges and immunities cases until the due process clause of the same Amendment began to take over the field of federal protection of fundamental substantive civil rights against abridgment by the state governments. For a description of this process, see Warren, The New "Liberty" Under the Fourteenth Amendment (1926) 39 Harv. L. Rev. 431. Also see 1 Willoughby, The Constitutional Law of the United States (2d ed. 1929) 243; Borchard. The Supreme Court and Private Rights (1938) 47 Yale L. J. 1051, 1057; Corwin, The Supreme Court and the Fourteenth Amendment (1909) 7 Mich. L. Rev. 643; Note (1938) 7 Brooklyn L. Rev. 490, 498.

[17]Quoted from the Slaughter-House Cases opinion: "Having shown that the privileges and immunities relied on in the argument are those which belong to citi-

immunities which "arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the United States Constitution,"[18] "or its laws and treaties made in pursuance thereof."[19] Until the case of *Colgate v. Harvey*, not one of forty-seven cases[20] reaching the Supreme Court on claim of violations of the clause was successful in establishing that federal privileges and immunities were infringed by state action.[21]

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zens of the States as such, and that they are left to the State Governments for security and protection, and not by this article placed under the special care of the Federal government, we may hold ourselves excused from defining the privileges and immunities of citizens of the United States which no citizen can abridge, until some case involving those privileges may make it necessary to do so. . . ." 16 Wall. 36, 78-79 (U. S. 1873). The doctrines of denying protection under the Fourteenth Amendment privileges or immunities clause to fundamental civil rights is somewhat without purpose in light of the fact that all persons including national citizens now have protection against a state's unreasonable abridgment of "fundamental substantive civil rights" under the due process of law clause of the same Amendment. See criticisms of this development by Borchard, The Supreme Court and Private Rights (1938) 47 Yale L. J. 1051, 1057; Warren, The New "Liberty" Under the Fourteenth Amendment (1926) 39 Harv. L. Rev. 431, 462; Note (1938) 7 Brooklyn L. Rev. 490, 495-496, 498 note 52.

[18]Twining v. New Jersey, 211 U. S. 78, 97, 29 S. Ct. 14, 19 (1908); Orr v. Gilman, 183 U. S. 278, 286, 22 S. Ct. 213, 217 (1902); Duncan v. Missouri, 152 U. S. 377, 382, 14 S. Ct. 570, 571-572 (1894); In re Kemmler, 136 U. S. 436, 448, 10 S. Ct. 930, 934 (1890). Nor were the guarantees of the first eight amendments considered "privileges and immunities of United States citizenship" under the Fourteenth Amendment. Twining v. New Jersey, 211 U. S. 78, 98, 99, 29 S. Ct. 14, 19 (1908); Maxwell v. Dow, 176 U. S. 581, 595, 20 S. Ct. 448, 454 (1900); Burdick, Law of the American Constitution (1922) § 117; McGovney, Privileges or Immunities Clause, Fourteenth Amendment (1918) 4 Iowa L. Bull. 219, 2 Selected Essays on Constitutional Law (1938) 402.

[19]McPherson v. Blacker, 146 U. S. 1, 38, 13 S. Ct. 3, 11 (1892). Also see Twining v. New Jersey, 211 U. S. 77, 97, 29 S. Ct. 14, 19 (1908); Hamilton v. Regents of the University of California, 293 U. S. 245, 261, 55 S. Ct. 197, 203 (1934).

[20]The cases are collected in Mr. Justice Stone's dissent in Colgate v. Harvey, 296 U. S. 404, 445, 56 S. Ct. 252, 266, 102 A. L. R. 54, 74 (1935), and additions are made in his specially concurring opinion in Hague v. CIO, 307 U. S. 496, 521, 59 S. Ct. 954, 967 (1939). Mr. Justice Stone listed forty-four cases in Colgate v. Harvey, and added three more in Hague v. CIO which had arisen before the Colgate decision. Also see McGovney, Privileges or Immunities Clause, Fourteenth Amendment (1918) 4 Iowa L. Bull. 219, 2 Selected Essays in Constitutional Law (1938) 402, 405. Some of the rights claimed were: to practice law in a state court, to vote, to sell or possess liquor, to use the American flag for advertising purposes, to obtain dower rights, to graze sheep on the public domain, or to attend a state university. An extensive listing is made by Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 270-272.

[21]There was little support for holding the making of investments in other states without deterrence by the state of origin a right so peculiar as to be a privilege or immunity of federal citizenship, and thereby to differ from rights protected under the interstate commerce, due process, and equal protection clauses. See Mr. Justice Stone's dissent to Colgate v. Harvey, 296 U. S. 404, 445, 56 S. Ct. 252, 266, 102 A. L. R. 54, 73-74 (1935); Howard, The Privileges and Immunities of Federal Citizen-

It was not made clear in the *Colgate* opinion whether the difference in the tax imposed on money loaned within the state and that imposed on money loaned without was considered an infringement of a federal privilege or immunity because merely discriminatory, or whether it was the arbitrary and unreasonable character of the discrimination that was considered an infringement.[22] If mere discrimination was the basis of the decision, the clause was being used to extend federal protection over citizens beyond the protection afforded in the other clauses of the Constitution[23] and, as Mr. Justice Stone saw, with the result of increas-

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ship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262. In Williams v. Fears, 179 U. S. 270, 21 S. Ct. 128 (1900), a state occupation tax on those engaged in hiring laborers for work outside the state was held not to infringe the federal privileges or immunities clause. In Board of Education v. Illinois, 203 U. S. 553, 27 S. Ct. 171 (1906) a state inheritance tax statute which limited exemptions to charitable corporations within the state was held not to infringe any rights protected by the privileges or immunities clause. That statutes tending to interfere with interstate transactions do not violate rights peculiarly inherent in national citizenship is further indicated by the case of Helson and Randolph v. Kentucky, 279 U. S. 245, 49 S. Ct. 279 (1929). Crandall v. Nevada, 6 Wall. 35 (1867) held that the right to travel through states on the way to the seat of the national government was a privilege of federal citizenship and that a state capitation tax on such a privilege was unconstitutional. In Railroad Co. v. Maryland, 21 Wall. 456, 472 (1874), the same type of state action was considered simply a violation of the commerce clause. The Helson and Randolph case went further and stated that in so far as Crandall v. Nevada made the right to pass from one state into another a privilege or immunity of federal citizenship rather than a right protected by the commerce clause, it had not been followed. Helson and Randolph v. Kentucky, 279 U. S. 245, 251, 49 S. Ct. 279, 281 (1929). Colgate v. Harvey, 296 U. S. 404, 444, 56 S. Ct. 252, 266 (1935), dissent of Stone, J.

The carrying on of business between states such as the issuing of foreign bonds of exchange and insurance policies, and lending money is not interstate commerce. Nathan v. Louisiana, 8 How. 73 (U. S. 1850); Paul v. Virginia, 8 Wall. 168 (U. S. 1868); Nelms v. Edinburg-American Land Mortgage Co., 92 Ala. 157, 9 So. 141 (1891). Even if it were, however, a tax on net income derived from interstate commerce is not a burden on such commerce. U. S. Glue Co. v. Town of Oak Creek, 247 U. S. 321, 38 S. Ct. 499, 62 L. ed. 1135 (1918); Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. ed. 445 (1920); Colgate v. Harvey, dissent of Stone, J., 296 U. S. 404, 448, 56 S. Ct. 252, 268, 102 A. L. R. 54, 76 (1935). States have been allowed to foster domestic industries by the exercise of their taxing power. Magnano v. Hamilton, 292 U. S. 40, 54 S. Ct. 599, 78 L. ed. 1109 (1934); Alaska Fish Co. v. Smith, 255 U. S. 44, 41 S. Ct. 219 (1921). Where there has been "neither an invidious discrimination nor a burden on interstate commerce, as that clause is usually construed, this favoring of domestic interest rates would seem to be a permissible public aim." (1936) 3 U. of Chi. L. Rev. 506, 507.

[22]Colgate v. Harvey, 296 U. S. 404, 447, 56 S. Ct. 252, 267, 102 A. L. R. 54, 75 (1935), dissent of Stone, J.; Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 277; (1936) 49 Harv. L. Rev. 935.

[23]The fact of discrimination alone does not violate the interstate commerce clause even conceding that interstate business was commerce. See supra, note 21. The equal protection and due process clauses apply only where a tax discrimination is hostile

ing federal judicial control over state action "sufficient to cause serious apprehension for the rightful independence of local government."[24] If it was the unreasonable and arbitrary feature of the discrimination that formed the basis for the application of the clause, it would seem to add nothing to the guarantee of the equal protection clause, which extends to "persons," as well as to "citizens."[25] Because of the Court's further decision that the exemption of dividends derived from corporate business in the state and non-exemption of the same type of dividends from without the state was not an infringement of the clause,[26] it appears that the majority's conception was that the clause was thought to prohibit only those inequalities in taxation considered arbitrary and unreasonable. If so, the same result could have been reached by the same judges through the equal protection clause alone.[27]

Legal commentators were confused by the decision and explanations advanced were varied. Some writers suggested that, if the clause was being extended beyond the equal protection clause, emphasis was upon strengthening the concept of a unified national society by removal of state barriers to interstate activity;[28] some thought it may have been an avoidance of the restricted construction of the interstate commerce clause,[29] or to give to interstate business which is not commerce the same protection given interstate commerce by the commerce clause.[30]

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or arbitrary and unreasonable with respect to the purpose of the tax. Rottschaefer, Constitutional Law (1939) §§ 284-286 and cases there cited.

[24]Colgate v. Harvey, 296 U. S. 404, 447, 56 S. Ct. 252, 267, 102 A. L. R. 54, 75 (1935); Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 277. The same idea was expressed in the Slaughter-House Cases, 16 Wall. 36, 77, 78 (U. S. 1873).

[25]Since a corporation is a "person," but not a "citizen" within the meaning of the Fourteenth Amendment, Western Turf Association v. Greenberg, 204 U. S. 359, 363, 27 S. Ct. 384, 386 (1907); Orient Insurance Co. v. Daggs, 172 U. S. 557, 561, 19 S. Ct. 281, 282 (1899), the privileges or immunities clause ostensibly does not benefit corporate business.

[26]Colgate v. Harvey, 296 U. S. 404, 450, 56 S. Ct. 252, 268-269, 102 A. L. R. 54, 77 (1935).

[27]Quoting from Mr. Justice Stone's specially concurring opinion in Hague v. CIO, 307 U. S. 496, 525, 59 S. Ct. 954, 968 (1939): "If it be the part of wisdom to avoid unnecessary decision of constitutional questions, it would seem to be equally so to avoid the unnecessary creation of novel constitutional doctrine, . . . in order to attain an end easily and certainly reached by following the beaten paths of constitutional decision." See Ashwander v. Tenn. Valley Authority, 297 U. S. 288, 346-347, 56 S. Ct. 466, 483 (1936), Mr. Justice Brandeis' second and third "canon of interpretation."

[28](1936) 49 Harv. L. Rev. 935; (1936) 30 Ill. L. Rev. 953; (1936) 84 U. of Pa. L. Rev. 655.

[29](1936) 3 U. of Chi. L. Rev. 506.

[30](1936) 20 Minn. L. Rev. 549.

While one saw in it a further protection of personal liberty against social control,[31] another feared the imperiling of democratic institutions by denying to the states the social control over economic enterprise formerly permitted them.[32] Among other suggestions: an expression of a laissez-faire desire to permit commercial endeavor to locate in the most favorable economic site,[33] the Court's revival and expansion of a third device in the Federal Government's arsenal of methods to review and censure state action,[34] and the beginning of a reversion to the fundamental rights theory as argued in the *Slaughter-House Cases* dissents.[35] The general opinion among the writers[36] was adversely critical and in support of the dissent.[37]

In spite of this controversy, *Colgate v. Harvey* did not seriously affect federal court litigation. In one case only did the privileges and immunities contention again appear to be upheld.[38] In *Hague v. CIO*[39] where unincorporated labor organizations and individuals were seeking to restrain the mayor and government of Jersey City from interfering with their union functions, Mr. Justice Roberts, with Mr. Justice Black concurring, wrote the first of the majority opinions,[40] in

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[31](1936) 11 Ind. L. J. 390.

[32]Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 278-279.

[33](1936) 36 Col. L. Rev. 669.

[34](1936) 34 Mich. L. Rev. 1034.

[35](1936) 24 Calif. L. Rev. 728.

[36]Among other discussions: (1936) 14 N. C. L. Rev. 282; (1936) 13 N. Y. U. L. Q. Rev. 496; (1936) 14 Tex. L. Rev. 548; (1936) 11 Wis. L. Rev. 434; (1936) 45 Yale L. J. 926.

[37]Typical objections are found in Howard, The Privileges and Immunities of Federal Citizenship and Colgate v. Harvey (1939) 87 U. of Pa. L. Rev. 262, 277: "The most disquieting aspect of Colgate v. Harvey . . . is its uncertain scope," and in (1936) 36 Col. L. Rev. 669: "The decision is an unfortunate introduction to a new area of constitutional uncertainty, in which the judiciary may romp between the lines of inclusion and exclusion." But cf. Borchard, The Supreme Court and Private Rights (1938) 47 Yale L. J. 1051, 1063.

[38]In one case, however, Asher v. Ingels, 13 F. Supp. 654, 658 (S. D. Cal. 1936), Colgate v. Harvey was hesitantly cited for its dictum that "The right to transact a lawful business is a privilege of national citizenship." The case was decided on the interstate commerce, due process, and equal protection of laws clauses, however, and no semblance of the privileges and immunities objection again appeared in the opinion. In Whitfield v. Ohio, 297 U. S. 431, 56 S. Ct. 532, 80 L. ed. 778 (1936), the federal privileges or immunities clause was rejected as without substance, since in that case its effect would have been the same as Article 4 § 2 of the Constitution which "is directed against discrimination by a state in favor of its own citizens and against the citizens of other states." Colgate v. Harvey was otherwise cited in various cases, but in the main for its equal protection dictum.

[39]307 U. S. 496, 59 S. Ct. 954 (1939).

[40]For a discussion of the line-up of the Justices in this case and the implication

which it was considered a privilege or immunity of national citizenship to enjoy "freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it. . . ."[41] It is perhaps significant that Mr. Justice Roberts did not call on *Colgate v. Harvey* to support his case. On the other hand he may have felt that the particular privileges infringed in the two cases were of too different a nature to afford an analogy. It does seem on principle that such a right as the one upheld in the *Hague* case could validly be a privilege of federal citzenship, even within the accepted interpretation of the privileges or immunities clause prior to *Colgate v. Harvey*.[42] Nevertheless Mr. Justice Stone, in a specially concurring opinion, approved by Mr. Justice Reed, again delivered an attack on the extension of the privileges and immunities principle strikingly similar to the one delivered in *Colgate v. Harvey*. Again he pointed out the futility of using a historically dead clause, as was done in that case, to achieve a result which was completely capable of being reached by the due process clause alone.[43] Quite evidently Mr. Justice Stone felt that this ex-

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of the opinion with respect to "freedom of opinion" cases, see Johnson, Post-War Protection of Freedom of Opinion (1940) 1 Wash. & Lee L. Rev. 192, 199-201.

[41]Hague v. CIO, 307 U. S. 496, 512, 59 S. Ct. 954, 962 (1939).

[42]Dissent of Brandeis, J.,in Gilbert v. Minnesota, 254 U. S. 325, 337-8, 41 S. Ct. 125, 129 (1920): "The right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment a State was powerless to curtail. . . . The right of a citizen . . . to take part . . . in the making of federal laws . . ., necessarily includes the right to speak or write about them. . . . Were this not so 'The right of the people peaceably to assemble for purpose of petitioning Congress for a redress of grievances, . . .' would be a right totally without substance." In the Slaughter-House Cases, 16 Wall. 36, 79 (U. S. 1873): "The right to peaceably assemble and petition for redress of grievances, the privilege of the writ of habeas corpus, are rights of the citizen guaranteed by the Federal Constitution." These rights were likewise considered under the privileges or immunities clause in U. S. v. Cruickshank, 92 U. S. 542, 552, 553 (1875). Mr. Justice Stone, however, felt that the step from the above statement to holding "the right to assemble and discuss the advantages of the National Labor Relations Act" a similar privilege, was a "long and by no means certain one." Hague v. CIO, 307 U. S. 496, 522, 59 S. Ct. 954, 967 (1939).

[43]Mr. Justice Roberts apparently held that because the rights infringed were privileges and immunities of national *citizenship* jurisdiction was conferred by Jud. Code § 24 (1) and (14), 28 U. S. C. A. § 41 (1) and (14) which require no averment or proof that the amount in controversy exceeds $3000. Mr. Justice Stone, citing the same provisions of the statute, held that the right to maintain an equity suit to restrain state officers, acting under a state law, from infringing the rights of freedom of speech and of assembly guaranteed by the due process clause, is given by Congress to all *persons* whether citizens or not.

Mr. Justice Stone's reasons for preferring the use of the due process clause were: (a) the extension of the privileges or immunities clause, and reversion to the fundamental rights doctrine argued in the Slaughter-House dissents, is a danger to the

tension was along the same lines as that in *Colgate v. Harvey*.[44] In spite of this fact, however, it cannot be said that the opinion of Mr. Justice Roberts in *Hague v. CIO* is in any way affected by the overruling of *Colgate v. Harvey* since the claimed privileges and immunities were of such different nature in the two cases. It is only in the interpretation propounded by Mr. Justice Stone that a conflict is found in the cases. Nevertheless it is not difficult to foresee that henceforth litigants will feel safer in considering the "privileges or immunities" clause of very dubious assistance even in freedom of opinon cases, and will base their arguments on the specially concurring opinion of Mr. Justice Stone in *Hague v. CIO* rather than on Mr. Justice Roberts' opinion.

It seems evident that *Madden v. Kentucky* in no uncertain terms has again limited the privileges or immunities clause as a "device in the Federal Government's arsenal of methods to review and censure state action."[45] Once more the clause will probably go into repose to be brought out, as in the days prior to *Colgate v. Harvey*, only by those litigants seeking protection for vague and uncertain privileges which find no specific protection in other clauses of the Constitution. If, as now seems likely, the clause is back where it was before the *Colgate* decision, its "panacea-like" language will again be held to afford little relief to such applicants. That the fate of the clause is settled gains weight with the consideration that the *Colgate v. Harvey* effort to vary the long-accepted doctrine of the *Slaughter-House Cases* was tolerated by the Supreme Court for less than five years.

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independence of local government; (b) an unnecessary creation of novel constitutional doctrine; (c) the record could not support the decree under the privileges or immunities clause since the plaintiff did not aver nor prove that he was a citizen; (d) a decree based on the privileges or immunities clause would have to be so narrow as to affect only the relation between the defendant and the national government, that is, it would have to be restricted to the dissemination of information concerning the National Labor Relations Act alone, rather than to the dissemination of any lawful information.

[44]Mr. Justice Stone: "I do not doubt that the decree . . . is rightly affirmed, but I am unable to follow the path by which some of my brethren have attained that end. . . ." 307 U. S. 496, 518, 59 S. Ct. 954, 965 (1939). It was evident that it was not solely precedent that prompted this position. Rather it seems that the mere use of this clause in the two cases represented to Justices Stone and Reed the advent of a dangerous device. This is apparent from the further language: ". . . resort to the privileges and immunities clause . . . would involve constitutional experimentation as gratuitous as it is unwarranted. We cannot be sure that its consequences would not be unfortunate." 307 U. S. 496, 532, 59 S. Ct. 954, 971 (1939). For a possible method by which "federal privileges and immunities," as so extended, could have eventually been used for the benefit of all persons as well as United States citizens, see (1936) 24 Calif. L. Rev. 728, 732.

[45](1936) 34 Mich. L. Rev. 1034, 1037.

CONSTITUTIONAL LAW—EFFECT OF JUDICIAL DETERMINATION OF UNCONSTITUTIONALITY; HABEAS CORPUS—USE OF WRIT TO SECURE RELEASE FROM IMPRISONMENT AFTER CONVICTION UNDER UNCONSTITUTIONAL STATUTE. [United States Supreme Court and New Jersey]

The problem of whether a judicial determination of constitutionality is to be given retrospective as well as prospective effect continues to confront state and federal courts. In *Chicot County Drainage District v. Baxter State Bank*[1] the United States Supreme Court refused to allow collateral attack upon a judgment reached in a civil proceeding approving a municipal debt reorganization plan, where the statute under which the proceeding had been undertaken was later declared unconstitutional. In *Ex parte Connellan*[2] the New Jersey Supreme Court permitted collateral attack, by way of habeas corpus, upon a judgment of conviction in a prosecution arising under an Act which subsequent to the prisoner's conviction had been held unconstitutional. Though the two cases at first glance appear to be in conflict, an examination of the two situations involved may well indicate that a complete reconciliation is possible on practical grounds.

In the *Chicot County* case the defendant was a drainage district organized under the laws of Arkansas, with power to issue bonds. In 1932 defendant defaulted on its obligation to pay the bonds and later, proceeding under the Municipal-Debt Readjustment Act,[3] filed a petition for readjustment of its debts. The plaintiff, a bondholder, was given full notice of the proceedings but did not contest the reorganization. Money was left in the hands of the court for one year for those bondholders who did not immediately join in the reorganization, but the plaintiff did not redeem his bonds within that time. Subsequently, the Municipal-Debt Readjustment Act was held unconstitutional by the Supreme Court in *Ashton v. Cameron County District.*[4] The plaintiff thereafter sued to recover on his old bonds, arguing that since the statute on which the reorganization was based had been invalidated, the reorganization itself was of no effect. The Supreme Court rejected the contention and held that the plaintiff, having failed to raise the question of the validity of the reorganization in the proceedings to which it was a party, and in which the issue could properly have been presented and decided, was now prevented by the bar of res judicata

[1] 60 S. Ct. 317 (1940). Rehearing denied, 60 S. Ct. 581 (1940).
[2] 123 N. J. L. 229, 8 A. (2d) 345 (1939).
[3] 48 Stat. 798 (1934), 11 U. S. C. A. §§ 301-303 (1937).
[4] 298 U. S. 513, 56 S. Ct. 892, 80 L. ed. 1309 (1936).

from raising it in a subsequent collateral attack on the judgment. Plaintiff had further contended that the district court, being one of limited jurisdiction conferred by the Act, was deprived of jurisdiction by virtue of the invalidation of the statute. In answer to this argument the Supreme Court declared that, though the district court's jurisdiction was limited, yet it had authority to determine whether it had jurisdiction when parties were properly before it; and, while the determination so made was open to direct review, it could not be attacked in a collateral action.

The decisions supporting the result of the *Chicot County* case are based on one of two general grounds: first, that the judgment rendered under the subsequently invalidated statute is voidable, not void, and thus not subject to collateral attack, or second, that the bar of res judicata applies to any subsequent action brought attacking the judgment, although the statute upon which the decision was based has been declared unconstitutional.

The first ground is set out in a dictum in *Hanchett Bond Co. v. Morris.*[5] The court cited the general rule to the effect that a judgment on the merits under an unconstitutional statute was not void, but merely voidable, and was binding on the parties to the action when it became final, even though at a later date the statute upon which the proceedings were based was held unconstitutional. Although this pronouncement was dictum, it was later adopted by the court as proper reasoning in two cases,[6] and practically the same reasoning was relied upon in a decision in another jurisdiction.[7]

The second ground is set out in *State v. Trustees of Milwaukee County Orphans' Board.*[8] The statute involved provided that after certain debts were paid, all the personal property of persons in Milwaukee County dying intestate and without heirs should be turned over to the Orphans' Board as part of its trust fund instead of escheating to the state. The statute was held unconstitutional,[9] and the state sued to recover the money that had been turned over to the Orphans' Board while the statute was in force. The Supreme Court of Wisconsin refused the state's claims, holding that the decisions of the county court in settling these estates were res judicata as to the state, since there had

[5]143 Okla. 110, 287 Pac. 1025, 1026 (1930).

[6]Jones v. McGrath, 160 Okla. 211, 16 P. (2d) 853 (1932); Walker v. Stubblefield, 167 Okla. 50, 27 P. (2d) 1043 (1933).

[7]Beck et al. v. State, 196 Wis. 242, 219 N. W. 197 (1928).

[8]218 Wis. 518, 261 N. W. 676 (1935).

[9]In re Payne's Estate, 208 Wis. 142, 242 N. W. 553 (1932).

been sufficient notice given by the court to all parties interested when it published notices of the various administration proceedings in the newspapers.[10]

Turning to the New Jersey case of *Ex parte Connellan*,[11] it appears that a judicial declaration of unconstitutionality is given a different effect. By this decision the court in habeas corpus proceedings ordered the release of a man who had been imprisoned upon a conviction under the New Jersey "Gangster Act"[12] which after his conviction but prior to the filing of the petition for habeas corpus had been held unconstitutional by the Supreme Court of the United States.[13] On the basis of New Jersey precedents[14] the prisoner was held to be "illegally restrained of his liberty." A line of cases arising under the same circumstances had already been decided by the New Jersey court, *Ex parte Rose*[15] being the first decision. There the court had held that habeas corpus was the only remedy open to the petitioner Rose, inasmuch as time for appeal had passed.[16] The further reasoning was advanced that since the statute had been declared unconstitutional there was no jurisdiction in the trial court, so that the proceedings in that court were wholly void.

In only one other jurisdiction have cases been found presenting the exact problem of the *Connellan* case. *Ex parte Safarik*[17] is the principal

[10]A similar ruling was made in a California case, Los Angeles County v. Seaboard Security Corp. of America, 139 Cal. App. 497, 34 P. (2d) 191 (1934), where it was held that if no appeal has been taken from a judgment, and it has been satisfied by payment, it stands impregnable and will prevent any action to change it, though the statute under which it was decided has subsequently been declared unconstitutional. And compare Kansas City Life Ins. Co. v. Anthony et al., 142 Kan. 670, 52 P. (2d) 1208 (1935), in which the court said that a judgment rendered by a competent court of record is res judicata when no appeal is taken therefrom, and cannot be set aside or annulled by subsequent acts of the legislature even on the theory of an emergency.

[11]123 N. J. L. 229, 8 A. (2d) 345 (1939).

[12]New Jersey Stat. Ann., 2:136.

[13]Lanzetta v. New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. ed. 888 (1939).

[14]In re Stanley Olbrys (mentioned in the Connellan case at 8 A. (2d) 345; no report found), and cases cited supra, note 15.

[15]122 N. J. L. 507, 6 A. (2d) 388 (1939). This was followed by two other cases at practically the same time, Ex parte Miller, 122 N. J. L. 511, 6 A. (2d) 389 (1939); Ex parte Sterling, 122 N. J. L. 510, 6 A. (2d) 390 (1939).

[16]This reasoning seems to come under one of the recognized exceptions to the rule that a writ of habeas corpus will not be granted where there is adequate remedy either by writ of error or appeal. This exception is generally stated broadly that, if the judgment or order upon which the petitioner is imprisoned is for any reason void and open to collateral attack, relief may be had by habeas corpus, although the remedy by appeal is also available. See 29 C. J. 19-20.

[17]25 Okla. Cr. 50, 218 Pac. 1112 (1923). This case was followed in Ex parte Scott, 25 Okla. Cr. 28, 219 Pac. 158 (1923); Ex parte Wade, 25 Okla. Cr. 29, 219 Pac. 159 (1923); Ex parte Heintz, 25 Okla. Cr. 116, 219 Pac. 160 (1923); Ex parte Spence, 25

case of such a group of Oklahoma decisions arising in 1923. Safarik was convicted under a law which made it a felony to have in one's possession equipment for making whiskey,[18] and was sentenced to one year in prison. When contested later by another party, the law was held unconstitutional, and the prisoner Safarik filed a petition for a writ of habeas corpus to obtain his release. The court granted the writ saying he was "illegally restrained of his liberty"[19] and was entitled to be discharged.

It is believed that the federal courts have not yet acted on this type of case. Habeas corpus is only allowed in these courts to test jurisdictional errors, not those of procedure,[20] and it is not clear which classification would include such questions as are raised in the *Connellan* case. However, in the case of *Ex parte Baer*,[21] a federal district court, in habeas corpus proceedings, ordered the release of a prisoner who had been convicted in a judicial proceeding held pursuant to a Kentucky statute[22] which entitled the judge trying the case to a portion of the fine imposed. Subsequently, a closely similar Ohio statute was declared unconstitutional on due process grounds by the Supreme Court of the United States in *Tumey v. Ohio*.[23] At the hearing in the *Baer* case the Commonwealth admitted the invalidity of the Kentucky statute on the authority of the *Tumey* case, but argued that since the petitioner had challenged the statute by which the judge was given power to try him he had waived his right to rely on the invalidity of the law. The court decided that the petitioner was being held in custody without due process of law, and was entitled to his discharge. Any conclusion that the petitioner had waived his constitutional right to a trial according him due process of law, simply by failure to assert the right at

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Okla. Cr. 283, 220 Pac. 479 (1923); Ex parte Lockhart, 25 Okla. Cr. 429, 221 Pac. 119 (1923).

[18]Chapter 1, Session Laws of Oklahoma, 1923.

[19]25 Okla. Cr. 50, 218 Pac. 1112 (1923).

[20]Dobie, Habeas Corpus in Federal Courts (1927) 13 Va. L. Rev. 433, 435: "The writ of habeas corpus in the federal courts tests solely the jurisdiction or power of the custodian to hold the petitioner in custody; it cannot be used as a writ of error to correct mere errors of procedure which are not jurisdictional." In Beard v. Sanford, 8 U. S. L. Week 503 (C. C. A. 5th, 1940), the court refused a writ of habeas corpus to a petitioner who had been convicted with evidence obtained by wire tapping, despite the fact that subsequent to the petitioner's conviction this practice had been held unlawful by the Supreme Court of the United States in Nardone v. United States, 60 S. Ct. 266 (1939), and Weiss v. United States, 60 S. Ct. 269 (1939).

[21]20 F. (2d) 912 (E. D. Ky. 1927). This case is critized in (1938) 14 Va. L. Rev. 483, as being unsound in principle and against the weight of authority.

[22]Ky. Code (Carroll, 1922 and Supp. 1924) §§ 2554a 41, 1731, 1721, 1720.

[23]273 U. S. 510, 47 S. Ct. 437, 71 L. ed. 749 (1927).

the invalid proceedings was branded "arbitrary." It will be noticed that in this case the petitioner himself first raised the question of the constitutionality of the law, while in the *Connellan* case the law had already been held unconstitutional as a result of an attack by another party. But the difference is not great, for in the *Baer* case a similar Ohio law had been struck down by the United States Supreme Court, leading the Attorney General representing the Commonwealth to admit the invalidity of the law.

In spite of the apparent conflict in the conclusions in the civil and criminal cases as to the validity of a prior adjudication based on a statute which is subsequently held unconstitutional, it is believed that there are sufficient reasons of policy to sustain each of these ostensibly inconsistent holdings.

In civil cases it has long been the rule that uniformity of decisions should be maintained and that uncertainty should be avoided whenever possible. The courts and general public feel that there should be stability in transactions that are carried out under the eyes of the courts. To give a retrospective effect to the judicial determination of invalidity inevitably will tend toward confusion and uncertainty in the field of commercial enterprise. Such considerations, however, are absent in the criminal cases, since ordinarily no person except the prisoner will be directly affected by the decision, and no influence will be felt in the commercial world. No inconsistency is present, therefore, in the position taken by the courts in criminal cases that proper protection for the liberty of the individual demands that retrospective effect be given a determination of unconstitutionality.[24]

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INSURANCE—RECOVERY UNDER A POLICY INSURING AGAINST DEATH CAUSED "SOLELY" BY ACCIDENTAL MEANS. [Massachusetts]

In the recent Massachusetts case of *Barnett v. John Hancock Mutual Life Insurance Company*[1] it appeared that the insured was injured in an

[24]In Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717 (1879), Mr. Justice Bradley said at page 377, "But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that . . . the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ." In this case the plaintiff was convicted of violating the election laws and appealed. The court upheld the conviction saying that the election laws were valid, but the Justice made the above statement in his opinion, by way of dictum.

[1]24 N. E. (2d) 662 (Mass. 1939).

automobile accident, and after being confined in the hospital for nine days was released and went about his business. Two weeks later he became ill with pneumonia, which developed into empyema, causing his death within two months. His insurance policy contained a clause which provided that double indemnity would be paid the beneficiary if the death of insured should be caused ". . . solely by external, violent and accidental means, . . . independently and exclusive of all other causes." The Massachusetts court held that double indemnity should be awarded saying that if the germs were already in his system and his body was so weakened as a result of the accident that the germs were enabled to develop into pneumonia, then the jury was warranted in finding that the death of the insured was "caused solely by external, violent, and accidental means . . . independently and exclusively of all other causes." The court stated further that even if the germs entered the body after the accident, and, because of the accident's having weakened his resistance, developed into pneumonia the jury would be warranted in reaching the same conclusion as to the cause of the death.[2]

Judging from cases in which the courts have dealt with the problem of causation, the court in the instant case could readily have regarded the automobile accident as the "proximate" cause of the death.[3] However, the provision of the policy, mentioned above, does not employ the term "proximate" but provides for the payment of double indemnity only where the accident is the *sole* cause of the death. Provisions such as this are obviously inserted by the insurance companies for the purpose of preventing payment of double indemnity in cases where disease, or bodily or mental infirmity concur with the accident to cause death, or in any way contribute to the death.[4] Yet the courts have ig-

[2]This statement seems to repudiate an implication of the case of Larson v. Boston Elevated Ry. Co., 212 Mass. 262, 98 N. E. 1048 (1912) in which the court said, in speaking of germs entering the body after an accident: "If, however, her tuberculosis came from germs introduced into her system after she had sustained these injuries, or by the operation of some other subsequent and independent cause, then, even though the disease would not have developed and manifested itself but for her physical condition having been weakened and her power of resistance diminished by those injuries, it well may be that she could recover no damages for that sickness and its consequences." 98 N. E. 1048, 1050. It should be noticed that the Larson case involved not an insurance claim, but an action for damages for negligent injuries, and that the quoted portion of the opinion is dictum. But the language of the Massachusetts court in the instant case would seem to indicate that the dictum of the Larson case would not be followed by that court in such a situation.

[3]Kliebenstein v. Iowa Ry. & Light Co., 193 Iowa 892, 188 N. W. 129 (1922); Watson v. Rhinderknecht, 82 Minn. 235, 84 N. W. 798 (1901); Hoseth v. Preston Mill Co., 49 Wash. 682, 96 Pac. 423 (1908). See Restatement, Torts (1934) § 458.

[4]Barnett v. John Hancock Mut. Life Ins. Co., 24 N. E. (2d) 662, 663 (Mass. 1939). The policy bound the company to pay double indemnity "Upon receipt of due proof

nored these provisions and almost uniformly have awarded payment of double indemnity in cases where the accident was merely the "proximate" cause of death.[5]

This practice seems to have first crept into the law with the case of *North American Life & Accident Insurance Co. v. Burroughs.*[6] The policy provided that "death must be caused solely by such accidental injury. . . ." Here there was an accident followed by disease resulting in death, and the court permitted the plaintiff to recover for the accidental death. In its decision the only authority the court found necessary to cite was the definition given the word "accident" in Webster's Dictionary.[7] The *Burroughs* case was relied upon in *Freeman v. Mercantile Mutual Accident Association,*[8] which later decision was cited as controlling in the principal case and in others to be mentioned in this discussion.

Further illustrative of this position is the case of *Pacific Mutual Life Insurance Co. v. Meldrim.*[9] Here the policy provided that double indemnity would be paid in cases where the accident was "the direct, independent and exclusive cause of death." The insured was lying in the hospital with an open wound from a very recent appendicitis operation. He happened to slip from his pillow, the jar causing an embolus to form in the wound, ultimately resulting in his death. The court failed to take into account the appendicitis operation, the open wound, and the weakened condition of the body, but blandly said that the accident of slipping from the pillow was the *sole* cause of the death, "independent, and exclusive of all other causes."[10]

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of the death of the insured . . . caused solely by external, violent and accidental means, of which there is a visible wound or contusion on the exterior of the body (except in case of drowning or of internal injuries revealed by an autopsy), and that such death occurred . . . as a direct result thereof, independently and exclusive of all other causes, . . . and provided further that the death of the Insured was not caused directly or indirectly by disease or bodily or mental infirmity. . . ."

[5]Hanna v. Interstate Business Men's Ass'n, 41 Cal. App. 308, 182 Pac. 771 (1919); Atlanta Accident Ass'n v. Alexander, 104 Ga. 709, 30 S. E. 939 (1898), 42 L. R. A. 188 (1899); Robinson v. National Ins. Co., 76 Ind. App. 161, 129 N. E. 707 (1921); Freeman v. Mercantile Mutual Accident Ass'n, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753 (1892); Hickey v. Minister's Casualty Union, 133 Minn. 215, 158 N. W. 45 (1916); Schwindermann v. Great Eastern Casualty Co., 38 N. D. 584, 165 N. W. 982 (1917); U. S. Casualty Co. v. Thrush, 21 Ohio App. 129, 152 N. E. 796 (1926).

[6]69 Pa. St. 43 (1871).

[7]69 Pa. St. 43, 51 (1871): "An accident is 'an event which takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause ,and therefore not expected; chance; casualty; contingency'."

[8]156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753 (1892).

[9]24 Ga. App. 487, 101 S. E. 305 (1919).

[10]The following cases involved similar facts and policies: Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. 945 (C. C. A. 6th, 1893), 22 L. R. A. 620 (1894);

An even more surprising result was reached in *Travelers' Insurance Co. v. Melick.*[11] The insured accidentally injured his foot, and gangrene and tetanus set in. From time to time he suffered tetanic spasms causing excrutiating pain. While he was suffering from such a spasm, the attendant momentarily left him, and upon returning found the insured with a knife in his hands and his throat and jugular vein cut. But the judge instructed the jury that they could find that the accident was the "proximate" cause of the death and award recovery for the plaintiff, in spite of the fact that the policy stated that double indemnity should be awarded only in case death arose, "through external, violent and accidental means alone . . . independently of all other means."

It is worthy of note that in situations in which the disease already existed when the accident occurred, and the effects of both contributed to cause death, the courts have reached a different conclusion and denied recovery.[12] Such a case was that of *Maryland Casualty Co. v. Morrow.*[13] Here the insured, who had diabetes, accidentally injured his toe; gangrene set in, and when he was operated upon he died. The court denied recovery saying that the accident was not the "sole and exclusive cause of the death." And in a similar case the court said that "The death in such a case would not be the result of accident alone, but it would be caused partly by the disease and partly by the accident, and the contract exempted the association from liability therefor."[14]

U. S. Fidelity & Guaranty Co. v. Blum, 270 Fed. 946 (C. C. A. 9th, 1921); Dewey v. Abraham Lincoln Life Ins. Co., 218 Iowa 1220, 257 N. W. 308 (1934); Collins v. Casualty Co. of America, 224 Mass. 327, 112 N. E. 634, L. R. A. 1916E, 1203 (1916).

Another case differing from the instant decision only in the phraseology of the policy is Sheehan v. Aetna Life Insurance Co., 6 N. E. (2d) 777 (Mass. 1937), in which an accident was followed by pneumonia resulting in the death of the insured. Here again the court ignored the fact that the parties had expressly contracted against payment of double indemnity in situations where death should be "caused wholly or partly, directly or indirectly by infirmity or disease," and awarded double indemnity even though it seems highly probable that the pneumonia must have played some part in causing the death.

[11]65 Fed. 178 (C. C. A. 8th, 1894), 27 L. R. A. 629 (1895).

[12]National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774 (C. C. A. 8th, 1896); Commercial Travelers' Mut. Acc. Ass'n v. Fulton, 79 Fed. 423 (C. C. A. 2d, 1879); Hubbard v. Mutual Acc. Ass'n, 98 Fed. 930 (C. C. E. D. Pa. 1879); Stanton v. Travelers' Ins. Co., 83 Conn. 780, 78 Atl. 317 (1910), 34 L. R. A (N S.) 445 (1911); Railway Mail Ass'n v. Weir, 24 Ohio App. 5, 156 N. E. 921 (1927); Aetna Life Ins. Co. v. Dorney, 68 Ohio St. 151, 67 N. E. 254 (1903).

[13]213 Fed. 599 (C. C. A. 3d, 1914), 52 L. R. A. (N. S.) 1213.

[14]National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 776 (C. C. A. 8th, 1896).

That the authorities are by no means unanimous even on this proposition is illustrated by the holdings in the following cases: Scanlan v. Metropolitan Life Ins. Co., 93 F. (2d) 942 (C. C. A. 7th, 1937); Fetter v. Fidelity & Casualty Co., 174 Mo. 256, 73 S. W. 592, 61 L. R. A. 459, 97 Am. St. Rep. 560 (1903).

It seems highly questionable whether there is any material difference between the two situations. In the one, the disease or bodily infirmity existed before the accident; in the other it arose after the accident. In neither situation was the disease or the accident the sole and exclusive cause of the death, for in both situations each aggravated the effects of the other.

It is difficult to see how the parties could have entered into contracts which would more specifically set out the obligations of the various insurance companies. There is nothing ambiguous about the phrases, "solely and exclusively" and "independent of all other causes." Yet the courts have refused to adopt the ordinary meaning of these words when so used in insurance policies. The reason for such interpretations may be that when the average man purchases such accident policies as discussed here, he is unaware of the exact wording of the contract, and the salesman usually does not bother to explain it to him. All the purchaser knows is that he has bought an insurance policy which will pay him double indemnity in case he dies as a result of an accident. But merely because the layman is unaware of the difference between "sole" and "proximate" cause, the courts should not in effect make a different contract between the parties. If the insurer has in any manner acted fraudulently, a different case would be presented, but no such theory is relied upon by the courts in the cases under discussion. It may be that as a matter of social policy, the public should be afforded protection against its own lack of business acumen, and the insurance companies should be prevented from limiting the extent of their liability on policies by inserting phrases not understood or noticed by persons taking insurance. But since the legislative departments of the state governments have widely assumed the power to regulate the insurance business as it affects the public interest, it seems that the needed aid should be extended to the insuring public by means of direct regulatory statutes adopted by the legislatures, and not by strained constructions of contracts by the courts. In any event, this purported protection will be indirectly neutralized by the necessary raising of insurance rates by the companies to cover the increased risk. The net result will still involve an improved situation, however, since both the companies and those insured will be certain of the extent of the coverage accorded by the policies.

STANFORD SCHEWEL

INSURANCE—WHETHER A TRAILER IS A "BUILDING" WITHIN THE TERMS OF AN ACCIDENT POLICY. [Federal]

In *Aetna Life Insurance Company v. Aird*,[1] the plaintiffs sued as beneficiaries on an accident[2] policy containing a clause providing for double indemnity in case of injuries sustained by the insured by the "burning of a building . . . if the insured is therein at the time of the . . . commencement of the fire." At the time of his death, the insured was on the lease engaged in drilling oil wells, and was using as a combined office and dwelling a trailer which had been raised off its wheels and placed on supporting jacks. In this condition, the trailer was destroyed by a fire, in which the insured was burned to death. The insurance company defended against paying double indemnity on the ground that "the trailer was not and could not be 'a building' within the policy terms."[3] The district court ruled that the trailer so situated was such a building, and submitted to the jury the single question of whether the death was caused by the burning of the trailer, the jury finding for the plaintiffs.[4] On appeal to the Court of Appeals for the Fifth Circuit, the holding of the district court on the nature of the trailer as a building within the meaning of the policy was affirmed.[5] Judge Hutcheson, though writing the opinion for a unanimous court, went further in his characterization of a trailer as a building than his colleagues were willing to follow. In his opinion he stated that "the trailer's mobility is of small significance in determining whether, within the policy terms, it is 'a building' "; for the dominant consideration lay in the fact that the trailer was built for use as a dwelling house, and this purpose persisted whether the trailer was fixed on jacks or was running on its wheels.[6]

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[1]108 F. (2d) 136 (C. C. A. 5th, 1939).

[2]In the courts' opinions the policy is referred to sometimes as a life policy and sometimes as an accident policy. The different terminology is immaterial to this discussion.

[3]The Insurance Company also defended on the ground that the insured's death was caused by a gasoline explosion which preceded the fire, rather than by the burning of the trailer. The jury decided that death resulted from the burning, and this conclusion was accepted by the trial and appellate courts.

[4]Aird v. Aetna Life Ins. Co., 27 F. Supp. 141 (W. D. Tex. 1939).

[5]Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136 (C. C. A. 5th, 1939).

[6]Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136, 138 (C. C. A. 5th, 1939): "What is dominant here, as to the trailer, is the purpose for which it was built and used, and to which it is primarily adapted. That purpose, to be used as a shelter and habitation for deceased, in short, a dwelling house, stands out in and dominates the case. A dwelling house, constructed so as to be easily movable, at times, runing or standing on its wheels, at times, sitting fixedly on jacks or other rigid support, it is still at all times a dwelling house."

Judge Hutcheson seems to use the term "building" and "dwelling house" sy-

The district judge had expressly declared that a trailer when attached to an automobile and moving along the highway "could not by any stretch of the imagination be conceived to be a building,"[7] and the two circuit judges concurring in the result reached by Judge Hutcheson specifically limited their holding to "this trailer, circumstanced as it was at the time of the fire."[8]

Despite the fact that courts have occasionally purported to set up a general definition capable of covering the meaning of the word "building,"[9] an examination of numerous case holdings makes it clear that the term is given widely varying significance by the courts when different issues are involved. Each decision is likely to furnish its own conclusion as to the import of the word, and a determination in one case that a certain structure is a "building," may be given no weight as precedent for the question arising in a different type of case.[10] Nor do the courts necessarily tend to adopt popular conceptions or the layman's understanding of the scope of the term.[11] Thus a fence to be put around a courthouse was held to be a "building" within the provisions of a statute requiring certain procedure for the letting of contracts for the construction of "public buildings";[12] and the English chancery court decided that a trelliswork screen erected by the tenant on the leasehold was a "building," the erection of which violated a covenant in the lease whereby the tenant promised not to construct any "building" without the consent of the landlord.[13]

Although the fact that a structure is fixed to the land and not

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nonymously; but for the purpose of the principal case this usage would have no significance.

[7]Aird v. Aetna Life Ins. Co., 27 F. Supp. 141, 143 (W. D. Tex. 1939).

[8]Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136, 138 (C. C. A. 5th, 1939).

[9]Great Eastern Casualty Co. v. Blackwelder, 21 Ga. App. 586, 94 S. E. 843 (1918); Rouse v. Catskill and N. Y. Steamboat Company, 59 Hun 80, 13 N. Y. Supp. 126 (1891), aff'd, adopting lower court opinion, 133 N. Y. 679, 31 N. E. 623 (1892); State v. Lintner, 19 S. D. 447, 104 N. W. 205 (1905).

[10]In the principal case the concurring judges, Sibley and Holmes, denied that the burglary cases cited by Judge Hutcheson were in point in regard to the meaning of an accident policy. Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136, 138 (C. C. A. 5th, 1939).

[11]Courts sometimes adopt the interpretation of the word "building" as used by the layman when such interpretation will strengthen their argument toward the desired result. See Rouse v. Catskill and N. Y. Steamboat Company, 59 Hun 80, 13 N. Y. Supp. 126 (1891).

[12]Swasey v. Shasta County, 141 Cal. 392, 74 Pac. 1031 (1903).

[13]Wood v. Cooper, [1894] 3 Ch. 671. Another English case held that the side guard-wall of a bridge constituted a "building" for purposes of a statute making owners of abutting buildings liable for contributions to the cost of paving the streets. Arnell v. London and North Western Ry. Co., 12 C. B. 697, 138 Eng. Rep. 1077 (1852).

capable of being easily adapted for movability aids in identifying it as a "building," the conclusion does not follow that movable objects can not be held to fall within the same classification. In cases arising under the common law or under criminal statutes defining burglary as "breaking and entering a building . . .", a sheep wagon used as habitation by sheepherders on the range was held to be a "building,"[14] and a popcorn and peanut vendor's wagon was given the same standing.[15] Similarly the New Jersey court held a movable lunch wagon to be a "building" within the meaning of a fire ordinance requiring inspection of buildings by city officials.[16] Freight cars have been denominated "buildings" in cases arising under burglary[17] and arson[18] statutes. But as against these decisions, one court ruled that a box car is not a "building" such as to satisfy the clause in a deed that the grantee-railway should erect a building for a depot on the land conveyed.[19] A floating wharf for receiving, storing, and forwarding goods in river traffic was found to be subject to a merchanics' lien under a statute allowing such liens to be filed against "buildings."[20] In *Inter-Ocean Casualty Co. v. Warfield*,[21] the Arkansas court, construing an insurance policy provision closely similar to the one involved in the principal case, held that the insured was entitled to recover for injuries suffered in a fire which burned a "quarter boat" in which insured and other workmen lived while employed by the government on a river improvement project. Despite the apparent readiness of the courts to find that objects adapted to movability are "buildings," a Maryland decision held that the term "building" could not be appropriately applied to a schoolhouse which was constructed so as to rest directly on the ground without any foundation, and which, though it had on occasion been moved from place to place within the city, could only be moved by being taken to pieces and transported section by section to the new location, to be reassembled there.[22]

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[14]State v. Ebel, 92 Mont. 413, 15 P. (2d) 233 (1932).

[15]People v. Burley, 26 Cal. App. (2d) 213, 79 P. (2d) 148 (1938).

[16]Town of Montclair v. Amend, 68 Atl. 1067 (1908), aff'd, 76 N. J. L. 625, 72 Atl. 360 (1909).

[17]State v. Anderson, 154 Iowa 701, 135 N. W. 405 (1912) (wheels and trucks of car had been removed, and body rested on timbers on ground).

[18]State v. Lintner, 19 S. D. 447, 104 N. W. 205 (1905).

[19]St. Louis Ry. Co. v. Berry, 86 Ark. 309, 110 S. W. 1049 (1908) (deed did not use word "building"; it called for "depot" to be put on land, and court held "depot" necessarily involves a "building").

[20]Olmsted v. McNall, 7 Blackf. 387 (Ind. 1845).

[21]173 Ark. 287, 292 S. W. 129 (1927).

[22]Whiteley v. Mayor and City Council of Baltimore, 113 Md. 541, 77 Atl. 882 (1910).

Obviously, no simple rule of thumb generalization can be applied to determine whether an object will be classified as a building or as a non-building. But the apparent inconsistencies among decisions, and the outwardly surprising rulings which sometimes appear can very often be fully explained or justified by an examination of the individual cases, with regard to the particular end to be attained by holding that a structure is or is not a building. Where the public purpose of a statute or the private purpose of a contract can be served only by finding that a "building" does or does not exist, the courts will reach the conclusion needed to effectuate that purpose—within the bounds of rational determination, of course. Thus in the portable schoolhouse case,[23] the Maryland court was confronted with a statute which required that before a city passed an ordinance for the opening of a new street, it must file with certain officials a map showing the location of all buildings which were so situated as to be disturbed by the opening of the new street. In the instance in question, the map filed by the city had not marked the position of the portable schoolhouse, though it was in the route of the proposed street. The court was clearly correct in holding that the schoolhouse was not a building within the meaning of the statute, inasmuch as the structure could readily be moved out of the area without damage, and thus could not become the subject of a claim against the city for compensation. On the other hand, the protection of the public against the theft and destruction of property requires that burglary and arson statutes be given broad application, and thefts or burnings involving structures of doubtful classification should be included within the penalties of the statutes.[24] Similarly the public

[23]Whiteley v. Mayor and City Council of Baltimore, 113 Md. 541, 77 Atl. 882 (1910).

[24]People v. Burley, 26 Cal. App. (2d) 213, 79 P. (2d) 148 (1938); State v. Anderson, 154 Iowa 701, 135 N. W. 405 (1912); State v. Sanders, 81 Kan. 836, 106 Pac. 1029 (1910) (cave mostly below the surface of the ground but having a roof and a door made of lumber was held to be a "building" within a statute making it a misdemeanor to injure or destroy the doors and windows of a building); State v. Ebel, 92 Mont. 413, 15 P. (2d) 233 (1932); State v. Lintner, 19 S. D. 447, 104 N. W. 205 (1905). But cf. Rouse v. Catskill and N. Y. Steamboat Company, 59 Hun 80, 13 N. Y. Supp. 126 (1891), aff'd, adopting lower court opinion, 133 N. Y. 679, 31 N. E. 623 (1892), in which a statute provided that any person allowing liquor to be sold in a "building" of his ownership should be liable in damages to dependents of one who drinks liquor in the building and whose subsequent death is caused by the resulting intoxication. The court held that a river steamboat was not a building within this statute. If the public needs such protection at all, that need would seem to extend to the selling of intoxicants on steamboats as well as in saloons. But the court openly expressed its disapproval of the statute and declared that its application should be strictly limited and not extended beyond its "evident meaning."

interest in guarding against loss of life and property by the fire justified the holding that the lunch wagon was a building within the terms of the fire inspection ordinance.[25] Further, the statute requiring a specific procedure for the letting of contracts to construct public buildings presupposes that the protection of the public against the misusing of public funds by government officials demands such regulations. Since the funds may be wrongly expended in building a fence around a courthouse as well as in building the courthouse itself, the court very properly held that such a fence was a building within the statute.[26] When the argument was made to the Indiana court that the statute providing for mechanics' liens on buildings could not be applied to floating wharves, the answer was that "the statute, being remedial, should receive such a construction as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy."[27] And in order to enable the workmen who had repaired the wharves to enforce payment for their services, the wharves were held to be "buildings."

Where the term "building" as employed in a private contractual instrument is before the court for interpretation, the same considerations are involved. Whether or not a certain structure is included in the reference must depend on which decision will carry out the purpose and intention of the parties. Thus, when the landowner conveyed land to a railway company with the stipulation in the deed that as part of the consideration for the conveyance the railway should maintain a depot on the land, it seems certain that the landowner was demanding something more substantial than a boxcar parked on a side track and available for storing freight. He contemplated a permanent structure for the accommodation of passengers and freight, such as a railroad ordinarily erects at stopping places along the line.[28] And the English landlord who desired to prevent his tenant from putting up buildings on the leased property without permission, may well have been as anxious to avoid having his premises defaced or his adjoining property injured by the contruction of a trelliswork screen as by the raising of a stable or woodshed.[29] In the insurance contract, the intention of the parties is likewise controlling, with the courts here having available for use the established rule that the terms of the policy are to be construed most

[25]Town of Montclair v. Amend, 68 Atl. 1067 (1908), aff'd, 76 N. J. L. 625, 72 Atl. 360 (1909).

[26]Swasey v. Shasta County, 141 Cal. 392, 74 Pac. 1031 (1903).

[27]Olmsted v. McNall, 7 Blackf. 387, 388 (Ind. 1845).

[28]St. Louis Ry. Co. v. Berry, 86 Ark. 309, 110 S. W. 1049 (1908).

[29]Wood v. Cooper, [1894] 3 Ch. 671.

strongly against the insurer.[30] Where the insured lived even temporarily in the boat in which he was burned, it would seem that a court need apply no particular favoritism to the insured to conclude that for the purposes of this case the boat was a building within the terms of the insurance contract.[31] It is no doubt true that the company did not intend to insure against all hazards to life and limb attendant on travelling by boat. But unless the fire causing the injuries of insured was of such a nature as to be likely to occur only in the case of boats as distinguished from structures attached to land, the particular loss involved is not outside the intended coverage of the policy. Similarly, in the principal case when insured died in a fire which burned his trailer, his death was caused by such a disaster as the parties must have contemplated—so long as the occurrence of the fire was not peculiarly affected by the fact that a trailer, rather than an immovable structure was involved.[32] When a trailer is attached to an automobile and moving along the highway, persons riding in it are doubtlessly subjected to various kinds of risk which insurance companies never intended to assume in writing policies covering "death by the burning of a building."[33] If the trailer is damaged in a manner characteristic of automobile accidents, and burns as a result thereof, the insurer should not be held liable under such policy terms. But if the burning was not materially influenced by the character of the trailer as a travelling structure, imposing liability on the insurer does not seem unreasonable, because only the type of risk contemplated in the policy is involved. Thus, neither the restrictive view of the concurring judges nor the expansive declarations of Judge Hutcheson would seem to include a safe generalization. Whether a trailer moving on the highway or stationed on a lot can furnish the subject of "the burning of a building" within the terms of the policy, should depend on whether the fire occurs in a manner and effect usual in the case of the burning of immovable structures.

*FORREST WALL

[30]Stroehmann v. Mutual Life Ins. Co. of N. Y., 300 U. S. 435, 57 S. Ct. 607, 81 L. ed. 732 (1937); Great Eastern Casualty Co. v. Blackwelder, 21 Ga. App. 586, 94 S. E. 843 (1918); Vance, Insurance (2d ed., 1930) § 179.

[31]Inter-Ocean Casualty Co. v. Warfield, 173 Ark. 287, 292 S. W. 129 (1927).

[32]Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136 (C. C. A. 5th, 1939). Of course, the risk of being burned in a trailer is greater than the risk in a fireproof house, because trailers are flimsy and often made of inflammable materials. But there seems no difference between the risk in a trailer and in an insubstantial wooden immovable structure, which latter would be conceded to be a "building."

[33]See Aetna Life Ins. Co. v. Aird, 108 F. (2d) 136, 138 (C. C. A. 5th, 1939). Judges Sibley and Holmes in the concurring opinion said: "While so used [a trailer rolling down the highway] the risk of collapse and perhaps of fire would be very different."

*Written in collaboration with the Editors.

INTERSTATE COMMERCE—VALIDITY OF SALES TAX AS APPLIED TO COMMODITIES SHIPPED INTO STATE FROM ANOTHER STATE. [United States Supreme Court]

The clause in the Federal Constitution providing that commerce among the several states shall be regulated by Congress[1] has never been interpreted as imposing an absolute prohibition on state action in this field. And in order to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, it has been necessary for the courts to make a reconciliation of competing constitutional demands. It is evident that commerce between the states must not be unduly hindered by state action, and that at the same time power to lay taxes for the support of a state government must not be too strictly curtailed.[2]

A state-imposed tax which operates to regulate commerce between the states to an extent that infringes the power conferred upon Congress clearly exceeds constitutional limitations.[3] Any form of state taxation the effect of which is to place interstate commerce at a competitive disadvantage with intrastate commerce is an unconstitutional exercise of taxing power.[4] But the mere fact that a tax has an incidental and indirect effect is no cause to relieve those engaged in interstate commerce of their just share of state tax burdens.[5] There is no prohibition of nondiscriminatory taxation of the instrumentalities of interstate com-

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[1]U. S. Const. Art. I, § 8, cl. 3.

[2]Board of County Comm'rs, Jackson County, Kansas v. United States, 308 U. S. 343, 60 S. Ct. 285, 84 L. ed. 233 (1939); Ford Motor Co. v. Beauchamp, 308 U. S. 331, 60 S. Ct. 273, 84 L. ed. 230 (1939); South Carolina Highway Dept. v. Barnwell, 303 U. S. 177, 58 S. Ct. 510, 82 L. ed. 734 (1938); Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257 (1885); Woodruff v. Parham, 8 Wall. 123, 19 L. ed. 382 (U. S. 1868).

[3]Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23 (U. S. 1824).

[4]J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365 (1938) (state tax on gross receipts derived from interstate sales); Fisher's Blend Station v. State Tax Comm., 297 U. S. 650, 56 S. Ct. 608, 80 L. ed. 956 (1936) (tax on gross receipts of radio broadcasting station); Crew-Levick Co. v. Pennsylvania, 215 U. S. 292, 38 S. Ct. 126, 62 L. ed. 295 (1917); Western Union v. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 L. ed. 355 (1910) (license fee on percentage of entire capital stock); Galveston, H. & S. A. Ry. v. Texas, 210 U. S. 217, 28 S. Ct. 638, 52 L. ed. 1031 (1908) (privilege tax on gross receipts from interstate transportation); Philadelphia & S. M. S. S. Co. v. Pennsylvania, 122 U. S. 326, 7 S. Ct. 1118, 30 L. ed. 1200 (1887); Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303 (U. S. 1872) (state property tax on movable property employed in interstate commerce).

[5]Western Live Stock v. Bureau of Revenue, 303 U. S. 250, 58 S. Ct. 546, 82 L. ed. 823 (1938); American Mfg. Co. v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. ed. 1084 (1919).

merce.[6] Property is taxable before its movement across a state boundary,[7] and likewise after such movement has terminated.[8]

In the recent case of *McGoldrick v. Berwind-White Coal Mining Co.*,[9] the Supreme Court was faced with the problem of whether a New York City sales tax violated the commerce clause. New York City, duly authorized by the state legislature, placed a two per cent tax on purchases of tangible personal property. The respondent, a Pennsylvania corporation, produced coal in its mines in that state and sold it to consumers and dealers (largely public utility and steamboat companies) in New York City. The contracts of sale were made by the company through its New York City sales office. The coal was generally moved by rail from the mine to the Jersey City dock, and thence by barge to the point of delivery at the purchasers' plants or steamships. Having paid the sales tax, the respondent sought an order directing the comptroller to make a refund, contending that the tax was an infringement upon interstate commerce. The Supreme Court, with three Justices dissenting, held the tax valid. As a basis for its position, the Court stated that taxation of a local business, separate and distinct from transportation which was interstate commerce, was not forbidden merely because it was induced or occasioned by such business. The coal upon transfer of possession to the purchaser at the end of an interstate journey was no longer in interstate commerce, and was subject to the sales tax because the transfer of possession was the taxable event, regardless of the time and place of the passing of title. The Court agreed that a state tax upon the operations of interstate commerce measured by gross receipts derived from such commerce was an infringement of the commerce clause, but it held that this tax was conditioned a local activity, i. e., delivery of goods within the city, so that there was neither discrimination against nor obstruction of interstate commerce.

The respondent corporation, however, insisted that a distinction be made between sales with no previous contract, transacted after passage into another state, and sales the contracts for which when made

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[6]Southern Ry. v. Watts, 260 U. S. 519, 43 S. Ct. 192, 67 L. ed. 395 (1923); Wells Fargo & Co. v. Nevada, 248 U. S. 165, 39 S. Ct. 62, 63 L. ed. 190 (1918).

[7]Minnesota v. Blasius, 290 U. S. 1, 54 S. Ct. 34, 78 L. ed. 131 (1933); Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. ed. 615 (1913); Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715 (1886).

[8]General Oil Co. v. Crain, 209 U. S. 211, 28 S. Ct. 475, 52 L. ed. 754 (1908); American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365, 48 L. ed. 538 (1904); Brown v. Houston, 114 U. S. 622, 5 S. Ct. 1091, 29 L. ed. 257 (1885).

[9]60 S. Ct. 388, 84 L. ed. 343 (1940).

contemplated transportation across a state line. It maintained that sales of the latter class were protected by the commerce clause. In this respect *Banker Brothers v. Pennsylvania*[10] presented a problem somewhat similar to the present situation. In that case a local automobile dealer sought to combat a one percent tax imposed upon sales of automobiles within the state. Its contention was that the tax was a violation of the commerce clause, since the cars came from a manufacturer in another state in response to the dealer's orders. But the court found the taxable transaction wholly intrastate, there being no agency relationship between manufacturer and dealer in so far as the ultimate purchaser was concerned. Since title was transferred from manufacturer to dealer, and from dealer to purchaser, there were two sales. This case then, cannot be considered as authority, technically, for the present decision on this point, for it would make no difference whether the shipment interstate came before or after the purchaser's orders. The second sale was intrastate and taxable as such.

In *Wiloil Corporation v. Pennsylvania*[11] the factual situation was somewhat different and more closely analogous to the principal case. An order for a shipment of oil was placed by a Pennsylvania customer with a distributor having headquarters in Philadelphia. Pursuant to this order, the distributor purchased oil in Delaware and had the shipment made directly to the customer. The Court in sustaining a sales tax upon the transaction, held that interstate shipment was neither contemplated nor required by the contract for sale, and since the orders could have been filled from sources in Pennsylvania, it deemed the interstate transportation merely incidental. However, it is doubtful that this case is absolute authority for the Court's refusal in the *Berwind-White* case to make a distinction between sales contemplating and requiring interstate movement, and sales made after such shipment.

Closer to the principal case is *Graybar Electric Co. v. Curry*,[12] which was decided upon the authority of the *Banker Brothers* and *Wiloil* cases. Alabama purchasers ordered goods from a dealer in electrical supplies who maintained a sales office and warehouse in that state. The goods were shipped directly from an out of state manufacturer to the Alabama purchaser, the manufacturer billed the dealer, and the dealer billed the purchaser. The dealer also maintained a warehouse in Georgia, and orders which could not be filled from stock in the Ala-

[10] 222 U. S. 210, 32 S. Ct. 38, 56 L. ed. 168 (1911).
[11] 294 U. S. 169, 55 S. Ct. 358, 79 L. ed. 838 (1935).
[12] 60 S. Ct. 139, 84 L. ed. 97 (1939).

bama warehouse were billed by direct shipment to the purchasers from the Georgia warehouse. The first of these situations involved two sales and, except that it necessitated but one delivery, was analogous to the *Banker Brothers* case. The second situation was very close to the principal case, the goods being supplied from stock of the dealer warehoused out of the state and requiring interstate delivery to reach the purchaser. Contracts were presumably made prior to the shipment across a state boundary and obviously contemplated such shipment, but the Court sustained a sales tax in both situations. The sales were held to be local transactions, the interstate character of the shipment was deemed to be incidental, and the contracts for the sales were thought neither to require nor contemplate transportation in interstate commerce.

The *Berwind-White* case differs from the second method of distribution in the *Graybar* case in that no coal was stored in New York so that any fulfillment of orders necessitated an interstate shipment. Yet the Court said "we have sustained the tax where the course of business and agreement for sale plainly contemplated the shipment interstate in fullfillment of the contract,"[13] and cited the *Wiloil* and *Graybar* cases. It is to be noted that in those cases, the Court specifically stated that the contracts for the sales did not contemplate nor require interstate shipment. Regardless of this inference to the contrary, the Court here decided that commerce would be subjected to no greater burden whether the contracts were solicited before or after the interstate shipment.[14]

It was further contended that the conclusion reached in the present case would be inconsistent with those decisions which held invalid attempts to tax the occupation of soliciting orders for the purchase of goods to be shipped into the taxing state. However, the Court stated

[13]McGoldrick v. Berwind-White Coal Mining Co., 60 S. Ct. 388, 397, 84 L. ed. 343 (1940).

[14]Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. ed. 488 (1939) (use tax made collectible by local agents of foreign corporation); Monamotor Oil Co. v. Johnson, 292 U. S. 86, 54 S. Ct. 575, 78 L. ed. 1141 (1934) (license fee on motor vehicle fuel); Federal Compress & Warehouse Co. v. McLean, 291 U. S. 17, 54 S. Ct. 267, 78 L. ed. 622 (1934) (license tax on operators receiving and shipping cotton interstate); Gregg Dyeing Co. v. Query, 286 U. S. 472, 52 S. Ct. 631, 76 L. ed. 1232 (1932) (gasoline storage tax); Bacon v. Illinois, 227 U. S. 504, 33 S. Ct. 299, 57 L. ed. 615 (1913) (local tax on grain in private elevators prior to interstate shipment); General Oil Co. v. Crain, 209 U. S. 211, 28 S. Ct. 475, 52 L. ed. 754 (1908) (inspection fee on oil awaiting shipment to out of state destination); American Steel & Wire Co. v. Speed, 192 U. S. 500, 24 S. Ct. 365 ,48 L. ed. 538 (1904) (merchants tax on nonresident manufacturing company making local distribution); Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. ed. 715 (1886) (logs intended for transportation into another state).

that such rule was narrowly limited to fixed-sum license taxes imposed on the business mentioned. The taxes in those cases seem to have been aimed at suppression of this business when brought into competition with intrastate sales, and clearly should be declared invalid.

It was last argued that the tax was measured by gross receipts derived from interstate sales and thus reached for taxation commerce both within and without the taxing state.[15] The Court admitted that a "tax upon the operation of interstate commerce measured either by its volume or the gross receipts from it"[16] would infringe upon the commerce clause for this very reason;[17] but it held that this tax was upon a local sale— "a local activity [,] delivery of goods within the taxing state upon their purchase for consumption"[18]—there being no attempt to tax anything in Pennsylvania. The Court said:

> "The effect of the tax, even though measured by the sales price, as has been shown, neither discriminates against nor obstructs interstate commerce more than numerous other state taxes which have repeatedly been sustained as involving no prohibited regulation of interstate commerce."[19]

Mr. Chief Justice Hughes, in whose dissent Justices McReynolds and Roberts concurred, felt that the delegation to Congress of power to regulate commerce among the states had as its purpose the safeguarding of a free national market and the prevention of erection of state trade barriers. The case of *Robbins v. Shelby County Taxing District*,[20] established the doctrine that a state cannot tax interstate sales. The Court there held invalid a tax imposed upon an agent soliciting orders for subsequent delivery from an extrastate merchant. The actual decision in the case was satisfactory, but its dictum seemingly stated too universal

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[15]Gwin, White & Prince v. Henneford, 305 U. S. 434, 59 S. Ct. 325, 83 L. ed. 272 (1939); Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365 (1938).

[16]McGoldrick v. Berwind-White Coal Mining Co., 60 S. Ct. 388, 398, 84 L. ed. 343 (1940).

[17]J. D. Adams Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365 (1938) held invalid a gross income tax upon an Indiana corporation engaged in the manufacture of goods a portion of which were sold outside the state. The tax was found to be not upon the local privilege of maintaining a manufacturing business, but upon the gross receipts of interstate sales. Mr. Justice Stone pointed out, however, that the tax would have been sustained "had it been conditioned upon the exercise of the franchise or its privilege of manufacturing in the taxing state." McGoldrick v. Berwind-White Coal Mining Co., 60 S. Ct. 388, 398, 84 L. ed. 343 (1940).

[18]McGoldrick v. Berwind-White Coal Mining Co., 60 S. Ct. 388, 398, 84 L. ed. 343 (1940).

[19]McGoldrick v. Berwind-White Coal Mining Co., 60 S. Ct. 388, 398, 84 L. ed. 343 (1940).

[20]120 U. S. 489, 7 S. Ct. 592, 30 L. ed. 694 (1887).

a rule in the declaration that "Interstate commerce cannot be taxed at all, even though the same amount of the tax should be laid on domestic commerce. . . ."[21] The Chief Justice did not go this far but stated a general rule that state taxation of interstate commerce "either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it"[22] would be beyond the limitations set by the Constitution.[23] He further thought it was a direct burden on interstate commerce since it was imposed immediately upon the gross receipts of that commerce.

The minority argued for disallowance of the tax on still another ground—the possibility that each state through which the commerce passed might impose similar taxes with equal right. It contended that Pennsylvania might tax the shipment of the coal just as New York has taxed the delivery, and in that manner subject the interstate commerce to a double burden. The majority held the delivery an event taxable only in New York and in that way attempted to avoid the argument of cumulative taxation. But the contention was not conclusively answered. The Chief Justice considered the shipment, transshipment, and delivery all integral parts of an interstate sale and saw no reason why New York should have more right to tax than Pennsylvania. It is but a matter of conjecture as to what the Court would do in the event that Pennsylvania attempted to tax the sales by virtue of the shipment within that state. It might, as the majority hints here, invalidate such a tax in the state of origin by holding the delivery the only taxable event of the transaction. But the minority has raised a point which is not decided here, and which, in the near future may arise for determination.[24]

This decision has adopted the test of transfer of possession as the point where interstate commerce ceases for purposes of a nondiscrim-

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[21]Robbins v. Shelby County Taxing District, 120 U. S. 489, 497, 7 S. Ct. 592, 596, 30 L. ed. 694 (1887).

[22]McGoldrick v. Berwind-White Coal Mining Co., 60 S. Ct. 388, 400, 84 L. ed. 343 (1940).

[23]J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. ed. 1365 (1938); Fisher's Blend Station v. State Tax Comm., 297 U. S. 650, 56 S Ct. 608, 80 L. ed. 956 (1936).

[24]Thomas Reed Powell suggests that Pennsylvania would hardly impose a tax upon the shipment for such would be prejudicial to its own coal industry. For a complete discussion of the case, see Powell, New Light on Gross Receipts Taxes—The Berwind-White Case (1940) 53 Harv. L. Rev. 909.

It is also of interest to note McGoldrick v. Compagnie Generale Transatlantique, 60 S. Ct. 670, 84 L. ed. 672 (1940) which sustained the New York City sales tax when applied to sales within the city of fuel oil from storage tanks in New Jersey. The oil was transported to New York piers and then sold and delivered to ships from foreign countries.

inatory sales tax. In effect, this is the adoption of the rule established in the use tax cases which hold that once the goods come to rest a nondiscriminatory tax upon use or enjoyment may be levied on the users to be collected by the seller.[25] Technically, interstate commerce may now be said to end when there is a transfer of possession of the goods; but practically it may be said that interstate sales are taxable (if the sales tax is nondiscriminatory) since the consummation of every interstate sale must necessarily include "a coming to rest" at point of destination and an unloading or delivery of the physical object sold.

FRANK C. BEDINGER, JR.

PROCEDURE—WHETHER RADIO BROADCASTING COMPANY IS SUBJECT TO JURISDICTION OF COURTS OF STATE IN WHICH BROADCAST IS HEARD OVER LOCAL AFFILIATED STATION. [Washington]

The Columbia Broadcasting Company, a New York corporation, had leased the facilities of the Queen City Broadcasting Company, a Washington State corporation, to retransmit programs originating in Columbia's studios, and in studios of affiliated stations. These programs were furnished to the local station over program transmission lines. In the course of a Columbia broadcast emanating from an affiliated station in St. Louis, and broadcast in Washington State through the facilities of the Queen City station, statements allegedly defaming the Waldo Hospital Association of Washington were made. The Hospital Association, in an action for damages for defamation, joined the Columbia Broadcasting Company as defendant with the Queen City Company. In an original application to the Supreme Court of Washington for a writ of prohibition,[1] Columbia questioned the power of the State of Washington to subject it to the jurisdiction of its courts. The Washington court held, in *State ex rel. Columbia Broadcasting Co.*

[25]Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62, 59 S. Ct. 376, 83 L. ed. 488 (1939); Henneford v. Silas Mason Co., 300 U. S. 577, 57 S. Ct. 524, 81 L. ed. 814 (1937); Monamotor Oil Co. v. Johnson, 292 U. S. 86, 54 S. Ct. 575, 78 L. ed. 1141 (1934).

[1]This device has been increasingly and effectively employed in preventing trial courts from taking jurisdiction where none exists in fact, and has done much to reduce the unnecessary time and expense of litigating issues beyond the power of the trial court to entertain. Jardine v. Superior Court in and for Los Angeles County, 213 Cal. 301, 2 P. (2d) 756 (1931), 79 A. L. R. 291 (1932); Westinghouse Electric and Mfg. Co. v. Justices' Court of Corcoran Tp. in and for Kings County, 79 Cal. App. 413, 250 Pac. 1104 (1926); Baltimore Mail S. S. Co. v. Fawcett, 269 N. Y. 379, 199 N. E. 628 (1936).

v. Superior Court of King County,[2] with one justice dissenting, that Columbia was "doing business"[3] in Washington State to an extent sufficient to make it amenable to suit in the courts of that state, and that service of process on the general manager of the Queen City Company was good service of process on Columbia.

The complexity of the problem of a state's power over a nonresident corporation doing business in the state is attested by a marked lack of harmony in both state and federal decisions.[4] No general rules are deducible from the decided cases and the courts seem content to decide each case upon its own facts.[5] The novel character of an advertising business carried on through the medium of radio, renders factual analogies both attenuated and unsatisfactory.

"The foundation of jurisdiction is physical power,"[6] but when, in the absence of express consent, does a state have this power over a nonresident corporation? In general, a state may exclude a foreign corporation from doing domestic business within the state,[7] and it may impose the condition precedent to its doing such business that it submit to service of process of the state courts.[8] Further, a state may impose such conditions even on corporations engaged in interstate commerce, so far as acts done within the state are concerned.[9] Absent express consent, three possible theories may be suggested as supplying the foundation of the court's jurisdiction over foreign corporations doing business within

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[2]96 P. (2d) 248 (Wash. 1939). An appeal to the United States Supreme Court is pending, 8 U. S. L. Week 493.

[3]As to the scope of the term "doing business," see: Restatement, Conflict of Laws (1934) §§ 167-181; Beale, The Conflict of Laws (1935) §§ 88-93; note (1929) 60 A. L. R. 994.

[4]People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 38 S. Ct. 233, 62 L. ed. 587 (1918); International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. ed. 1479 (1914); Green v. C. B. & Q. Ry. Co., 205 U. S. 530, 27 S. Ct. 595, 51 L. ed. 916 (1907); Rishmiller v. Denver & Rio Grande R. R. Co., 134 Minn. 261, 159 N. W. 272 (1916); Beale, The Conflict of Laws (1935) §§ 88.2, 89.1; Fead. Jurisdiction Over Foreign Corporations (1926) 24 Mich. L. Rev. 633.

[5]St. Louis S. W. Ry. of Texas v. Alexander, 227 U. S. 218, 33 S. Ct. 245, 57 L. ed. 486 (1913); Hutchinson et al. v. Chase & Gilbert Inc. et al., 45 F. (2d) 139 (C. C. A. 2d, 1930).

[6]McDonald v. Maybee, 243 U. S. 90, 91, 37 S. Ct. 343, 61 L. ed. 608 (1917).

[7]Paul v. Virginia, 8 Wall. 168 (U. S. 1868); Scott, Jurisdiction Over Non Residents Doing Business Within a State (1919) 32 Harv. L. Rev. 871.

[8]Scott, Jurisdiction Over Non Residents Doing Business Within a State (1919) 32 Harv. L. Rev. 871, 879-80.

[9]International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. ed. 1479 (1914); Beale, The Conflict of Laws § 82.2; Scott, Jurisdiction over Non Residents Doing Business Within a State (1919) 32 Harv. L. Rev. 871, 878, 886-891.

the state.[10] One theory is that of "implied consent," presumed from the acts of the corporation in doing business in the state.[11] This concept has been generally discarded in the more recent decisions as fictional.[12] Another theory is that of "presence",[13] which still is widely adhered to, but which would seem to be inapplicable to the principal case in the light of *Bank of America v. Whiting Central National Bank*.[14] A third theory is that of "submission,"[15] based on principles of justice which require a corporation doing business within a state to submit to the jurisdiction of its courts to the extent that its laws provide for the exercise of jurisdiction and are reasonable.[16] As indicated by Judge Learned Hand[17] with reference to the "presence" doctrine, these theories do no more than put the question to be answered. Each of them leaves unsolved the nebulous and elusive question of whether the foreign corporation is "doing business" within the state; and an affirmative answer to this query is essential to the application of any principle giving jurisdiction to the courts of the state.

It is not the purpose of this discussion to attempt a general examination of the judicial scope of the term "doing business"; and no

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[10]Beale, The Conflict of Laws (1935) §§ 89.5, 89.6, 89.7, 89.8; Scott Jurisdiction over Non Residents Doing Business Within a State (1919) 32 Harv. L. Rev. 871.

[11]In Railroad Co. v. Harris, 12 Wall. 65, 81, 20 L. ed. 354 (U. S. 1870), Mr. Justice Swayne said: "If it do business there, it will be presumed to have assented and will be bound accordingly." Similar language is found in other cases. See, Robert Mitchell Furniture Co. v. Selden Breck Const. Co., 257 U. S. 213, 42 S. Ct. 84, 66 L. ed. 201 (1921); Old Wayne Mutual Life Ass'n v. McDonough, 204 U. S. 8, 27 S. Ct. 236, 51 L. ed. 345 (1907); Lafayette Ins. Co. v. French, 18 How. 404, 15 L. ed. 451 (U. S. 1855).

[12]In Flexner v. Farson, 248 U. S. 289, 293, 39 S. Ct. 97, 98, 63 L. ed. 250 (1919), Mr. Justice Holmes said: "But the consent that is said to be applied in such cases is a mere fiction, founded on the accepted doctrine that the States could exclude foreign corporations altogether, and therefore could establish this obligation as a condition to letting them in." See also, Pennsylvania Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. ed. 610 (1917).

[13]Mr. Justice Brandeis has constantly said that if a corporation does business in a state it is present or found there. Bank of America v. Whitney Cent. Nat. Bank, 261 U. S. 171, 43 S. Ct. 311, 67 L. ed. 594 (1923); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U. S. 516, 43 S. Ct. 170, 67 L. ed. 372 (1923); Philadelphia & Reading Ry. v. McKibbin, 243 U. S. 264, 37 S. Ct. 280, 61 L. ed. 710 (1917).

[14]261 U. S. 171, 173, 43 S. Ct. 311, 312, 67 L. ed. 594 (1923), Mr. Justice Brandeis said: "The jurisdiction taken of foreign corporations, in the absence of statutory requirement of express consent, does not rest upon a fiction of constructive presence like 'qui facit per alium facit per se.' It flows from the fact that the corporation itself does business in the state or district in such a manner and to such an extent that its actual presence there is established."

[15]Smolik v. Philadelphia & Reading C. & I. Co., 222 Fed. 148 (S. D. N. Y. 1915).

[16]Beale, The Conflict of Laws (1935) § 89.8.

[17]Hutchinson et al. v. Chase & Gilbert, Inc. et al., 45 F. (2d) 139 (C. C. A. 2d, 1930).

cases have been found which purport to apply to the specific business of radio broadcasting such general principles as may be thought to be available as guides in cases involving other types of enterprises. The case of *Fisher's Blend Station v. Tax Commission,*[18] strongly relied on by the majority in the principal case, holds no more than that radio broadcasting is essentially interstate in character.[19] It does not reach the conclusion of the majority that the broadcasting company is therefore present and carrying on business[20] in those states in which the broadcast is heard. In *Hoffman v. Carter,*[21] when that case was first before the Supreme Court of New Jersey, language was employed from which a conclusion contrary to that of the principal case could be inferred.[22] However, on a re-appeal[23] that court expressly reserved decision on the question of whether the delivery to radio receivers in New Jersey, of programs transmitted by the Columbia Broadcasting Company in New York, could be considered in any sense to constitute the doing of business in New Jersey. Many cases involving other businesses are of but negative assistance, in that they merely hold that a particular activity *does not* constitute doing business, and do not attempt to state what activities *do* amount to doing business.[24] But it is apparent

[18]297 U. S. 650, 56 S. Ct. 608, 80 L. ed. 956 (1936).

[19]This point was made by Mr. Justice Robinson, dissenting in State ex rel. Columbia Broadcasting Co. v. Superior Court for King County, 96 P. (2d) 248, 250 (Wash. 1939); and the holding of Fisher's Blend Station v. Tax Commission, 297 U. S. 650, 56 S. Ct. 608, 80 L. ed. 956 (1936), would appear to be correctly confined to the minority interpretation.

[20]In Consolidated Textile Corp. v. Gregory, 289 U. S. 85, 53 S. Ct. 529, 77 L. ed. 1047 (1933) the Supreme Court of the United States reaffirmed the proposition laid down in People's Tobacco Co. v. American Tobacco Co., 246 U. S. 79, 87, 38 S. Ct. 233, 235, 62 L. ed. 587 (1918) that, "The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction. . . ." Engaging in interstate commerce, alone, would not necessarily meet the requirements of this rule, and the inference of the majority in the principal case would seem to be erroneous in this respect.

[21]117 N. J. L. 205, 187 Atl. 576 (1936).

[22]In 117 N. J. L. 205, 187 Atl. 576, 577, 578 (1936) the court emphasized the fact that Columbia's acts were done in New York and that but for the independent acts of the local station nothing would transpire in the state of New Jersey.

[23]Hoffman v. Carter, 118 N. J. L. 379, 192 Atl. 825 (1937).

[24]Activity of a subsidiary corporation is not enough to constitute "doing business" in a state, Cannon Manufacturing Co. v. Cudahy Packing Co., 267 U. S. 333, 45 S. Ct. 250, 69 L. ed. 634 (1925); Peterson v. Chicago R. I. & P. Co., 205 U. S. 364, 27 S. Ct. 513, 51 L. ed. 841 (1907). Activity of an agent is not enough, Bank of America v. Whitney Cent. Nat. Bank, 261 U. S. 171, 43 S. Ct. 311, 67 L. ed. 594 (1923). Sending traveling show rooms around for advertising purposes is not enough, Larkin Co. v. Commonwealth, 172 Ky. 106, 189 S. W. 3 (1916).

that among the courts generally a practice or policy prevails whereby a minimum of activity is held to afford a basis for finding that a corporation is doing business within a jurisdiction and thus is amenable to service of process on its agents therein.[25] However, the decisions are progressively stricter in requiring more activity for a holding that jurisdiction exists for purposes of taxation and of regulation.[26] This minimum requirement for purposes of service of process would appear to be satisfied in the case of the Columbia Broadcasting Company, for although its programs emanated from an affiliated station outside of Washington State, the essential ends and conceded objects of the advertising business were accomplished only when they were received in homes all over the state. Advertising with Columbia is a business within itself, as distinguished from mere solicitations that are incidental to a business concern which is engaged in the actual selling and delivery of its products.[27] Unlike these incidental solicitations, which are isolated and occasional in their nature, the acts of the Columbia Broadcasting Company are continuous. Regardless of the medium it chose, Columbia projected its advertising business into the State of Washington. It should be answerable in the courts of Washington for wrongs arising out of such business. Of the three possible theories of jurisdiction, it would appear that the theory of "submission"[28] may correctly be applied to hold Columbia subject to the jurisdiction of the state court.[29]

But in service of process on a foreign corporation two elements are necessary:[30] the transaction of business, and an agent through whom the corporation can be reached. This agent must bear such a relation to the corporation as to sustain the conclusion that he has power to

[25]International Harvester Company of America v. Commonwealth of Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 L. ed. 1479 (1914) (a continuous course of business in Kentucky, the solicitation of orders which were sent to another state and in response to which the machines of the Harvester Company were delivered within the state, was held to amount to "doing business" in Kentucky to the extent which authorized service of process on its agents engaged in conducting the business; St. Louis S. W. Ry. of Texas v. Alexander, 227 U. S. 218, 33 S. Ct. 245 (1913) (where a railroad company establishes an office in a foreign district and its agents there attend to claims presented for settlement, it is carrying on business to such an extent as to render it amenable to process under the laws of that state); Isaacs, An Analysis of Doing Business (1925) 25 Col. L. Rev. 1018.

[26]Isaacs, An Analysis of Doing Business (1925) 25 Col. L. Rev. 1018.

[27]Larkin Co. v. Commonwealth, 172 Ky. 106, 189 S. W. 3 (1916), see supra note 24.

[28]Beale, The Conflict of Laws (1935) § 89.8.

[29]Smolik v. Philadelphia and Reading C. and I. Co., 222 Fed. 148 (S. D. N. Y. 1915).

[30]Farmers' and Merchants' Bank v. Federal Reserve Bank, 286 Fed. 566 (E. D. Ky. 1922); Beale, The Conflict of Laws (1935) §§ 88-93.

receive such service.[31] In the principal case this relationship could have been found, had there been in Washington State an agent duly consented to,[32] a public official either consented to,[33] or not consented to,[34] or a "representative agent."[35] The failure of either the Queen City Broadcasting Company or its manager to fall convincingly into any of the four named categories, as shown by an examination of the contract,[36] displays an inherent weakness in the decision of the principal case. This difficulty of finding an agent on whom process may be served points to the need for legislation providing for statutory agents for the service of process on foreign broadcasting corporations.

WILLIAM S. BURNS

STATUTE OF LIMITATIONS—PERIOD OF LIMITATION APPLICABLE TO A SUIT ON A NEW PROMISE. [Virginia]

In 1938, the plaintiff instituted suit against the defendant to recover the balance due on a sealed promise to pay a debt made in 1923, payable on demand. The defendant filed a plea of the Statute of Limitations, alleging that suit on the instrument was barred by the ten-year limitation. Plaintiff then gave notice of his intention to rely upon the debtor's unsealed promise in writing, made in 1930, to pay the instrument. The defendant filed another plea of the Statute of Limitations, alleging that the claim sued on was barred five years after the date of the new promise. The sole issue was whether the limitation of ten

[31]Conn. Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569 (1899).

[32]Penn. Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. ed. 610 (1917).

[33]Penn. Fire Ins. Co. v. Gold Issue Mining Co., 243 U. S. 93, 37 S. Ct. 344, 61 L. ed. 610 (1917).

[34]Mutual Reserve Fund Life Association v. Phelps, 190 U. S. 147, 23 S. Ct. 707, 47 L. ed. 987 (1903).

[35]Commercial Mutual Accident Co. v. Davis, 213 U. S. 245, 29 S. Ct. 445, 53 L. ed. 782 (1909); Conn. Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 S. Ct. 308, 43 L. ed. 569 (1899).

[36]There is manfestly no question here of service upon a statutory agent, consented to or otherwise, since service was made pursuant to a Washington statute (Rem. Rev. Stat. § 226), providing for service upon "any agent" of the corporation.

The contract between Columbia Broadcasting Company and the Queen City Broadcasting Company provides only for a leasing of facilities and broadcasting time for prescribed periods; and beyond a clause directing that Queen City shall obtain as much publicity for Columbia as possible, it is authorized in no way to act for Columbia, nor is it empowered in any respect to bind Columbia by its acts.

See, Restatement, Agency (1933) § 1.

years upon the sealed instrument or that of five years upon the new unsealed instrument, governed the period of limitation following the new promise.

The Court of Appeals of Virginia, faced with a case of first impression in the jurisdiction and thus proceeding without aid of local precedent, held in *Ingram v. Harris*[1] that the new promise merely revitalized the old debt and did not create a new and substantive contract, and that, therefore, the original ten-year period of limitation was applicable to the new promise.

Though this result might be considered to be in accord with the general rule announced by courts of other states, in order to evaluate the decision accurately, it is necessary to refer to the statutes involved and to the interpretation put upon them by the court. The Virginia Code of 1849 provided that in the case of a new promise, an action could be brought "within such number of years after the said promise, as it might originally have been maintained within upon the award or contract. . . ."[2] It is clear down to this point, as the court stated, that the period applicable to the original demand would govern the period of limitation following the new promise. When the Code was revised in 1887, however, the phraseology was changed to provide that an action could be brought on the new promise "within such number of years after such promise, as it might be maintained under section twenty-nine hundred and twenty,[3] if such promise were the original cause of action."[4] The revisors of the Code of 1919 adopted this language without charge,[5] and the identical provision appears in the Code of 1936.[6]

The established rule of statutory construction is that the legislature will be held not to have intended to change the effect of the existing statute unless such intention clearly appears.[7] Applying this rule, the

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[1]5 S. E. (2d) 624 (Va. 1939).

[2]Va. Code of 1849, p. 592, c. 149, § 7.

[3]Section 2920 of the Virginia Code of 1887, as revised in Va. Code Ann. (1919) § 5810, provides that action may be brought upon any contract by writing under seal within ten years; if it be upon a contract not under seal, within five years. The same provision appears in Va. Code Ann. (Michie, 1936) § 5810.

[4]Va. Code of 1887, p. 701, c. 139, § 2922.

[5]Va. Code Ann. (1919) § 5812.

[6]Va. Code Ann. (Michie, 1936) § 5812.

[7]Norfolk & Portsmouth Bar Ass'n v. Drewry, 161 Va. 833, 172 S. E. 282 (1934); Parramore v. Taylor, 11 Gratt. 220 (1854). Black, Interpretation of Laws (2d ed. 1911) 594: "When statutes are codified, compiled, or collected and revised, a mere change of phraseology should not be deemed to work a change in the law, unless there was an evident intention, on the part of the legislature, to effect such change."

majority of the court in the principal case was of the opinion that the revisors in 1887 did not intend to change the meaning of the law but merely to alter the phraseology. The provision "if such promise were the original cause of action" was held by the majority to mean "if the original cause of action had accrued at the date of such promise." However, if the Code of 1849 was *perfectly clear,* as the court itself stated, it would seem a logical assumption that the change in the language of the statute must have been made in order to alter the meaning. Otherwise, there would have been no reason for adopting the new phraseology. Surely the revisors would not substitute ambiguous terminology for clear statement, yet intend the statute to retain its original meaning. In the principal case, great weight seems to have been given to the address before the Virginia State Bar Association by Judge E. C. Burks, one of the revisors of the Code of 1887. The court felt that since he spoke of other changes in the Statutes of Limitations, he would have made some reference to this particular section of the statute had the revisors intended to make such an important change as that contended for in this case. But Judge Burks stated that he would only refer to a few of the more *important* changes, for otherwise his remarks would assume the length of a book.[8] It is entirely conceivable that he thought this change was unimportant, and such an opinion is borne out by the fact that this is the first case requiring a construction of the statute since its enactment fifty-three years ago.

The insertion of the word *new* before the word promise in the section, "within such number of years after such [new] promise as it [the action] might be maintained under section fifty-eight hundred and ten, if such [new] promise were the original cause of action," as Mr. Justice Hudgins pointed out in his dissent,[9] clearly shows that the intention was to make the form of the new promise the determining factor in fixing the new period of limitation. To say the least, if this interpretation had been adopted by the majority it would have done no undue violence to the words of the statute. The better rule would seem to be that the time should be extended by such a promise for the period allowed by law for the enforcement of simple contracts.[10]

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[8](1891) 4 Va. St. Bar Ass'n Rep. 115.

[9]See Ingram v. Harris, 15 S. E. (2d) 624, 627 (Va. 1939).

[10]1 Williston, Contracts (Rev. Ed. 1936) § 185.

If the intention of the revisors of the Code of 1887 was that the form of the old contract should govern the period of limitation of the new promise, it is submitted that such intention could have been plainly shown by employing the following language: "If any person against whom the right shall have so accrued on an award,

As a general rule, in other states, if the acknowledgment or new promise is made before the Statute of Limitations has run, the effect is to set aside the operation of the statute up to the time of the acknowledgment or promise, and to start the statute running anew against the original claim.[11] But, when the acknowledgment or promise is made after the bar of the statute has become complete, the period of limitation is governed by the form of the new promise.[12] Even in the latter situation, however, there are numerous cases which apply the period of limitation that governs the original demand.[13] The general view proceeds upon the theory that if the acknowledgment is made before the statute has run, it vitalizes the old debt, whereas if an acknowledgment is made after the statute has run, it creates a new cause of action. All authorities agree that the old debt or the moral obligation to pay, furnishes the consideration for the new promise.[14] It is to be noted that in

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or any such contract, shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised, within such number of years after such promise *as the original cause of action might have been maintained* under section fifty-eight hundred and ten. . . ." If the intention was that the form of the new promise should govern the new period of limitation, the following language would be appropriate: "If any person against whom the right shall have so accrued on an award, or any such contract, shall, by writing signed by him or his agent, promise payment of money on such award or contract, the person to whom the right shall have so accrued may maintain an action for the money so promised, within such number of years after such promise as it might be maintained under section fifty-eight hundred and ten, *as* if such *new* promise were *an* original cause of action. . . ."

[11]Deshler v. Cabiness, 10 Ala. 959 (1847); Austin v. Bostwick, 9 Conn. 496, 25 Am. Dec. 42 (1833); Rich v. Dupree, 14 Ga. 661 (1854); Van Patten v. Bredow, 75 Iowa 589, 39 N. W. 907 (1888); Russell v. Centers, 153 Ky. 469, 155 S. W. 1149 (1913); Gilbert v. Collins, 124 Mass. 174 (1878); Mastin v. Branham, 86 Mo. 643 (1885); Mason v. Rice, 18 Vt. 53 (1844). Contra: Gruenberg v. Buhring, 5 Utah 414, 16 Pac. 486 (1888) (limitation period governed by the new promise).

[12]Moore v. Diamond Dry Goods Co., 54 P. (2d) 553 (Ariz. 1936); McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170 (1868); Coker v. Phillips, 89 Fla. 283, 103 So. 612 (1925); Gilmore v. Green, 77 Ky. 772 (1879); Thornton's Adm'r v. Minton's Ex'r 250 Ky. 805, 64 S. W. (2d) 158 (1933); McNeill v. Simpson, 39 S. W. (2d) 835 (Tex. 1931); Canon v. Stanley, 100 S. W. (2d) 377 (Tex. 1936); Kuhn v. Mount, 13 Utah 108, 44 Pac. 1036 (1896); Thisler v. Stephenson. 54 Wash. 605, 103 Pac. 987 (1909).

[13]St. John v. Garrow, 4 Port. 223, 29 Am. Dec. 280 (Ala. 1836); Dawson & Dawson v. Godkins, 28 Ga. 310 (1859); Sammons v. Nabers, 186 Ga. 161, 197 S. E. 284 (1938); Bayliss v. Street, 51 Iowa 627, 2 N. W. 437 (1879); Sennott v. Horner & Hypes, 30 Ill. 429 (1863).

[14]Shepherd v. Thompson, 122 U. S. 231, 7 S. Ct. 1229, 30 L. ed. 1156 (1887); McCormick v. Brown, 36 Cal. 180, 95 Am. Dec. 170 (1868); Pittman v. Elder, 76 Ga. 371 (1886); Spencer v. McCune, 73 Ind. App. 484, 126 N. E. 30 (1920); Spilde v. Johnson, 132 Iowa 484, 109 N. W. 1023 (1906); Wilson v. Butt, 168 Va. 259, 190 S. E. 260 (1937). Needham v. Matthewson, 81 Kan. 340, 105 Pac. 436 (1909); Tolle v. Smith, 98 Ky.

most jurisdictions, the statutes provide only that the new promise must be in writing and signed by the party to be charged, but make no provision as to the period within which an action may be brought on the new promise.[15] It seems, therefore, that the courts have read into the statutes the distinction between a promise made before and a promise made after the bar of the statute has become complete. The decision in the principal case would place the Virginia statute in line with the general rule, so far as a promise made before the bar of the statute had run is concerned. Since the case did not involve a promise made after the bar of the statute was complete, and since the court expressed no opinion with reference to that question, assurance is lacking as to the court's probable holding when such a case comes before it for decision.

The Virginia statute makes no distinction between a promise made before and one made after the running of the statute, and since it allows suit on either the original demand or the new promise,[16] recognition of such a distinction by the court would be unnecessary. Yet it is difficult to see why the new period of limitation should be governed by considerations of whether the statutory bar was already complete when the new promise was made.[17] Since the debt still exists in both instances, and only the remedy is gone where the bar is complete at the time of making the new promise, it would seem that the debt should be

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464, 33 S. W. 410 (1895) (no statute of limitation involved but there was a discharge in bankruptcy; since debt was discharged, moral obligation held sufficient consideration for the new promise).

[15]At least three states do make provision for the period of limitation which shall be applicable following the new promise. See Ill. Rev. Stat. Ann. (Smith-Hurd, 1935) c. 83, § 17; Kan. Gen. Stat. Ann. (Corrick, 1935) c. 60, § 312; W. Va. Code (1931) c. 55, Art. 2, § 8.

[16]Va. Code Ann. (Michie, 1936) § 5812.

[17]It may be suggested that a practical basis for the different rules exists in considerations of the meritorious character of the defendant-debtor's conduct in the two cases. Where the bar has not yet run completely, the debtor by his new promise does not deprive himself of any existing defense, but merely postpones the time at which his defense of limitations may accrue. Though this is beneficial to the creditor, it may well be that the new promise is made with a view of aiding the debtor himself, as perhaps by persuading the creditor to refrain from immediate suit to collect the debt. On the other hand, where the bar has been completed before the new promise is made, the debtor seems voluntarily to give up an already perfect defense, and give the creditor a chance to enforce the obligation where without the promise there was no such chance. Thus, in the latter case, the debtor is more deserving of having the doubtful question of limitations determined in his favor. In most instances, the new promise would be made with less formality than the original promise, and to give the debtor his merited mercy would be to enforce the limitation period applicable to obligations in the form of the new promise. Though the courts have reached this result, none apparently has employed this type of reasoning.

revived in both situations. But as previously stated the new period of limitation should be governed by the form of the new promise. The only thing that should turn upon the distinction is the matter of pleading—whether the plaintiff would sue upon the original claim or upon the new promise.

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