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After the Running of the Three-Year Statute

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an inventory be taken once a year, the contract was not breached because the assured permitted sixteen months to elapse before taking an inventory.¹⁷

As in the case of representations, Section 4202-m has likewise changed the rule pertaining to warranties and it is now necessary, in order to avoid the policy, to show that the warranty was not only false but that it was made with intent to deceive.

On account of legislative enactments herein pointed out, it is perceived that there is a wide distinction in the law of concealments and representations as applied to fire insurance policies and the other branches of insurance, but the law applicable to warranties, as provided by Section 4202-m, seems to apply with equal force to all branches of insurance.

17. *Newton vs. Theresa Village Mut. Fire Ins. Co.*, 125 Wis. 289, 104 N. W. 107.

TAX TITLES UPON WHICH THE THREE-YEAR STATUTE OF LIMITATIONS HAS RUN

BY K. K. KENNAN, OF THE MILWAUKEE BAR.

EDITOR'S NOTE:—This is the second of two articles on tax titles by Mr. Kennan. The first, dealing with *TAX TITLES UPON WHICH THE THREE-YEAR STATUTE HAS NOT RUN*, appeared in the April number of the *Review*.

Having examined some of the technical defects which can be utilized to set aside a tax deed *before* the three-years' statute has run in its favor, we shall now consider some of the points which can be raised to set aside a tax deed *after* the statute has run, or appears to have run, in its favor.

The three-years' statute of limitations, as against the former owner, will be found in Section 1188 of the Revised Statutes, and reads as follows:

"No action shall be maintained by the former owner or any person claiming under him to recover the possession of any land or any interest therein which shall have been conveyed by deed for the non-payment of taxes or to avoid such deed against any person claiming under such deed unless such action shall be brought within three years next after the recording of such deed. Whenever any such action shall be commenced upon a tax deed heretofore or hereafter issued after the expiration of three years

from the date of the recording of such deed, unless such action shall be brought by a person who was a minor at the time the right of action shall accrue as aforesaid, such deed, if executed substantially in the form prescribed by law for the execution of tax deeds, shall be conclusive evidence of the existence and legality of all proceedings from and including the assessment of the property for taxation up to and including the execution of such deed."

The effective operation of this statute has been so uniformly sustained and its functions so clearly defined, through a long line of decisions of our Supreme Court, that it stands as a sort of corner stone upon which most of our valid tax titles rest. But it must not be thought that, because a tax deed has been recorded three years, it is therefore necessarily invulnerable to attack. There are quite a number of methods by which a tax deed may often be drawn forth from the protecting aegis of the three-years' statute and successfully assailed. If an opinion is asked as to the validity of a tax deed which has been recorded three years, it is well not to be in haste to declare it valid until the following contingencies have been carefully investigated and considered:

First: The *tax* for the non-payment of which the land was sold may have been *paid or redeemed*. It happens quite frequently that the town, village or city treasurer, in making out the tax receipts, or in noting the payments upon the tax roll, makes an error by which a description upon which the tax has been paid, is returned delinquent and sold. If the error is in the tax receipt, the party paying the taxes should notice it and have the receipt corrected. One who pays the taxes upon another man's land cannot recover the money. If a person sends a list of lands to the town treasurer and with the list the amount of money necessary to pay the taxes, and he sends back a receipt for other lands, it is such person's duty to call his attention to the error in his receipt and have it corrected; but it often happens that the receipt is correct, but the stub of the receipt is wrong, or the payment of the tax is entered against the wrong description on the tax roll, leaving the correct description to be returned as delinquent. In such a case, the receipt governs and the tax deed is absolutely void and the defect is not cured by the statute of limitation. The party holding the tax receipt can exhibit it to the county clerk, who will make a notation on the sales book of the date and number of the tax receipt and the county board will then order the deed

canceled. The tax deed holder can usually recover the money which he paid for the tax certificates and for tax deed fees and recording, with interest at seven per cent under Section 1184, Revised Statutes, if application is made for such refund within six years.

In order to investigate the question of whether the tax has been paid or not it is well to look at the stub of the tax or redemption receipt and at the entry of the payment of the tax in the tax roll or in the salesbook, if it was redeemed. It must also be remembered that there is such a thing as *constructive payment* of the tax, resulting from a *bona fide* attempt to pay the tax which is frustrated through some fault of the public official. The rule governing such cases has been enunciated by the Supreme Court as follows: "If a person offers to pay to the proper official the tax assessed upon a particular description of land for a particular year, or to redeem the land from a tax sale for such tax, and the officer informs him that there is no tax to be paid or tax sale to redeem from, and he, in good faith, relies thereon, a tax deed based on the tax which he endeavored to so pay, thereafter executed, will not pass title to the land to the grantee therein." *Nelson vs. Churchill*, 117 Wis., 10. If a person, while owner of the land, should own the tax certificates even for an instant of time this would work a redemption of the certificates, and no valid deeds could be issued upon them. *Bennett vs. Keehn*, 57 Wis., 582.

Second: There may be *minors* who are entitled to redeem. Under Section 1166, Revised Statutes, the lands of minors or any interest they may have in lands sold for taxes may be redeemed at any time before such minors come of age and during one year thereafter. The lands of idiots and insane persons so sold, or any interest they may have therein, may be redeemed at any time during the disability and during one year thereafter. It has even been held that equitable interests or interests resting solely upon moral obligation are sufficient to justify redemption on the part of a minor. In a very early case it was held that if a statute *began* to run before the death of the ancestor it would continue to run until its completed period, although the title, in the meantime, should pass from the adult owner to the minor. *Swearingen vs. Robertson*, 39 Wis., 462.

While the purposes of this law are unquestionably laudable, advantage has been taken of its provisions in ways which were

evidently not intended by those who framed it. For example, the writer knows of a millionaire landowner who deeded a large amount of his least valuable lands and city lots to his youngest son, who was only a few years old, intending, that if the land should become more valuable before this boy reached the age of twenty-two years, he would redeem them in his son's name and, if not, would let them go. In another case a large manufacturing company, which owns a great many thousand acres of cutover lands, deeded all these lands to one of its officers in trust for the daughter of that officer, who was a young child. The company continues to handle the land as before, paying taxes upon the more valuable portions and selling whenever opportunity offers. They reserve the right to redeem on behalf of the minor whenever the lands which they had supposed were worthless turn out to have some value. There is some doubt whether the courts would sustain the right of the trustee to redeem on behalf of the minor under such circumstances.

As an illustration of the tricks which may be played under this law, let us suppose that a person takes and records a perfectly valid tax deed upon a piece of land. The deed is correct in form, is properly recorded and indexed, and the land is unoccupied. Upon consulting the records he finds that the land is owned by an adult person, and, believing his title good, after the statute has run in its favor, he conveys the land by warranty deed to other parties who, perhaps, make valuable improvements. For twenty years the taxes on the land are paid by those holding under the tax deed; then, a deed is put on record, which shows that some twenty years before, the former owner conveyed the land to his infant child. The minor redeems the tax certificate upon which the tax deed was issued, and claims the land. He is not required to pay the taxes which the tax-deed holder and his grantees have paid for twenty years, nor even the cost of the tax deed; and, if he regains possession of the property without maintaining ejectment, it is doubtful whether he can be required to pay for the improvements.

It is the possibility of some such contingency as this, which makes one hesitate to say that *any* tax deed conveys a perfect title.¹

Third: The *constructive possession* of the tax-title claimant

I. NOTE:—Upon this point see the late cases of *Corry vs. Shea*, 144 Wis., 135; and *Brooks vs. Dyke*, 156 Wis., 152.—K. K. K.

may have been *interrupted* by acts of possession on the part of the original owner, in which case the statute would run *against* the tax deed instead of in its favor. In such a case the tax-title claimant could preserve his rights by bringing a suit to bar the original owner before the expiration of the three years, but he would run the risk of having his tax title defeated by any of the technical defects which would otherwise be cured by the statute.

As to the degree of possession required to constitute such an interruption our decisions are not very definite. It has been held, on the one hand, that mere fugitive, occasional acts of occupancy, such as pasturing cattle upon the land or cutting a small amount of timber, or paying taxes upon it, would not suffice to break the bar of the statute. On the other hand, the building of fences, or the cutting of pine timber, have been held sufficient. To use the words of the Court: "If the plaintiffs actually and exclusively occupied the land in question in hostility to the defendant's title and subjected the same to their will and dominion by actual and appropriate use thereof, according to its locality, quality and character, the evidence of such occupancy being tangible and visible to a person going upon and examining the land, such occupancy and use constitute adverse possession." *Finn et al vs. Wisconsin River Land Co.*, 72 Wis., 546.

Fourth: There may be *jurisdictional defects*, as, for example, that the land was not taxable at the time the assessment was made, *Whitney vs. Gunderson*, 31 Wis., 359; or was taxed in the wrong town, *Smith vs. Sherry*, 54 Wis., 114. Or that it included in part land which was exempt from taxation; *C. St. P. M. & O. Ry. Co. vs. Bayfield County*, 87 Wis., 188.

In the northern portion of this state very many tax certificates and tax deeds have been set aside upon the ground that the right-of-way of the railroad had not been excepted in the various taxing proceedings. The question has never come squarely before the Supreme Court and there is some doubt as to how they will hold in regard to it. Of course, a tax deed cannot be taken which will actually cover the right-of-way, track and roadbed, in such a way that the tax title owner could take possession of it and tear up the track, thus interfering with the public use; but in those cases where the railroad owns merely the easement over the land it might be urged with much force that this was a public, notorious, visible easement, like an ordinary highway, and that

the taxing proceedings would be presumed to have affected only the right in the soil subject to the easement.²

Fifth: There may have been an element of *fraud* in the taking of the tax deed which the statute would not cure, as, for example, when a person who bears such a fiduciary relation to the owner that it would be improper for him to take a tax deed, has attempted to do so. In a case where an agent for minors allowed their land to go for taxes and took a tax deed to himself, the whole transaction was held to be void, or more correctly speaking, the tax deed was held to have been taken for the benefit of the minors. *Pulford et al vs. Whicker et al*, 76 Wis., 555. In another case where negotiations for settlement were in progress between the original owner and the tax-title claimant, by reason of which the tax-title claimant was deterred from bringing suit within the three years, the Court held that the negotiations for settlement interrupted and suspended the constructive possession of the claimant. *Cornell Univ. vs. Mead*, 80 Wis., 387.

A mortgagor cannot take a tax deed on the mortgaged premises which will cut off the mortgage. *Newton vs. Marshall*, 62 Wis., 8. Neither can a mortgage cut off the equity of redemption of the mortgagor by means of a tax deed. *Burchard et al vs. Roberts*, 70 Wis., 111. By Section 1143, Revised Statutes, it is made unlawful for a county clerk or county treasurer, or any of their clerks or deputies, or any person for them to purchase tax certificates, and deeds upon certificates purchased in contravention of this law would not be protected by the statute.

Sixth: The tax deed may not have been properly *recorded* and *indexed*. In this case the statute would not run in its favor and the taxes could be redeemed at any time. Our Supreme Court has held, not only that a tax deed should be recorded, but also that the recording is not complete until the deed has been properly *indexed*. As to the requirements for correct indexing as set forth in Section 759 of the Revised Statutes, the reader is perhaps aware that it is not necessary to index under the head of State of Wisconsin, and that the words "see record" are sufficient under the head of description; but the writer has seen indexes in this State which do not comply with the law as to the

2. NOTE:—But, as to special assessments, see *C. M. & St. P. Ry. vs. Janesville*, 137 Wis., 7.

headings and would no doubt be held insufficient by the Court. The law requires that the index should show.

Number of Instruments,
Time of Reception,
Name of Grantor,
Name of Grantee,
Description of Land,
Name of Instrument,
Volume and page where recorded,
To whom delivered,
Fees received.

It is probable that an error or omission in the first or either of the last two of these headings would not be considered fatal; but if the instrument were described as a quit-claim deed when it was a tax deed or the wrong volume and page were given, or there was an error in the description, these defects would no doubt invalidate the record.

A curious question arises in the case of transcripts from other counties which are necessarily indexed separately and frequently in a separate volume. It remains to be seen whether the courts will consider such an indexing sufficient. In the matter of recording deeds, our Supreme Court has recently shown a disposition to be quite lenient and only requires that the record should be a substantial copy and "so near a literal copy of the same as to point out to a person of ordinary intelligence, upon a reasonably careful inspection, the subject matter and substance thereof." *Laughlin vs. Kieper*, 125 Wis., 161.

This was held in a case where the variations between the original deed and the record thereof were quite numerous and, in the writer's opinion, this decision marks a step in the wrong direction. It is not too much to require of every register of deeds that all instruments should be recorded accurately, and if anything less than an accurate transcript is to be admitted as a record, we are sure to have difficulty in drawing the line between what can be omitted with impunity and what cannot.

Seventh: The tax deed may be *cut off by a tax deed* on a later sale to a different grantee. This, of course, is not properly a defect in the tax deed, but a contingency which might operate to defeat *any* title and it is alluded to solely for the purpose of calling attention to two points. *First*. One who holds several successive tax deeds may plead and rely upon all or any of them

and is not required to elect which one he will rest his title upon. *Second.* The tax deed upon the later sale (called the junior tax deed) will cut off a tax deed based upon a previous sale, even though the deed upon the earlier sale was taken *after* the other. As much confusion has arisen on this point, it may be well to give a concrete instance. Supposing that X had taken a tax deed last June on a certificate of sale of 1905, and at a later date — say in September — Y took a tax deed on the same property on sale of 1904. X's deed, if valid, would cut Y's off, and no statute of limitation would help Y's deed unless aided by actual possession. In a recent case a somewhat curious argument was advanced. It was claimed that when a series of tax deeds were taken upon successive sales, each new deed would interrupt and terminate the constructive possession under the preceding one, so that the statute of limitations would fail to run its full period upon any of the deeds, except the last one. But our Supreme Court has disposed of this contention in a good-humored way, as follows: "No particular reason is perceived why one tax-title claimant may not be in constructive possession as to the original owner, and a subsequent tax-title claimant may not also be in constructive possession as to both the original owner and the prior claimant at the same time. The shadowy possessions will certainly not crowd each other. The whole force of the defendant's argument depends on the proposition that there can be but one constructive possession at the same time, and hence that when the second tax deed was recorded the ghostly shade which represented the plaintiff must necessarily have glided noiselessly from one side of the land, while the equally diaphanous shade of the defendant glided in upon the other side." *Cezikolski vs. Frydrychowics*, 120 Wis., 369.

Eighth. Another contingency which may arise hereafter to defeat a tax deed upon which the three-year statute has run is that made possible by Chapter 607, Laws of 1907,³ which provides that when *the original owner*, or any one claiming under him, *shall pay all the taxes* assessed against the lands continuously *for five years* next after the execution of such tax deed "without actual notice of the existence of such tax deed" said tax deed shall be void. As will readily be seen, the effect of this section could be nullified by notifying the owner of the land, after the three-years' statute had run, that a tax deed was outstanding.

3. Sec. 1187, Revised Statutes.

No cases are likely to arise calling for a construction of this act until five years after the publication of the act (which was July 15, 1907), as it does not seem to be retroactive.

Ninth: The tax deed may be *void upon its face*. A few suggestions as to the more common mistakes which render tax deeds void upon their face may not be out of place at this time. Perhaps the most common is the failure to show positively that the person to whom the deed is issued is either the purchaser at the sale or the assignee of such purchaser. In any case the name of the purchaser must be given. *Krueger vs. Knab*, 22 Wis., 409; *North vs. Wendell*, 22 Wis., 411; *Eaton vs. Lyman*, 33 Wis., 34; *Hunt vs. Stinson*, 101 Wis., 556.

Referring to the tax deed itself, it must appear that the person named in the deed as grantee is either the person designated therein as purchaser at the tax sale, or else that he was the *assignee* of such person. It has been held that where the purchasers were named as a certain county *and* an individual, this rendered the deed void as showing a joint purchase; *Sprague vs. Coenen, et al*, 30 Wis., 109. But where the deed recited that the sale was to Douglas County and to F. H. Ruger, *respectively*, this did not indicate a joint purchase and the deed was sustained. *Hunt vs. Stinson*, 101 Wis., 556.

Judge Marshall, in reviewing the various decisions mentioned in that case, said: "They have stopped short of holding that the deed must specify as to each description who was the purchaser at the tax sale, or that when there have been several assignees the facts in that regard shall appear; or that, if some of the lands were sold to one person and some to another, and that appear, with the names of the purchasers, but without showing the purchaser as to each tract, that is not substantial compliance with the requirements of the statute. * * * The purpose of the requirement that the name of the purchaser shall appear, is that the deed shall show a legal sale as regards a vendee competent to purchase, and the requirement that the tax deed shall run to an assignee of the certificate is for the purpose of showing that the tax deed issued to a person entitled to receive it."

In some counties in Wisconsin, the county clerks have attempted to improve upon the form of tax deed given in the statute by inserting an additional clause, as follows:

"And whereas it appears, as the fact is, that the aforesaid certificates have been duly assigned by the said.....
to said....."

This clause is entirely unnecessary and occasionally makes trouble, as it did in the case of *Dunbar vs. Lindsay*, in which case the name of the purchaser, William Lindsay, was written in the second line of the deed and also in the fourteenth, and thus far the deed was entirely correct; but, in the additional clause to which I have referred, the name was also filled in so that it was made to appear that the certificate had been *assigned* to the said William Lindsay. The Court held the deed void upon the ground that its recitals were contradictory. *Dunbar vs. Lindsay*, 119 Wis., 239.

In another case where the second line read, "Whereas, A. C. Probert, *assignee* of Bayfield County," etc., and the fourteenth line gave the same name as that of the *purchaser*, the Court held, that as the recitals were contradictory, the tax deed was void upon its face, said A. C. Probert, being spoken of both as assignee and purchaser. *Washburn Land Co. vs. C. St. C. & O. R. Co.*, 124 Wis., 305.

In a recent case the party taking the tax deed varied the form of it by making the second line read, "Whereas, Jennie A. White, assignee of the several tax certificates as stated below, and then inserting opposite the amount for which each description was sold, a separate column headed "Buyer of certificates at tax sale," writing out the names of the various buyers in that column. The fourteenth line set forth that the sale was made "to the said several purchasers." The Court held this deed sufficient. *Doolittle vs. J. L. Gates Land Co.*, 131 Wis., 24.

A second defect, which may render a tax deed void on its face, is any *error or indefiniteness* in the *description*. The following are instances of descriptions which have been held indefinite:

North and west part N. E. $\frac{1}{4}$ Sec. 4, T. 4, R. 12.

Part of N. W. $\frac{1}{4}$, Lot 3, B. by Wolcott, E. by Scharb, S. by Worthy, W. by Webber, 5.25 acres of Sec. 9, T. 7, R. 22, Lot 3 and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ less seven acres of Sec. 5, etc.

Third: If the *time* or *place of sale* is erroneously stated this would be a fatal defect, as, for example, if the day of sale should appear to have been a legal holiday, or a day prior to the time authorized by law. As the sale may continue from day to day, a date *later* than the third Tuesday of May⁴ is not necessarily illegal.

4. NOTE:—Now changed to second Tuesday in June.—K. K. K.

In *Wood vs. Meyer*, 36 Wis., 308, the Court held that a tax deed would not be held void on the ground that the tax sale was made at a time not authorized by law unless the Court should find that the day of sale mentioned, was *ex necessitate legis* one on which the sale could not have properly taken place.

The writer some time ago attempted to set aside a tax deed which conveyed several descriptions and which set forth that the sale took place upon the 18th, 20th and 21st days of May, the argument being that it was impossible to tell the date of sale as to any one of the descriptions and that, therefore, the date was not given. The Court did not, however, have occasion to decide the question. In a case where the place of sale was given as Green Bay when it should have been Ft. Howard, the deed was held void. *Lander vs. Bromley et al*, 79 Wis., 372.

Section 1130 of the Revised Statutes seems to require that the sale should be conducted at a public place, at the seat of justice of the county, but our court has held that a statement that the land was sold at the county treasurer's office in Bayfield County was sufficient.

Fourth: If the deed shows upon its face that it was *issued before the expiration of three full years from the date of sale*, it is clearly void upon its face. For example, if the sale took place May 20, 1902, and the deed was issued May 20, 1905, it would be void, as the owner or occupant under Section 1165 has the right to redeem "at any time within three years *from* the date of the certificate of sale." *Whittlesey vs. Hoppenyan*, 72 Wis., 140; *Safford vs. Conan*, 88 Wis., 354; *Gates vs. Parmly, et al*, 93 Wis., 294.

The issuance of the tax deed one day too soon is quite a common error and one which is easily overlooked.

It has been held that where the tax deed was not dated at all, but the acknowledgment was dated, the deed was not necessarily void for that reason, as it took effect from delivery and the statute of limitations began to run from the date of the indexing and recording. *McMichael vs. Carlyle*, 53 Wis. 504.

Fifth: *The deed may have been issued upon outlawed certificates.* Section 1182 of the Statutes expressly provides that no tax deed shall issue on a tax certificate after the expiration of six years from date of the sale or assignment. If the tax deed shows on its face that it was issued more than six years from

the date of the purchase of the certificate, this would render it void.

The statute further expressly provides that no tax deed shall be issued on any tax certificate after fifteen years from the day of sale. The date of assignment does not usually appear on the tax deed, but can be ascertained by looking up the tax certificate which will be attached to the affidavit of non-occupancy or the notice of taking tax deed. The county clerk probably has no jurisdiction to issue a tax deed on an outlawed certificate.

Sixth: In several early cases it was held that the omission of the words "as the fact is" would render the deed void upon its face. *Lain vs. Cook*, 15 Wis., 446; *Wakely vs. Mohr*, 18 Wis., 336; *Cutler vs. Hurlbut*, 29 Wis., 152; *St. Croix Land & Timber Co. vs. Ritchie*, 73 Wis., 409.

Seventh: The omission of the State of Wisconsin as one of the grantors, has repeatedly been held sufficient to render the deed void on its face, and if the State were given as one of the grantors, and the county omitted, the result would be the same. This omission is quite frequently found in deeds which are not drawn on regular forms, but are written out with a pen. *Woodman vs. Clapp*, 21 Wis., 355; *Lindsay vs. Fay*, 25 Wis., 460; *Eastley vs. Whipple*, 51 Wis., 485.

Eighth: The absence of the county seal will render the deed void on its face, though the Court has recently shown a disposition to give great force to the recital in the testimonium clause to the effect that the deed was sealed. The seal can be in any form which has been adopted by the county board as the county seal, and it does not seem to be held necessary that the record of the deed should contain an exact copy of the seal. A scroll with the word "seal" written in it has been held sufficient. *Hunt vs. Miller*, 101 Wis., 583.

Ninth: The absence of one or both of the witnesses required by the statute will invalidate the deed, and prevent the statute from running in its favor. *Whittlesey vs. Hoppenyan*, 72 Wis., 140.

Tenth: A *defective acknowledgment would*, of course, render a deed void. The Court has held that the ordinary form of acknowledgment is sufficient. *Laughlin vs. Kieper*, 125 Wis., 161.

This concludes a somewhat hasty and imperfect review of some of the more common errors and defects which can render a

tax deed invalid even after it has been recorded three years. These points may be of some assistance in passing upon the validity or invalidity of a tax deed. No attempt has been made to exhaust the subject of tax titles; this discussion has been limited to only one phase of it. Every man, and especially every lawyer, is presumed to know the law; but in the matter of the very complex law of tax titles the presumption is a violent one. It may be of interest to know that the number of what might be called "tax cases," down to and including Volume 133 of the Wisconsin Supreme Court Reports is 1136. It is to the credit of our Supreme Court, that through all this maze of litigation they have constantly kept in view certain definite, fixed principles and as a result the law of tax titles, in this State, has crystallized into clear, coherent, definite form.

The writer has had occasion during the past ten years to visit most of the other States of the Union for the express purpose of studying their system of taxation, and it seems that the State of Wisconsin has today a more definite, clearly defined and rational system of taxation than can be found in any other State; and it may safely be added that in no other State have the proper theory and functions of the tax title been more fully developed and applied. It is doubtful whether in any other state so many good tax titles can be found. In 1896 our Supreme Court, after some hesitation held that a tax title fair upon its face was *prima facie* a marketable title, which the vendee was bound to accept as such unless objection was made and it was found upon a hearing to be not free from reasonable doubt. *Gates vs. Parmley*, 93 Wis., 312.

A Wisconsin tax deed may be, and often is, as strong a title as a patent direct from the government. Millions of dollars worth of valuable property are now securely held by such titles in this State.

The subject of tax titles is, therefore, a very important one to Wisconsin lawyers, and is deserving of close study and attention.