Constitutional Law - Due Process of Law - Denial of Counsel to Indigent Defendants in State Criminal Trials

Joan Moonan
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DISCHARGE UNDER SECTION 14
SUB. c(2) AND (3) OF THE
CHANDLER ACT

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SECTION 14 Sub. c(2) and (3) of the Chandler Act reads as follows:
"The court shall grant the discharge unless satisfied that the bankrupt has ***(2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) obtained money or property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; ***(3)."

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2 11 U.S.C.A., Sec. 32, C(2) and (3).
The matters embraced in the foregoing provisions have received considerable attention by the Federal Courts, and there are numerous authorities construing the sections involved. It would appear that the Bar generally has not given sufficient attention to the rights afforded both the bankrupt and the creditors and also to the duties of the bankrupt under these sections. The hazards involved to the bankrupt in obtaining a discharge are great and the penalty to him, denial of his discharge, may be very severe in many instances.

I. Sub. c(2)—Failure to Keep Proper Books

Both Congress and the courts have indicated a disposition towards increasing the strictness of compelling the bankrupt to properly account for his assets under this section of the Act. The Act originally provided that it was necessary to establish that the bankrupt's destruction or concealment of adequate records, or his failure to keep them, was with "fraudulent intent to conceal the true financial condition and in contemplation of bankruptcy."

In 1903 the Act was amended and omitted the word "fraudulent" and also the phrase "in contemplation of bankruptcy," and in 1926 the Act was amended to its present form to provide that books must be kept "from which his financial condition and business transactions might be ascertained; unless the court deems such failure to have been justified under the circumstances of the case." It was realized that the former provisions made it practically impossible to prevent a discharge under this provision, in view of the fact that it was necessary to establish that the destruction of books or the failure to keep books was done with intent to conceal and in "contemplation of bankruptcy." Both Congress and the Courts have come more and more to realize the necessity of the keeping of proper books in any business in order that the business might be successfully conducted. Many businesses have failed because of inadequate bookkeeping and bankruptcy has thereby resulted.

Under the present Act the burden of proving the intent to conceal has been taken from the objecting creditor or the trustee, and the burden of proving justification is placed upon the bankrupt. There is thus indicated on the part of Congress a purpose to lodge with the bankruptcy court a reasonably wide judicial discretion in the matter, and the cases have indicated this wide discretion on the part of the Bankruptcy Court. A finding by the trial court will not be upset unless there is an absolute abuse of discretion and the finding was clearly erroneous.

Where the creditor has shown an absolute lack of any adequate records, the burden of satisfying the Court that the failure to produce
them by the bankrupt was justified is on the bankrupt. Under subsection (c) it is necessary only that the objector show to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which would prevent his discharge, and then the burden of establishing otherwise is upon the bankrupt.

The making of false entries is of course an absolute ground for preventing the discharge of the bankrupt under this subsection. The mere neglect to keep books, or inadvertence or mistake in keeping books showing the bankrupt's financial condition, is under many circumstances not sufficient grounds for the refusal of the discharge. It is of course not necessary that the bankrupt, in every instance, keep a set of books, and this is particularly true in the case of wage earners who are not involved in any extensive financial transactions. It has been consistently held that this class of bankrupts need not establish the keeping of books in order to obtain a discharge. Where, however, a salaried employee has borrowed extensively or made extensive loans to his relatives or family, it has been held that his failure to properly record the transactions in an adequate manner is ample grounds to prevent the discharge.

The failure to keep books in the case of a clergyman receiving money from several sources and borrowing considerable sums was held to be grounds for denial of a discharge.

It is generally held that the nature and not the size of the bankrupt's business or enterprise determines the necessity of keeping books and records, and the facts in every case must be scrutinized closely in order to determine the necessity of a bookkeeping system. The rule is stated as follows:

"What will justify that failure depends largely upon how extensive and complicated the bankrupt's business is—a cobbler will succeed with much less than a manufacturer—but the important change is that since 1926 no moral obliquity need be shown. Honesty is not enough; the law demands as the condition of a discharge either that the bankrupt shall produce such records as are customary to be kept by a person doing the same kind of business, or that he shall satisfy the bankruptcy court with adequate reasons why he was not in duty bound to keep them."

A recent case arising in this district and decided January 28, 1942, is that of John Henry Marx, Bankrupt, in which the Circuit Court...

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2 White v. Schoenfeld, 117 Fed. (2d) 131 (1941).
3 In re Perkins, 40 Fed. Supp. 114 (D.C., N.J. 1941); In re Pinko, 94 Fed. (2d) 259 (C.C.A. 7th, 1938).
5 In re Northridge, 53 Fed. (2d) 858 (D.C. N.Y. 1931).
6 White case, note 2.
7 125 Fed. (2d) 335 (C.C.A. 7th, 1942).
of Appeals held that Marx, a real estate broker, engaged in the general real estate business, was not entitled to a discharge by reason of his failure to keep books. In 1935 he was hopelessly insolvent and in 1936 he engaged in the purchase and sale of property in the name of his daughter, and to protect himself against garnishment he began to take bank accounts per himself as trustee or some similar designation. He paid no regard to the source of the moneys and deposited them all together in the same account, and actively drew on the account for every purpose. He kept no books of any kind, and the bankrupt's records were at variance with his own bank records and checks. He kept no copies of income tax returns which he had filed, and the returns of three of these years had disappeared from the assessor's office. Under this set of facts the Referee found that the bankrupt was not entitled to a discharge. In affirming the order based upon the Referee's findings, the Court stated as follows:

"What books of accounts or records satisfy the requirement of section 14c (2) are, of course, not a constant. In each case they are a function of the nature of the particular bankrupt's business transactions and financial condition. What would suffice in one, would be hopelessly unsatisfactory in another. Yet, the absence of articulated mechanics does not leave a broad area of uncertainty in which all must wander with no idea of whether they would be entitled to a discharge if economic misfortune should overtake them. Records or books of accounts are but the means to an end, the ascertainment of the bankrupt's financial condition and his business transactions, and any records which meet that end are satisfactory. They should show in some way his loss and gains, and present a satisfactory explanation of the receipts and disbursements. This condition precedent to discharge strikes at otherwise non-demonstrable fraud, for no longer does the successful objecting creditor have to prove the absence or inadequacy of the records was with intent to conceal; the bankrupt must now really have the necessary records or explain why the circumstances of his case excuse his failure. By no longer requiring proof of such intent, the statute has narrowed the bankrupt's road to the salutary discharge. * * * Now, whenever a section 14c (2) objection to the discharge is raised, the bankrupt's records must be adequate, unless excused by circumstances, or the discharge will be denied. With this considerable penalty upon inadequate books or records, perhaps the adequacy of the records kept will increase and thereby at least help remove whatever causal relation exists between inadequate bookkeeping and bankruptcy.

"The statute lodges in the bankruptcy court a reasonably wide judicial discretion in determining whether the failure to keep books of account or records was justified under all the circumstances of the case, and the determination of that question will
DISCHARGES UNDER THE CHANDLER ACT

not be disturbed on appeal except in case of abuse of such discretion.8

In the case of In Re Herzog,9 a set of books was kept, but transactions by a partnership and a corporation were so intermingled and the books were in such shape that not even an auditor could ascertain the financial condition of the bankrupt, who was interested in the corporate and the partnership affairs. The only excuse offered by the bankrupt was ignorance to differentiate between corporate and partnership activities. It was held that this was no excuse and that ignorance and honesty are not a sufficient justification where a bankrupt was conducting a business as extensive as the one involved in that case.

It can readily be observed, therefore, that an attorney representing a bankrupt must be careful to protect the bankrupt's rights by establishing either that the nature of the business did not necessitate the keeping of books or that the books which the bankrupt kept were adequate to determine the bankrupt's financial condition at all times.

II. SECTION 14 SUB. C(3). FALSE STATEMENTS IN WRITING

In order to establish that a bankrupt is not entitled to a discharge under this subsection, it is necessary to consider five essential elements, to-wit:

(a) Statement must be in writing.
(b) It must be materially false.
(c) Bankrupt must have knowledge of the falsity.
(d) Property must be obtained or credit extended.
(e) Creditor must have relied upon the statement.

(a) Statement in Writing Regarding Financial Condition

Statements under this section must be in writing and must involve the financial condition of the bankrupt. The most common form of statement is a financial statement given to a creditor for the purpose of obtaining property or an extension of credit. The most common form of falsity in statements is as to the concealment or overstatement of general accounts or of money borrowed, which is understated. In many cases the bankrupt will give a statement in which he disregards family obligations, and at the time of the bankruptcy the member of the family will then file a claim for the amount of the indebtedness.

It is held that the issuing of bad checks does not constitute a false statement in writing.10 A false statement means more than a mere

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9 121 Fed. (2d) 581 (C.C.A. 2d, 1941).
representation. Although the debt represented by the bad check is not dischargeable, that fact in itself is not sufficient to prevent the discharge of other obligations of the bankrupt. In the case of chattel mortgages, it has been held that a bankrupt giving a chattel mortgage on property which he does not own is not entitled to a discharge, as the chattel mortgage constitutes a false statement in writing.\(^{11}\)

On some rather unsound reasoning it was held in \textit{In Re Hudson}\(^{12}\) that a chattel mortgage does not constitute grounds for denying the discharge, it being stated in that case that the debt represented by the chattel mortgage comes under a non-dischargeable debt and is not a ground for discharge, in view of the fact that the two are inconsistent. This case was referred to in the \textit{Powell} case and the court stated that it felt the reasoning of the \textit{Hudson} case was rather unsound.

There was formerly considerable conflict in the holdings regarding the question as to whether or not commercial reports were false statements within the Act. The question seemed to turn upon whether or not the agency obtaining the statement actually represented the subscribing creditor at the time the statement was given by the debtor. There can be no question, of course, that where the agency is constituted the bankrupt's agent to circulate a false statement, which the agency obtains in making a special investigation for the subscriber, the bankrupt would not be entitled to a discharge.\(^{13}\) It has, however, been more recently held that statements given to credit companies do constitute false statements in writing within the meaning of the Act.\(^{14}\) In the \textit{Muscara} case\(^{15}\) the Court states as follows:

"The test, therefore, is whether the agency to which the false statement was made was in fact the representative of the person who, receiving the statement, extended credit. From the very nature of its occupation, a mercantile agency is the representative or agent of its subscribers in the business of obtaining for them credit ratings of persons with whom they propose to have dealings, and when a false statement is made to such representative and is communicated to the subscriber with the result that the subscriber relying upon it, sells property and extends credit to one who becomes bankrupt, then the situation contemplated by the provision arises. If the amendment of 1910 did not thus enlarge the provision, then it did not change the law from what the courts had interpreted it to be before the addition of the word 'representative'."

\(^{11}\) \textit{In re Powell}, 22 Fed. (2d) 239 (D.C. Md., 1927).
\(^{12}\) 262 Fed. 778 (D.C. Ala., 1920).
\(^{13}\) 6 Am. Jur. 796.
\(^{15}\) \textit{In re Muscara}, 18 Fed. (2d) 606 (D.C. Pa., 1927).
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It would therefore seem that under the present Act statements made to credit reporting companies and circulated to their subscribers do constitute false statements in writing.

(b) Materially False Statements

Insignificant omissions of liabilities from a statement are not sufficient to constitute grounds for the denial of the discharge. The failure to list a contingent liability, which is doubtful, has been held not to render the statement false and it has also been held that an omission of an equal amount of assets and liabilities does not of itself make the statement materially false. However, the mere showing of a substantially correct balance of assets over liabilities was held not to excuse understating both of them.\(^6\) The question as to whether or not the falsity is material, of course must be governed by the amount involved and the circumstances in each case. Of course, if the omission of a liability which is contained in the statement would show the insolvency of the debtor, this would obviously be sufficient to render the statement materially false.

(c) Knowledge of Falsity

While the Act does not provide that there must be any intent on the part of the bankrupt, it would seem that the bankrupt must have knowledge of the falsity of the statement, either actual or implied, in order to bring it within this section. The rule has been stated as follows:

"In consideration of the primary and ordinary meaning of the word 'false' and of the general characteristic of personal misconduct that attaches to all but one of the other specified grounds for denying a discharge, and because there is no good reason why an incorrect statement innocently made to one creditor should bar the discharge of the bankrupt as to all his other debts, whatever be its effect as to the debt of that particular creditor, the word 'false' as here employed is not merely equivalent to 'untrue' or 'incorrect,' but it connotes a guilty scienter on the part of the bankrupt, and requires that the written statement made for the purpose of obtaining credit shall be knowingly and intentionally untrue in order to constitute a bar to the bankrupt's discharge. Ordinary negligence—as, for example, merely signing as a matter of form a blank which has been filled out incorrectly by another, under extenuating circumstances and without any intent on the bankrupt's part to deceive—does not seem to be contemplated as ground for refusing a discharge."\(^7\)

\(^6\) In re Maaget, 245 Fed. 804 (D.C. N.Y., 1911).
\(^7\) 6 Am. Jur. 793-4.
As held in *Third National Bank v. Schatten*, the provision "false statement in writing" implies that the statement is knowingly false or made recklessly without the owner's belief in its truth and with purpose to mislead or deceive. It has been held that actual knowledge of the falsity and conscious intent to deceive are not essential to denying the discharge on this ground where the bankrupt makes no effort to verify the facts and does not inquire into omitted liabilities, and in conformity with this holding it has also been held that the bankrupt's failure to read a statement dictated by the manager of the creditor, where the language of the statement was unambiguous, did not relieve the bankrupt from the falsity of the statement.\(^1\)

It will therefore be noted that it is not necessary to establish absolute knowledge on the part of the bankrupt of the falsity of a statement, but that any reckless indifference in making the statement is sufficient.

\[(d)\] **Obtaining Property or Extension of Credit**

The fourth essential element to the denial of a discharge on this ground is that the bankrupt must have obtained property in some form or the extension of time to pay an existing obligation. It had been held prior to the 1926 Amendment of the Act that the extension of credit on a present indebtedness was within the Act, but this holding was probably erroneous under the former provisions. The Amendment of 1926 expressly provided for the renewal of credit and the Chandler Act so provides.

There was at one time some conflict in the authorities as to whether or not the bankrupt who gave the false statement must be the recipient of the property or credit, in order that the discharge be denied. These cases usually arise out of a stockholder giving the statement to obtain money for the corporation in which he is interested. This question was definitely settled, however, in *Levy v. Ind. Fin. Corp.*, \(^2\) wherein the Supreme Court affirmed the decision of the lower court to the effect that the property need not be obtained by the bankrupt, but it was sufficient that a corporation in which the bankrupt had a substantial interest obtained the property.

There was also some conflict in the cases as to whether or not a surety's obligation on a bond furnished to the bankrupt is "Property" within the meaning of the Act. It has now been definitely settled that a surety bond was "property" within the meaning of the Act. \(^2\)

If after the false statement was given there never was a larger amount due the creditor than at the time the statement was given and

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1. 81 Fed. (2d) 538 (C.C.A. 6th, 1936).
2. 276 U.S. 281, 72 L.Ed. 572 (1927).
in making application for new credit, the bankrupt partially reduced the indebtedness, such circumstances do not prevent the denial of a discharge on this ground.

(e) **Reliance by the Creditor**

A concise statement on this point is contained in *Remington on Bankruptcy,* as follows:

"The false statement must have been relied on, and if it was not relied on in parting with the property, the discharge will not be barred.

"But reliance may be proved by circumstantial evidence, and the mere facts that the statement was asked for and furnished as a basis of credit, and that the goods were supplied within a reasonable time thereafter are sufficient proof that the creditor parted with the merchandise on the strength of the representation, in the absence of adequate rebutting evidence."

"It is a sufficient 'reliance' if the decision to give the credit was induced by the false statement, or that, had the truth been stated, the credit would not have been given. If the reliance was not upon the false statement, but rather upon the fact that payments of preceding invoices had been made or dividends on the stock sold had been received, it is not a sufficient reliance to bring the case within the statute.

"It is not necessary, however, that the false written statement shall have been the sole thing relied on, nor that the credit shall have been obtained solely on the written statement; thus, a discharge will be denied where the false statement was accompanied with a deposit of securities, if the credit would not have been extended had not the statement also been given. For, usually, there are many other things also taken into account and relied upon in giving credit, as, for example, the health of the applicant, his industry, etc., etc., but such other reliance is no defense, if the statement was one of the material elements in the extending of the credit.

"Long lapse of time between the making of the statement and the extending of the credit naturally tends to weaken the likelihood of reliance being had upon the statement when the credit was granted."

There is a presumption that where credit is given, the creditor relied on the statement, this being particularly true if the credit is extended immediately following the giving of the statement. The burden of proof is then upon the bankrupt to establish that the creditor knew the truth and could not have relied on the false statement. Where the creditor insists upon and obtains security before extending credit, it has been held to indicate the lack of reliance on the creditor's part, but the making of an independent investigation does not establish the lack of reliance on the false statement.

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24 73 L.Ed. 593, note.
THE STATUTE OF FRAUDS AFFECTING SALES OF GOODS

Lloyd J. Planert*

Historically, the Wisconsin Statute of frauds affecting sales of goods is derived from the English statute enacted in 1677.¹ The English legislation was incorporated into our statutory law in 1849 and has since remained there without substantial change or amendment.² The purpose of the Wisconsin statute³ is the same as that of the English statute, namely to prevent fraud by avoiding the enforcement of baseless sales through perjured oral testimony, the means provided by the statute being a requirement of written or otherwise adequate evidence of the transaction.⁴

The Wisconsin statute provides that no contract to sell or sale of any goods or choses in action of the value of fifty dollars or upwards shall be enforceable by action unless 1) a contract to sell or sale valid at common law is shown, and 2) the statute of frauds is satisfied in one of three specified ways.⁵ These three alternate methods of complying with the statute are as follows: 1) the buyer must “accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same”;⁶ or 2) the buyer must “give something in earnest to bind the contract, or in part payment”;⁷ or 3) there must be some “note or memorandum in writing of the contract or sale . . . signed by the party to be charged or his agent in that behalf.”⁸ Until the making of a contract to sell or sale and a compliance with one of the three specified means of satisfying the statute has been proved, no recovery can be had on the alleged contract; the defendant can withdraw without liability.⁹ This is a firmly established rule and cannot be derogated or abrogated by any custom or conduct of the parties in prior transactions.¹⁰

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¹ Korner v. Madden, 152 Wis. 646, 140 N.W. 325 (1913); 29 Car. IIc 3.
² Korner v. Madden, 152 Wis. 646, 140 N.W. 375 (1913).
³ Wis. Stat. (1941) § 121.04.
⁴ Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904); Holdsworth, History of English Law, Vol. VI, pp. 384, 386.
⁶ Wis. Stat. (1941) § 121.04(1).
⁷ Idem.
⁸ Idem.
⁹ Supra, note 5.
While the statute seems clear enough, yet its application to many and different transactions has naturally given rise to varying questions and divergent views of solution. A consideration of some of these questions and the interpretation which the Wisconsin Supreme Court and the courts of other jurisdictions have placed upon the statute, is the purpose of this paper.

A question that arises at the outset in a cause involving the statute of frauds, is one of pleading, namely, whether the statute must be pleaded as an affirmative defense or may be relied on under a denial of the contract of sale. The authorities are thoroughly divided on this question, some declaring that advantage may be taken of the statute under a simple denial of the contract,1 while others following the English rule,2 require it to be affirmatively pleaded.3 The Rules of Civil Procedure for the District Courts of the United States, likewise require the Statute of Frauds to be set up as an affirmative defense.4 Since under the wording used in the statute "shall not be enforceable by action" a transaction is not entirely void without a writing but merely unenforceable5 it would seem that the authorities requiring the statute to be affirmatively pleaded present the sounder view. While Wisconsin in Flatley Brothers v. Beauregard,6 seems to have aligned itself with the states holding that the statute need not be affirmatively pleaded, it should be noted that this decision is expressly based on a second version of the statute of frauds found in the Wisconsin Statutes at the time of that decision in 1927, namely Section 241.03 which provided that any contract in violation of the statute of frauds shall be "void." Section 241.03 was repealed in 19317 so that when the question again comes up for determination, Wisconsin probably will align itself with the states and the Federal Rules which require the statute to be affirmatively pleaded.

1 Connecticut Practice Book, 1934, No. 104; Flatley Bros. Co. v. Beauregard, 192 Wis. 174, 212 Wis. 262 (1927); Mason-Hefflin Coal Co. v. Currie (1921) 270 Pa. 221, 113 Atl. 202; Franklin Sugar Refining Co. v. Eiseman (1927) 290 Pa. 486, 139 Atl. 147; Quinn-Shepherdson Co. v. Triumph Farmers' Elevator Co. (1921) 149 Minn. 24, 182 N.W. 710.
4 Rule 8 (c).
6 192 Wis. 174, 212 N.W. 22.
7 1931 c. 470. s. 8.
As to the subject-matter within the statute, an examination of its provisions discloses that it includes two types of contracts, namely, a “contract to sell” and a “sale”; it also reveals that the statute is applicable to two definite classes of subject matter, namely, “goods” and “chooses in action.” The statute therefore can apply to four different situations, namely, to a contract to sell goods, to a sale of goods, to a contract to sell a chose in action and to a sale of a chose in action. The significance of each of these four key concepts will next be considered.

The connotation that is to be given to a “contract to sell” and a “sale” as used in the Uniform Sales Act offers no difficulty inasmuch as both terms are defined expressly in the Act. The distinction between the two terms is a fundamental one. In the case of a “contract to sell,” the seller merely agrees to transfer the property in the goods to the buyer; the actual transfer takes place at some future time. In the case of a “sale,” the seller actually transfers the property in the goods to the buyer as of the time of the sale.

These absolute terms, namely, “contract to sell” and “sale,” are qualified by the succeeding words “of any goods or choses in action.” The first of these two words, namely “goods,” as construed by the Wisconsin Supreme Court include any personal property in existence at the time of the making of the contract, and also personal property not ready for delivery or even existent at the time of the making of the contract provided that it need not be made especially for the buyer.

That “goods” means “personal property” is apparent from the following expression of the Wisconsin Supreme Court: “The alleged contract in question was one for the sale of personal property and so comes within the statute of frauds....” Particular illustrations are the holdings of the Supreme Court of Wisconsin that the following subjects of contracts to sell or sales are “goods” within the statute of frauds: wheat, land scrip, trees, logs, potatoes and the sale of one-fourth of an interest in a boat. The latter decision indicates that

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18 Wis. Stat. (1941) § 121.04.
19 Idem.
20 Wis. Stat. (1941) § 121.01. “Contracts to sell and sales.
   (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price.
   (2) A sale of goods is an agreement whereby the sellers transfers the property in goods to the buyer for a consideration called the price.”
21 Wis. Stat. (1941) § 121.04(1).
22 Idem. § 121.04(1) (2); Meinicke v. Falk, 55 Wis. 427, 13 N.W. 545 (1882).
23 Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920).
24 Hooker v. Knab, 26 Wis. 511 (1870); Nichols v. Mitchell, 30 Wis. 329 (1872).
25 Smith v. Bouck, 33 Wis. 19 (1873).
26 Hawkinson v. Harmon, 69 Wis. 551, 35 N.W. 28 (1887).
27 Hansen v. Roter, 64 Wis. 622, 25 N.W. 530 (1885).
29 Brown v. Slauson, 23 Wis. 244.
Wisconsin regards even the sale of an interest in a chattel as personal property and thus "goods" within the statute of frauds. Whether or not corporate stock is "goods" within the statute of frauds has been an issue of considerable controversy in some jurisdictions, but the matter is definitely settled in Wisconsin, corporate stock being without question included in the term "goods." 30 "There may be some doubt arising from the decisions elsewhere" says the Circuit Court of Appeals of the Seventh Circuit "as to whether 'corporate stock' is 'goods' as used in the Statute of Frauds, but for Wisconsin the question is settled by decision...." 31

The statute of frauds 32 itself is authority for the statement that "goods" includes personal property even though not ready for delivery or in existence at the time of the making of the contract. It is to be noted, however, that not all cases in which personal property is involved are held to be within the statute of frauds. The statute expressly excludes from its scope contracts to sell and sales of goods that are "to be manufactured by the seller especially for the buyer, and are not suitable for sale to others in the ordinary course of the seller's business. ..." 33 This provision marks the distinction between contracts for manufacture and sale which are by this provision excluded from the operation of the statute of frauds, and contracts of sale only where there is nothing for the seller to do but to tender the property, which are within the statute. Although this enactment would seem to present no special difficulty, yet a full appreciation of its import especially in view of some broad language in the cases 34 requires a consideration, not only of the determinative Wisconsin decisions, but also an examination of the history of this "exclusion" clause. 35 Due to border line cases between contracts for manufacture and sale which are not within the statute and contracts of sale only which are within the statute, there was much conflict of authority in various jurisdictions as to the rule by which to determine whether a contract was within one class or the other, this conflict resulting in the development of three specific rules—the English Rule, 35a the New York Rule, 35b and the Massachusetts

30 Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920); Backus v. Taplin, 81 Fed. (2d) 444 (C.C.A. 7th, 1936).
31 Backus, ibid.
32 Wis. Stat. (1941) § 121.04.
33 Ibid. § 121.04(2).
34 Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904); Boyington v. Sweeney, 77 Wis. 55, 45 N.W. 938 (1890); Wiger v. Carr, 131 Wis. 584, 111 N.W. 657 (1907).
35 Wis. Stat. (1941) § 121.04(2).
Rule. The English Rule if the contract is intended to result in the transfer of a chattel in which the vendee had no previous property, then, although work and labor are to be done on such chattel before delivery, the contract is within the statute of frauds. The New York Rule states that an agreement for the sale of any commodity not in existence in solido at the time, but which the seller is to manufacture or put in condition to be delivered is not a contract of sale within the statute of frauds, but, if at the time of the agreement the commodity sold substantially exists in its ultimate form, or is to be procured in substantially its ultimate form from others, then, even though acts remain to be done in finishing it, the agreement is a contract of sale within the statute of frauds. The Massachusetts Rule, is as follows: "A contract for the sale of articles then existing, or such as the vendor in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods, to which the statute applies. But on the other hand, if the goods are to be manufactured especially for the purchaser, and upon his special order, and not for the general market, the case is not within the statute. . . ." The difference between the three rules is well stated in an Oregon case as follows: "By the Massachusetts rule, the test is not the existence or non-existence of the commodity at the time of the contract, as in New York, or whether the contract will ultimately result in the transfer of the title of a chattel from vendor to the vendee, as in England, but whether the article is such as the manufacturer ordinarily produces in the course of business, and for trade, or as the result of a special order and for special purposes. If the former, it is regarded as a contract of sale, and within the statute; if the latter, it is held to be essentially a contract for labor and material, and, therefore, not within the statute. . . ."

Under the English Rule, Missouri has held contracts to make a coat and vest of peculiar design and pattern, and to make a number of special drawings to be contracts for the sale of goods and within the statute of frauds. Such contracts would be held to be contracts for skill and labor and, therefore, not within the scope of the statute of frauds under the Massachusetts Rule.

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35d Supra, note 29.
35f Alfred Shrimpton & Sons v. Dworsky, 21 N.Y.S. 461, 2 Misc. 123 (1892).
35g Seymour v. Davis, 4 N.Y. Super 239.
36 Supra, note 31.
38 Idem.
The Massachusetts Rule, being a part of the Uniform Sales Act, is the most generally accepted American doctrine. It has been adopted by thirty-three of the forty-eight states, namely, Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kentucky, Missouri, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming; Alaska, the District of Columbia, and Hawaii have also accepted the Act. In the Meinicke case, the Wisconsin Supreme Court referring to the Massachusetts Rule lays down the conforming interpretative Wisconsin "exclusion" rule as follows: "We are inclined to think that the rule announced by Chief Justice Shaw . . . and followed in Goddard v. Bin-

43 Wis. Stat. (1941) § 121.04(2).
42 Supra, note 37.
41 Idem.; Cape County Milling Co. v. Morris, 137 Ark. 430, 208 S.W. 792 (1919); Moore v. Camden Marble Works, 80 Ark. 274, 96 S.W. 1063 (1906).
39 Supra, note 43; Crockett v. Scribner, 64 Me. 447 (1875).
37 Supra, note 43; O'Neil v. N. Y. Mining Co., 3 Nev. 141.
36 Supra, note 43; Courtney v. Bridal Veil Box Factory, 55 Ore. 210, 105 Pac. 896 (1909).
35 Supra, note 43; McDonald v. Webster, 71 Vt. 392, 45 Atl. 895; Scales v. Wiley, 68 Vt. 39, 33 Atl. 771 (1895).
34 Supra, note 43; Meinicke v. Falk, 55 Wis. 427, 13 N.W. 545 (1882).
ney, . . . is entitled to our confidence and respect. We, therefore, hold that, while an executory contract for the sale of an article for the price of $50 or more may be within the statute, notwithstanding such article does not at the time exist in solido, yet where such contract is to furnish materials and manufacture the article according to specifications furnished or a model selected, and when without the special contract the thing would never have been manufactured in the particular manner, shape, or condition it was, then the contract is essentially for skill, labor, or workmanship, and is not within the statute.\textsuperscript{80} The legal basis upon which the Massachusetts Rule is founded is stated as follows by the Wisconsin Court: Contracts for the purchase of goods that are to be manufactured especially for the buyer and that are not suitable for sale on the general market are not within the statute of frauds because such contracts imply "that the application of such labor and capital in the execution of the agreement is to be accepted as the work of the manufacture processes, contingent upon the thing, when produced, corresponding to that ordered. The result is that, as soon as the process of manufacture commences the contract is no longer wholly executory. When the article contracted for is ready for delivery and the situation is such that it might then form the subject of a sale within the meaning of the statute, the real contract has been substantially performed upon one side. To allow the statute of frauds to then interfere with the final consummation of the agreement would be a use thereof to perpetrate fraud instead of to prevent fraud."\textsuperscript{81}

Wisconsin, under the Massachusetts Rule, has held the following contracts to be contracts, not for the sale of goods, but for skill and labor, and, therefore, not within the statute of frauds: a contract for a specially-built carriage,\textsuperscript{82} a contract for the publication of an advertisement in a newspaper,\textsuperscript{83} a contract for iron-work to be manufactured according to a particular design,\textsuperscript{84} a contract for specially-made matting,\textsuperscript{85} and a contract for the purchase of certain lithographs and engravings to be made according to a specific design.\textsuperscript{86}

However, one Wisconsin case,\textsuperscript{87} as a result of its general language, causes a quaere to arise as to whether the Wisconsin "exclusion" clause\textsuperscript{88} should really be limited to goods that are to be manufactured especially for the buyer or whether this enactment should also embody

\textsuperscript{80} Idem.
\textsuperscript{81} Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904).
\textsuperscript{82} \textit{Supra}, note 79.
\textsuperscript{83} Goodland v. LeClair, 78 Wis. 176, 47 N.W. 268 (1890).
\textsuperscript{84} Heintz v. Burkhard, 29 Ore. 55, 54 Am. St. Rep. 777 (1896).
\textsuperscript{85} \textit{Supra}, note 81.
\textsuperscript{86} Central Lithographing & Engraving Co. v. Moore, 75 Wis. 170, 43 N.W. 1124 (1882).
\textsuperscript{87} Gross v. Heckert, 120 Wis. 314, 97 N.W. 952 (1904).
\textsuperscript{88} \textit{Wis. Stat.} (1941) § 121.04(2).
contracts for the sale of any goods that must be manufactured in the future. In the case in question, namely, the Gross case, the court uses the following language: "That statute (statute of frauds) relates only to the executory sales of property; not to contracts for the manufacture and sale of property. Meinicke v. Falk, 55 Wis. 427 . . ." Accepting this general statement as it stands, it would seem that the Wisconsin "exclusion" clause is meant to include all contracts wherein the goods must be manufactured in the future regardless of whether these goods are to be manufactured especially or in the ordinary course of the seller's business. However, in view of the fact that the court cites the Meinicke case as authority for its general statement, and in view of the fact that the case concerns specially made matting, it is apparent that the court referred only to goods that were to be manufactured especially for the buyer and which would not be suitable for sale in the ordinary course of the seller's business. That such is the rule is thoroughly established by the words of the statute itself and the Hansen case. In that case the court held that a contract for the sale and delivery of logs was a contract for the sale of goods within the statute of frauds even though it was necessary for the vendor to cut, transport and deliver the logs to a certain place. The court spoke as follows: "The logs were an ordinary article of traffic, like lumber, or other merchandise, and stand upon the same ground. It could not with propriety be said that the contract was for special skill and labor . . . ." If any other construction were allowed to be given to the opening words of the court in the Gross case, Wisconsin would not be following the Massachusetts Rule at all, but rather would be applying the New York Rule, namely, the non-existence of the article at the time of the contract. General language is found in other Wisconsin cases also, but, in all of these cases the Meinicke case is cited as authority for these general statements. Thus, it is apparent that the court is really referring only to goods which are manufactured by the vendor especially for the vendee and which are not saleable on the general market and that Wisconsin accepts the Massachusetts Rule.

Besides those contracts which are declared not to be within the statute of frauds because they fall under the express "exclusion" provision of the statute, there is still another type of contract which is

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89 supra, note 87.
90 55 Wis. 427, 13 N.W. 545 (1882).
91 supra, note 88.
92 Hansen v. Roter, 64 Wis. 622, 25 N.W. 530 (1885).
93 Idem.
94 supra, note 87.
95 Boyington v. Sweeney, 77 Wis. 55, 45 N.W. 938 (1890); Wiger v. Carr, 131 Wis. 584 (1907).
96 supra, note 90.
97 Wis. Stat. (1941) § 121.04(2).
declared not to be within the statute although personal property is involved, namely, those contracts in which the personal property is but incidental to common services or employment or a compromise agreement. In the Agnew case the Wisconsin Supreme Court held that a promise to fill lots with dirt was a contract for services and not a sale of property and, therefore, not within the statute of frauds even though the transfer of title to the dirt was involved. The Wisconsin court in a later case held that a contract authorizing another to act as agent and purchase property from a third person was not within the statute of frauds. In arriving at its decision the court reasoned as follows: "The distinction involved in the employment of one as an agent to obtain for the principal something which he has not is in close analogy to that in an employment to manufacture for another that which at the time of contracting has no existence." In the Mygatt case the court held that an agreement between two execution creditors, each of whom claimed priority, to allow the property of the debtor to be sold under one execution and to divide the proceeds equally is not a sale at all but a compromise of the conflicting claims of the parties in respect to their priority of levy, and, therefore, not within the statute of frauds. Another Wisconsin case presented the question Whether an oral contract between two vendees to jointly purchase a stock of merchandise and sell part of the goods and then divide the proceeds and the balance of the goods between themselves was a contract within the statute of frauds. The court held that the contract was not within the statute of frauds because "the parties do not stand in the relation of seller and buyer. They agree to buy jointly and to divide what they buy." In other words, there is no contract to sell or sale at all; it is merely a contract to divide the interests growing out of a joint purchase.

The second class of subject-matter to which the statute of frauds is applicable, is "choses in action." By "choses in action" is meant any "rights to personal things of which the owner has not the possession but merely a right of action for their possession." The Alexander case involving an order drawn upon the county treasurer is a good example of a sale of a chose in action. The only reason that "choses in action" are expressly designated in the present Wisconsin statute of frauds is
to avoid any mistaken conception that choses in action are not to be included within its scope.

The next key word of the statute, to namely, "of the value of fifty dollars or upwards," further limits the scope of the statute of frauds, restricting its scope to contracts to sell or sale of goods or choses in action of the value of fifty dollars or more. However, regardless of whether the vendee is purchasing a full or partial interest in the property, the contract is within the statute if the value of interest purchased is fifty dollars or over. The value limit of the Wisconsin statute is taken from the original English statute of frauds fixing the limit at £10, which roughly translated corresponds to $50. It has been suggested, that constantly rising price levels during the last two centuries have gradually made the statute applicable to smaller and smaller sales and that the limit should be raised. The Uniform Sales Act, as recommended by the Commissioners on Uniform State Laws, fixes the limit at $500 and this amount is fixed in most of the jurisdictions which have adopted the act. However, the Wisconsin Legislature, notwithstanding the recommendation, has seen fit to retain the original limit.

Having considered what contracts are within the statute of frauds, we next inquire what must be done in order to comply with the statute if the contract in question is governed by it. Although the statute itself states the three alternate modes of compliance, yet a consideration of the decisions is necessary in order to properly interpret these statutory requirements.

The first of the three alternate methods of satisfying the statute of frauds is expressed as follows in the Wisconsin statute: "the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same." While the statute specifies acceptance and receipt as necessary requirements to satisfy the statute, yet the words of the statute "actually receive the same" necessarily include delivery of the goods on the part of the seller. There could be no actual receipt on the part of the buyer unless the vendor delivered the goods. Therefore to constitute a valid sale by a compliance with the first method, there must be 1) delivery of the goods; 2) receipt of the good; and 3) acceptance of the goods.

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107 Wis' STAT. (1941) § 121.04(1).
109 Gerndt v. Conradt, 117 Wis. 15, 93 N.W. 804 (1903).
110 Supra, note 107.
111 Supra, note 107.
112 Friedman v. Plous, 158 Wis. 435, 149 N.W. 218 (1914); Mellen Produce Co. v. Fink, 225 Wis. 90, 273 N.W. 538 (1937).
113 Supra, note 112; Hansen v. Roter, 64 Wis. 622, 25 N.W. 530 (1885); Bacon v. Eccles, 43 Wis. 227 (1877); Pike v. Vaughn, 34 Wis. 499; Smith v. Bouck, 33 Wis. 19 (1873).
Considering the term "delivery," the decisions show that it must be such a transfer of possession as the property is susceptible of;\textsuperscript{114} mere words are not sufficient to constitute delivery.\textsuperscript{116} A constructive or symbolic delivery may satisfy the necessary transfer of possession to constitute delivery in the case of articles incapable of actual manual delivery. However, in such case the thing done to effect the transfer and delivery must be such as to put the goods as fully in the actual physical control of the buyer as of any other person.\textsuperscript{126} The Mahoney case\textsuperscript{11} illustrates this rule. In that case an oral contract was made for the sale of the stock of a certain company but no stock had as yet been printed or issued. However, after the making of the contract, the seller (owner of all the stock) ceased to act as secretary, treasurer and general manager, and he transferred his checking right to the buyer; he took no further part at all in the management of the corporation. The buyer took over the company, appointed his own manager, and drew checks upon the company's funds in the bank. The issue in the case was whether there was a sufficient delivery to satisfy the statute of frauds. The court spoke as follows: "In view of the nature of the subject matter sold it is difficult to see what more could have been done to perform the contract. The certificates of stock were not printed so could not be delivered. . . . The nature of the subject matter of the sale in this case did not permit of a manual delivery, but delivery so far as possible was made by plaintiff stepping out and the defendants stepping in. This constituted delivery and acceptance."\textsuperscript{118} However, actual manual delivery of the goods is necessary in those cases where such delivery is possible.\textsuperscript{119} Moreover, delivery of the goods is not sufficient in itself to take the contract out of the statute of frauds; the delivery must be under and pursuant to the contract.\textsuperscript{120} However, it is not necessary that all of the goods be delivered in order to constitute a sufficient delivery; a delivery of a portion of the goods will suffice.\textsuperscript{121} As to the time at which delivery must be made, proper delivery can be made either when the agreement is made or afterwards.\textsuperscript{122} In certain circumstances no semblance of an actual physical transfer of the goods is necessary in order to constitute delivery although actual physical

\textsuperscript{114} Supra, note 112; Roberts, Johnson & Rand v. Machowski, 171 Wis. 420, 177 N.W. 509 (1920).
\textsuperscript{115} Supra, note 112.
\textsuperscript{116} Mellen Produce Co. v. Pink, 225 Wis. 90, 273 N.W. 538 (1937).
\textsuperscript{117} Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920).
\textsuperscript{118} Idem.
\textsuperscript{119} Supra, note 116.
\textsuperscript{120} Libman v. Fox-Pioneer Scrap Iron Co., 175 Wis. 485, 185 N.W. 551 (1921).
\textsuperscript{122} Amson v. Dreher, 35 Wis. 615.
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transfer is possible. For example, where a person sells his property to his bailee;123 where the vendee constitutes the vendor his bailee of the goods and the vendor thereafter holds these goods as bailee;124 where the vendor writes a notation to the effect that he holds the goods as bailee for the vendee and vendee accepts this instrument;125 where the vendee of all the merchandise in a store places a sale sign across the front of the building, takes the key and assumes control of the store;126 where the original vendee resells the property to the original vendor before any delivery is made under the original sale.127 In the Snider case128 the Wisconsin court said that "a person can sell his property to his bailee and make a good delivery thereof without actually taking the property into his own possession and then returning it to the possession of the vendee." The court reasoned as follows: "The law is founded in reason and common sense, and requires the performance of no such useless acts to make a sale valid."129 In the Janvrin case130 the court stated that "parties contract without writing for the sale of goods exceeding fifty dollars in value. There is no payment and no delivery. The contract is void by statute. But the vendor says to the vendee, 'I deliver the goods'; and the latter replies, 'I accept them, and desire you to store them for me as my bailee;' and the contract is good! . . . If such a delivery and acceptance are actually made, it satisfies the letter of the statute." The Wisconsin court, in a later case,131 spoke as follows: "It would seem that the giving of a written receipt for the goods by Limits (seller), acknowledging that he held the goods subject to the order of the company, and the acceptance of such receipt by the company, was a sufficient delivery and acceptance of them by the company to take the case out of the statute." In an even more recent case132 the court held that: "His (buyer's) sign spread across the front of the building was a public declaration that a delivery sufficient to effect a sale had been made. His taking and retaining possession of the key to the premises in which the goods were found, the assuming control thereover, the subsequent sales by the clerk, all furnish ample support for the conclusion . . . that there had been a delivery and acceptance." On the question of retained possession by a repurchasing vendor and delivery, the Wisconsin court set down the rule that the retained possessions was equivalent to delivery; "no further delivery

123 Snider v. Thrall, 56 Wis. 674, 14 N.W. 814 (1883).
124 Janvrin v. Maxwell, 23 Wis. 51, 82 N.W. 298 (1888).
125 Norwegian Plow Co. v. Hauthorn, 71 Wis. 529, 37 N.W. 825 (1888).
127 Couillard v. Johnson, 24 Wis. 533 (1869).
128 Supra, note 123.
129 Supra, note 123.
130 Supra, note 124.
131 Supra, note 125.
132 Supra, note 126.
was practicable or necessary in order to take the transaction out of the statute.\textsuperscript{133}

The Wisconsin cases are very much in accord on the question of delivery with the exception of the \textit{Silkman} case\textsuperscript{134}. The \textit{Silkman} case is out of line with the tenor of a number of Wisconsin cases, but it is especially at variance with the \textit{Snider} case.\textsuperscript{135} The court in the \textit{Silkman} case says, that "the fact that the goods are already in the A's (buyer's) possession under a prior understanding does not amount to a delivery or acceptance. There must be some affirmative act of his to take the case out of the statute."

\textsuperscript{136} A redelivery by the vendee to the vendor and another delivery by the vendor to the vendee under the circumstances disclosed in the \textit{Silkman} case would seem to be just such "useless acts" as the \textit{Snider} case\textsuperscript{137} declared to be unnecessary.

The next two requirements under the first method - of complying with the statute of frauds, namely, acceptance and receipt, can best be considered together. The meaning of "acceptance" is stated in the statute itself as follows: "There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specified goods."

\textsuperscript{138} The Wisconsin case of \textit{Friedman v. Plous}\textsuperscript{139} points out the difference between acceptance and receipt and a later Wisconsin case\textsuperscript{140} further defines receipt: "The statute seems to separate acceptance from receipt and provide that the former requirement may be satisfied by words or conduct, while the latter presupposes a delivery by the seller and requires some intentional act of receipt on the part of the purchaser. . . . Mere words are not sufficient to establish . . . receipt."\textsuperscript{141} "Obviously there can be no actual receipt on the part of the purchaser in the absence of some affirmative action on his part. Actual receipt cannot result from passive or negative conduct."\textsuperscript{142} However, a physical delivery is not always necessary to constitute receipt. If the nature of the subject matter of the sale is not such as is capable of manual receipt, any constructive or symbolic receipt is sufficient to transfer possession and constitute a valid receipt.\textsuperscript{143} "There may be a transfer of possessions although the property remains with the seller. . . . But in such case title and possession must be in the unre-

\textsuperscript{133} \textit{Supra}, note 127.
\textsuperscript{134} J. H. Silkman Lumber Co. v. Hunholz, 132 Wis. 610, 112 N.W. 1081 (1907).
\textsuperscript{135} \textit{Snider} v. Thrall, 56 Wis. 56, 14 N.W. 814 (1883).
\textsuperscript{136} \textit{Supra}, note 134.
\textsuperscript{137} \textit{Supra}, note 135.
\textsuperscript{138} \textit{Wis. Stat.} (1941) § 121.04(3).
\textsuperscript{139} Friedman v. Plous, 158 Wis. 435 (1914).
\textsuperscript{140} Roberts, Johnson & Rand v. Machowski, 171 Wis. 420, 177 N.W. 509 (1920).
\textsuperscript{141} \textit{Supra}, note 139.
\textsuperscript{142} \textit{Supra}, note 140.
\textsuperscript{143} \textit{Mellen Produce Co. v. Fink}, 225 Wis. 90, 273 N.W. 538 (1937).
restricted control of the buyer, so as not to permit or recall or rescission.\textsuperscript{144} As to the time at which acceptance and receipt can be made, it is evident from the statute (121.04) and the cases\textsuperscript{145} that acceptance can be made either before or after the contract, and that receipt can be made either at the time of the making or after the making of the contract. The \textit{Mellen Produce Co.} case\textsuperscript{146} states that "to enable acceptance and receipt of part of the goods to vitalize the oral contract, it is not necessary that they occur at the time the contract was made." The \textit{Amson} case\textsuperscript{147} is to the same effect. Moreover, the fact that the vendee has previously canceled the oral contract will not prevent the operation of the acceptance and receipt theory if the vendee subsequently receives and accepts the goods and gives the vendor no notification of rejection within a reasonable time.\textsuperscript{148} However, where an owner makes an oral contract of sale with one party and later makes a written contract of sale with a bona fide third party, any subsequent delivery, acceptance and receipt under the oral contract of sale after the execution of the written contract is of no effect and does not take the prior oral contract of sale out of the statute of frauds.\textsuperscript{149}

In many cases one of the two requirements is present but the other is missing, and, as a result,\textsuperscript{150} the contract fails. For example, in an Illinois case the vendee received shares of stock manually but gave no expression by word or conduct of his assent to become the owner of the stock. The court held that that was a receipt but no acceptance. In the \textit{Mellen Produce Co.} case,\textsuperscript{151} the vendee inspected the lumber in the vendor's yard and said it was satisfactory, but he left the lumber in the vendor's yard and did no affirmative act in regard to it. The court held that there was an acceptance but no receipt. However, the court did point out that if the vendee had left some one in charge of the lumber for him and thus obtained unrestricted control of title and possession, there would have been a valid receipt even though the lumber remained upon the vendor's land. A New York court\textsuperscript{152} held that despite the fact that the vendee signed a receipt for the delivery of needle-books as "in good order" and said "It is all right," and even though the needle-books were left on the sidewalk in front of the

\textsuperscript{144} Supra, note 143; Dolan Mercantile Co. v. Marcus, 276 Pa. 404, 120 Atl. 396 (1923); Urbanski v. Kutinsky, 86 Conn. 22, 84 Atl. 317 (1912); Castle v. Swift & Co., 132 Md. 631, 104 Atl. 187 (1918).
\textsuperscript{145} Amson v. Dreher, 35 Wis. 615; Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920).
\textsuperscript{146} Supra, note 143.
\textsuperscript{147} Amson, Supra, note 145.
\textsuperscript{148} James Talcott, Inc. v. Cohen, 226 Wis. 418, 275 N.W. 906 (1938).
\textsuperscript{151} Mellen Produce Co. v. Fink, 225 Wis. 90, 273 N.W. 538 (1937).
\textsuperscript{152} Alfred Shrimpton & Sons v. Dworsky, 21 N.Y.S. 461 (1892).
buyer's place of business, nevertheless, there was no receipt within the meaning of the statute of frauds. In the *Spear* case\(^{153}\) the vendor, in pursuance of an oral contract, delivered stock to the vendee, but the vendee, not having the purchase price with him, handed the stock back to the vendor and told him to send the stock to a certain bank with a draft drawn upon the vendee for the price. The court, in deciding that there was no receipt and acceptance, held that the vendee merely agreed to buy the stock and to accept and pay for it afterwards at the bank. In the *Roberts, Johnson, and Rand* case\(^{154}\) the vendee left a shipment of defective shoes at a railroad depot for two and one-half months and gave the vendor no notification of rejection. The court held that there was neither an acceptance nor a receipt. In this regard, the point is often made that delivery by the vendor to the railroad and receipt by the railroad constitutes a delivery, acceptance and receipt by the vendee. However, the decisions\(^{155}\) show that delivery to a carrier for conveyance to the vendee is prima facie an actual receipt by the vendee, a carrier being the vendee's agent to receive the goods but that the carrier is not the vendee's agent to accept the goods. In the *Weinrich* case\(^{156}\) the New York court specifically states as follows: "Assuming that the delivery to the carrier was equivalent to an actual receipt by the buyer, there has been no acceptance of the goods . . . " However, inasmuch as acceptance and receipt need not be contemporaneous, and, since delivery to the carrier constitutes delivery to and receipt by the vendee, it would seem that if the vendee accepted the goods by word or conduct before delivery to the carrier, then, upon delivery to the carrier, the statute would be fulfilled.

The question is often raised whether a manual receipt of goods by the vendee is not always 'de facto' such conduct as to constitute an "acceptance." This quaere is answered in the *Bacon* case\(^{157}\) as follows: "We think the question must be answered in the negative. To hold otherwise would be to hold that the words "accept" and "receive," as used in the statute, are synonymous. . . . When the seller gives to the buyer the actual control of the goods, and the buyer accepts such control, he has actually received them. Such a receipt is often evidence of an acceptance, but it is not the same thing. Indeed, the receipt by the buyer may be, and often is, for the express purpose of seeing whether he will accept or not." In order that a receipt may constitute an acceptance "there must be a vesting of the possession of the goods in the vendee as absolute owner, discharged of all lien for the price on the

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\(^{153}\) *Spear v. Bach*, 82 Wis. 192, 52 N.W. 97 (1892).

\(^{154}\) *171 Wis. 420, 177 N.W. 509 (1920).*


\(^{156}\) Hancock, *Supra*, note 155.

\(^{157}\) *Bacon v. Eccles*, 43 Wis. 227 (1877).
part of the vendor, and an ultimate acceptance and receiving of the property by the vendee, so significant that he shall have precluded himself from taking any exception to the quantum or quality of the goods sold."[158] However, if the vendor delivers goods to the vendee in pursuance of an oral contract and if the vendee receives these goods with intent to accept them in case they should agree with the sample, and if they do actually agree with the sample, this is a complete "acceptance" even though the vendee subsequently refuses to accept the goods. The intention of the vendee to accept if the goods agree with the sample, concurring with the fact that they did so agree, is held to constitute a complete acceptance.[159]

"Part performance" is often spoken of as a method of satisfying the statute of frauds.[160] However, this term designates no separate manner of complying with the statute but is rather a form of compact terminology for expressing the idea that a delivery, acceptance and receipt have taken place.[161]

Whether or not oral "repurchase agreements," that is, promises to repurchase the property from the vendee at the option of the vendee, are rendered unenforceable by the statute of frauds depends wholly upon who makes the "repurchase" promise. If the vendor owner himself makes the "repurchase" promise as a condition of the sale, the "repurchase" agreement is valid because "the whole constitutes but an entire original contract that is sufficiently performed to take it out of the statute of frauds";[162] the agreement of the vendee to purchase and the agreement of the vendor owner to repurchase are parts of an original and entire contract constituting a conditional sale, and the delivery of the property and the payment of the purchase price satisfies the statute of frauds.[163] Part performance is the ultimate basis for holding such an agreement valid. If the vendor is selling goods as agent of another, and, as part of the contract of sale enters into an individual agreement to repurchase the goods, this "repurchase agreement" is valid because "the contract between the agent and buyer is in the nature of a contract of indemnity, which is neither a contract for the sale of goods, ware, and merchandise, nor a contract to answer for the debt default or miscarriage of another hence not within the statute

158 Idem.
159 Idem; Smith v. Stoller, 26 Wis. 671 (1870).
160 Mahoney v. Kennedy, 172 Wis. 568, 179 N.W. 754 (1920); Cotterill v. Stevens, 10 Wis. 422 (1860); Hankwitz v. Barrett, 143 Wis. 639, 128 N.W. 430 (1910); Hoberg v. McNevis, 169 Wis. 486, 173 N.W. 221; Gano v. Chi. & N. W. Ry. Co., 66 Wis. 1, 27 N.W. 628 (1886).
161 Idem.
162 Korrer v. Madden, 152 Wis. 646, 140 N.W. 325 (1913); Hankwitz v. Barrett, 143 Wis. 639, 128 N.W. 430 (1910).
of frauds.” The “repurchase agreement” is an original undertaking made upon a valuable consideration and to subserve the business or pecuniary purposes of the vendor agent. The question of the enforceability of this type of “repurchase agreement” was merely raised by the Wisconsin Supreme Court in the Korrer case, but was expressly answered by the court in the cases of Lingelbach and Hull. If the “repurchase promise” is made by a third person, this agreement is unenforceable under the statute of frauds even though made at the time of the sale and even though it is an “inducing cause thereof because it is a separate, distinct and independent agreement from the contract between the parties to the sale consummated.”

The second method of complying with the statute of frauds is stated in the statute as follows: “give something in earnest to bind the contract, or in part payment.” Although the statute contains a disjunctive, yet in effect and to all intent and purposes it offers but one manner of compliance—namely, the giving of any personal property, money or otherwise, as a part of the purchase price. This construction is placed upon the statute because the two key words of the disjunctive are practically synonymous. “Today,” said a New York court, “the giving of earnest and part payment are practically synonymous. Some overt act is what the framers wanted in addition to words of mouth. The statute places no limitation on the manner in which payment shall be made. . . . The payment may be in the form of any personal property. ‘The statute requires that he should pay some part of the purchase money. No doubt it must be taken, in its spirit, to mean anything or part of anything given, by way of consideration, which is money or money’s worth. But the object was to have something pass between the parties besides mere words; some symbol like earnest money’.” “Whatever may have been the meaning of the word ‘earnest’ its statutory meaning is part payment. . . . ‘Earnest’ seems understood to be a part of the price.” However, part payment can be made in many different ways other than by the manual transfer of money or personal property. For example, a promise to pay the seller’s credit, accepted by the latter, who thereupon discharges the seller, is

164 Lingelbach v. Luckenbach, 168 Wis. 481, 170 N.W. 711 (1919).
165 Hull v. Brown, 35 Wis. 652; Cooper v. Huether, 156 Wis. 346, 146 N.W. 485.
166 Supra, note 162.
167 Supra, note 164.
168 Supra, note 165.
169 Korrer v. Madden, 152 Wis. 646, 140 N.W. 325 (1913); Becher v. Kreul, 173 Wis. 273 (1921); Felton v. Cherkasky, 234 Wis. 223, 290 N.W. 591 (1940).
170 Wis. STAT. (1941) § 121.04(1).
173 Idem.
a part payment within the statute;\(^{175}\) the fact that the buyer gives credit to the seller on the debt he owes the buyer is "as much a payment for them (the goods purchased) as though the money had been paid over for them."\(^{176}\) The actual surrender of the seller's promissory note by the buyer, as part of the purchase money for goods purchased, is also such a part payment as will take the sale out of the statute of frauds.\(^{177}\) Nevertheless, in order to constitute part payment, the payment must run primarily from the vendee to the vendor.\(^{178}\) For example, neither the payment of a commission by a vendor to a broker for selling property, nor the transfer of the property by the vendor to the purchaser constitutes the giving of "something in earnest to bind the contract, or in part payment."\(^{179}\) The quaere concerning whether the giving of a check is payment within the statute of frauds is answered as follows by the Missouri court: "Nothing is better settled than that a check is not payment, but is only so when the cash is received on it. There is no presumption that a creditor takes a check in payment arising from the mere fact that he accepts it from his debtor. The presumption is just the contrary. Where payment is made by check drawn by a debtor on his banker, this is merely a mode of making a cash payment, and not giving or accepting a security. Such payment is only conditional, or a means of obtaining the money. In one sense the holder of the check becomes the agent of the drawer to collect the money on it; and if it is dishonored there is no accord and satisfaction of the debt."\(^{180}\)

As to the time within which the payment of some portion of the purchase price must be made in order to comply with the statute, all of the Wisconsin decisions\(^{181}\) hold that such "payment . . . must be made at the time the contract was entered into, and a subsequent payment does not meet the requirements of the statute," except "where there is a distinct, intelligent reference by both parties, where the payment is made, to the previous void contract, and a declared intent to make the agreement valid and binding according to the tenor of the previous negotiation; there the sale may be deemed made in fact at that time, and the requirements of the statute are fully satisfied."\(^{182}\) However, in view of the fact that all of these decisions are based upon the previous version of the statute of frauds which expressly stated

\(^{175}\) Cotterill v. Stevens, 10 Wis. 423 (1860).
\(^{176}\) Norwegian Plow Co. v. Hanthorn, 71 Wis. 529, 37 N.W. 825 (1888).
\(^{177}\) Sharp v. Carroll, 66 Wis. 62, 27 N.W. 832 (1886).
\(^{178}\) Schwanke v. Dhein, 215 Wis. 61, 254 N.W. 346 (1934).
\(^{179}\) Idem.
\(^{180}\) Supra, note 174.
\(^{181}\) Bates v. Cheesbro, 32 Wis. 594 (1873); Kerhof v. Atlas Paper Co., 68 Wis. 674, 32 N.W. 766 (1887); Alexander v. Oneida County, 76 Wis. 56, 45 N.W. 21 (1890); Crosby Hrdw. Co. v. Trester, 90 Wis. 412 (1895).
\(^{182}\) Bates, Supra, note 181.
that the part payment must be made “at the time” of the making of
the contract, and also declared that unless the statute was complied
with the contract would be “void,” these cases are not determinative
in construing the present statute. New York, however, has had occa-
sion to decide upon this very point under the present statute, and, in
so deciding, spoke as follows: “The Legislature has enacted the Uni-
form Sales of Goods Act as the law of this state. . . . It will be noted
that the requirement for part payment to be made at the time is
omitted, thus changing the law of this state. . . . In my opinion, it is
now the law of this state that neither acceptance, receipt nor part
payment need be contemporaneous with the making of the contract,
but may occur at any time thereafter, if under the contract and prior
to its revocation.” In another case involving the identical issue, the
New York court stated that “the amendment of the statute of frauds
has eliminated the requirement that the part payment must be made
‘at the time’ of making the contract.” In view of these decisions con-
struing the Uniform Sales Act, it can be said with reasonable certainty
that in Wisconsin, as in New York, neither delivery, acceptance, receipt
nor part payment need be contemporaneous with the making of the
oral contract if made under the contract and prior to its revocation.

The third and most common method of satisfying the statute of
frauds is expressed as follows in the statute: “unless some note or
memorandum in writing of the contract or sale be signed by the party
to be charged or his agent in that behalf.” In considering this man-
ner of complying with the statute, it is to be noted that this clause
refers not to a written contract but to a written note or memorandum
of the existing oral contract. The interpretation to be placed on the
two key words “note or memorandum” is stated by the Wisconsin
Supreme Court as follows: “It is not necessary in order to take the
contract of sale out of the statute of frauds that there be a formal
written contract, nor is it necessary that the written memorandum be
complete in one writing. . . . It is well established that a complete con-
tract, binding under the statute of frauds, may be gathered from let-
ters, writings, and telegrams between the parties relating to the subject
matter of the contract and so connected with each other that they may
be fairly said to constitute one paper relating to the contract, though
only one of the papers may be signed by the party to be charged. . . .
However, it must appear from the several writings, without resorting

183 Supra, note 181.
186 Wis. Stat. (1941) § 121.04(1).
to parol evidence, what the contract is."

Letters, receipts, order blanks, statements of account, notes, checks, deeds, wills, pleadings, advertisements, records of municipal affairs, telegrams and memorandum books have all been held to be notes or memorandums within the meaning of the statute. As to the actual contents of the note or memorandum, it must state 1) the parties, and their respective identities; 2) the consideration or price, if the price has not been paid; if the price has been paid, it need not be specifically stated; 3) the subject matter of the contract; and 4) the signature of the person to be charged. In regard to the description of the subject matter of the goods, Wisconsin holds that the memorandum of a sales contract need not describe the goods so minutely and exactly as to exclude the possibility that other goods than those intended will fall within the words of the writing; no more is required than that there be reasonable certainty. As to the time when the note or memorandum must be made, the cases hold that they may be made at any time before the action is brought. Further, it is not necessary that they be made with the intent of making a note or memorandum.

Concerning the issue of whether or not the note or memorandum must be delivered in order to satisfy the statute, Williston, citing Wisconsin authority, says as follows: "Since the memorandum need not itself be a contract and intent to make it is not requisite, it should follow, ...

189 Wis. Club v. John, 202 Wis. 476, 233 N.W. 79.
190 Pearlberg v. Leishon, 112 Misc. 95, 182 N.Y.S. 615 (1920).
194 Campbell v. Thomas, 42 Wis. 437 (1877).
199 Tarbell Co. v. Grimes, 84 N.H. 219, 149 Atl. 73 (1930); St. Edwards Co. v. Shawano Milk Products Co., 211 Wis. 378, 247 N.W. 465 (1933).
200 Weiner v. Whipple, 53 Wis. 298, 10 N.W. 433.
201 Des Brisay v. Puss, 264 Mass. 102, 162 N.E. 4 (1928); Frank v. Etttingham, 65 Miss. 281, 3 So. 655 (1888).
204 Wis. Stat. (1941) § 121.04(1).
207 Idem.
208 Campbell v. Thomas, 42 Wis. 437 (1877).
especially in view of the fact that neither the original statute, nor its successors, mentions delivery, that a writing retained wholly within the control of the party to be charged, but which complies with the other requirements of the statute, should be a sufficient memorandum."

Any writing by hand, or printed, or typewritten is sufficient to satisfy the qualifying term “in writing.”

As to the nature of the signature required by the statute, any signature in the form of writing, stamping, printing or typewriting is sufficient to meet the calls of the statute if made with the intention of authentically and finally adopting it as one’s own. It is to be noted also that, in view of the fact that the note or memorandum is not a contract, it is not compulsory that both parties to the contract sign; it is necessary only that one party sign, namely, the party to be charged or his agent. Moreover, “for the purpose of satisfying the provisions of a statute requiring a note or memorandum to be signed by the party to be charged or by his agent, a memorandum signed by a properly authorized agent with or without indication of the existence or identity of the principal is sufficient to charge the principal.” On the question of whether or not the agent must be authorized in writing it is held in the Kreutzer case that in the absence of statutory requirement, an agent need not be authorized in writing to sign a note or memorandum of a contract for a sale.

Having considered what contracts are within the scope of the statute of frauds and the three alternate methods of satisfying the statute the question arises as to who can raise the statute of frauds as a defense. This is answered in Wisconsin by two cases—the Draper case and the Gehl case. From a reading of these cases it is evident that the defense of the invalidity of a contract of sale under the statute of frauds is a personal defense and is not available to strangers to the contract. Like usury, infancy, and various other defenses, it can only be relied upon by parties of privies. Consequently, where a vendor, by written contract, sells hay to vendee A and

211 Idem; 54 Wis. 214, 11 N.W. 534; 56 Wis. 292, 14 N.W. 465; 104 Wis. 614, 80 N.W. 530; Lee v. Vaughn Seed Store, 101 Ark. 68, 141 S.W. 496 (1911).
214 Kreutzer v. Lynch, 122 Wis. 474, 100 N.W. 887 (1904).
215 Draper v. Wilson, 143 Wis. 510, 128 N.W. 66.
217 Supra, note 215.
later sells the same hay to vendee \( B \) by an oral contract, vendee \( A \) cannot raise the statute of frauds in regard to the oral contract between the vendor and vendee \( B \).\(^{218}\) Vendee \( A \) is a stranger to the oral contract. But, where the vendor makes an oral contract of sale to vendee \( C \) first and then sells the same property to vendee \( D \) by a written contract, vendee \( D \) can raise the statute of frauds as to the prior oral contract\(^{219}\) because by making this subsequent written contract of sale the vendor "de facto" repudiated the previous oral contract. The vendor, upon making this subsequent written contract, said, in effect, to vendee \( C \), "Our contract is unenforceable because not in writing and I am repudiating it. Therefore, vendee \( D \) is not raising the statute of frauds to question the validity of an oral contract to which he is a stranger; he is merely availing himself of the fact that the vendor used the statute of frauds to repudiate a prior oral contract of sale which he, the vendor himself, had made with vendee \( C \) in regard to the same property which he later sold to vendee \( D \) by a written contract.

Concerning the question of oral modification of a contract within the statute of frauds, the authorities are in accord that no oral modification of the essential terms of a contract required to be in writing is permitted.\(^{220}\) However, no case holds that a collateral agreement referred to in a contract required to be in writing must be regarded as an essential element of such contract, or that it is within the statute.\(^{221}\) Consequently, a collateral agreement as to wages can be orally modified though contained in a written contract of sale which, under the statute of frauds, is required to be in writing.\(^{222}\) However, there is one basis upon which an oral modification of the essential terms of a written contract within the statute of frauds is permitted, namely, upon the doctrine of estoppel.\(^{223}\) One party to a contract cannot invoke the statute of frauds to close the door to a trap in which the other party may be caught by reason of having relied upon an oral agreement made between the parties.\(^{224}\) For example, where the parties to a written contract within the statute of frauds make an oral agreement extending the time for delivery, and the seller relies upon the oral agreement and would have made delivery within the time specified

\(^{218}\) Supra, note 215.

\(^{219}\) Supra, note 216.

\(^{220}\) Gutknecht v. C. A. Lawton Co., 231 Wis. 413, 285 N.W. 411 (1939); Hansen v. Gunderson, 95 Wis. 613, 70 N.W. 827 (1897); Saveland v. Western Wis. Ry. Co., 118 Wis. 267, 95 N.W. 130 (1903); Schaas v. Wolf, 173 Wis. 351, 181 N.W. 214 (1921); Gether v. R. Connor Co., 196 Wis. 25, 219 N.W. 378 (1928).

\(^{221}\) Gutknecht, Supra, note 220.

\(^{222}\) Gutknecht, Supra, note 220.

\(^{223}\) Hirsch Rolling Mill Co. v. Milw. & Fox River Valley, 165 Wis. 220, 161 N.W. 741 (1917).

\(^{224}\) Idem.
in the written contract if he had not relied on this oral agreement, the buyer is estopped from asserting that this oral modification of the written contract was invalid under the statute of frauds.\footnote{Idem.}

Whether or not the statute of frauds is a just and equitable law has often been questioned. It has been asserted that the statute has outlived its usefulness and is out of place amid the changed legal and commercial conditions of today.\footnote{Idem.} This viewpoint has its foundation in the fact that some of the original reasons for requiring the writing, such as the interest disqualification of the party to a lawsuit have now disappeared and that it appears to furnish opportunity for a fraudulent defendant to avoid an honest bargain on the mere technical defense of the statute. However the Wisconsin Supreme Court has taken a favorable attitude toward the statute, the court expressing itself in \textit{Korrer v. Madden}\footnote{152 Wis. 646, 140 N.W. 325 (1913).} as follows: "The statute of frauds sometimes works hardships, but it is the law as written by our lawmaking power, and it is the duty of the courts to enforce it in all cases which come fairly within its scope. Our statute is substantially taken from Statute 29, Cor. II, which has stood the test of over two centuries of time and change. The English statute was incorporated in our statute law in 1849 and has since remained there without substantial change or amendment. This is pretty substantial evidence that the good which it has accomplished far outweighs any wrong that has resulted from its operation."\footnote{Idem.}
NOTES

DENIAL OF COUNSEL TO INDIGENT DEFENDANTS IN STATE CRIMINAL TRIALS AS A VIOLATION OF DUE PROCESS

Does the clause of the 14th Amendment assuring to every person due process before he can be deprived of life, liberty or property, require that a state court, in all criminal cases, provide counsel for an indigent defendant?

Assistance of counsel in criminal cases is clearly set forth in the Bill of Rights, Sixth Amendment, of the federal Constitution which provides:

“In all criminal prosecution the accused shall enjoy the right * * * to have the assistance of counsel for his defense.”

But the Bill of Rights is applicable to the Federal government only and consequently this provision has application only to criminal trials in the federal courts and not in state courts. However, the due process clause of the 14th Amendment while it incorporates none of the specific guarantees found in the Sixth Amendment and other provisions of the Bill of Rights has been interpreted as safeguarding certain of the fundamental rights embodied in the Bill against invasion by the state, one of which is assistance of counsel in criminal cases. But the guarantee is not an absolute one. Whatever conclusion to the contrary may fairly be drawn from expressions of early text writers as well as expressions found in the cases it is now settled law that an indi-

4 "The presence advice and assistance of counsel," is said by Story to be necessarily included in "due process of law." STORY, CONSTITUTION, p. 668. That provision (Sixth Amendment) “was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner.” Ex Parte Chin Loy You, 223 Fed. 833, cited with approval in Powell v. Alabama, supra.
"What * * * does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. * * * Even the intelligent and educated layman * * * lacks both the skill and knowledge
A gent prisoner in a state court has no absolute right to assistance of counsel in his defense, and a denial of counsel does not in every case violate due process, but each case depends upon its own particular circumstances. Broadly speaking, due process is violated where there is a "conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right." But to determine whether there is such a lack of fundamental fairness each case must be tested by an appraisal of all the facts and asserted denial of due process will be sustained only where the Supreme Court is satisfied on the whole record that the accused tried without counsel has been handicapped by such fact and has not had a fair trial.

What then are the circumstances disclosed by the record which will lead to the conclusion that the trial was or was not offensive to due process?

The factors upon which the Supreme Court of the United States based its decision in Betts v. Brady, that the refusal of a trial court to appoint counsel for a defendant charged with robbery was not a denial of due process, were these: the age of the defendant, the degree of his intelligence, prior convictions familiarizing him with court procedure, and the simplicity of the issue before the court. Said the court: "* * * the accused was not helpless, but was a man forty-three years old, of ordinary intelligence and ability to take care of his own interests on the trial of that narrow issue." (The simple issue in this case was the veracity of the testimony for the State and that for the defendant, the only defense in the case being an alibi.) "He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure."

In reaching its decision in Smith v. O'Grady that due process had been denied to a defendant charged with burglary, the Supreme Court took into consideration the degree of intelligence of the accused, and the fact that there were no prior convictions. The decision was based also on the false statements of law enforcement officers inveigling the accused into pleading guilty by promising him a light sentence. Another factor leading to the court's decision was the policy of the state (Nebraska) in which the crime was committed, the state law requiring appointment of counsel for a person on trial for the offence involved. "The circumstances under which petitioner asserts he was entrapped adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel in every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." Powell v. Alabama, supra.

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5 Betts v. Brady, supra.
6 Betts v. Brady, supra.
7 Smith v. O'Grady, 61 S.Ct. 572, 312 U.S. 329, 85 L.Ed. 859 (Nebraska, 1941).
8 Nebraska, General Statutes, 1873, C. 58 (437).
and imprisoned in the penitentiary are wholly irreconcilable with the constitutional safeguards of due process. For his petition presents a picture of a defendant, without counsel, bewildered by court processes strange and unfamiliar to him, and inveigled by false statements of state law enforcement officers into entering a plea of guilty."

The bases for the Supreme Court's decision in Powell v. Alabama\(^9\) were the policy of the state in which the crime occurred in respect to appointment of counsel, the age of the defendants, the intelligence and amount of education of the defendants, the nature of the crime committed, and the particular incidents of the trial. From these elements the court drew its conclusion that the defendants had been denied due process of law, although counsel had volunteered a few minutes before the trial to act in their behalf. "The defendants, young, ignorant, illiterate, surrounded by hostile sentiments, haled back and forth under guard of soldiers, charged with an atrocious crime regarded with especial horror in the community where they were to be tried, were thus put in peril of their lives within a few minutes after counsel for the first time charged with any degree of responsibility began to represent them." "Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense. To decide otherwise, would simply be to ignore actualities." According to the Constitution of the state of Alabama the accused shall enjoy the right to have the assistance of counsel in all criminal prosecutions; and a state statute requires the appointment of counsel for a defendant who is financially unable so to provide for himself. In this case the State Supreme Court held that these provisions had not been violated. The Supreme Court of the United States could not interfere with this holding; but it could, and did, decide that refusal to appoint counsel, under the circumstances, amounted to a denial of due process. "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

An illustration of a State court reaching different conclusions as to the fairness of trial had without counsel, upon consideration of different circumstances disclosed by the record is afforded by the cases of Smith v. State\(^10\) and Coates v. Smith.\(^11\) The cases were decided by the

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\(^9\) Powell v. Alabama, supra.
same court in the state of Maryland within a short time of each other. In each case the elements of age, previous criminal record, experience in court procedure, and amount of protection afforded by the court during the trial were considered. The charges in both cases were robbery and assault. In *Smith v. State* the accused was thirty years of age at the time of the trial, had served a jail sentence and sentences in the state penitentiary, was familiar with criminal trials, and was well protected, as the record showed by the court during the trial. The court refused to reverse the conviction. The defendant in the case of *Coates v. Smith*, on the other hand, was only nineteen years of age, had had no experience in court procedure, and was given little or no protection by the court during his trial. Confessions not properly introduced were used against him. In drawing its conclusion in the latter case the court said: "* * * the prisoner although vicious, was young and ignorant and unaccustomed to court procedure and apparently incapable of taking an active part in his trials. The penalties hanging over him were severe. The more revolting the crime and the worse the situation appears for him the more necessary it is that he have the protection of his legal rights. As care for his interests has now been made an essential in some cases, we think in these cases now before us he should have been provided at the outset with counsel."

It is the policy of the state of Maryland to provide counsel only for persons charged with capital crimes.

From the above cases it may be concluded that the factors which the court will take into consideration in determining whether or not the refusal to appoint counsel in a particular case amounted to a denial of due process may be outlined as follows:

1) The policy of the particular state as to the appointment of counsel.
2) The age of the defendant.
3) The amount of education, or degree of intelligence, of the defendant.
4) Prior conviction for crime familiarizing him with court procedure.
5) Knowledge of court procedure.
6) The nature of the crime charged.
7) The nature of the issues involved, i.e. whether simple or complex.
8) The degree of protection given by the court to the accused during the course of the trial.

In addition to this the court will take into consideration those circumstances which can be classified only under the broad heading of incidents peculiar to the trial. This would include such elements as public sentiment as to the crime or as to the defendant, fraud on the part of law-enforcement officers, and others, varying with the case.
The problem as to the appointment of counsel arises not so frequently in capital as in non-capital cases. In the former the policy of the states generally is to require appointment. In the latter, the policy varies. Twenty-five of the states require, by statute, that an indigent defendant be provided with counsel in a non-capital as well as in a capital case; and eight other states impose the same requirement by judicial decision or by established practice judicially approved. Two of the states have constitutional provisions to this effect, while nine others have neither constitutional provision, statute, nor judicial decision establishing the requirement.\textsuperscript{12}

Notwithstanding that it is historically sound, it does not seem entirely satisfying to say that the Constitution of the United States does not, even where a felony is charged, require counsel to be appointed by the state for indigent defendants in all cases. This denies them an important right enjoyed by those more fortunately situated in an economic way. "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right'," says Mr. Justice Black in his dissenting opinion in the case of \textit{Betts v. Brady},\textsuperscript{13} "which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with a satisfactory degree of certainty, that the defendant's case was adequately presented." "Any other practice," (than that which assures that no man shall be deprived of counsel merely because of his poverty) "seems to me to defeat the promise of our democratic society to provide equal justice under the law."

The policy of the state of Wisconsin as established by Article I, section 7 of the Wisconsin Constitution as construed in the case of \textit{Carpenter v. Dane County}\textsuperscript{14} is a most liberal and ideal one. In all cases of felony appointment of counsel is required, unless it is expressly waived, and in cases of misdemeanor appointment is allowed when the court deems it necessary to afford a fair trial to the accused. By thus limiting the exercise of the court's discretion adequate protection would seem to be secured to indigent defendants. The Supreme Court of Wisconsin, in declaring the state's policy, said in \textit{Carpenter v. Dane County}: "* * * would it not be a little like mockery to secure to a pauper those solemn constitutional guarantees for a fair and full trial of the matters with which he was charged, and yet say to him on trial, that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him. * * * Why this great

\textsuperscript{12} Betts v. Brady, supra.
\textsuperscript{13} Betts v. Brady, supra.
\textsuperscript{14} Carpenter v. Dane County, 9 Wis. 249 (1859).
solicitude to secure him a fair trial if he cannot have the benefit of counsel?"15

The question of expense may be raised since the burden of paying the fees of counsel appointed falls on the county. In Milwaukee County Municipal Court where counsel is appointed for an average of thirty-five to forty per cent of the felony cases tried, the cost has not been found to be exhorbitant. Investigation has shown that the sum expended annually for the appointment of counsel for indigent defendants amounts, approximately, to only one-eighth of that spent to maintain the District Attorney’s office and staff over the same period of time.

Surely, that the innocent be not deprived of liberty is as important as that the guilty be punished. “It is not to be thought of, in a civilized community, for a moment,” says the Supreme Court of Indiana, “that any citizen put in jeopardy of life or liberty should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.”16

JOAN MOONAN.

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15 This statement was quoted with approval by Mr. Justice Black’s dissenting opinion in Betts v. Brady, supra.
ABSOLUTE OR LIMITED DIVORCE JUDGMENTS UNDER SECTION 247.09 OF THE WISCONSIN STATUTES

A problem confronting divorce courts in this state almost daily arises out of section 247.09 of the Wisconsin Statutes. It reads:

"A divorce from the bond of matrimony may also be adjudged for either of the causes specified in the second and third subdivisions of section 247.08 whenever, in the opinion of the court, the circumstances are such that it would be discreet and proper so to do."

The subdivisions referred to are as follows:

"(2) Extreme cruelty of either party
(3) On the complaint of the wife, when the husband, being of sufficient ability, shall refuse or neglect to provide for her or when his conduct toward her is such as may render it unsafe and improper for her to live with him."

It is clear that the court with jurisdiction in matters of divorce have the power under section 247.09 to grant an absolute divorce upon grounds which are declared in section 247.08 to be cause for a limited divorce. The question here raised is two fold: first, have the divorce courts, under section 247.09, the power to grant an absolute divorce when only a limited divorce is prayed for in the complaint; secondly, if the courts do have such power should such absolute discretion be vested in them.

The first question finds its answer in the cases which appear to stand as precedent in this state. As far as research herein has revealed there are only three cases which involve this problem directly, the most recent of which is Sang v. Sang. In that case the plaintiff husband sued for a divorce from bed and board but the trial court granted an absolute divorce to the plaintiff. Upon appeal, the plaintiff sought modification of the judgment so as to grant a limited divorce in accordance with his complaint. While the Supreme Court reversed the judgment on the ground that the trial court was without jurisdiction over the parties, it stated the law to be that "the trial court may grant an absolute divorce although the prayer be for one from bed and board." This case cited In re Estate of Kehl, and Shequin v. Shequin as controlling precedent.

In the case of In re Estate of Kehl, the language of the trial court upon rendering the judgment indicated rather clearly that an absolute

1 Wis. Stat. (1941) 247.08(2) (3).
2 3 N.W. (2d) 340, April, 1942.
3 215 Wis. 353, 254 N.W. 639 (1934).
4 161 Wis. 183, 152 N.W. 823 (1915).
5 Supra, note 3.
divorce was granted though the prayer of the complaint was for a limited divorce only. The appellants in the supreme court insisted that it was a divorce *a vinculo*, the respondent that it was a limited divorce. Upon deciding the issue, the supreme court said: "It is true that a court may grant a divorce *a vinculo* although the prayer of the complaint be for one from bed and board. But the prayer of the complaint, with nearly all judges, we believe, controls the nature of the judgment granted by the court especially when the defendant interposes no objection, and none was interposed herein. We consider the real intention of the court was to render a judgment in accordance with the prayer of the complaint." While this case is clearly in line with the position taken in *Sang v. Sang* as to the discretionary power of the court, it lends support to the view that the prayer of the complaint should be the basis for the judgment.

The earliest and leading case in point is *Shequin v. Shequin.* In this case, the complaint, as amended before trial, was for a divorce *a mensa et thoro*. An absolute divorce was granted, however, at the request of the defendant who was the guilty party. The plaintiff appealed. The supreme court said that "the mere fact that the prayer of the complaint asked for a limited divorce did not preclude the court from granting a divorce from the bonds when the proof warranted such a judgment." This language upholds the statements in *Sang v. Sang* and *In re Estate of Kehl.* But it should be noted that in *Shequin v. Shequin* it was shown by the defendant that the plaintiff's attorneys consented to the judgment for an absolute divorce; and the supreme court held the plaintiff bound thereby. In *Shequin v. Shequin*, the court cited *Dutcher v. Dutcher* as precedent for the discretionary power of the court to grant an absolute divorce though only a limited divorce is prayed for. *Dutcher v. Dutcher* does not seem to involve this problem directly or indirectly, nor does it discuss the statute out of which this problem arises. The only possible language therein, it seems, which might have been construed as relating to the question is as follows:

"It has been seen that this case was in the minds of the revisers in New York, and influenced them in framing the divorce statute from which section 13 in our statute is copied, and on which our whole statute is largely modeled. And accordingly we find the New York statute in terms permissive both as to judgments of nullity and judgments of divorce. In our statute, the provisions for judgments of nullity or affirmation of marriage are in terms

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6 Supra, note 2.  
7 Supra, note 4.  
8 Supra, note 2.  
9 Supra, note 3.  
10 Supra, note 4.  
11 39 Wis. 651 (1874).
obligatory, and for judgments for divorce in terms permissive throughout; a distinction of language in kindred sections in the same statute pregnant with meaning.

The rule that may means shall in statutes where the public or individuals have a claim de jure to the exercise of the power conferred, is not overlooked. But we have the great authority of Chancellor Kent for holding permissive words in the grant of this peculiar jurisdiction, to imply a sound judicial discretion in its exercise; strongly fortified here by the abrupt transition of the statute from uniformly obligatory words in one branch of the jurisdiction conferred, to uniformly permissive words in the other; an antithesis precluding oversight and implying design."

While this language does not seem to justify the broad statement in Shequin v. Shequin, the fact remains that ever since that decision the trial courts have taken the position that they have the power to grant an absolute divorce under section 247.09 irrespective of the prayer of the complaint so long as the proof warrants such a judgment, and the broad language of the cases above cited justifies this view.

As to the second question, namely, whether or not the courts should be vested with this broad discretion, it is the opinion of the writer that the courts should not possess this power. This opinion is based, first, upon the statute itself; secondly, upon authorities holding that relief granted must be in conformity with the demands of the complaint; and lastly, upon justice and sound social policy.

Under section 247.09, an absolute divorce may be granted 1) for extreme cruelty of either party, 2) on the complaint of the wife, when the husband, being of sufficient ability, shall refuse or neglect to provide for her or when his conduct toward her is such as may render it unsafe and improper for her to live with him. It must be remembered, however, that these grounds are originally grounds only for a limited divorce under section 247.08 and they are made grounds for an absolute divorce only by virtue of section 247.09. In other words, in the absence of section 247.09 it would be impossible to obtain an absolute divorce upon these grounds. It seems, therefore, that the statute was intended to grant an adequate remedy to the complaining party where, in the absence of the statute, such remedy would not exist. It does not seem to have been the intention of the legislature that this statute should be, in effect, a subdivision of section 247.08 so as to give the courts the power to grant, in its discretion, an absolute divorce without regard for the prayer of the litigants. Further, the discretionary power seems to be given in this statute so that the court may decide from the circumstances of the case whether or not a party

12 Dutcher v. Dutcher, 1847, 39 Wis. 651, pp. 666-667.
13 Supra, note 4.
seeking the remedy of an absolute divorce under this statute should be granted such remedy.

As far as actions in the courts are concerned, divorce actions are treated the same as other cases. And in cases generally, at law or in equity, the demands of the complaint control and limit the relief granted by the judgment. The state of Wisconsin has so provided by statute and the courts have upheld the statute in their decisions.

It is true that this statute on the measure of relief provides that where the judgment is taken by default, when it does as a matter of fact apply to other aspects of a divorce action. In Hoh v. Hoh the complaint in the divorce action demanded relief only as to alimony and temporary allowances. The trial court granted a default judgment for a division of the husband's property. Upon appeal the judgment of the trial court was held erroneous as granting a remedy outside the prayer of the complaint.

The danger of vesting this power in divorce courts which are so fundamentally vital to the proper and wholesome direction of a sound social policy of which marriage is in many ways the basis, is a real one. If this power to grant an absolute divorce without at least the consent of the parties when only a limited divorce is requested continues to exist in the courts the ends of social evils and injustice can only be served: social evil, because divorce always affects society and judgments for absolute divorce without regard for the desire of the litigants seems to lead to no apparent good to society; injustice, because this power may violate the rights of individuals who have moral convictions and reasons opposed to absolute divorce whether these convictions or reasons be religious or personal in character. Socially and in justice, then, no litigant should be subjected to such complete judicial discretion.

The cases cited herein were not decided solely upon the basis of this discretionary power. In Shequin v. Shequin there was present the consent of the plaintiff's attorneys; In re Estate of Kehl, the supreme court was asked merely to interpret a trial court's judgment; in Sang v. Sang, the trial court's lack of jurisdiction was the decisive element. Nevertheless, from what has been said it is clear that the supreme court

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14 Wis. Stat. (1914) 270.57.
15 Hoh v. Hoh, 84 Wis. 378, 54 N.W. 731; Wis. Nat. L. & B. Ass'n v. Pride, 136 Wis. 102, 116 N.W. 637; Good v. Schlitz, 195 Wis. 481, 218 N.W. 727.
16 Wis. Stat. (1941) 270.57; City of Wauwatosa v. Union Free High School District, 214 Wis. 35, 252 N.W. 351.
17 Supra, note 15.
has stated and reiterated its position in favor of absolute discretion of the trial court under section 247.09, and relief, it would seem, can come only from the legislature.

It is suggested here that section 247.09 be amended by the legislature to include the words “with the consent or at the prayer of the complainant.” With this amendment by insertion, the statute would read in its entirety as follows:

“A divorce from the bonds of matrimony may also be adjudged for either of the causes specified in the second and third subdivisions of section 247.08 with the consent or at the prayer of the complainant whenever, in the opinion of the court, it would be discreet and proper so to do.”

The inserted amendment would empower the court to grant the remedy prayed for and no other, or deny it, depending for its decree upon the facts and circumstances of the case. Such a legislative act would remove the uncertainty and fear that litigants going into court must now face under section 247.09 in that they can never know when a judgment for an absolute divorce granted under judicial discretion will give them what they do not seek or desire.

Anthony Palasz.
Negligence—Foreseeability of Intervening Cause.—Action by Mary G. Wray, as administratrix of the estate of Norman E. Wray, deceased, against the Riesbeck Drug Company, to recover damages for the death of Norman E. Wray. From a judgment for the plaintiff, the defendant appeals. The evidence showed that (on May 7, 1928), Russell Wray, an eight year old son of the decedent, at the request of the decedent, purchased of an employee of the defendant a small bottle of carbolic acid. This acid was delivered by the employee to the son, who returned with it to the home of his father, which was about four blocks from the drug store. The father was in bed when the son gave him the carbolic acid. The father then drank it and died. Plaintiff charged that the defendant was negligent when it sold and placed in the hands of the infant son, eight years old, who did not understand the dangerous nature thereof, the bottle containing carbolic acid, without making inquiry concerning the purpose for which the acid was to be used or to whom it was to be delivered. Plaintiffs claim this negligence was the proximate cause of the death of the decedent. However, the Appellate Court of Indiana reversed the decision on the ground that the death by suicide of the father could not have been reasonably foreseen by the druggist when he sold to the infant son the bottle of carbolic acid. The court stated the rule to be that where harmful consequences are brought about by intervening and independent forces, the operation of which might have been reasonably foreseen, there will be no break in the chain of causation of such a character as to relieve the actor from liability. But if the new independent intervening force was not reasonably foreseeable at the time of the defendant's wrongful conduct, the consequences, ordinarily, are not caused proximately by the original wrongful act. Where the intervening force is a deliberate act of a human being which was in no sense foreseeable by the defendant at the time of his misconduct, the chain of causation is broken. Riesbeck Drug Co. v. Wray, 39 N.E. (2d) 776 (Ind. 1942).

"A common statement of the general rule is, that in order that an act or omission may be the proximate cause of an injury, the injury must be the natural and probable consequence of the act or omission and such as might have been foreseen by an ordinarily reasonable and prudent man, in the light of the attendant circumstances, as likely to result therefrom." Throockmorton's Cooley On Torts (1930), Sec. 32.

The rule which is generally followed in cases where intervening cause is a factor may be stated as follows: "Where harmful consequences are brought about by intervening and independent forces the operation of which might have been reasonably foreseen, there will be no break in the chain of causation of such a character as to relieve the actor from liability." Harper, Torts (1933) 185.

The question of proximate cause was involved in a Kentucky case where (on August 3, 1933), a 750 ton oil and rock barge belonging to the defendant cement company was tied to a dock on the Ohio River during a thunderstorm. An explosion occurred, killing everyone on board, including the plaintiffs' decedents. The plaintiffs contended that the explosion was caused by the negligence of the defendant in failing to use reasonable care to provide the deceased persons with a safe place in which to work, in that the defendant, after having used the barge for oil, failed properly to clean out its hold so as to prevent the generation of gases. The lower court held that the defendant had failed to use reasonable care and that the explosion of the gases caused the death of the decedents. It also held that the gases were set off and exploded by a lightning
bolt which struck the barge, and the striking of the barge by the lightning, and the explosion of the gases therein as a result thereof, was not such a natural and probable consequence of leaving the gases in the barge as should have reasonably been anticipated by the respondent at the time it permitted the decedents to begin work on the barge, and that the plaintiffs could not recover. Upon appeal the cause was reversed the appellate court holding that when the thing done produces immediate danger of injury, and is a substantial factor in bringing it about, it is not necessary that the author of it should have had in mind the particular means by which the potential force he has created might be vitalized into injury; that here it was enough that the defendant realized the possibility of some danger resulting in allowing the gases to generate in the hold; and that it was not necessary that he foresee the particular danger which resulted. Johnson, et al. v. Kosmos Portland Cement Co., 64 F. (2d) 193 (C.C.A. 6th, 1933).

"The harm which was foreseeable, and the specific harm which actually resulted, need not be absolutely identical. * * * If there is a substantial likelihood that certain conduct when pursued will result in some appreciable harm to the plaintiff's person, then the defendant if he so conducts, cannot escape liability on the ground that he could not foresee the precise manner in which the harm would occur, nor the exact nature of the harm, nor the full extent of the harm." 25 Harv L. Rev. 238.

In a Wisconsin case, the plaintiff was riding along the highway at a reasonable speed, and the defendant was driving along behind the plaintiff. Just as the defendant was about to pass the plaintiff's vehicle, there was a sudden deflation of the defendant's left rear tire which caused the defendant to lose control of his car and strike the rear of the car in which the plaintiff was riding, causing the injuries for which the plaintiff seeks damages. Lower court granted judgment for the plaintiff. On appeal the judgment was reversed, the appellate court holding that the accidental and unavoidable deflation of the tire on the defendant's car constituted an unforeseeable, intervening and efficient cause of the resulting collision with the plaintiff's car so that the defendant was not liable for the injuries caused to the plaintiff. The court said, "Whenever a new cause intervenes which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequences would not have happened, then such injurious consequences must be deemed too remote to constitute the basis of a cause of action. Byerly v. Thorpe, 221 Wis. 28, 265 N.W. 76 (1936).

As a result of a grade crossing collision, a horse was killed, a wagon destroyed, and the contents of the wagon scattered, and were stolen by various persons at the scene of the accident. The driver, who was alone in charge for the plaintiff, was so stunned that he was found in a fit immediately after the accident. The plaintiffs are seeking to recover for the loss of the contents of the wagon. The defendants contended that their negligence was not the proximate cause of the loss of this property, since the act of the thieves was an intervening cause. The court, in affirming the decision of the lower court in favor of the plaintiff, said that it was permissible for a jury to find that the collision was the proximate cause of the loss of the contents of the wagon, saying, "The negligence which caused the collision resulted immediately in such a condition of the driver of the wagon that he was no longer able to protect his employer's property; the natural and probable result of his enforced abandonment of it in the street of a large city was its disappearance; and the wrong-
doer cannot escape making reparation for the loss caused by depriving the plaintiff of the protection which the presence of the driver in his right senses would have afforded." Brauer, et al. v. N. Y. Central & H. R. R. Co., 103 Atl. 166 (N.J. 1918).

The question of intervening cause was involved in a Massachusetts case where the plaintiff was riding in the rear seat of an automobile belonging to one Barrow. Barrow stopped to buy gasoline. The gasoline tank was under the front seat and the defendant's attendant inserted the nozzle of the hose into the tank, and then gave the handle of the pump a quick jerk, causing the nozzle of the hose to flop out, spilling gasoline over the clothes of the plaintiff. Barrow had left the cover off of the coil box of the car, and when he cranked it, a spark flew off and set the plaintiff's clothes on fire, resulting in severe burns to the plaintiff. The defendant oil company contended that the negligence of their station attendant was not the proximate cause of the plaintiff's injuries, but that the act of Barrow in leaving the cover off of the coil box was an intervening cause. The lower court rendered a judgment for the plaintiff which was affirmed on appeal, the court saying that the intervening act of a third person, which contributes a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer, if such intervening act should have been foreseen; and, that while there was no evidence that the defendant's employee knew of the uncovered coil box, it is a matter of common knowledge that gasoline is highly inflammable and that its contact with a spark is liable to result in serious consequences. Teasdale v. Beacon Oil Co., 164 N.E. 612 (Mass. 1929).

A similar result was reached in another Massachusetts case where the defendants left a wagon loaded with iron on the street unguarded. The plaintiff, a seven year old boy, and another boy came along, and a third boy called them over to watch him move the wagon. When the third boy lifted the tongue of the wagon a piece of the iron rolled off and struck the plaintiff, injuring his leg. The defendants contended that the injury was not due to their negligence in leaving the wagon unguarded, but to the intervening act of the third boy who moved the wagon. Liability of the defendants was sustained the court holding that the act of a 3rd person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen, the original negligence still remaining a culpable and direct cause of the injury. Lane v. Atlantic Works, 111 Mass. 136 (1872).

In a Missouri case, a seven year old child sued the city for negligence in failing to maintain a proper sidewalk. Because of the muddy condition of the sidewalk on one side of the street the plaintiff decided to cross the street in order to use a concrete sidewalk on the opposite side. While crossing, the plaintiff was struck by an automobile. It was contended that the negligence of the city concurred with the negligence of the driver of the car in producing the injuries, and therefore the city must respond in damages for such injuries. The court sustained a demurrer by the city which, on appeal, was affirmed on the grounds that the negligence by the city was not a "proximate cause" of the injury, and that the city was not liable to the child since the acts of the motorist were the independent, efficient and proximate cause of the accident. Smith v. Mabrey, et al., 154 S.W. (2d) 770 (Mo. 1941).

In another suit by a minor, a similar result was reached. The plaintiff, an eleven year old boy sues the administratrix of the estate of Dr. Wetherby for injuries sustained by the plaintiff when accidentally thrown from the decedent's
automobile. The plaintiff accompanied the decedent on an automobile trip, and as they rode along the plaintiff observed that the door was not securely closed. Plaintiff opened the door with the intention of closing it more securely, and the rush of air threw the door violently open and the plaintiff was thrown to the ground and was injured. The contention was that the Doctor was negligent in not examining the door to see that it was securely locked before he started the car. Judgment for the defendant, was affirmed on appeal, the court holding that proximate cause is that which, in a natural and continuous sequence, unbroken by any new, independent cause produces the injury, and without which the injury would not have occurred. Said the court: "It was only the independent act of the plaintiff in attempting to open and close the door which caused the accident, and an independent act which Dr. Wetherby was under no duty to anticipate." Newton v. Wetherby's Administratrix, 153 S.W. (2d) 947 (1941).

In another automobile case, the plaintiff sued the defendant to recover damages on account of injuries alleged to have been caused when a third party negligently drove an automobile into an electric light pole maintained by the defendant corporation, thereby causing another electric light pole also maintained by the defendant corporation to fall upon the plaintiff, injuring him. The plaintiff contended that the defendant corporation was negligent in permitting the second pole to become rotten and decayed so that when the third party negligently struck the first pole, the second pole fell, injuring the plaintiff. The defendant corporation demurred on the ground that its negligence was not the proximate cause of the injuries. The order overruling the demurrer was reversed. Held, An essential element of proximate cause is the requirement that the result must be such as might reasonably have been anticipated in the ordinary experience of men. Where the negligence merely creates a condition by which an injury is made possible and a subsequent independent act of an intervening agency causes the injury, in order for the negligence to be the "proximate cause" of the injury, not only should the type of the injury have been reasonably anticipated, but the intervention of the independent agency should have been anticipated. Indiana Service Corporation v. Johnston, et al., 34 N.E. (2d) 157 (Ind. 1941).

A similar result was reached in a Pennsylvania case where the plaintiff sued the county to recover damages for the death of her son. The son was killed when a car in which he was riding struck the wall of a bridge. The plaintiff contended that the defendant was negligent in not providing additional warnings of the approach to the bridge. There was also an allegation of the negligent maintenance and improper construction and design of the approach to the bridge and of the bridge. The lower court found that the proximate cause of the accident was not the alleged negligence of the defendant, but the negligence of the driver of the car. On the plaintiff's appeal this holding was affirmed, the appellate court saying that the intervening negligent act of the driver caused the accident and was so clearly unforeseeable and extraordinarily negligent that the alleged negligence of the county was not the "proximate cause" of the decedent's death. The proximate cause was the reckless and negligent act of the driver whose actions nobody could foresee. Biearman v. Allegheny County, 145 Pa. Super. 330, 21 Atl. (2d) 112 (1941).

In another case involving intervening cause, some of the defendant's employees negligently left some dynamite caps lying on some lumber, and a small boy picked one up. He later threw it into a bonfire and it exploded, injuring him. The defendant's insurer disclaimed liability upon the theory that the boy's act was an "intervening cause." Judgment for the plaintiff was affirmed, the
court saying that where a dangerous article is negligently left by a defendant where it is likely to be found by children, the act of children who find the article and are injured by it is not an "intervening cause" of the injury so as to relieve the defendant of liability, since the result must have been, or at least should have been foreseen and the defendant is held liable under the general rule that a negligent person is responsible for all of the consequences of his negligence which ought reasonably to have been foreseen. American Mutual Liability Insurance Co. v. Buckley & Co., 117 F. (2d) 845 (C.C.A. 3rd, 1941).

A Tennessee court rendered judgment in favor of the defendant electric company in a case where the company allowed tree branches to grow up around an uninsulated transmission line at a point where the line crossed the highway, and a third party cut the limb from the tree at the direction of the owner of the abutting property and the limb lodged on the wire pulling it on top of the tree, thus creating a short circuit and causing the wire to burn and separate. A few minutes after, the electric company received notice that the wire was down and extending across the highway. The owner of the abutting land attempted to lead the plaintiff's horse under the wire and the horse came in contact with the wire and was killed. On appeal the judgment was affirmed, the appellate court saying that the electric company was not bound to anticipate the actions of the owner and the third party which constituted an "independent intervening cause" of the accident. An injury that is the natural and probable consequence of an act of negligence is actionable and such an act is the proximate cause of the injury. But an injury which could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable and such an act is either the remote cause, or no cause whatever, of the injury. Moyers, et al. v. Ogle, 148 S.W. (2d) 637 (Tenn. App. 1940).

In a Texas case, the plaintiff was an employee of a street car company and while in the course of employment, the street car was derailed because of a defective condition of the tracks. In attempting to derail the car by the use of a "frog," the plaintiff motorman was injured. He had reported the defective condition of the track to the company, but they had done nothing about it. The lower court sustained a general demurrer to the petition, from which the plaintiff appeals. The appellate court reversed saying that negligence creating a condition may become the "proximate cause" of an injury, even though the active cause is some intervening agency, if the fact of the intervening agency could have been reasonably anticipated, but if the intervening agency could not have been reasonably anticipated, then the intervening agency will be deemed the "proximate cause." Here in view of the fact that the defendant knew of the defective condition of the tracks it could reasonably have anticipated an injury to someone. Renegar v. Fort Worth Transit Co., 143 S.W. (2d) 443 (Tex. Civ. App. 1940).

A New Mexico court rendered judgment in favor of a defendant in a case where the defendant had placed grasshopper poison on the land of an adjoining owner for the purpose of storing it, and the land was later leased to the plaintiff who used it for grazing purpose for his cattle, which cattle ate the poisoned feed and died. The defendant had personal knowledge of the leasing, but did not tell the plaintiff of the poison which he had placed on the land. The defendant contended that the renting of the land by the plaintiff was an "intervening cause" which he should not be required to anticipate, and which broke the causal connection between his negligence and the poisoning of the cattle. On appeal the judgment was reversed, the court saying that if the occurrence of the intervening cause upon which the defendant relies might reason-
ably have been anticipated, such intervening cause will not interrupt the connection between the original cause and the injury. The defendant here should have anticipated the results. Reif v. Morrison, 100 Pac. (2d) 229, 44 N.M. 201 (1940).

In a Georgia case the plaintiff was a guest in the automobile of the defendant when the defendant struck a car coming from the opposite direction. It was shown that the defendant was driving very negligently and at an excessive rate of speed under the very unfavorable weather conditions, and that at the time of the accident he was attempting to tune in a broadcast on his auto radio instead of watching where he was driving. The defendant insisted that the acts of the other driver were the proximate cause of the plaintiff's injuries. The court of appeals affirmed the judgment for the plaintiff saying, "While the general rule is that if, subsequently to an original wrongful or negligent act, a new cause has intervened of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote, still if the character of the intervening act claimed to break the connection between the original wrongful act and the subsequent injury was such that its probable or natural consequences could reasonably have been anticipated, apprehended, or foreseen by the original wrongdoer, the causal connection is not broken, and the original wrongdoer is responsible for all of the consequences resulting from the intervening act." The defendant should have foreseen that some danger might result from his negligent driving. McDaniel v. Brown, 6 S.E. (2d) 382 (Ga. App. 1939).

In an action against a telephone company for destruction of the plaintiff's warehouse by fire allegedly caused by the negligence of defendant company's employee who forced open a window of the warehouse in order to enter and remove a dead telephone and then left by the door, leaving it open, as a result of which hoboes entered the warehouse and caused the fire, an Arkansas court rendered judgment for the plaintiff which was affirmed on appeal, the court stating the rule to be that in no case is the connection between an original act of negligence and an injury broken by an intervening act of negligence of another, if a person of ordinary sagacity and experience, acquainted with all of the circumstances, could have reasonably anticipated that the intervening event might in natural and ordinary course of things follow his act of negligence, or if the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause. Southwestern Bell Telephone Co. v. Adams, 133 S.W. (2d) 867 (Ark. 1939).

In an Illinois case two boys found a fuse on the right-of-way of the defendant railroad. They took it home with them, and later one of the boys lit it in the presence of the plaintiff, a child of nine years of age, and a spark flew and ignited the dress of the plaintiff, as a result of which the plaintiff was severely burned. The plaintiff charged that the defendant railroad was negligent with respect to the fuse. The lower court rendered judgment in favor of the plaintiff. However, on appeal, this verdict was reversed on the ground that the negligence of the defendant was not the proximate cause of the injury to the plaintiff. The court said that proximate cause is that which naturally leads to or produces, or contributes directly to producing a result such as might be expected by any reasonable and prudent man as likely to directly and naturally follow and flow out of the performance or nonperformance of any act. The act here was not of that nature. Dabrowski v. Illinois Central R. Co., 24 N.E. (2d) 382, 303 Ill. App. 31 (1939).
In an action for property damage caused by the falling of the walls of the defendant's brick building during a fire, the plaintiff charged that the building was negligently constructed and maintained, by reason of the fact that the second story walls were too thin and so negligently constructed that they had cracked, and were bulging and out of line long before the fire, and that the defendant knew or must necessarily have known of such faulty construction and dangerous condition. The defendant contended that the fire was no fault of his, and that it was an independent, intervening agency. The lower court granted judgment for the plaintiff which was affirmed by the Texas Court of Civil Appeals, the court stating the rule to be that negligence creating a condition may become the "proximate cause" of an injury, even though the active cause is some intervening agency, if the fact of the intervening agency could have been reasonably anticipated under all the circumstances. It held that the defendant ought reasonably to have foreseen the possibility of fire in view of the fact that fire insurance was so common. *Wachholder v. Kitchens*, 126 S.W. (2d) 519 (Tex. Civ. App. 1939).

In a Nebraska personal injury case, the plaintiff sued to recover for personal injuries received by her as a result of the negligence of the defendant in the construction and maintenance of a roof monitor on its warehouse. The monitor was torn from the warehouse by a windstorm and carried more than a block away to the home of the plaintiff, injuring her. The defendant contended that the injury was the sole and proximate result of an act of God, and that the wind was an intervening cause between the negligence of the defendant and the injury to the plaintiff. The plaintiff showed that the wind was usual for that time and place. The Supreme Court affirmed a judgment for the plaintiff saying that if the occurrence of the intervening cause might reasonably have been anticipated, such intervening cause will not interrupt the connection between the original cause and the injury. Under this rule the ordinary forces of nature and condition of the weather, such as cold, heat, wind, or a rainstorm or snowstorm, which are usual at the time and place, are conditions which reasonably could have been anticipated, and will not relieve from liability the person guilty of the original negligent act or omission. *Long v. Crystal Refrigerator Co.*, 277 N.W. 830 (Neb. 1938).

A Texas court rendered judgment for the plaintiff who sued to recover for injuries to his wife sustained while she was a customer in the defendant's store and resulting from gunshot wounds inflicted by the accidental discharge of an automatic shotgun in the hands of another customer. The plaintiff charged that the defendant was negligent in permitting the other customer to inject shells into the gun, and that such act was dangerous to the safety of other customers in the store. The defendant contended that his negligence was not the "proximate cause" of the injury, but that the gun was caused to fire by either a defect in the mechanism of the gun, or by some improper manipulation of the gun by the other customer, and that either of these facts constituted an "intervening cause" which would relieve the defendant from liability. On appeal the upper court affirmed the judgment for the plaintiff saying that it is not every "new intervening cause" that will relieve from liability the original negligence. If it be such a new intervening cause as in the light of the attending circumstances ought reasonably to have been foreseen, then the causal connection between the original wrong and the resultant injury is not broken. *Berry v. Harper*, 111 S.W. (2d) 795 (Tex. Civ. App. 1937).

In a Colorado case a child, eight years old, through his next friend, sued the defendant for injuries received on a partially constructed merry-go-round
which the defendant and his employees had negligently left unguarded. The plaintiff and other children were playing on the merry-go-round when two older boys began to revolve the merry-go-round. The plaintiff's foot got caught in a cog and it was so badly crushed that it had to be amputated. The defendant contended that the act of the boys in causing the merry-go-round to revolve was such an intervening cause as to relieve him from liability. The lower court granted judgment for the defendant which, on appeal, was reversed on the ground that the act of a third person in setting in motion machinery attractive to children and left unguarded is not considered such an intervening independent cause as will relieve the owner of such machinery from liability for injury to a child, and a fortiori, the act of a child in the course of his play, after he reached the dangerous and attractive premises or machinery, cannot be regarded as an intervening efficient cause which will relieve the owner of liability. Simkins v. Dowis, 67 Pac. 2d 627, 100 Colo. 355 (1937).

In an Iowa case the plaintiff was a passenger in a car being driven along the public highway in the city of Des Moines. At a certain point the street was in a very defective condition, the bricks in the pavement having become loose and some having fallen away into the ditch and the others becoming disarranged and laying loose in the sand. The car in which the plaintiff was riding struck a defective spot in the pavement, swerved to the left, and collided with a cattle truck which was going in the opposite direction. For a long time prior to this accident the street had been in this defective condition. The lower court rendered judgment in favor of the plaintiff. The defendant city, on appeal, contended the proximate cause of the injury to the plaintiff was the collision of the two cars, and that such was a sufficient intervening cause to excuse the defendant. The judgment was affirmed on the ground that the defendant could reasonably have anticipated that some accident might result from the defective pavement. Gray v. City of Des Moines, 265 N.W. 612 (Iowa 1936).

An Illinois court rendered judgment for the plaintiff in a case where the plaintiff was riding with her husband in an automobile along a highway and a third person attempted to pass them, and where at the same time the defendant was coming from the opposite direction and driving three feet over the black line in the middle of the road, resulting in a collision between all three cars and causing injuries to the plaintiff. The defendant contended that the attempt of the third person to pass the car in which plaintiff was riding was an intervening cause of the plaintiff's injury. However, the court, in affirming the judgment for plaintiff said that the defendant as a reasonable person should have anticipated a collision unless he pulled over to his side of the road in order to let the third car pass. The court stated the rule to be that if the occurrence of an intervening cause might reasonably have been anticipated, such intervening cause will not interrupt the connection between the original cause and the injury. Votrian v. Quick, 271 Ill. App. 259 (Ill. 1933).

In a Georgia case the defendant sold to a minor some loaded cartridges and a pistol in violation of the criminal statute of the state, and this minor, some days afterwards, lent the pistol to another minor, and the latter accidentally shot a third minor, the plaintiff in this action. The defendant contended that the proximate cause of the injury was the negligent act of the minor who accidentally discharged the pistol and that such act could not reasonably be expected by the defendant. Judgment for the defendant in the lower court, was reversed on appeal the Court of Appeals of Georgia saying the defendant was bound to anticipate the negligent habits of boys in handling weapons, and stating the rule to be that if, subsequently to the original wrongful act, a new cause intervened,
sufficient of itself to stand as the cause of the injury, the former will be considered too remote. But if the intervening cause and its probable consequence should reasonably have been anticipated by the original wrongdoer as a natural and probable result of the wrongful act, the causal connection between the wrongful act and the consequent injury is not broken, and an action for resulting damages will lie against the original tort-feasor. Spires v. Goldberg, 106 S.E. 585, 26 Ga. App. 530 (1921).

In another case involving intervening cause, in which the plaintiff sued as administrator, the evidence showed that the train on which the plaintiff's decedent was riding struck an automobile at a crossing and threw it against a switch stand, and that thereby the track was turned to such an extent that the train ran off the main track onto a switch track, and struck some cars standing thereon, resulting in injuries to the plaintiff's decedent. The plaintiff contended that the defendant was negligent in the operation of the train and the maintenance of the tracks. The lower court rendered judgment in favor of the defendant which was affirmed on appeal, the court saying it could not reasonably have been anticipated by the defendant that the automobile would be thrown against the switch stand. The court held that where there is an independent responsible agency intervening between the defendant's negligence and the injury, the question whether the original negligence is the proximate cause of the injury is to be determined by whether the agency might have been reasonably expected under the circumstances to intervene in such a way as to be likely to produce an injury similar to the one actually caused; and that if the intervening agency was one over which the original tort-feasor had no control, and which could not have reasonably been expected to occur in the ordinary course of nature, and according to common experience, such agency is the sole proximate cause of the injury. Engle v. Director General of Railroads, 133 N.E. 138, 78 Ind. App. 547 (1921).

The general rule as to foreseeability which can be gathered from the foregoing cases is that, where there is a negligent act or omission, it is not necessary to render it the proximate cause that the person committing it could or might have foreseen the particular consequence or precise form of the injury, or the particular manner in which it occurred, or that it would occur to the particular person, if the act might have been foreseen or anticipated that some injury might result. It is sufficient that the consequence attributable to the negligent act or omission was the natural and probable result thereof, although it might not have been specifically contemplated or anticipated. It should be particularly noted that the element of anticipation does not mean that the wrongdoer should anticipate the particular injury in question. It is sufficient if the wrongdoer had reasonable ground to apprehend some injury might occur from the negligent act. If the damage follows the wrongful act in an unbroken sequence, without any intervening, independent cause to break the continuity, then such damage is proximate to the injury, though the wrongdoer had no reasonable ground to apprehend it would occur from the negligent act.

A question of some difficulty arises where a person is guilty of a failure to exercise ordinary care, which failure, in the field of reasonable anticipation and experience of the average person, is usually followed by slight or immaterial results and damages, whether such person must nevertheless respond in damages to the full extent thereof when to such slight and to be anticipated results there are added unusual and extraordinary results. To make such person respond to the full extent might seem to work an injustice upon him. However, on the other hand, to deny to a person innocent of any wrong-doing compensation for
injuries and results therefrom which would not have occurred except for the negligence of a responsible person, would also, in many instances, work injustice. In the choice thus presented between two interested persons, one breaching the law imposed upon him of exercising due care, and the other being without fault, the courts favor the innocent party and lay the entire responsibility upon the one breaching his legal duty.

In the final analysis, the determination of a case involving the question of foreseeability and intervening cause must depend upon an appraisal of the totality of facts and circumstances in the individual case, and the application of the rules of law to the results of such appraisal.

ANTHONY FRANK.

Torts—Libel and Slander—Innuendo.—Plaintiff brought suit for libel on the basis of articles appearing in the newspaper of the defendant publisher. In commenting editorially on the settlement of claims of the county against former officials for alleged fraudulent land tax deals, the defendant charged that in the past, members of the highway committee had made money on the sale of road machinery to the county. In a subsequent issue, the editor qualified his statement by adding that the reference was not to present committee members but to those of many years ago. Thereafter, plaintiff, who had been a committee man ten years previous to the statement, sent a letter to the defendant requesting an express retraction if the charge did not refer to him. Defendant published plaintiff's letter in connection with an editorial stating that if the plaintiff had attended Christmas eve services in any of the town churches he "would have gotten a lot of good out of it and felt a whole lot better." Plaintiff alleged that by innuendo, defendant's statement accused him of such a general lack of Christian virtue as to require his attendance at church services. Defendant demurred, contending that the alleged defamatory statement standing alone without the innuendo did not in any way injure the plaintiff's character or subject him to ridicule and contempt; and that no innuendo could alter the sense of a statement or supply a meaning not obviously present. The trial court overruled the demurrer and defendant appealed from the order.

On appeal, held, order reversed. No innuendo can alter the sense of the alleged derogatory statement, or supply a meaning which is not there. The court must determine as a matter of law whether the language complained of is capable of the meaning ascribed to it by the complaint. Luthey v. Kronschnabl, 1 N.W. (2d) 799 (Wis. 1942).

There is a great deal of diversity of opinion in various jurisdictions as to the role which innuendo may play in libel actions where the defamatory meaning of the words is not immediately apparent. A comparison of the various positions adopted by courts can best be made if the well recognized distinction between words libellous per se and those libellous per quod is kept in mind. In the former situation, the effect of the words is so direct that damages will be presumed by the court; while in the latter, no such presumption arises, and if the plaintiff is to succeed, he must make proof of actual damages. The function of innuendo differs in each case, and the differences are so great as to necessitate separate examination.

When the theory of the plaintiff's action is that the words were defamatory in themselves, a numerical majority of the courts will not allow him to assign
a meaning by innuendo. *Old Dearborn Distributing Co. v. Seagram Distilling Corp.*, 288 Ill. App. 79, 5 N.E. (2d) 610 (1937), *Kassowitz v. Sentinel*, 277 N.W. 177 (Wis. 1936), *Ellsworth v. Martindale-Hubbell Law Dictionary*, 268 N.W. 400 (N.D. 1936). In other words, in these states the question is one of the normal unstrained meaning of the words employed. A strong minority, however, adopts a freer interpretation of the phrase "ordinary meaning of the words" and approaches the problem of a derogatory meaning present in a statement by innuendo in this fashion: if the words are ambiguous and capable of several meanings, one of which is actionable in se, the plaintiff may plead the meaning which he claims as the basis of his cause of action. These courts look upon such a pleading, not as an extension of the meaning of a statement or as an averment of special damages because of defamatory understanding, but as the statement of an actionable meaning which while not apparent, was always inherent in the statement. *Furr v. Foulke*, 266 N.W. 687 (S.D. 1936), *Bradstreet v. Gill*, 72 Tex. 115, 9 S.W. 753 (1888); *Maas v. National Casualty Co.*, 97 F. (2d) 247 (C.C.A. 4th 1938); *Washington Post v. Chaloner*, 250 U.S. 290, 39 Sup. Ct. 448, 63 L.Ed. 987 (1919).

Some courts of the majority which refuse to allow an innuendo to determine the meaning of an ambiguous statement have carried this policy to the extreme of throwing a plaintiff into a libel per quod action if he averred any extraneous facts surrounding the publication on which he brought suit. Clarity of legal thought has been sacrificed for example, when a court which denied the ability of an innuendo to change the natural import of the words was faced with the following situation: an actress brought suit on the basis of a picture and article which described her as the lady love of a famous comedian. Without showing special damages, the plaintiff contended that the words in their most innocent sense becarme actionable in the light of the additional fact that she was a married woman. In an opinion, two judges dissenting, the court decided that the plaintiff was properly allowed to assert the fact of her marital status, though neither the majority or minority questioned that such was a pleading by innuendo. *Sydney v. McFadden Newspaper Publications*, 242 N.Y. 208, 151 N.E. 209 (1926). Likewise, several southern courts by their strict adherence to the letter of the majority rule have precipitated themselves unnecessarily into a discussion of innuendo in libel in se actions based on articles describing a man as colored when in fact he was white. *Upton v. Times-Democrat Pub. Co.*, 104 La. 141, 28 So. 970 (1900); *Flood v. News and Courier Co.*, 71 S.C. 112, 50 S.E. 637 (1905).

These courts are apparently using innuendo in its widest sense: to cover every averment which is not immediately apparent from the statement on which the complaint is based, whether such averment resolves an ambiguity in meaning or describes the circumstances making the statement actionable. Logic would seem to be with the courts restricting the use of the term innuendo and the prohibitions surrounding its use to pleadings of the former type. When the term is used in a wider sense than this, courts involve themselves in at least an apparent contradiction of the rule that the standard of interpretation of an article allegedly defamatory is how those in the community would reasonably understand the statement. Facts attending publication but extraneous to it can give to an apparently innocent article a nuance of meaning which could not be detected merely from an examination of the words used. *Hubbard v. Associated Press*, 123 F. (2d) 864 (C.C.A. 4th, 1941).

An entirely different rule applies to the pleading of innuendo in actions on the theory of libel per quod. In such cases innuendo is almost universally
admitted, and the cases seem concerned with two questions—(1) the differences between libel per se and per quod, and (2) the uses to which innuendo can be put to make out a case.

From the standpoint of damages, the distinguishing factor between libel in se and per quod seems to be the obviousness and directness of the damage done to the plaintiff by the statement. "A publication is not of itself libellous unless the language as a whole in its ordinary meaning naturally and proximately was so injurious to the plaintiff that the court will presume without proof that his credit or reputation have been thereby impaired." McAuliffe v. Local Union No. 3 IBEW, 29 N.Y.S. (2d) 963 (1941), following O'Connell v. Press Publishing Co., 214 N.Y. 352, 108 N.E. 556 (1915); see also Ellsworth v. Martindale-Hubbell Law Dictionary Co., supra.

The most stringent application of the above rule is that governing libel in se actions in Connecticut, where in an early case, a candidate for political office brought an action against a person who accused him of violating the election laws by having liquor bought for voters. After denying the ability of innuendo to change the sense of words not actionable in themselves where no special damages were shown, the court stated: "To be actionable in se, the words must not only impute to the plaintiff a violation of a penal or criminal law, but it must charge him with a crime involving moral turpitude or subjecting him to an infamous punishment." Hoag v. Hatch, 23 Conn. 585 (1855).

New York, on the other hand, is rather lenient in its view of what constitutes libel in se. In a case tried in the federal court under New York law, the defendant newspaper was accused of charging that the plaintiff Congressman had opposed the appointment to the Federal bench of a named individual because of the latter's religion and foreign birth. Defendant contended that such a charge became actionable only if special damages could be shown, and innuendo pleaded, but a divided court found the charge libellous in se and laid down the following as New York law:

1. A false statement need not charge a violation of any law to be actionable in se.
2. False statements which might lead right thinking people to think a public official less fit to hold office are actionable in se.
3. The falsehood need not make even a majority of the readers think less of the person defamed in order to be libellous in se. Sweeney v. Schenectady Union Publishing Co., 122 F. (2d) 288 (C.C.A. 2d, 1941).

When, however, suit is brought on the theory of libel per quod, the plaintiff pleads that the defamation is actionable because of the meaning which was conveyed to the readers and the actual provable losses which he suffered thereby. Special significance which the words had because of their reference to preceding facts and exterior circumstances may and often must be alleged; and often the procedure followed is the pleading of innuendo. Ellsworth v. Martindale-Hubbell Law Dictionary, supra, illustrates pointedly the additional burden of proof the plaintiff must bear when the court decides that the words are not libellous in se.

In the case last mentioned, the plaintiff's attorney sued the defendant publisher because of blanks following his name in defendant's directory of attorneys. Plaintiff alleged that the possessors of the key to the ratings were given an untrue and defaming picture of his ability, credit, and recommendations. The court decided that the blanks were not libellous in se, and hence were not actionable unless the plaintiff gave to them by innuendo a meaning which they did not of themselves possess. Moreover, even if he did so, the plaintiff assumed
the burden of proving not the tendency of the words to cause damage, but of proving the actual damages caused.

Furthermore, in a per quod action, the assigning of a defamatory meaning by innuendo coupled with proof of special damages does not lead to recovery in all cases, for damages which were voluntarily incurred have been held to be not recoverable. In a 1941 case, Ohio courts refused to allow recovery when the article complained of fell into the above category. Plaintiff was a minister and the sponsor of proposed amendments to the state constitution. He was accused by the defendants of being a paid lobbyist and he brought suit, alleging that the statement, by innuendo, accused him of being connected with a tax movement opposed to the best interests of the people and of being a person of ill repute who would work for any interest if compensated according to his price. As items of special damage he listed the expenses incurred by him in denying the charges. On the ground that the items were voluntarily incurred, the court denied recovery.

There is a further division of authority on the question of the province of the court and jury in a trial where innuendo may be alleged. The principal case holds that it is for the court to determine whether the innuendo on which the complaint is based is properly ascribed to the statement. These are cases to the contrary. \textit{Pollard v. Forest Lawn Memorial Park Ass'n,} 59 P. (2d) 203, 15 Cal. App. (2d) 77, (1936); \textit{Lily v. Belk's Department Store,} 182 S.E. 889, 178 S.C. 278 (1935); \textit{Stampler v. Richmond,} 125 Pa. Sup. 385, 189 A. 730 (1937).

\textit{William Malloy.}
BOOK REVIEW


The author has adopted an unusual pattern for this book. It is divided into two parts, the first part is written by Wellman himself; the second part is divided into nine chapters each of which is written by some prominent member of the legal profession. The result is an extremely interesting and profitable work.

This volume really has a "double barreled" worth, for it has appeal both for the layman and the lawyer. To the layman this volume presents the lawyer in his most glamorous light, as he engages in a contest of wits and skill with his adversary. As far as the lawyer is concerned it really could be considered an outline of trial procedure spiced with anecdotes illustrating the points to be made.

For the young lawyer who contemplates engaging in trial work this work could be freely recommended. It is the next best thing to actual experience itself, this study of the methods of trial procedure employed by specialists in that field. A look at the list of contributors to this book shows, in addition to Wellman, such legal lights as a former United States Solicitor General, a former Chief Justice of the Supreme Court of Illinois, District Attorneys, a United States Ambassador, etc.

Part one of this volume concerns itself with Wellman's ideas on the importance of various phases of trial work; the opening statement, cross-examination of witnesses, argument to the jury, etc. As a basis for a discussion of such topics Wellman draws examples from his own considerable trial experiences and also from the experiences of such famous trial advocates as Rufus Choate, Abraham Lincoln, William F. Howe, Joseph Choate and many others. These illustrations from the lives of famous lawyers serve to emphasize the underlying theme of part one, that is, constant study of the lives, speeches and experiences of the masters of trial work for those who hope to make a success of this phase of the profession of law.

As has been indicated, part two of this book is devoted to more specific details of trial procedure, seen through the eyes of some advocate who has perhaps specialized in that field. To the reviewer the chapter contributed by the Hon. John W. Davis on the argument of an appeal was particularly instructive. He sets down ten rules by which the argument of an appeal should be governed which really could be considered the ten commandments of appellate argument. There is also a chapter on international law, a phase of the law which perhaps more than any other, has been taken over by specialists. This chapter by Frederic R. Coudert sets forth his hope and belief that in the future every American lawyer will be grounded in at least the rudiments of international law. These two contributions in the second part of this book are specially cited to show the variety of subjects which make up this half of the work. All nine of the chapters have something of value and interest to the reader.

It is the reviewer's opinion that this book compares favorably with Wellman's earlier efforts and is certainly one that may be read with profit and enjoyment by either the lawyer or the layman. It is not a dry stuffy text but rather a light, informative work which perhaps serves its purpose better than the ordinary text because it instructs while it entertains.

THE Soldiers' and Sailors' Civil Relief Act as it now stands is a composite of similar legislation passed in 1918 during the last war, substantially re-enacted in 1940 more than a year before the United States entered the present war, and of amendments adopted in 1942.¹

The express purpose of the Act is to “suspend enforcement,” temporarily, of civil liabilities of persons in the military service in order to entitle them to devote their entire energy to the “defense needs” of

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the nation. With few exceptions, the provisions of the Act do not relieve a debtor of liability. Although certain rights have been recognized as being "extinguished," the Act is officially described as "freezing" debt obligations, as "directed toward merely the withholding of remedies," and as affecting only adjective law. In general it provides a qualified moratorium on civil liabilities of men in the armed forces and certain others incidentally affected.

The method by which the soldier is protected and the rights of the various parties are adjusted, is through judicial machinery, broad discretionary power being lodged in the courts.

Despite division of the Act under headings, provisions under various of such headings must be considered in order to really determine how the law applies to any particular subject.

**Specific Application of the Act.**

The principal subject of relief is the soldier's civil liability which existed at the time of entry into military service. However, all actions against the soldier are subject to supervision; and relief is expressly afforded as to certain liabilities incurred subsequent to entrance into military service, as in relation to leases, taxes, and insurance.

The person entitled to benefits of the Act is primarily a person in the military service of the United States, such service period being generally considered to commence with the order to report for induction. Citizens serving in the armed forces of other United Nations are also protected. Dependents of the soldier are afforded relief in relation to lease, purchase contracts, and secured liabilities; also as to taxes other than income. The lessor of the soldier is granted conditional relief as to the leased property; and employees of a soldier apparently have certain protection in respect to real estate taxes. Persons secondarily liable with the soldier, and his sureties, may be afforded relief correlative to that granted the soldier. The Act also seems to have limited application to a "homestead entryman" engaged in performing farm labor, without any military service whatever.
As to procedure, relief can be granted by "any court" of the United States or its territories in "any action or proceeding." The action may be one against the soldier, or may have been brought by the soldier. Where no action is pending, the soldier or his dependent may, under certain circumstances, make special application to the court for relief, as in relation to extension by instalment payments and relief from eviction or rental liability under a lease. Similar application may be made by the creditor of the soldier for correlative relief respecting purchase contracts, mortgages, and taxes where relief is granted to the soldier under a lease, and to prevent reduction of interest rate to the 6% otherwise limited by the Act. The court may disregard the Act if property dispositions have been made "with intent to delay the just enforcement" of certain rights.

In most cases the court's power is exercised by ordering a stay of proceedings. A general power of stay is provided for "any action or proceeding"; and for relief from penalty. A special power of stay is provided in relation to persons secondarily liable, executions and attachments, rights of both tenant and owner under leases, in relation to sales contracts, secured obligations, storage liens, and tax sales. Co-ordinate to the general stay is a general tolling of limitations both for and against the soldier during the period of military service except as to Revenue Laws.

The power of the court is largely discretionary. In some situations the court's power depends on whether the soldier's military service has had an adverse effect upon his ability to pay, or on ability to interpose his defense. In still other situations the court's discretion is described in varying but broad terms. And in some situations this discretion is entirely unqualified, as in requiring plaintiff to file bond before entry of judgment, and in granting stays to persons secondarily liable.

An essential part of procedure under the Act is the appointment of an attorney for the soldier. The court is required to appoint an attorney for a defendant before entry of judgment against him, and after period of default, unless it affirmatively appears that such defendant is not in military service. Showing in this regard may be made by affidavit

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13 Secs. 102(1) (2), 200(1), 201.
14 Compare secs. 200, 201.
15 Secs. 700, 300.
16 Secs. 304(2), 206.
17 Sec. 600.
18 Secs. 201, 204, 202.
19 Secs. 103(1), 203(2) (b), 300(2), 301(3), 302(2) (a), 305(2) (a), and 500(2), respectively.
20 Secs. 205, 207.
22 Sec. 200(4), 201.
23 See Footnote 89.
24 Secs. 200(1); and 103(1) (2).
or by official certificate. The court also has discretionary power to appoint an attorney for a soldier where he is not otherwise represented. The soldier's "legal representative" (as well as the soldier) is expressly authorized to apply for relief from a judgment; and the attorney would apparently be a "person on behalf" of the soldier who would be authorized to apply for a stay in the course of any court proceeding. However, the attorney has no power to waiver. And it is apparently contemplated that the lawyer serve without compensation, except possibly in probate proceedings.

Waiver of rights under the Act is covered, and apparently limited, by three provisions. The soldier may waive right in relation to secured obligations and sales contracts by written agreement of the parties, presumably bi-lateral, executed after the soldier has entered military service. A co-obligor of the soldier, generally a guarantor or an accommodation maker, may waive by a writing, separate from the main obligation, apparently unilateral,—which is rendered ineffective if such co-obligor subsequently enters military service. And life insurance collateral may be released by written consent of the soldier. As above stated, power of waiver is expressly denied to the attorney representing the soldier.

Actions generally against the soldier are the subject of general relief under the law. An attorney may be appointed for the soldier at any stage of such proceedings; and such appointment is mandatory before entry of any judgment against the soldier. On application made during or within sixty days after military service, relief may be obtained by requiring plaintiff to file bond, by stay of proceedings on just terms for a period up to three months after military service, and by order "to protect the rights of the soldier."

Sec. 200(1); 601. As to an action involving more than one "judgment," see 20 Neb. Law Rev. 357, 361. Affidavit of non-military service made before expiration of time for answer held insufficient: National Bank v. Van Tassel, 36 N.Y.S. (2d) 478 (1942); and see cases under 1918 Act cited 28 Iowa Law Rev. 19. Court finding on "adequate investigation" held to constitute sufficient proof of non-military service: Petition of Institution for Savings (Mass. 1941) 33 N.E. (2d) 526.

Sec. 200(3).

Secs. 200(4), and 201.

Sec. 200(3).

Sec. 200 v. Downey, 25 N.Y.S. (2d) 600 (1941); In re Cool's Estate (N.J. 1941) 18 Atl. (2d) 714; see also Memorandum of Committee on National Defense, A.B.A. 3/25/41, p. 5.

Sec. 107.

Sec. 103(4).

Sec. 305(1).

Sec. 200(3).

Secs. 200(3), 200(1).

Secs. 200(1)(3), 201, 204.
Judgments against the soldier are subject to general stay of enforcement, and cognovit judgments cannot be enforced by sale or seizure of security, without court approval, during or within three months after military service. Judgments entered against soldiers during or within thirty days after military service are subject to vacation on application within ninety days after military service.

Garnishment and attachment proceedings are governed by the above provisions relating to actions generally and to judgments; and are also subject to express restriction by stay and vacation.

As to the soldier's obligations generally, existing prior to military service, maturity may be extended on an instalment basis and on other just terms, provided application is made during or within six months after military service. Interest on all such obligations is limited to 6% unless on application by the obligee, a court finds that the soldier's ability to pay is not materially affected by the military service.

Obligations secured by real estate owned by a soldier are subject to the above provisions relating to actions, judgments, and obligations generally. Such debts which existed prior to military service are also covered by express provisions: (a) that there be court approval of any sale or foreclosure of such security during and within three months after military service; (b) that foreclosure commenced during military service be subject to stay or other equitable disposition; and (c) that maturity may be extended on an instalment basis for a period equal to the combination of the period of military service and the remaining life of the obligation. The Act also contains a provision that no part of the period of military service after October 6, 1942 shall be included in any period “provided by any law for the rememption of real property sold * * to enforce any obligation * *.” As above indicated, the Act does permit of waiver of such relief by written agreement of the parties executed after the commencement of the period of military service.

Obligations secured by personal property are covered by the above provisions relating to “obligations secured by real estate”—excepting (a) maturity may be extended only for a period equal to that of the prior military service,—not to the combined period of military service and remaining life of the contract; and (b) period of redemption is

38 Secs. 201, 203 (2), 204.
37 Sec. 302 (3).
36 Sec. 200 (4).
39 Secs. 204, 203 (b).
40 Sec. 700.
41 Sec. 206.
42 Sec. 302 (3); 302 (2); and 700 (1) (2), respectively.
43 Sec. 205.
44 Sec. 107.
45 Sec. 700 (1) (b).
not extended. However, other provisions relate specially to personal property. Repossession of real property may be made by leave of court after an appraisal and payment of "just" sum to the soldier or dependent, where undue hardship will not result to such persons.46 Life insurance collateral cannot be taken over by the creditor during or within a year after the military service except by leave of court; and the government-guaranteed policies cannot be "forfeited" for "any indebtedness."47 A lien for storage cannot be enforced without court approval during or within three months after military service.48

Sales of real and personal property are subject to the appropriate provisions above referred to. Furthermore, where such contracts were effective by payment prior to military service, they are enforceable only by court action, the court having power to order repayment, repossession, stay of proceedings, or other equitable disposition.49 With respect to real estate sales, maturity may be extended on just terms and with equal periodic instalments for a period equal to that of military service combined with the remaining life of the contract.50 With respect to personal property sales, (a) maturity may be similarly extended for the military service period;51 and (b) repossession may be effected by leave of court after an appraisal and payment of a just sum to the soldier or dependent where "undue hardship" will not result.52 The Act permits waiver of such relief by written agreement of the parties executed after the commencement of military service.53

Liability under leases, as for accrued rent, is subject to the appropriate general provisions above referred to, also to certain special provisions.

As to a lease executed before the tenant's entry into military service and covering property occupied by the soldier's dependents, rent liability may be terminated in general on thirty days' written notice, effective on monthly rent day, otherwise on the last day of a calendar month;—although this relief is subject to modification as "justice and equity may under the circumstances require," upon application by the lessor within the termination period.54 A lease with a view to purchase is also subject to the provisions relating to sales of property.55

As to a lease on the home of dependents of the soldier, unless the monthly rental exceeds $80, eviction rights must be exercised by court

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46 Sec. 303.
47 Secs. 305(1); 403.
48 Sec. 305(2).
49 Secs. 301(1); 301(3).
50 Sec. 700(1)(a).
51 Sec. 700(1)(b).
52 Sec. 303.
53 Sec. 107.
54 Sec. 304(1)(2).
55 Sec. 301(1).
action, and the court may "stay the proceedings for not longer than three months" or "make such other order as may be just";—although where such relief is granted to the tenant, the lessor is "entitled" to relief "similar" to that provided by the Act in respect to sales of property, secured obligations, and taxes.\(^56\) (For "tax" provisions see below). Payments on such rental may be ordered out of the soldier's allotment under government regulations.\(^57\) Certain provisions relating to leases may be waived by written agreement executed after the soldier has entered military service.\(^58\)

As to all taxes except on income, including taxes on real property occupied by dependents "or employes" of a soldier, sale cannot be had except by leave of court; such sale will be stayed until six months after military service if the soldier's ability to pay is materially affected by his military service.\(^59\) Moreover, if real estate tax sale is had, the period of military service is not to be included in computing the period of redemption.\(^60\) On application made during or within six months after military service, maturity of all taxes may be extended on an instalment basis for the period of military service and on other just terms.\(^61\)

Income taxes of the soldier may be deferred as to collection during and for six months after military service if the soldier's ability to pay is materially impaired; and he is protected against double residence for state tax purposes.\(^62\)

Life insurance of a soldier is, on application, subject to protection. Policies up to $10,000, in force October 6, 1942 or at least thirty days before entrance into military service, may be covered by government guaranty of premium during and for two years after military service; such policies cannot be forfeited for indebtedness.\(^63\) As above stated, a debt secured by any of a soldier's life insurance as collateral is subject to restriction in enforcement.\(^64\)

Rights of the soldier in public lands are the subject of protection under the Act, to-wit: Homestead rights, desert lands, irrigation rights, rights to mineral lands, and mining claims.\(^65\) To obtain certain of such relief, the soldier is required to file notice within a limited time after entrance into military service, or after October 6, 1942.\(^66\) The period of relief variously extends for the period of military service and

\(^{56}\) Secs. 300(1) ; and 300(2).
\(^{57}\) Sec. 300(4).
\(^{58}\) Sec. 107(b).
\(^{59}\) Sec. 500(1) (2).
\(^{60}\) Sec. 205.
\(^{61}\) Sec. 700(1) (b).
\(^{62}\) Secs. 513 ; 514.
\(^{63}\) Sec. 400-408.
\(^{64}\) Sec. 305(1).
\(^{65}\) Secs. 502, 503(1) (2) ; 504(1) (2) ; 508 ; 501(1), 506(1) ; 505(1).
\(^{66}\) Secs. 504(3), 505(2), 506(2), 510(1).
six months thereafter, also for a period of hospitalization and dis-
ability.  

Probate proceedings are not expressly referred to in the Act. How-
ever, the provisions as to general relief, relating to the filing of affidavit as to non-military service, the appointment of attorney for defendant, the vacation of judgment, and the granting of stays relate to "any action or proceeding commenced in any court"; and the Act provides for tolling of limitations on the "bringing of any action or proceedings in any court," in actions by or against "heirs, executors, administrators" of the soldier. 68 And a New Jersey court has expressly held probate pro-
cedings to be within the purview of the relief statute. 69 It may be noted, however, that the benefits of the Act have been held not extend to a soldier acting in a representative capacity. 70

Penalties for violations of the Act are provided in certain respects. Breach or attempted breach, knowingly, of the provisions relating to repossession on sales, secured obligations, exiction, life insurance col-
ateral, and storage liens, constitute misdemeanors. 71 Similarly intentional use of a false affidavit of non-military service, and improper attempt to collect rent accruing after lease termination, are declared to be misdemeanors. 72

QUESTIONS OF INTENT AND CONSTRUCTION

In some respects the intent of the Soldiers' and Sailors' Relief Act is doubtful and judicial construction may well involve various legal questions, for example:

—Was it intended that the period for relief against a judgment expire ninety days after the termination of military service, even though the soldier have notice or knowledge of the entry of such judg-
ment? 73

—Is it entirely consistent and practical that varying periods of time be fixed in limiting the soldier's right to apply for relief under the Act? Six months after end of military service is provided in respect to extension on maturities on an instalment basis, 74 and redemption from tax sales. 75 Ninety days after end of military service is apparently provided in relation to vacation of a judgment 76 Sixty days after end

67 See secs. 501(1), 502, 503(2), 504(1) (2), 505(1), 508.
68 Secs. 200, 201; 205.
69 In re Cool's Estate, (N.J. 1941) 18 Atl. (2d) 714; and see 28 Iowa Law Rev. 29-32.
70 Halle v. Canenaugh (N.H. 1920) 111 Atl. 76.
71 Secs. 301 (2), 302(4), 300(3), 305(3).
72 Secs. 200(2); 304(3).
73 Cf. sec. 200(4).
74 Sec. 700.
75 Sec. 500(3).
76 Sec. 200 (4).
of military service is apparently provided in relation to stays of proceedings generally.\textsuperscript{77} Six months after start of military service is provided in relation to public lands.\textsuperscript{78}

—Is it entirely consistent that the relief to the soldier extend for varying periods of time after his military service? A period equal to that of military service is provided in relation to extension of maturity on instalment basis.\textsuperscript{79} Two years after military service is provided in relation to protection of life insurance policies, and one year for life insurance collateral.\textsuperscript{80} Six months after termination of military service is provided for stays in relation to tax sales and income taxes.\textsuperscript{81} Three months after military service is the protection period on foreclosure of encumbrances and sales generally, on storage lien enforcement, and on stays generally.\textsuperscript{82}

Is it entirely consistent that the period of the soldier's hospitalization and disability be added to his direct military service in computing the time within which the soldier may apply for relief in certain respects,\textsuperscript{83} and not in others?

—Was it intended that the special relief relating to foreclosure actions on secured obligations not apply to actions brought immediately after military service?\textsuperscript{84}

Is it consistent that the benefits of the Act extend to the soldier's dependents only in matters involved under Article III (generally leases, sales, mortgages) and in respect to taxes, and not in respect to other general provisions?\textsuperscript{85}

—Who are "dependents" of the soldier?\textsuperscript{86}

—What is the significance of the varying provisions as to the court's extent and manner of considering facts and relief? In one instance the requirement is "notice and hearing," in another, "such notice to the parties affected as it may require," in another "hearing";\textsuperscript{87} in other provisions notice and hearing are not mentioned. The term "opinion of

\textsuperscript{77} Sec. 201.
\textsuperscript{78} Secs. 504(1), 505(1)(2), 506(2), 511.
\textsuperscript{79} Sec. 700.
\textsuperscript{80} Secs. 403; 305(1).
\textsuperscript{81} Secs. 500(2)(3); 513.
\textsuperscript{82} Secs. 302(3); 305(2), 204. Comment 91 Penn. Law Rev. 192 re six month-three month variance.
\textsuperscript{83} Secs. 504(1), 505(1), 508.
\textsuperscript{84} See sec. 302(3) relating to proceedings "commenced during the period of military service."
\textsuperscript{85} Sec. 306; cf. sec. 300, 500, 103(4), 503. Comment 36 Ill. Law Rev. of Northwestern Univ. 337.
\textsuperscript{86} Act contains no definition, although one provision, sec. 300(1), refers to the "wife, children, or other dependents." Comment in Hearings before Committee on Military Affairs on H.R. 7029, 77th Cong. pp. 23, 24.
\textsuperscript{87} Secs. 700; 602; 302(2).
the court” likewise is used with relation to some, but not all fact determinations?

—What various meanings, if any, are intended in describing the types of court orders authorized to be made under the Act: “As may be equitable to conserve the interest(s) of all parties”; “as justice and equity may in the circumstances require”; “in accordance with principles of equity and justice”; “as in its (the court’s) opinion may be necessary to protect rights”; “as may be just?”

—Is any distinction intended between the “leave” of court required in relation to disposition of life insurance collateral; and the “approval” by the court, required in relation to enforcement of storage liens, and other relief?

—In matters relating to sales contracts, is the court required to enter a stay of proceedings if the defendant's ability is materially affected by his military service; or, may the court make any disposition of the case as may be “equitable”?

—What distinction is intended between the two terms used to describe the effect military service must have had upon the soldier’s financial situation to entitle him to relief under the Act, to-wit: materially “impaired” and materially “affected”?

—What is the nature of the relief, “similar” to that granted persons in military service, which, in event of lease termination, may be granted to a lessor not in military service?

—Is a distinction intended between the term “equal instalments” and the “equal periodic instalments” in the two provisions relating to extension of obligations?

—Is the court’s power to stay exition proceedings limited to three months?

—Has the court any power, discretionary or otherwise, to have rent paid by use of allotment, which may be ordered under “regulations”?

88 Secs. 304(2), 305(1), 306, 500(2).
89 Secs. 301(3), 302(2) (b), 305(2) (b); 304(2); 103(3); 200(1); 204, 300(2), 700. Note absence of any qualification in discretion relating to posting of bond and relief to sureties [(secs. 200(1) and 103(1) (2)] ; comment on wide discretionary power in 36 Ill. (N.W.) Law Review, 325; comment regarding section 304(2) in 91 Penn Law Rev. 186.
90 Sec. 305(1).
91 Secs. 305(2), 302(3).
92 Compare “shall,” with use of “or” connecting the various clauses in sec. 301(3).
93 Secs. 202, 306; and 201, 206, 300 (2), 301(3), 302(2), 305(1), 700(1), respectively.
94 Sec. 300(2).
95 Subsec. (a) and (b) of sec. 700(1).
96 See sec. 300(2); compare Gilluly v. Hawkins (Wash. 1919) 182 Pac. 958; and Riordan v. Zube (Cal. App. 1920) 195 Pac. 65; note discussion, Hearings before Committee on Military Affairs on H.R. 7029, 77th Cong. pp. 14-17; also 91 Penn Law Rev. 84.
prescribed by the Secretaries of War and Navy?97 Was it intended that an owner of real estate, unlike other creditors, be compelled to extend credit for three months or other period to the soldier-tenant without any financial protection within control of the court?98

—Is it entirely consistent that, when a soldier-lessee obtains relief, correlative relief may be granted his lessor, yet when a soldier-mortgagor obtains relief, correlative relief is not so afforded his mortgagee?99

—Is the redemption period in a real estate mortgage foreclosure, which, as in Wisconsin, occurs primarily before a sale, necessarily extended by the period of military service of any defendant?100

—Is it intended that there be no extension of redemption period in relation to tax or mortgage sales of personal property?101

—Should not the soldier or dependent or employe be required to file notice by affidavit or otherwise, in order to obtain relief relating to tax sales?102

—Is the “appointment” of attorney mandatory before entry of judgment against a soldier even though he personally appears or is represented by an authorized attorney?103

—Is there any significance in the distinction between the “legal representative” who may act on behalf of a soldier in respect to vacation of judgments, and the “person on behalf of the soldier” who may apply for a stay of proceedings?104

—Who is a “bona fide purchaser for value under such judgment” in the provision protecting third party rights on vacation of a judgment entered against the soldier?105

—Was it intended that a soldier be permitted to waive secondary liability rights by execution of a writing during military service? If so, can all rights under the Act be so waived?106

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97 Compare sec. 300(4). Information as to “prescribed regulations,” if any, is not available in this corps area.
98 Compare sec. 300(2) and (4); see Comment 91 Penn L. Rev. 184.
99 Lessor relief under secs. 300, 304. Protection need of mortgagee would include taxes on real estate not occupied by soldier, dependent or employe. Cf. sec. 500(1). See also Comment 91 Penn Law Rev. 187.
101 Compare extension of redemption on sales of real estate under sec. 205.
102 Under sec. 500(1) (2) no method is provided by which municipal authorities can practically determine who property in the municipality is and is not owned or occupied by a person “in military service” or his dependent or employe. Compare filing of notices in relation to public lands, secs. 504(3), 505(2), 506(2).
103 Note use of phrase “shall have appointed” in sec. 200(1).
104 Secs. 200(4), and 201.
105 Secs. 200(4). For varying opinions as to whether a purchaser can be “bona fide” where requirements as filing of affidavit of non-military service, have not been complied with, see 28 Iowa Law Rev. 23-27, 34.
106 Cf. sec. 103(4) under which such waiver is rendered invalid by “subsequent” entrance into military service. See Report, War Work Sub-Committee, A.B.A. 7/18/42, p. 5; also 15 Wis. Bar Association Bulletin, p. 222.
Does the Act apply to administrative agencies and governmental tribunals? While the provision as to tolling of limitations, as recently amended, includes "any action or proceeding in any court, board, bureau, commission, department, or other agency of government," the general authority under the Act applies only to "courts."

What if any power has the court to appoint a custodian for property of the soldier during his military service?107a

FUTURE IMPORTANCE OF CLARIFICATION

The immediate purpose of the Act is to strengthen the morale of the soldier during the war, but the substantial significance and value of this legislation depend upon its application after the war. This law is designed as both present and future protection for individual property rights of the men in the armed forces. If those property rights are denied, or prejudiced, as a result of military service, not only will the men properly feel that a grave injustice has been done them, but their part in our economic system, and indeed that system itself, may be jeopardized. In view of the number of men in the armed forces, and the period of time involved, this Relief Act will be of far greater significance in our national life than any other similar law in the history of the country.

To make the Act really effective after the war, (a) the rights of the soldier must be made known to him immediately upon his discharge from military service; (b) he must be properly represented in the enforcement of his rights; and (c) such rights must be as free from doubt as possible, so that they may be judicially declared without undue delay.

Doubt as to the meaning of provisions of this Act will result in extended legal controversy which, regardless of outcome, may well deprive soldiers of the relief intended. Neither the soldier's financial situation, nor the amount involved, will normally permit of long drawn-out litigation. To avoid this danger, at least the apparent difficulties of construction should be eliminated if possible. In respect to this particular statute, the need for later judicial clarification should be reduced to a minimum. It is submitted that Congress might consider the possibility of clarifying phraseology of the Soldier's and Sailor's Civil Relief Act in respects above mentioned.

107 Secs. 205; 101(4). See Hearings before Committee on Military Affairs on H.R. 7029, 77th Cong. 13; also recommendation War Work Sub-Committee, A.B.A. 7/18/42, p. 23.

107a Compare Alberta Statutes 4 Geo VI c 4 (1940) providing for "Public Administrator" to care for soldier's property; and approval comment 36 Ill. L. Rev. of Northwestern Univ. 334.
LAWYERS AND THE FUTURE OF THE RELIEF ACT

The lawyer is already a vital factor in the present operation of the Civil Relief Act. The American Bar Association and local associations had set up facilities to render legal service under the Act some time before the United States entered the war. Since December 1941, thousands of lawyers throughout the nation have offered their services and, without compensation, have handled tens of thousands of legal matters for men in the armed forces and their dependents. Requests for such service have come from the American Red Cross, Army Emergency Relief, the U.S.O. and other public and private relief organizations as well as directly from the soldier.\(^\text{108}\)

After the war, when the soldiers are leaving military service, it will be vital that the ex-service men promptly obtain correct information as to their rights under the Act; and that they be properly represented in the enforcement of those rights. Lawyers will be essential in both respects. Although the Act provides for official notice to the soldier "of the benefits accorded by" it,\(^\text{109}\) it is obvious that he cannot fully understand the scope and limitations of the relief afforded under this complex statute without professional legal advice. Moreover the need for such promptness and accuracy in obtaining such service is accentuated by the relatively short\(^\text{110}\) and varying periods after military service within which the soldier must act to obtain relief. Relief under the Act is afforded solely by court proceedings. The ex-soldier will obviously require legal representation in obtaining such relief.

A serious problem is presented as to just how the ex-soldier can be assured of obtaining legal advice and representation. In many, if not most of the controversies, the soldier will not be in a position to pay a reasonable attorney fee. Yet it would not seem proper that lawyers be asked or even expected to continue rendering such service after the war, entirely without compensation. The matter appears to be one worthy of immediate consideration and action on the part of the organized bar, possibly in collaboration with federal and state authorities.

The economic readjustment of the soldier and his continuance as part of the free-enterprise-life of the nation, may depend materially upon the Soldiers' and Sailors' Civil Relief Act, and upon whether that Act is given its real intended effect after the war. It is not only the duty, but the privilege of the lawyer to take a leading role in accomplishing this purpose. Such service will advance lawyers in the regard of their community; and an enlightened public will realize the true meaning of law in a democracy.


\(^{109}\) Sec. 105.

\(^{110}\) Cf. two years in Alberta and Saskatchewan, unlimited in Great Britain and Manitoba. also discussion: 36 Ill. Law Rev. of Northwestern Univ. 333-336.
SUBVERSIVE ACTIVITIES AGAINST GOVERNMENT---TWO CONFLICTING DOCTRINES*

ROGER SHERMAN HOAR*

In a free democracy such as ours, one of the most difficult problems will always be to maintain a nice balance between non-encroachment on our freedoms, and the preservation of the government which protects those freedoms. Abraham Lincoln has well expressed this dilemma as follows:

"Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence."1

This fundamental dilemma is exemplified in the struggle for ascendancy, from the first World War until the second, between two doctrines of constitutional law: (1) the "clear and present danger" doctrine, sometimes called the "Holmes" doctrine, to the effect that civil liberties cannot be denied to subversive movements, unless and until those movements are seen to be on the verge of success; and (2) the "self-defense" doctrine, to the effect that the constitution, for its own protection, withdraws the benefits of its guarantees of civil liberties from those who seek to overthrow it.

The object of this present paper is to trace the constitutional history of the ups and down of these two competing doctrines, in opinions, both majority and dissenting, of the Supreme Court of the United States.

The "self-defense" doctrine is the more ancient of the two. Justice Frankfurter2 traces it back to Abraham Lincoln's message of July 4, 1861, to a special session of the Congress, when in reply to an accusation that he had illegally suspended the writ of habeas corpus, the President asserted that the Federal Government must be preserved, even if that preservation necessitates that

"some single law, made in such extreme tenderness of the citizen's liberty that practically it relieves more of the guilty than of the innocent, should to a very limited extent be violated."3

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2 Dissenting opinion in Bridges v. California, 314 U.S. 252, 62 S.Ct. 190 (1941) 203.

It is generally agreed that the "clear and present danger" doctrine originated in the following dictum by Justice Holmes in the *Schenck* case in 1918:

"The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."\(^4\)

It is important that we note the following facts about this obscure sentence. It occurs in a unanimous opinion. It was wholly unnecessary to the decision of the case, inasmuch as the conviction of Schenck for attempting to cause insubordination and obstruct the draft was sustained by the Court. Furthermore the context leads to the conclusion that these words were employed as a species of "thinking out loud," a sort of "on the one hand . . . ; but on the other . . . ."

Whether they were noticed at all by the other members of the Court, who were unanimously agreed that Schenck should be convicted, doctrine or no doctrine, will probably never be known.

It would not be seemly to accuse Justice Holmes of inserting those words into that opinion as what fiction-writers call a "plant," but the fact remains that later on they proved very handy for that purpose. At any rate the thought contained in those words was not raised again by Justice Holmes in his opinions sustaining the convictions of Frohwerk\(^5\) and of Debs,\(^6\) on the authority of the *Schenck* case, nor even in his dissent in the *Stilson* case,\(^7\) in which dissent Justice Brandeis joined.

But, in 1919, in Justice Holme's dissenting opinion in the *Abrams* case, in which opinion Justice Brandies joined, the doctrine is casually alluded to in the following words:

"I do not doubt for a moment that by the same reason that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent."\(^8\)

This is an even more moderate statement of the doctrine than Justice Holmes's original statement of it, for note the words: "or is intended to produce," words later forgotten or repudiated by him.

In 1920, in the majority opinion of Justice McKenna in the *Schaefer* case, we find an explicit assertion of the competing "self-defense" doc-

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\(^4\) Schenck v. United States, 249 U.S. 47, 52, 63 L.Ed. 470 (1918).
\(^5\) Frohwerk v. United States, 249 U.S. 204, 63 L.Ed. 560 (1918).
\(^6\) Debs v. United States, 249 U.S. 211, 63 L.Ed. 566 (1918).
\(^7\) Stilson v. United States, 250 U.S. 583, 589, 63 L.Ed. 1154 (1919).
\(^8\) Abrams v. United States, 250 U.S. 616, 627, 63 L.Ed. 1173 (1919).
trine, which had been implicit in the Schenck, Frohwerk, Debs, Stilson and Abrams opinions. The Court now stated:

“A curious spectacle was presented: that great ordinance of government and orderly liberty was invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. . . . Verdicts and judgments of conviction were the reply to the challenge, and when they were brought here our response to it was unhesitating and direct. We did more than reject the contention; we forestalled all shades of repetition of it including that in the case at the bar.”

So they thought. Their assertion of that doctrine made it wholly unnecessary for the majority to dignify even by rebuttal the assertion of the “clear and present danger” doctrine in the dissent in that case by Justice Brandeis, Holmes concurring, in which the astonishing statement is made that in the Schenck case “the extent to which Congress may, under the Constitution, interfere with free speech was . . . declared by a unanimous court to be” this alleged doctrine! Brandeis and Holmes then proceed to base their entire dissent categorically on a demonstration that Schaefer’s subversive publications created no clear and present danger.

Later that same year, in the Pierce case, Justice Brandeis (Holmes concurring) again asserted the “clear and present danger” doctrine, and again the majority merely ignored it.

In the Gilbert case late in 1920, Justice McKenna, speaking for the majority of the Court, including Justice Holmes, reasserted the “self-defense” doctrine. After citing a number of prior opinions, from Schenck down to Abrams, Justice McKenna said:

“In Schaefer v. United States, 251 U.S. 466, commenting on those cases and their contentions it was said that the curious spectacle was presented of the Constitution of the United States being invoked to justify the activities of anarchy or of the enemies of the United States, and by a strange perversion of its precepts it was adduced against itself. And we did more than reject the contention, we forestalled all repetitions of it, and the contention in the case at bar is a repetition of it.”

Chief Justice White dissented on merely a point of jurisdiction. Justice Brandeis alone dissented on the merits; and it is to be noted that, now that for the first time Justice Holmes was on the other side of the fence, there is no mention of the “clear and present danger”
doctrine. May not this occurrence absolve Mr. Brandeis from responsibility for that doctrine?

This brings us down to 1925, up to which time the "self-defense" doctrine had been categorically asserted in two majority opinions, and had been implicit in at least five more, and had not up to then been explicitly questioned even in a dissent. We find that the "clear and present danger" doctrine had been asserted in one dictum (written by Justice Holmes) and in three Holmes-Brandeis dissents; but even this slight recognition had brought the alleged doctrine to the point where it could not longer be ignored by the rest of the Court; it became incumbent upon the majority to scotch it. Accordingly, in the Gitlow case, the majority opinion by Justice Sanford quotes with approval the following from the Supreme Court of Illinois:

"Manifestly, the legislature has authority to forbid the advocacy of a doctrine designed and intended to overthrow the government, without waiting until there is a present and imminent danger of the success of the plan advocated. If the State were compelled to wait until the apprehended danger became certain, then its right to protect itself would come into being simultaneously with the overthrow of the government, when there would be neither prosecuting officers nor courts for the enforcement of the law."[^14]

And, he further says:

"That utterances inciting to the overthrow of organized government by unlawful means, present a sufficient danger of substantive evil to bring their punishment within the range of legislative discretion, is clear. . . . And the immediate danger is none the less real and substantial, because the effect of a given utterance cannot be accurately foreseen. . . . A single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."[^15]

Justice Holmes and Brandeis, in their dissent[^15a] again assert the doctrine refuted by the above quotations from the majority. Their in-

[^15]: Id., at 669.
[^15a]: Id., at 672.
sistence that this doctrine had the unanimous sanction of the Court in the Schenck case, required some reply.

This reply consisted in distinguishing the Schenck case, rather than in dignifying the alleged "clear and present danger" doctrine by overruling it. Justice Sanford stated that the sentence which Justice Holmes had inserted in the Schenck case,

"has no application to those like the present, where the legislative body itself has previously determined the danger of substantive evil arising from utterances of a specified character."

Subsequent developments cast doubt on the tactical wisdom of Justice Sanford's not dismissing the Hughes interpolation as a mere inadvertent dictum of the Schenck case, rather than to have resorted to this somewhat labored attempt at distinguishing.

The Whitney case in 1927 afforded Justices Holmes and Brandeis an opportunity to attack the Gitlow opinion on two fronts, with a pincers movement. Their specially concurring opinion: (a) relied on the fact that the Gitlow case had merely distinguished the Schenck dictum; and (b) invented a new doctrine to combat the ground of distinguishing. This new doctrine was that a legislative determination that certain acts are dangerous, must be disregarded unless the Court finds that these acts actually are dangerous. The two dissenters even tried to add a new limitation to the "clear and present danger" doctrine, namely that the danger must also be serious. Thus they sought not only to limit the applicability of the Gitlow decision, but also to weaken it in cases to which it was applicable. And all under the guise of a concurrence!

Such persistence certainly deserves to be rewarded. Yet, up until 1936 there had never been a majority reliance upon the "clear and present danger" doctrine, so often asserted by Holmes and Brandeis, and by them alone; a doctrine once completely and logically demolished by the majority, a doctrine utterly inconsistent with the twice-asserted majority "self-defense" doctrine.

In the Stromberg case in 1931, although a conviction under a red flag law was reversed, the majority opinion by Justice Hughes reiterated the "self-defense" doctrine in the following words:

"There is no question but that the State may thus provide for the punishment of those who indulge in utterances which incite to violence and crime and threaten the overthrow of organized government by unlawful means. There is no constitutional immunity for such conduct abhorrent to our institutions."
There was no mention of the "clear and present danger" doctrine in this case, nor in three others of about the same period to which it might have been pertinent.²⁰

In the first *Herndon* case, Justice Cardozo mentioned the doctrine in a dissent.²¹

Finally, in 1937, nineteen years after its first assertion, the "clear and present danger" doctrine first received majority reliance, not however in a case involving either national defense or an attempt at overthrowing the government, but rather one merely involving the preaching of race-equality to negroes.²² Even this case does not overrule the *Gitlow* case, but reasserts the two principles there asserted; and, in at last dignifying the *Schenck* dictum as a principle of law, does so by merely distinguishing the *Gitlow* dictum as it in turn had distinguished the *Schenck* dictum. As the writer interprets the distinction in the *Herndon* case, it is that Herndon was not trying to overthrow the government. The second pincer of the Holmes-Brandeis specially concurring opinion in the *Whitney* case, namely that the court can go behind a legislative determination of imminent danger, still has not been dignified by majority support. In fact, recent decisions in other fields seem to bar out this possibility.

Since the initial majority recognition of the "clear and present danger" doctrine in the second *Herndon* case, it has been reasserted only five times, one of them a dissent, and all in fields remote from the field of national defense in which Justice Holmes so often futilely tried to establish it. Three of these five instances related to peaceful picketing,²³ one to the distribution of religious tracts (alleged to be likely to disturb the peace),²⁴ and one to contempt of court.²⁵

It was not asserted in the handbill cases,²⁶ nor in the Jersey City free speech case,²⁷ nor in the flag-salute case,²⁸ nor even in Justice Stone's lone disent in the latter, though it may perhaps be considered implicit in his concluding sentence.²⁹

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In the *Bridges* case, handed down the day after "Pearl Harbor," but too soon to have been influenced thereby, we can note what may be the beginning of a new trend. Justice Frankfurter, is now the dissenter, and *against* the "clear and present danger" doctrine. He says:

"Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights... In the cases before us, the claims on behalf of freedom of speech and of the press encounter claims on behalf of liberties no less precious. California asserts her right to do what she has done as a means of safeguarding her system of justice."^29

He is joined by the strongest members of the Court: Chief Justice Stone, and Justices Roberts and Byrnes. Is it not likely that this Frankfurter dissent may lay the foundation for the eventual repudiation of this doctrine?

From all the foregoing, we can draw the following conclusions:

1. The "self-defense" doctrine is well-established, and has never been directly attacked, even in a dissent.
2. The "clear and present danger" doctrine has never been relied on by the Court to overturn a conviction in a case involving an attempt to subvert the government, or opposition to national defense.
3. The majority has applied it only five times: once in a case involving propaganda of race equality, twice in picketing cases, once in a case involving distribution of literature, and once in a case involving contempt of court.
4. The latest time that it has been applied, it prevailed in a mere five-to-four decision, the dissenters being the strongest members of the Court, headed by that great liberal, Justice Frankfurter.
5. The complete refutation of the doctrine by Justice Sanford in the *Gitlow* case has never been answered, in fact no attempt has ever been made to answer it.
6. The "clear and present danger" doctrine is utterly inconsistent with the well-established "self-defense" doctrine.
7. It may be considered to have reached its height just before Pearl Harbor, and now to be on its way out.

Shortly after the formulation of the Constitution of the United States, and before the result had been made public, Benjamin Franklin was asked by a Philadelphia lady whether "we had a monarchy or a republic." He replied: "A republic, if you can keep it."^30

Is not the answer to the proponents of the "clear and present danger" doctrine: "What good are civil liberties, if we are unwilling to qualify them in order to keep them?"

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^29 Bridges v. California, *supra*, 596.

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A WIDENING HORIZON

DOWN through the years the study of government has engrossed the attention of men. The problems of government have a habit of recurring. We are surprised to find that the ancients struggled with our problems and did not find the answer. Dictators are not new—wars of conquest, revolution, fill the pages of history.

An ideology becomes the goal of a people, something to die for, to sacrifice for. People grope their way upward in travail and hardship. Russia, China, India are examples. Their destiny is unknown to them or to us. It is idle to think that we can control the destinies of a billion people in flux. We may influence destinies by our example, we cannot direct, or control, or police them.

What should a government bring to a people? A consensus would probably be that the essential elements of an acceptable government must include these features:

- Ability and willingness to fight for country in war in spite of an intense desire for peace.
- Ability to produce munition of war.
- Great productivity in times of peace.
- A high standard of living for citizens.
- Opportunity for advancement and improvement of conditions by work and education.
- Administration of adequate standards of justice and maintenance of guaranteed right by independent courts.
- Good municipal or local governments.
- A solvent government.

Any system of government which grants or produces these elements may be an acceptable government regardless of its nature, be it an autocracy, a state socialism, a pure democracy or a republic of self-governing people.

If we apply the foregoing acid test to ourselves we find a highly creditable record in all elements except the extremely important last three. It is a singular thing that it is in those three the legal profession should make its greatest contribution. We have made a good start in the improvement of the administration of justice in recent years and the growing consciousness of our joint responsibility in this field of good government is producing results. But we cannot have good administration of justice in poor or corrupt systems of municipal government. We have brilliant sporadic instances of leadership and participation in local governments—Detroit, Essex County, N. J., Milwaukee, Cincinnati, Kansas City, New Orleans, New York. We have tolerated Long, Tammany, Hague, Kelly, Pendergast and many lesser lights.
We have not been deeply concerned with the science of good government. We have permitted our students in high schools and colleges to complete their courses without the study of history, government or constitution and then wondered why we did not produce more active citizens. We have unctuously boasted that we do not participate in politics. We have acted as though we were contaminated by politics, forgetting that government is politics. We must participate actively in government—good government—if we are to win in the fight for improved judicial administration.

Our lives are now governed by war, we are disciplined and tested, we are absorbed by actual participation in the struggle of the human race for freedom, we fight for our lives. But we can think this tremendous problem through, we can widen our horizon of thought in preparation for a widened horizon of action. We can be better citizens, we can influence others to be better citizens. It has been said that our profession must have an intellectual awakening. It must have an awakening in government and its responsibility for it.

Our splendid sons are the messengers of democracy through the world, carrying to harassed and struggling people everywhere an opportunity for freedom. As a result of their work, governments will be instituted among men. Shall it be state socialism or democracy? Shall there be freedom of thought in the world?

American industry and labor are winning the fight for production. Our soldiers will win in war with that production. What are we winning? Good government in all its aspects must be our goal. We must make democracy work if we want others to adopt it. We must widen our horizon.

Carl B. Rix.*

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LEGAL RELATIONS OF OWNERS OF PRESENT AND FUTURE INTERESTS IN PERSONALITY—CONSUMABLES

In the problem of protection of future interests in personalty one question must be whether future interests can exist in personalty. This problem has had a peculiar and long history and its adequate recounting as an historical problem has been done elsewhere and needs no repetition.¹

Today the chief vestige of the hoary past lies in the rule that there can be no future interests in consumables, an anachronistic survival among personalty doctrines. The rule raises two question: 1) what is a consumable and 2) to what extent can there be no future interest in consumables.

The first question: what is a consumable, is largely a question of fact. Actually it seems that there are two rules here which are often confused. The first rule concerns things which are necessarily consumed in their use and this group consists largely of foodstuffs. The second rule concerns things whose use involves deterioration or diminution and in some cases annihilation and this group covers a wide variety such as household goods, tools and the like. As to the first group: foodstuffs, the rule is that there can be no future interests² unless the quantity is so large that no one would reasonably expect actual physical consumption. The other rule concerning things whose use involves deterioration is that the life tenant has free and unlimited use (short of waste) and the remainderman gets whatever, if anything, is left.³ But a formalistic rule based on the form of the res has given way to a freer classification, thus if the res is part of a stock in trade or is given

¹ Gray, Future Interests in Personal Property, 14 HARV. L. REV., 52 (1901).
² Andrew v. Andrew, 1 Colby Ch. Cas. 686, 63 Eng. Rep. 598 (1845); Bryant v. Easterson, 5 Jur. N.S. 166 (1859); Phillips v. Beal, 32 Beav. 25, 55 Eng. Rep. 10 (1862); Underwood v. Underwood, 162 Ala. 553, 50 So. 305, 136 Am. St. Rep. 61 (1909); Burnett v. Sister, 53 Ill. 325 (1870); Walker v. Fritchard, 121 Ill. 221, 12 N.E. 336 (1887); Buckingham v. Morrison, 136 Ill. 437, 27 N.E. 65 (1891); Gentry v. Jones, 6 J. J. Marsh 148 (Ky., 1831); Christler's Ex. v. Meddis Adm., 6 B. Mon. 35 (Ky. 1845); Davison's Adm. v. Davison's Admx., 149 Ky. 71, 149 S.W. 982 (1912); Healy v. Toppan, 45 N.H. 243, 86 Am. Dec. 157 (1864); Ackerman v. Vreeland, 14 N.J. Eq. 23 (1861); Rapalye v. Rapalye, 27 Barb. 610 (N.Y., 1857); Holman's Appeal, 24 Pa. 174 (1854); Robertson v. Collier, 1 Hill 370 (S.C., 1883); Calhoun v. Furgeson, 3 Rich. 160 (S.C., 1850); Wilson v. Gordon, 81 S.C. 395, 61 S.E. 85, 62 S.E. 593 (1908); Henderson v. Vaulx, 10 Yerg. 30 (Tenn., 1836); Forsey v. Luton, 2 Head 183 (Tenn., 1858); Dunbar's Ex. v. Woodcock's Ex., 10 Leigh 628 (Va., 1840). The cases are gathered in Note, 77 A.L.R. 753 (1932).
³ Re Hall, 1 Jur. N.S. 974 (1855); Groves v. Wright, 2 Kay & J., 60 Eng. Rep. 815 (1856); Phillips v. Beal, supra, n. 2; Leonard v. Owen, 93 Ga. 678, 20 S.E. 65 (1893); Christler v. Meddis, supra, n. 2; Davison's Adm. v. Davison's Adm., supra, n. 2; Field v. Hitchcock, 17 Pick. 182 (Mass., 1835).
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together with another res in which future interests can exist, there
may be future interests.4 Occasionally anomalous cases arise. Such
was Sealwik v. Grimes in which the court refused to recognize a future
interest in a printing press.5

The other and important question is: to what extent is it true that
future interests cannot be created in consumables.

The Master of the Rolls, Sir William Grant, has given an historical
explanation6 of the doctrine of consumables which has been frequently
quoted: "A gift for life of a chattel is now construed to be a gift of
the usufruct only. But, when the use and the property can have no
separate existence, it should seem that the old rule must still prevail,
and that a limitation over, after a life interest, must be held to be
ineffectual."

What rationale can support the rule? It is argued that a gift for
life in a consumable imports a power to consume and that such a power
is inconsistent with the existence of a future interest. This by analogy
to the case of a power of sale coupled to a life estate. But most cases
do not hold the latter a gift of the absolute interest.7

A strong argument, but one not often cited in the opinions, although
perhaps tacitly assumed, is that normally no effort is made to create
future interest in consumables and if they were permitted, undesirable
results would follow.

There are several limits to the rule that there can be no future
interests in consumables. Several cases provide that if the grantor were
clear as to his intent, he might vitiate the rule8 or circumstances just
pointed out, namely, gift of stock in trade or of consumables and an-
other res clearly not a consumable with the intent that they be a unit
may take the case out of the rule.

But the most important exception is the case where there is a gift
of a residue or a general bequest. In that case there is said to be a
duty on the executor to sell the goods and the future interests attach

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6 It has been suggested that the run of mine cases involving the holding
that a res is consumable do not necessarily involve holding that there can be
no future interest but may merely decide that there is a future interest in
whatever is left at the cessation of the first interest.

The present case involves holding that there can be no future interest in
consumables because here the court was dealing with what was left over after
the cessation of the first interest and the quarrel was between the heirs of the
first owner and the future owner. The heirs of the first owner prevailed, the
court holding there could be no future interest in consumables.

9 Greggs v. Dodge, 2 Day 28 (Conn., 1805); Innes v. Polter, 130 Minn. 320, 153
Devlin, McMul. Eq. 459 (S.C., 1827); Madden v. Madden's Ex., 2 Leigh 337
(Va., 1830).
to the proceeds. This rule was first stated in England in 1802 in *Howe v. Dartmouth*. The rule is based on the implied intent of the testator. Since future interests were stated and there may well be no property to enjoy if the life tenant can consume it, the property must be converted into income-yielding property and the income paid to the life tenant. The distinction between a general or residuary gift and a specific devise lies in the fact that in a specific devise the testator has made it clear that he intends the life tenant to enjoy that particular res. The rule of *Howe v. Dartmouth* is followed generally but not in Maryland on the ground that such an intent as the rule involves is too fictitious.

If a contrary intent is manifest, the rule of *Howe v. Dartmouth* will be set aside.

Included in the class of consumables to which the rule of *Howe v. Dartmouth* applies are: leaseholds, annuities, and royalties in addition to the aforementioned foodstuffs and household goods.

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10 Hinves v. Hinves, 3 Hare 609, 67 Eng. Rep. 523 (1844); Re Bates (1907) 1 Ch. 22, 6 B.R.C. 199; Prendergast v. Prendergast, (1850) 3 H. L. Cas. 195, 10 Eng. Rep. 75; Tickner v. Old, (1874) 18 Eq. 422; Harrison v. Foster, 9 Ala. 955 (1846); Burnett v. Lyster, 53 Ill. 325 (1870); Welsch v. Belleville Sav. Bank, 94 Ill. 191 (1876); Buckingham v. Morrison, 136 Ill. 437, 27 N.E. 65 (1891); Balch v. Hallet, 10 Gray 402 (1858); Minot v. Thompson, 105 Mass. 533 (1871); Dexter v. Dexter, 274 Mass. 273, 174 N.E. 493 (1931); Healey v. Toppan, 45 N.H. 243, 86 Am. Dec. 159 (1864); Ackerman v. Vreeland, 14 N.J.Eq. 23 (1861); Hull v. Eddy, 14 N.J.L. 169 (1833); Rowe v. White, 16 N.J.Eq. 411, 84 Am. Dec. 169 (1863); Howard v. Howard, 16 N.J.Eq. 486 (1864); Jones v. Stites, 19 N.J.Eq. 324 (1868); Coole v. Monkhose, 47 N.J.Eq. 73 (1890); Ott v. Tewksbury, 75 N.J.Eq. 4, 71 Atl. 302 (1908); Covenhoven v. Shuler, 2 Paige 122 (N.Y., 1830); Cairns v. Chaubert, 9 Paige 160 (N.Y., 1841); Spear v. Tinkham, 2 Barb. Ch. 211 (N.Y., 1841); Rapalje v. Rapalje, 27 Barb. 610 (N.Y., 1857); Re Housman, 4 Dem. 404 (N.Y., 1886); Re Kendall, 4 Dem. 133 (N.Y., 1885); and many later N.Y. cases; Smith v. Barham, 2 Dev. Eq. 420, 25 Am. Dec. 721 (N.C., 1833); Jones v. Simmons, 7 Ired. Eq. 178 (N.C., 1851); Saunders v. Haughton, 8 Ired. Eq. 217 (N.C., 1852); Ritch v. Morris, 78 N.C. 377 (1878); Simmons v. Fleming, 157 N.C. 369, 72 S.E. 1082 (1911); Henderson v. Vaulx, 10 Yerg. 30 (Tenn., 1836); Golder v. Littlejohn, 30 Wis. 344 (1872).
11 Evans v. Inglehart, 6 Gill & J. 171 (Md. 1834); Wooten v. Burch, 2 Md. Ch. 190 (1851).

There are dicta in several other jurisdictions against *Howe v. Dartmouth*.

12 Alcock v. Sloop, 2 Myl. & K. 699, 39 Eng. Rep. 111 (1833) and a score of succeeding English cases; Gay v. Focke, 291 Fed. 721 (1923); Harrison v. Foster, 9 Ala. 955 (1846); Buckingham v. Foster, 136 Ill. 437, 27 N.E. 65 (1891); Old Colony Trust Co. v. Shaw, 261 Mass. 158, 158 N.E. 530 (1927); Corle v. Monkhose, 47 N.J.Eq. 73, 20 Atl. 367 (1890); Re Housman, 4 Dem. 404 (N.Y., 1886); Taylor v. Bond, Busbee Eq. 5 (N.C., 1852); Deighmiller's Estate, 1 Lega Gaz. 42 (1869); Robertson v. Collier, 1 Hill Eq. 370 (S.C. 1833); Vancil v. Evans, 4 Coldw. 340 (Tenn. 1867); Golder v. Littlejohn, 30 Wis. 344 (1872).
A contrary intent (opposing Howe v. Dartmouth) may be found from an authorization or direction to retain\textsuperscript{16} or to sell at a designated time\textsuperscript{17} or at discretion\textsuperscript{18} or to pay rents.\textsuperscript{19}

*ERWINESSERNEMMERS.*

EDITOR'S NOTE: This article is the third part of a series relating to Problems in the Legal Relation of Owners of Present and Future Interest in Personality, the first of which will appear in the March issue of the Wisconsin Law Review, and is entitled "The Right of the Owner of a Future Interest in Personality to Security"; the second part will appear in either the February or March issue of the Michigan Law Review, and is entitled "Some Problems in the Apportionment of Increase Between Holders of Present and Future Interests in Personality."\textsuperscript{†}

\textsuperscript{*}Member of Wisconsin bar; Austin, Lehman and University fellow, Harvard University.

\textsuperscript{†} The author acknowledges with thanks his debt to the late Professor Joseph Warren and to Professor A. James Casner of the Harvard Law School for their assistance in the preparation of this article.

\textsuperscript{16}Re Bates (1907) Ch. 22, 6 B.R.C. 199.


\textsuperscript{18}Re Pitcairn (1896) 2 Ch. 199; Robertson v. Collier, 1 Hill. 370 (S.C., 1833).

Where the jury returns a verdict in a case and the trial court deems the damages awarded to be either inadequate or excessive, it is necessary in order to preserve the constitutional right to a trial by jury that the court award a new trial?

It is the purpose of this note to show how this problem has been handled by the Wisconsin courts and by the Federal courts, and also to point out the various alternatives to granting a new trial that have been adopted and applied by the Wisconsin court.

The problem arises when the trial court is faced with a verdict which in its opinion is either inadequate or excessive; should it grant a new trial, which would necessarily mean additional expense to the litigants and an additional burden on the court, or is there any other means by which the rights of the litigants can be protected and justice promoted?

The Wisconsin court has apparently reached its answer to this problem by using the "option" system, that is the court sets a sum which is the lowest or the highest sum which an impartial jury properly instructed could award, and gives either the Plaintiff or the defendant an option to accept the amount set or to submit to a new trial. The first time the "option" plan came before the Wisconsin Supreme Court appears to have been in the case of Nudd v. Wells; where in an action to recover damages for the non-delivery of a box of machinery the jury returned a verdict for the Plaintiff for $1,087. The defendant moved to set this verdict aside as excessive, the trial court held the verdict was excessive and ordered the plaintiff to remit the excess to the defendant or it would grant the motion for new trial. On appeal to the Wisconsin Supreme Court the court held, "If the excess was clearly ascertainable and the proper amount of damages might be readily fixed by the application of a settled rule of law to the evidence, perhaps the practice adopted by the court below of allowing the Plaintiff to remit the excess and then refusing a new trial, would be proper. . . . But we are unable to see how such a practice can be sustained in such cases (as this) without doing the very thing which they profess not to do; that is allow the court to substitute its own verdict for a wrong verdict of the jury, and on the Plaintiff's accepting that refusing a new trial.”

Altho the “option” plan did not receive a warm welcome by the Wisconsin court in its first appearance or in its second appearance the court soon began to recognize the practicibility of such a plan and in the

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1 Nudd v. Wells, 11 Wis. 407 (1860).
cases of Mauson v. Robinson;\(^3\) and Corcoran v. Harran\(^4\) the "option" system was formally adopted by the court. The Mauson case was an action in contract wherein the Plaintiff alleged the defendant was indebted to him in the sum of $350 with interest; the jury returned a verdict for $692.12. The defendant moved to set the verdict aside because excessive, the trial court denied the motion. On appeal the Wisconsin Supreme Court hld, "The motion for a new trial, if denied should have been denied only upon condition that the respondent enter a remittitur of the excess." The Corcoran case carried the court one step farther, that is to include tort cases within the "option" powers of the trial court. This was a civil action for assault and battery, the jury's verdict gave the Plaintiff $200, the defendant moved for a new trial and the lower court allowed the Plaintiff to remit $100 of the verdict and then denied motion for new trial. On appeal the Supreme Court held, "In actions of tort as well as contract, where the damages are clearly excessive, the trial judge may either grant a new trial absolutely or give the plaintiff the option to remit the excess and in case he does so order the verdict to stand for the residue. Clearly the practice will tend to promote justice and lessen the expense to litigants and the public." In commenting on the effect of such a practice on the defendant the court said, "It is evident that the defendant has no complaint since the reduction was a favor to him, 'certainly a party against whom a judgment has been recovered cannot reverse it on the ground that it is less than it should have been'." So by these two cases the foundation was laid for the trial court to grant an option to the Plaintiff to remit the excess of an excessive verdict or stand a new trial. However the courts were still faced with the contention that such an option violated the constitutional right to a trial by jury. This contention was first answered by the court in rather broad general terms the court saying that this practice didn't constitute an invasion of the province of the jury but rather, "indicated that our jurisprudence is still developing towards that ideal of perfection where the administration of the law is truly the administration of justice."\(^5\) It was in the case of Heimlich v. Tabor\(^6\) that the court first stated the rule as to granting an option in a case where the verdict is excessive as we know it today, and it was in this case that the court gave the first logical answer to the contention that such options violated the right to a trial by jury. The court said the rule concerning excessive verdicts allowed the court "... to permit the Plaintiff to terminate the controversy without the expense of a new trial by consenting to take judgment for an amount sufficiently

\(^3\) Mauson v. Robinson, 37 Wis. 339 (1875).
\(^4\) Corcoran v. Harran, 55 Wis. 120 (1882).
\(^5\) Baxter v. Chicago & North Western R. Co., 104 Wis. 307, 80 N.W. 644 (1899).
\(^6\) 123 Wis. 565 (1905).
under that named by the jury to cure such error in the judgment of the court; and also to permit the defendant in such situations to terminate the litigation whether plaintiff is willing or not, by consenting to judgment for a sum sufficiently less than the verdict to, in the judgment of the court cure the error." Thus we see that the court recognized the possibility of not only giving the plaintiff an option to take a lesser sum but also the possibility of giving the defendant an option to take a lesser sum. The court went on to say that the requirement concerning these options to be free from the charge of judicial invasion of the right of jury trial is simply this, "Require the sum imposed upon the defendant, whether he consents or not; giving the option to the plaintiff, to be as small as an unprejudiced jury would probably name; and the sum to be imposed upon the plaintiff whether he consents or not, giving the option to the defendant, to be large as an unprejudiced jury on the evidence would probably name." The rule laid down in the Heimlich case as to the sum which must be set by the court, that is it must be the lowest amount which an unprejudiced jury would award when the option is given the plaintiff; and the highest amount which an unprejudiced jury would award when the option is given the defendant, was followed by the Wisconsin court and is the law today.

Although since the Heimlich case the power of the trial court to grant options in case the verdict is excessive seemed firmly entrenched, several other interesting questions have arisen concerning the use of this power. One such question arose in the case of Urban v. Anderson where it was contended that the trial court was limited in its use of options to cases where the excessiveness was due to prejudice, passion, ignorance or bias of the jury. The Wisconsin Supreme Court held, "The court may deal with the matter whether the error is attributable to perversity or the amount found by the jury is not supported by the evidence in the case."

Another question arising under the use of options by the trial court, which was faced with an excessive verdict, is the situation where the trial court does not regard the verdict to be excessive but the Supreme Court does. Must the Supreme Court order a new trial or may it impose an option? The case of Secord v. John Schroeder L. Co. is an example of the Supreme Court imposing an option. Here the jury returned a verdict for the plaintiff of $5,500 the Supreme Court held, "We are inclined to hold in case of another trial a jury properly instructed would probably not assess the damages at less than $4,000."

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7 Stangarone v. Jacobs, 188 Wis. 20 (1925); West v. Johnson, 202 Wis. 416 (1930); Muska v. Apel, 203 Wis. 389 (1931); Malliet v. Super Products Co., 218 Wis. 145 (1935); Urban v. Anderson, 234 Wis. 280 (1940).
8 234 Wis. 280 (1940).
9 160 Wis. 1 (1915).
The court then reversed and remanded the case with an option to the plaintiff to take judgment for $4,000 and costs within twenty days after filing of the remittur or have a new trial.

Thus in Wisconsin at least when the trial court has a verdict before it which it deems excessive it may either grant a new trial; or it may set the lowest sum which a properly instructed jury would award giving the plaintiff the option to accept that amount or have a new trial; or it may set the highest sum which a properly instructed jury would probably award, giving the option to the defendant.

We have seen that the Wisconsin court has recognized the principle that the trial court may use this "option" plan in connection with excessive verdicts, but what about verdicts where the damages awarded are inadequate, may the court use a similar option plan in such cases? The answer, at least in the Wisconsin court is yes.

Apparently the first time the court applied the "option" plan to inadequate verdicts was in the case of *West v. The Mil., Lake Shore and Western Ry. Co.*, where the lower court erroneously made the direction not to allow interest in the judgment. The Supreme Court reversed this holding saying, "The defendant is authorized at his option within 30 days after filing the remittitur, to serve upon the opposite party and file with the clerk a stipulation authorizing the Plaintiff to take judgment for the amount of the verdict with interest thereon at 7% from the time of the rendition of said award to the entry of such judgment, in which case the plaintiff will be entitled to judgment for the amount of such verdict with interest." The court went on to say, "Upon principle, we see no difference in allowing a party against itself voluntarily to add to the verdict the amount so improperly excluded, and then authorize judgment for the amount of such verdict and addition and the remission of part of an excessive verdict." The court then remanded the case for a new trial subject to the option to the defendant given above. This principle was affirmed in the case of *Molzahn v. Christensen*, which was an action on a building contract, the trial court found that the defendant's claim for unfinished work on the manure pit was undetermined, having been omitted from the verdict and on this account that the defendant was entitled to a new trial if he desired one, and therefore, it gave the defendant the right to elect to have a new trial on account of this error or submit to judgment against him on the balance due the plaintiff according to the verdict. The defendant elected to have judgment awarded against him for such amount. This was affirmed on appeal.

10 56 Wis. 318 (1882).
11 152 Wis. 520 (1913).
The next problem which seems to have arisen in connection with the court’s use of options in connection with inadequate verdicts was the contention that in case the trial court gave no option to allow judgment for a sum fixed by the court or to accept a new trial that the Supreme Court should do so. But in the case of Reuter v. Hickman, Lauson & Dinger Co.\textsuperscript{12} the Supreme Court held that these options were a matter of discretion with the trial court, and the Supreme Court would not interfere unless there had been an abuse of discretion. In discussing just what sum should be fixed on by the trial court in case it decides to use this method the court said, “In fixing such a sum the maximum amount that in the judgment of the court any jury would be warranted in assessing would have to be fixed on (if the option given to defendant). If such option is given to the plaintiff the minimum amount any jury would be likely to assess would be fixed on.”

The Wisconsin court has been faced with the contention that these options granted by the trial court in cases where the verdict is inadequate constitute a violation of trial by jury, just as they were in options used where the verdict was excessive. The first real answer to such a contention was made by the court in Campbell v. Sutliff.\textsuperscript{13} In discussing these options the court said, “When the court grants the option to take judgment for the sum which the court determines to be the least amount which a jury could assess under the proof, the plaintiff cannot complain that he has been deprived of his right to trial by jury because he cannot question a judgment which has been entered because he elected to accept judgment for that amount. . . . The defendant’s constitutional rights are not invaded because the judgment is reduced to the least amount which the plaintiff may recover as determined by the court that has the power to fix the minimum amount that may be recovered—the smallest verdict which the court will permit to stand.”

“Conversely neither party can complain when the defendant elects to consent to the entry of judgment for the sum which the court determines to be the largest amount which a jury could assess under the proof. The defendant cannot question the judgment because he has elected to have it entered. The plaintiff cannot question it because it is for the largest amount which the court will permit the jury to assess under the proof of the case. . . . The right to a jury trial on the question of damages can be waived like any other right guaranteed by the constitution. It is waived by the party that elects to have judgment entered in accordance with the option given him by the court . . . ” To the same effect is the court’s holding in the case of Risch v. Lawhead\textsuperscript{14} where the court said “Where in a case involving unliquidated damages,

\textsuperscript{12} 160 Wis. 284 (1915).
\textsuperscript{13} 193 Wis. 370, 214 N.W. 374 (1927).
\textsuperscript{14} 211 Wis. 270, 248 N.W. 127 (1933).
the amount found by the jury is deemed by the court wholly inadequate it seems clear that the trial court may grant a new trial unless the plain-
tiff consents to take judgment for such increased amount found by the
court to represent the least amount that an unprejudiced jury would probably fix. Since the court finds the 'least amount' plaintiff must be
given an option to consent to the amount of damages found by the
court. In such a situation the defendant may not complain because the
court has only increased the damages to the least amount which it will permit to stand in lieu of granting a new trial."

So the trial court may grant an option to the plaintiff or to the
defendant to accept a fixed amount or submit to a new trial in a case
where the court deems the damages awarded by the jury to be inade-
quate as well as a case where the damages awarded are excessive, and
this remains the law of Wisconsin today.\(^5\)

Therefore the Wisconsin court makes use of the option system both in cases involving excessive verdicts and in cases involving inade-
quate verdicts. The question then is as to what variations of this option system may be used. The options which may be used by the Wisconsin
courts can be divided into six classes:

1) In a case where the damages are inadequate the court may give an
option to the defendant to have judgment entered against him for the
maximum amount which a properly instructed jury could award, or to
submit to a new trial.

2) Also in a case where the damages are deemed inadequate the court
may give an option to the plaintiff to accept judgment for the minimum
amount which a jury properly instructed could award or to submit to
a new trial.

3) Or where the damages are inadequate the court may combine the
options number one and number two above; and first give the defendant
the option and then give the plaintiff an option and if neither elects
then the court will grant a new trial.

4) In case the damages awarded are excessive the court may give an
option to the plaintiff to accept the lowest amount which any reasonable
jury properly instructed could award, or to submit to a new trial.

5) In a case where the damages are excessive the court may also give
an option to the defendant to pay the maximum amount which a rea-
sonable jury, properly instructed could award, or to submit to a new trial.

6) In a case where the damages are excessive the court can combine
the two options given in number four and five above and first give the

\(^5\) Tollander v. Bonneville, 3 N.W. (2d) 679 (Wis. 1942)
plaintiff an option and then give the defendant an option and if neither elects to accept the option then the court will grant a new trial.

The Federal courts do not seem to be in accord with the holdings of the Wisconsin court in this matter of allowing the trial court to fix options where the verdict is inadequate or excessive. Although the United States Supreme Court started out on the same line of reasoning as did the Wisconsin court they failed to go to the length of the Wisconsin holdings. For example in the case of *Northern Pac R. Co. v. Herbert*, where the jury found for the plaintiff in the sum of $25,000, the defendant made a motion for new trial because the damages were excessive. The lower court ordered that a new trial be granted unless plaintiff remitted $15,000 of the verdict and in case he did so that the motion for new trial would be denied. The Supreme Court held this was proper saying, "The exaction as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much damages as in its opinion the jury had improperly awarded."

This decision was apparently followed without question for some time and the Supreme Court had even declared that such an option did not violate the right to trial by jury. However with the case of *Dimick v. Schiedt* the U.S. Supreme Court adopted the rule in regard to these options in place of granting a new trial which stands as the federal rule today. This was an action to recover damages for personal injuries resulting from the alleged negligent operation of the defendant's automobile. The jury returned a verdict in favor of the plaintiff for $500; the plaintiff moved for a new trial on the ground that the damages awarded were inadequate. The trial court ordered a new trial unless the defendant would consent to an increase of the damages to the sum of $1,500. The defendant consented to this option and the motion for new trial was denied. However on appeal to the Circuit Court of Appeals this judgment was reversed on the ground that this conditional order violated the 7th. amendment of the United States Constitution in respect to the right of trial by jury. The Supreme court of the United States affirmed the holding of Circuit Court of Appeals saying, "... no federal court so far as we can discover has ever undertaken

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18 Arkansas Cattle Co. v. Mann, 130 U.S. 69 (1888).
similarly to increase the damages although there are numerous cases where motions for new trials have been made and granted on the ground that the verdict was inadequate. . . . When we consider the great length of time mentioned, the federal courts were constantly applying the rule in respect to the remission of excessive damages, the circumstance that the practice here in question in respect of inadequate damages was never followed, or, apparently its approval even suggested, seems highly significance as indicating a lack of judicial belief in the existence of the power.” The court went on to say that in fact if the question of granting such an option even in cases where the damages were excessive were originally before it it would not hesitate to deny the existence of such a power in the trial court in such cases as well as in cases where the verdict was inadequate. In commenting more specifically on the use of such a power by the trial court and a denial of the right to a trial by jury, the court in the Dimick case said: “When therefore the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing in additional amount of damages, bring the constitutional right of the plaintiff to a jury trial to an end in respect of a matter of fact which no jury has ever passed on either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept an assessment partly made by a jury which has acted improperly, and partly by a court which has no power to assess.”

So the Federal rule seems to be, that the trial court can within its discretion in lieu of unconditionally granting a new trial for excessive-ness of damages, grant a new trial unless the plaintiff remits the excessive portion of his damages. But the trial court does not have the power to increase an inadequate verdict for the plaintiff, though the defendant consents thereto, the only course open being to grant a new trial.

One more point should be mentioned in connection with the federal holdings on this question, and that is, that apparently the rule in the Dimick case is restricted to common law actions. In the case of United States v. Kennesaw Mountain Battlefield Ass'n., the Circuit Court of Appeals held that the lower court was empowered to give the defendant an option to consent to a verdict which had been raised because inadequate, or to submit to a new trial in a condemnation case. The District court in the Kennesaw case in discussing the option said, "Verdicts have often been set aside as excessive unless written down to an amount fixed by the judge. I know of no precedent for refusing

21 Supra, note 20.
one to be written up as a condition of refusing a new trial. I see no difference in principle. In both cases the judge thinks the verdict wrong in amount and will set it aside unless the party who desires to maintain the verdict will voluntarily correct it rather than suffer a new trial.” The Circuit Court in discussing the District Court’s opinion said, “... We agree with the District judge that Dimick v. Schiedt is not controlling. We agree with the reason he gives that the complained of action in requiring an additur and refusing a new trial was not taken in a common law action within the 7th amendment as it was in the Dimick case, but in a condemnation proceeding to which the guarantees of the 7th amendment do not apply.” Another Circuit Court of Appeals case seems to strengthen the view that the restriction set up in the Dimick case is confined to common law actions. The court saying, “Under the 7th. amendment the national courts are without power to add to a verdict in a common law action. ...”

It seems to the writer that the position taken by the Federal Court in adopting the option system when the verdict in question is excessive but refusing to adopt it in reference to verdicts where the amount awarded is deemed inadequate, is not logical. In the writer’s opinion the position taken in the Kennesaw Mountain case and of the dissent in the Dimick case, that there is no distinction between granting an option in a case, where the damages are excessive, and granting the option in a case where the damages are inadequate, is the correct one. The Wisconsin court seems to have had good success with this system and their answer to the contention that any such option violates the right to trial by jury seems a complete and logical one. Moreover, as the Wisconsin court says, “Clearly the practice will tend to promote justice and lessen the expense to litigants and the public.”

ROBERT T. McGRAW.

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22 Mutual Ben. Health & Accident Ass’n. v. Thomas, 123 Fed. (2d) 353 (C.C.A. 8th, 1941).
23 Supra, note 20.
24 Supra, note 19.
25 Corcoran v. Harran, 55 Wis. 120 (1882).
DOUBLE TAXATION OF INTANGIBLES

May a state other than the state of domicile of the creditor levy a transfer tax upon intangible property, the interest in which is transferred by the death of the creditor?

Any attempt by a state to levy such a death tax when it has no jurisdiction to do so is a violation of the Fourteenth Amendment, and as such would be prohibited. A question must then immediately arise as to when a state does have jurisdiction to impose a death tax.

Perhaps the earliest leading case on this subject was the case of Blackstone v. Miller, where New York levied a tax upon the transfer by will of debts owed to an Illinois decedent by a New York firm and bank. Illinois had already taxed this succession. One of the objections to the New York tax was that it was contra the Fourteenth Amendment. The test laid down in this case was that if the transfer of the debt necessarily depends upon and involves the law of New York for its exercise, or, in other words, if the transfer is subject to the power of the State of New York, then New York may subject the transfer to a tax. The tax was sustained, the court stating that the transfer of the debts necessarily depended upon and involved the law of New York for its exercise, because it was the law of New York that gave validity to the debt. This rule was affirmed in Bullen v. Wisconsin, where the Supreme Court of the United States permitted Wisconsin to impose a transfer tax upon certain stocks and bonds which a Wisconsin decedent had transferred to an Illinois trust company to hold in trust, retaining a power of revocation, and the right to direct and control the disposition of both principal and income.

The doctrine of the Blackstone case, supra, was followed until 1930, in which year it was overruled by the case of Farmers Loan & Trust Co. v. Minnesota, in which case a New York resident died owning negotiable bonds issued by the State of Minnesota and the cities of Minneapolis and St. Paul. His will was probated in New York and a tax was levied on the testamentary transfer. Minnesota also assessed an inheritance tax on this transfer on the ground that the bonds were debts of Minnesota and of corporations subject to her control; that her laws gave them validity, protected them and provided means for enforcing payment. On appeal to the Supreme Court of the United States, the judgment of the Minnesota court upholding the tax was reversed, the court saying that no state may tax anything not within her jurisdiction without violating the Fourteenth Amendment. While debts have no territorial situs a state may properly applying the rule "mobilia sequun-

1 188 U.S. 189, 23 Sup. Ct. 8, 47 L.Ed. 439 (1902).
2 240 U.S. 625, 36 Sup. Ct. 473, 60 L.Ed. 830 (1915).
3 280 U.S. 204, 50 Sup. Ct. 98, 74 L.Ed. 439 (1929).
tur personam" and treat them as localized at the creditor's domicile for taxation purposes. The court further stated that there was no reason for saying that intangibles are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles. The dissent by Justice Holmes was to the effect that the debt, wherever enforced, is enforced only because it is recognized as such by the law that created it and keep it still a debt.

The court in arriving at its decision in the Farmers Loan & Trust Co. v. Minnesota case affirmed and elaborated upon the decision it had reached in the slightly earlier case of Blodget v. Silbermann. In that case a Connecticut resident died leaving the greater part of his wealth in New York, some of which was intangible in nature. It was held that the transfer of the intangible property was subject to the tax imposed by the law of the decedent's domicile, the court saying that the situs of intangibles is the domicile of the creditor. (The decision in this case was a further application of the principle, "mobilia sequuntur personam."

This rule was again upheld in the case of First National Bank of Boston v. Maine, which was an action to recover the amount of a transfer tax levied by the State of Maine against shares of a Maine corporation owned by a Massachusetts decedent. The Maine tax was held to be invalid, the court saying that shares of stock, like other intangibles, constitutionally can be subjected to a death transfer tax by one state only, and that convenience and justice alike dictates the desirability of a uniform general rule confining the jurisdiction to impose death transfer taxes as to intangibles to the state of the domicile.

Although the tendency of the courts has been to avoid double taxation, exceptions to the rule have arisen.

In the Farmers Loan and Trust Co. case, supra, the court alluded to an exception to the rule that intangibles are taxable only at the domicile. It was there stated that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. The case of Wheeling Steel Corporation v. Fox, is an apt illustration of this exception. There, West Virginia levied an ad valorem property tax upon accounts receivable and bank deposits in West Virginia of a corporation organized under the laws of Delaware. The corporation maintained its principal office in Delaware, but the general books and accounting records were also kept. It was held that the intangibles were taxable in West Virginia because the corporation had established a "commercial domicile" there. There had been such a localization of the corporation's business that there was

* 277 U.S. 1, 48 Sup. Ct. 410, 72 L.Ed. 749 (1928).
imparted to its entire intangible property a prima facie situs for taxation in that place.

In *Curry v. McCannless*; the decedent, a resident of Tennessee transferred stocks to an Alabama trustee. The deceased reserved the power to dispose of the trust estate by her last will and testament, however this power was never exercised. It was held that both Tennessee and Alabama could impose the death transfer tax, the court applying the benefit theory of taxation. When the taxpayer extends his activities with respect to his intangibles so as to avail himself of the protection and benefit of the laws of another state, such other state may tax these intangibles. Protection, benefit, and power over the subject matter are not confined to either state. The taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of the intangibles used in his business. The court expressly denied that the Fourteenth Amendment prohibited the taxation of the same intangible in more than one state.

*Graves v. Elliott* was decided by the same court in the same term, and is usually cited as a companion case to *Curry v. McCannless, supra*. In that case a decedent domiciled in New York created a trust in Colorado. Both New York and Colorado were permitted to impose a death transfer tax, the court applying the same reasoning as in *Curry v. McCannless*.

From the foregoing cases it appears that the rule in the Farmers Loan & Trust Co. case to the effect that only the state of the domicile of the creditor can tax an intangible is applicable only where the decedent has confined his activities to his domicile. However, where he extends his activities to another state, that state also can tax the intangibles. Under such circumstances both states can tax the intangibles.

The foregoing cases represent the law as it existed until April 27, 1942. On that date the Supreme Court of the United States handed down the decision in the case of *State Tax Commission of Utah v. Aldrich*, which overruled the case of *Farmers Loan & Trust Co. v. Minnesota*, and permitted both the state of the domicile of the creditor and of the debtor to tax the transfer of intangible personal property at death. In this case a New York resident died owning stock in a Utah railroad. The certificates, as well as the company's stock books, records and transfer agents were kept in New York. The administrators of the estate of the deceased sought a declaratory judgment in the Utah court to the effect that the transfer of the shares were not subject to taxation by Utah under the provisions of its inheritance tax law. The Utah court rendered judgment for the administrators under the

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9 62 Sup. Ct. 1008 (1942).
doctrine of *First National Bank of Boston v. State of Maine*, supra. Certiorari was granted, and the United States Supreme Court reversed the judgment of the Utah Court saying that in cases of shares of stock “jurisdiction to tax” is not restricted to the domiciliary state. Another state which has extended benefits or protection or which can demonstrate “the practical fact of its power” or sovereignty as respects the shares may likewise constitutionally make its exaction.

In arriving at the decision in the case of *State Tax Commission of Utah v. Aldrich*, the United States Supreme Court has reestablished the rule of *Blacksone v. Miller*. This result has been predicted by some, in view of the more liberal tendency of the court as indicated by such cases as *Curry v. McCannless* and *Graves v. Elliot*, and also in view of the changing personnel of the court.

Thus as the law stands today, double taxation of intangibles is constitutional, and a state other than the state of domicile of a creditor may levy a transfer tax upon intangible personal property transferred by the death of the creditor.

*Anthony Frank.*
CONSTITUTIONALITY OF STERILIZATION STATUTES

Whether the year 1927 marks the turning point away from the preservation of the natural rights and the constitutional protection of those rights to the citizens of the United States is perhaps still a problem for future historians to determine. In that year Mr. Justice Holmes of the United States Supreme Court decided that a Virginia statute providing for the sexual sterilization of inmates of institutions supported by the State who should be found afflicted with a hereditary form of insanity or imbecility was valid and was not open to the attack that it denied such inmates the equal protection of the laws guaranteed by the 14th Amendment since “the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines and seeks to bring within the lines all similarly situated so far and so fast as its means allow” and “so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached.”

Again in 1942 the United States Supreme Court found occasion to determine the validity of a state law which provided for the sterilization of habitual criminals, i.e., persons convicted two or more times for crimes amounting to felonies involving moral turpitude, save “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses.” Though the court found the statute unconstitutional inasmuch as “sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination” because the two crimes are distinguishable only “with reference to the time when the fraudulent intent to convert the property to the taker’s own use” arises, the court did cite Buck v. Bell as precedent for upholding such a legislative enactment where proper equality in application is achieved.

Accordingly under the decision in Buck v. Bell and Skinner v. State of Oklahoma we may properly conclude that any statute permitting sterilization of mental defectives or habitual criminals will be upheld as constitutional and not violative of the equal protection clause of the 14th Amendment provided that no discriminatory classification is effected as to those within the natural class designated as proper subjects for its application. Sterilization laws can no longer be attack as constituting a denial of equal protection unless discrimination is present.

NOTES

1 Acts 1924, c. 394, p. 569.
5 Supra.
6 Supra.
State courts are bound in principal by the decisions of the supreme tribunal of the land when it has spoken upon that for which it is constituted to decide, and are therefore controlled by its decisions in determining whether a statute before it violates the equal protection clause of the 14th Amendment to the Constitution of the United States.\textsuperscript{7}

Unfortunately most courts in determining whether such enactments are valid have utterly neglected to inquire whether the state can proceed to deny one of his natural right to bodily integrity by means of sterilization. In \textit{Buck v. Bell}\textsuperscript{8} it was said, "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." But the principle sustaining compulsory vaccination is confined to the rule that a state may limit personal freedom in any reasonable manner for the protection or promotion of public health.\textsuperscript{9} Though it is true that sterilization may promote public health insofar as it will, in theory at least, rid society of the birth of mental unfortunates of eugenic origin, the solution cannot be designated reasonable, unless we are to concede that the state has a right to mutilate innocent subjects and consequently concede that man exists only for the good of the State. Certainly if man exists but for that purpose there can be no rational basis in the enactment of laws to secure to him the due process of law when called upon to render account to the State but the presence of an empty Constitutional provision. The entire framework of our constitutional system must of necessity collapse as must any government which proceeds upon a materialistic conception of man.

Perhaps it was the foresight of things to come that prompted at least one court to state its attitude upon the inherent dangers of laws allowing sterilization of unfit when it said in extenso, "While the case raises the very important and novel question whether it is one of the attributes of government to essay the theoretical improvement of society by destroying the function of procreation in certain of its members who are not malefactors against its laws, it is evident that the decision of that question carries with it certain logical consequents having far-reaching results. For the feeble-minded and epileptics are not the only persons in the community whose elimination as undesirable citizens would, or might in the judgment of the legislature, be a distinct benefit to society. If the enforced sterility of this class be a legitimate exercise of governmental power, a wide field of legislative activity and duty is thrown open to which it would be difficult to assign a legal limit.

"If in the present case we decide that such a power exists in the case of epileptics, the doctrine we shall have enunciated cannot stop there.

\textsuperscript{7}Davis v. Walton, 74 Utah 80, 276 Pac. 921 (1929).
\textsuperscript{8}Supra.
For epilepsy is not the only disease by which the welfare of society at large is injuriously affected, indeed, it lacks some of the gravest dangers that attend upon such diseases as pulmonary consumption and communicable syphilis. So that it would seem to be a logical necessity that, if the legislature may under the police power theoretically benefit the next generation by the sterilization of the epileptics of this, it both may and should pursue the like course with respect to the other diseases mentioned with the additional gain to society thereby arising for the protection of the present generation from contagion and contamination. Even when these and many other diseases that might be named have been included, the limits of logical necessity have by no means been reached.

"There are other things besides physical and mental diseases that may render persons undesirable citizens or might do so in the opinion of a majority of a prevailing legislature. Racial differences for instance, might afford a basis for such an opinion in communities where that question is unfortunately a permanent and paramount issue. Even beyond all such considerations it might be logically consistent to bring the philosophic theory of Malthus (sic) to bear upon the police power, to the end that the tendency of population to outgrow its means of subsistence should be counteracted by surgical interference of the sort we are now considering." The Skinner case likewise noted the dangers of allowing such laws to become tools for purposes of oppression but went no further than to state that such possible abuse gave greater cause for careful scrutiny in determining whether actual discrimination was present.

Without resort to judicial opinion it should be clear to reasonable men who retain that proper respect for human dignity and personal independence as is necessary for the preservation of a well ordered society that eugenic sterilization of mental incompetents and criminals is a direct attack by the state upon an absolute right of the individual, namely, the right to his faculties. Though imbeciles and hopelessly diseased have no right to procreation, the public authority is doing wrong in destroying their procreative faculty for the right to the faculty itself is absolute. The right of the state to rid itself of individuals who are a standing danger, morally or physically, to the community cannot be extended beyond the power of segregation. Economic considerations cannot be tolerated unless the traditions and philosophy from which

11 Supra.
the Founding Fathers drew for inspiration in formulating that cherished document known as our Constitution are cast aside.\textsuperscript{12}

Even conceding that the state had the requisite authority to sterilize a human being for eugenic reasons the avowed purpose of sterilization laws would still remain unaccomplished. Society would not be benefited by turning loose degenerates after sterilization. Indeed, it would be an inducement for certain degenerates to commit their crimes with an added sense of security. Where one is guilty of repeated criminal acts he has no place in a societal union. Segregation under supervision of competent authorities is the only proper remedy, and if so confined there is no cause for fear that more of his kind will be propagated (if it be true that criminals procreate criminals), and removal of many dangers to society arising from the freedom of the unfit is realized. Segregation is the only rightful way of preventing the use of the procreative faculty of the weak-minded and criminals.

In \textit{Buck v. Bell}\textsuperscript{13} it was said, "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." Indeed! Upon what theory of law or morality can it be said the state possesses the power to execute an irresponsible person for even the most heinous crime? Has the meting of punitive measures sunk to such depths as to execute one who has come into the world without possession of his natural reason? And if it is sought to sterilize to prevent offspring who will starve for their imbecility what reason is there to make barren the imbeciles of the rich? Definitely, the answer to such rationalization can be but one—economic considerations. Under such theories human law and morality become conflicting norms of action and human individuality must surrender to the might of the State. How inconsistent with present ideals!

\textbf{ROBERT SCHEFFER.}

\textsuperscript{12} Declaration of Independence, July 4, 1776. "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness—That to secure these rights, Governments are instituted among men . . ."

\textsuperscript{13} Supra.
Code Practice—Five-Sixths Jury Verdict.—Plaintiff's automobile collided with a bus belonging to the defendant company at a blind T-shaped intersection when plaintiff had almost completed a left turn into the street on which the bus was approaching from the opposite direction. In reaching a verdict the jury was unanimous in its finding that the defendant was negligent in several respects and that such negligence was the cause of the collision. The jury was also unanimous as to the plaintiff's contributory negligence on all items except that of "lookout." As to that item, two jurors found the plaintiff not negligent. On the question of damages, one juror, other than the two dissenting on the item of "lookout," dissented as to the amount. Held that the verdict was fatally defective in that the same ten jurors did not agree as to negligence, contributory negligence, and damages. 5 N.W. (2d) 750 (Wis. 1942). In reaching its decision the court followed the rule as laid down in Biersach v. Wechselberg, 238 N.W. 905, 206 Wis. 113 (1931) that there must be an identity of ten jurors not only on the question of the defendant's causal negligence, but also as to the amount of damages and as to the plaintiff's contributory negligence. The Biersach case was an action against an automobile driver for injuries to a guest in the verdict of which there was an identity of ten concurring jurors as to failure to exercise ordinary care and as to such failure being the proximate cause of the plaintiff's injuries, but not as to negligence on the part of the plaintiff contributing to the injuries. Judgment for the plaintiff was reversed on the ground that in order to complete a verdict in favor of the plaintiff the same ten jurors had to agree upon all questions necessary to sustain the judgment, including that of assumption of risk or contributory negligence. The court in this case explained the seeming conflict between its decision and the language in Will v. Chicago, M. & St. P. Ry. Co., 210 N.W. 717, 191 Wis. 247 (1926), that "One set of ten jurors might find defendant negligent and that such negligence was the proximate cause of the injury; another set of ten might, however, find that there was negligence by plaintiff proximately contributing to the same injury. That defendant was thus found negligent and proximately contributing to the injury would then become immaterial, so far as plaintiff's ultimate right to recover was concerned, because ten jurors having found that plaintiff himself was negligent, then it follows as a matter of law, that the plaintiff cannot recover." The court explained in the Biersach case that this language would be inapplicable in a situation where, as in the Biersach case, the jury found no contributory negligence on the part of the plaintiff. In the Will case, also a personal injury action, all twelve jurors were unanimous in finding that the defendant could be charged with failing to exercise ordinary care in learning of the danger to which the plaintiff was subjected, although one juror, A, then dissented from the finding that the defendant did not have actual knowledge of the danger. Two jurors, B and C, dissented as to the time when the plaintiff was overcome by the gas while working in the defendant's employ, and two jurors, A and D, dissented to the finding of contributory negligence on the part of the plaintiff. 50% of the negligence was found to be attributable to the plaintiff. On appeal by the defendant the order for new trial because the verdict was defective in that the same ten jurors had not agreed upon all the findings was reversed. The Court however indicated that the trial court had been justified in ordering a retrial in view of the decisions reached in the cases of Kosak v. Boyce, 201 N.W. 757, 185 Wis. 513 (1925); Stevens v. Montfort State Bank, 198 N.W. 600, 183 Wis. 621 (1924); Bentson v. Brown, 203 N.W. 380, 186 Wis. 629, 38 A.L.R. 1417 (1925); and
Hobbs v. Nelson, 205 N.W. 918, 188 Wis. 108 (1925), the rule being stated in the last case to be that a special verdict is defective unless the same ten jurors agree upon their answers to each and every question of the special verdict. The language used in the last case was, as the court expresses it in Will v. Chicago, supra, "unfortunate" and has led to mistakes by trial courts. The basis for the ruling in these cases is found in Dick v. Heisler, 198 N.W. 734, 184 Wis. 77 (1924), one of the first cases to construe the statute on five-sixths jury verdict. "As we construe the statute ten members of the jury must agree before a question can be answered; but the same ten must agree to each question before it can be answered." The Dick and Hobbs cases are overruled by the Will case so far as identity of jurors on all the answers is concerned and the only problem remaining is: Upon what answers must the same ten jurors agree?

The key to this problem is to be found in the words used in Biersach v. Wechselberg, supra, that the same ten jurors must agree upon all questions necessary to sustain the judgment. What these questions may be will vary somewhat with the case. As the court explains the situation in the Will case, each lawsuit presents two sets of issues, one as to the plaintiff's attack and the other as to the defendant's defense. If the plaintiff fails to prove his attack and ten jurors find that he has so failed, the defendant's defense is immaterial, and the same ten jurors need not reach a decision on that point. The same is true when contributory negligence on the part of the plaintiff is found. No great problem is raised by the comparative negligence statute. If the plaintiff is found to be more than 50% negligent then as a matter of law he cannot recover and the question of the defendant's negligence is immaterial. On the other hand, if the plaintiff is found to be not negligent or is found to be less than 50% negligent then the verdict must also decide whether the defendant was negligent, whether such negligence was the proximate cause of the plaintiff's injuries, and the amount of the damage sustained by the plaintiff. The same set of ten jurors must concur on all these questions in order to sustain the judgment.

The rule as stated above was apparently followed in the cases of Lefebvre v. Autoist Mut. Ins. Co., 236 N.W. 684, 205 Wis. 115 (1931) and Fraundorf v. Schmidt, 256 N.W. 699, 216 Wis. 158 (1934). In the former case the same ten jurors did not agree on any two of the questions of the special verdict. It was held that the verdict was not imperfect since only the answer to the first question was essential to support the judgment and it then became immaterial as to how the other questions were answered. In the latter case, an instruction that at least the same ten jurors must agree to all of the answers in the verdict was held to be erroneous although not prejudicial since three jurors had dissented, showing that the jurors had not followed the instruction. A verdict returned as the result of the consensus of opinion of at least ten jurors on all questions necessary to sustain recovery by the plaintiff was there held sufficient to warrant the entry of judgment.

The question as to when an identity of jurors is necessary in a special verdict is interesting more from a technical than from a practical viewpoint. During the past twenty years, as far as the writer has been able to ascertain, the question has gone to the Supreme Court of Wisconsin only ten times. Four of these cases followed exactly the rule as laid down in the case first construing the statute allowing a five-sixths jury verdict in civil cases. These were followed by the Will case narrowing the rule as originally laid down. The Biersach case followed the same rule and explained the apparent conflict with the previous
RECENT DECISIONS

case. The instant case then cites the *Biersach* case as ruling its decision; and the *Fraundorf* and *Lefebvre* cases fall directly in line with both the reasoning and the rule of the *Biersach* case. Thus it would seem that a definite and harmonious construction of the five-sixths jury verdict statute has been attained.

JOAN MOONAN.

**Municipal Corporations—Limitations on the Power to License.**—By an ordinance of the respondent city, transient photographers were forbidden to engage in the business of photography, or the sale of photographs, enlargements, or coupons without first obtaining a license from the city at a cost of ten dollars per business day. The defendant was arrested, tried in municipal court, and found guilty of violating the ordinance. On the trial, it appeared that the defendant was engaged in taking snapshots and forwarding the film to an out of state photography house which paid the defendant a flat fee for each sales prospect with an additional bonus if sales exceeded a given total. The defendant’s average income was $11.33 per day, while the firm for which he worked derived a profit of between six and seven per cent. The circuit court on appeal affirmed the sentence of the municipal court, sustaining the city’s contention that the ordinance was valid as a revenue measure. Defendant appealed to the Supreme Court on the ground that the ordinance was invalid as discriminatory and the fee was unreasonable and confiscatory. The Supreme Court reversed the conviction on the ground that the ordinance was invalid as amounting to the suppression of a lawful business and as an imposition which could not be sustained under the taxing power of the municipality. *City of Racine v. Wayhe*, 5 N.W. (2d) 747, Wis. 1942.

The power of a municipality to require a license of those engaged in a designated trade or profession within its boundaries and to demand a fee for such license is recognized generally to have two sources: the police power and the power to raise revenue. Since municipal corporations are totally the creatures of the state, neither power can be exercised unless authorized by the charter of the municipality or by a charter ordinance having the same effect. The granting of one power does not confer the other, and if either the power to tax or the power to regulate a vocation is given specifically, the courts will not infer the existence of the other. *City of Tucson v. Stewart*, 45 Ariz. 36, 40 P. (2d) 72. 1935; *City of Creston v. Messinsky*, 213 Ia. 212, 240 N.W. 676 (1932); *License Tax Cases*, 5 Wall. 471, 18 L.Ed. 497 (1867). Nevertheless, the state may grant to a municipal corporation both the power to regulate and to license for revenue, and an ordinance passed under such authorization will not be held invalid because justified by several provisions in a charter. *Gundling v. City of Chicago*, 176 Ill. 340, 52 N.E. 441 (1898); *City of Monroe v. Endelman*, 150 Wis. 621, 138 N.W. 70 (1912).

Where the business sought to be regulated bears no reasonable relation to the health, safety, or morals of the community, ordinances imposing a license can not be justified as a valid exercise of the police power. *Fetter v. City of Richmond*, 142 S.W. (2d) 6 (Mo. 1940); *City of Creston v. Messinsky*, supra.

Moreover, the same result will be reached if, though, as in the instant case, the business might be subject to reasonable regulation, the ordinance itself shows a contrary intention; for instance, by demanding as a condition of the license a fee so grossly in excess of the expense of issuing the license and enforcing the
regulation that the courts can say as a matter of law that there has been an invalid exercise of the police power. *Maryland Theatrical Corp. v. Brennan*, 24 A. (2d) 911 (Md. 1942).

When a municipality lays a license upon a vocation for the purposes of raising revenue, as mentioned before, it must be able to justify its exaction by reference to a specific provision in its charter authorizing such method of raising revenue. The power is in its nature the power to impose an excise tax on the privilege of conducting business. Beyond the need of authorization, the only limitations upon the power of the municipality lie in the due process clause of the 14th amendment to the Federal Constitution and in kindred provisions of state constitutions. *C. B. and Q. R. R. Co. v. Chicago*, 166 U.S. 226, 41 L.Ed. 979, 17 S.Ct. 581, (1897).

The municipality need not restrict its taxes to those businesses which it could prohibit entirely. Impositions have been held legal when levied upon transactions or occupations which are matters of inherent and natural right as well as on those made possible by virtue of statutory authority. *Beals v. State*, 139 Wis. 544, 121 N.W. 347 (1909).

The requirements of due process are twofold. The first and lesser constitutional hurdle which an ordinance must pass is that a valid ground must exist for setting the business sought to be licensed apart from others not so taxed. In this respect the legislative body of the municipality has wide discretion, and in order that the ordinance be sustained it must only appear that the classification is not palpably arbitrary. *Singer Sewing Machine Company v. Bricknell*, 233 U.S. 304, 34 S.Ct. 493, 58 L.Ed. 974 (1913); followed in *Campbell Baking Co. v. City of Harrisonville, Mo.*, 50 F. (2d) 670 (C.C.A. 8th, 1931).

In the latter case, the Circuit Court of Appeals on a state of facts very similar to that of the principal case held that a substantial distinction did exist between transient and resident merchants, and that a license fee of two dollars a day, imposed for revenue purposes upon all merchants with a saving clause exempting those doing business at an established local place of business could not be challenged as discriminatory by a non-resident bakery company making deliveries in the city.

In addition, a revenue licensing measure must not demand a fee which is exorbitant. Under the power to tax, municipal corporations cannot prohibit an individual from engaging in a legitimate trade. What is reasonable as a fee varies in individual cases and only very general principles can be laid down. Courts have held that the city may take into consideration the population of the city, the profitableness of the business, the nature of the business and its effect upon the community, and the expenses incurred in supervising its enforcement. *Ex Parte Sikes*, 102 Ala. 173, 15 So. 522 (1894). The number of persons who have found it profitable to pay the charge and remain in business, and the amounts previously collected is also a valid consideration. *Maryland Theatrical Corp. v. Brennan*, supra.

Courts have held that a flat fee license amounting to four tenth of one per cent of gross sales is not unreasonable. *Giant Tiger Corp. of Camden v. Board of Commissioners of the City of Camden*, 122 N.J.L. 240, 4 A. (2d) 775 (1939).

The same court held a licensing ordinance imposing a fee of three hundred dollars on each vehicle used by ice cream peddlers was void as excessive when such tax was shown to amount to thirteen per cent of the annual gross income from the use of such vehicle. *Gurland v. Town of Kearny*, 128 N.J.L. 22, 24 A. (2d) 210 (1942). In Wisconsin license fees of twenty and twenty-five dollars a day have been disposed of as confiscatory, the former by the federal district
court without reference in the opinion to the value of the goods sold. \textit{Ex Parte Eaglesfield}, 180 F. 558 (D.C. E.D. Wis. 1910); \textit{Monroe v. Endelman, supra}.

In determining what is reasonable and what is confiscatory, courts have tended to recognize a distinction between businesses regarded as legitimate and those regarded as illegal in tendency. While the city may be given the power to single out for taxation either pursuits which are a matter of natural right or those made possible only by virtue of statute, higher fees are generally sustainable in the latter case than in the former on the theory that there is a public policy in favor of suppressing the business or at least restricting the numbers which engage therein. \textit{City of Seattle v. Rogers}, 106 P. (2d) 598, Wash. (1940).

WILLIAM SMITH MALLOY.

\textbf{Sales—Warranties by Express Representation.—}Defendant set up a defense of breach of warranty in an action on a note given in a sale of dairy cows. In making the sale the plaintiff made the statement that, “these cows would have to be as recommended, first class dairy milk cows and six gallons a day, they would give.” He also promised to take back any cow that went wrong. Within two to four weeks after the purchase of said cows they began falling ill, and the entire herd became diseased. The infection caused the milk of the cows to become ropey and stringy; and it soured before it could be sold. The defendant counterclaimed for damages to his own herd. In affirming the decision of the lower court allowing damages to the defendant the appellate court quoted the clause of the Uniform Sales Act which provides that, “any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon,” and held that the statement concerning the production of the cows was an affirmation of fact by the seller relating to the goods within the meaning of the provision of the Act above set out and was therefore an express warranty and not a mere statement of value, or seller’s opinion, as claimed by the plaintiff, \textit{Teter v. Schultz}, 93 N.E. (2d) 802 (Ind. 1942).

Although the court is guided by the provision of the Sales Act defining an express warranty it is, nevertheless, confronted with the problem of interpretation when it is required to determine if a particular statement of a seller is an express warranty within the meaning of the Act. In arriving at the conclusion that a statement is a warranty, the courts have applied various tests.

All courts agree that to constitute a warranty the affirmation of fact must be of a material fact. Typical of the application of this rule is the case of \textit{Lloyd et al. v. James}, 198 Ark. 255, 128 S.W. (2d) 1019 (1939), where the court instructed the jury that, “before expressions rise to the dignity of a warranty, they must amount to a specific, definite, and certain representation of a fact that is material, and, if you find from all the testimony in this case that the expression of the salesman who sold the defendant the truck in the controversy did not definitely and certainly point to some material quality of the truck on which the defendant might rely and did rely, your verdict should be for the plaintiff.”

No special words of warranty are necessary. The word warranty or its precise equivalent need not be used. “It is enough,” said the Minnesota court in \textit{Skoog v. Mayer Bros. Co.}, 122 Minn. 209, 142 N.W. 193 (1913), “if the vendor definitely undertakes that the thing sold shall be of a certain kind or quality.”
This same court held that the word "good," used to describe the condition of a second hand tent, was an express warranty, *Saunders v. Cowl, et al.*, 201 Minn. 574, 277 N.W. 12 (1938). The court based its holding on the fact that the word "good" related to the condition of the goods—a fact—and that this induced the buyer to purchase the tent. In *Detjen v. Moerschel Brewing Co.*, 157 Mo. 614, 138 S.W. 696 (1911), a mule was declared to be "straight and all right," by the seller. The mule died of a hidden disease soon after it was purchased. The court held this to be an express warranty, saying that, "Where the defect is not discoverable upon ordinary inspection representations of soundness made by the vendor, with the intent and purpose of inducing the vendee to rely on them, and their acceptance by the vendee will constitute a warranty. The seller is not permitted to take unfair advantage of his superior knowledge."

Where an article is of a character that might do the buyer harm if the statements that he relied on in purchasing were not true, the court will be stricter in construing words of the seller as a warranty than where the article is harmless. A used car lot owner in dealing with the plaintiff referring to all the cars on his lot stated that, "they were all in good condition and that they would be guaranteed for thirty days." The plaintiff drove the car and was injured when the wheel fell off. In awarding him damages for the breach of warranty the court said: "Where sellers are describing the conditions of chattels so likely, if defective, to occasion injury to life and limb, they should anticipate close scrutiny of their language by the courts. What might be considered mere "puffing" of a perfectly harmless product must be held a distinct representation in case of an automobile," *Curby v. Mastenbrook*, 288 Mich. 676, 286 N.W. 123 (1939).

In dealing with intention to warrant the earlier cases emphasized the exact stipulation of the contract to show it. Thus in *Hawkins v. Pemberton*, 51 N.Y. 199 (1872), the court declared: "It is not true, as sometimes stated, that the representation, in order to constitute a warranty, must have been intended by the vendor, as well as understood by the vendee, as a warranty. If the contract be in writing and it contain a clear warranty, the vendor will not be permitted to say that he did not intend what his language clearly and explicitly declares; and so if it be by parol, and the representation as to the character or quality of the article be positive, not mere matter of opinion or judgment, and the vendee understands it as a warranty, and he relies on it and he is induced by it the vendor is bound by the warranty, no matter whether he intended it to be a warranty or not. He is responsible for the language he uses, and cannot escape liability by claiming that he did not intend to convey the impression which his language was calculated to produce upon the mind of the vendee." *Smith v. Justice*, 13 Wis. 671 (1861), is to the same effect.

However the later cases place more stress on the question—Did the seller intend to warrant? In 55 C.J. 673, it is stated, "To constitute an express warranty there must be an express undertaking to warrant in so many words, or, if representations are relied on to make out the warranty, they must be made in such manner and circumstances as to authorize the buyer to understand that the seller intended to be bound by them as a part of the contract for sale, and he must have purchased in reliance on them." This rule was followed in *Wallace et al v. McCampbell*, (Tenn.) 156 S.W. (2d) 442 (1941); *Naylor v. McSwegan*, 21 N.Y.S. 930, 50 N.Y. 339 (1893); *Giffert v. West*, 33 Wis. 617 (1873).

The warranty must be made before or at the time of the sale. In the case of *Beckett v. F. W. Woolworth Co.*, 376 Ill. 470, 34 N.E. (2d) 427 (1941), the plaintiff had been buying the same kind of mascara for ten years. In this in-
stance she picked up the tube, paid for it, and then asked if it was safe. The clerk answered, "It is on the tube, it says harmless." The buyer suffered serious eye injury but was denied recovery on breach of warranty. The Illinois court pointed out that all statements made by the clerk seemed to have been made after the sale was completed. "Manifestly, acts or statements of a retailer made after a sale do not support a claim that a regular customer was induced to buy merchandise in reliance upon such statements. In order to recover for a breach of warranty in this case it was thus incumbent upon the plaintiff to prove an affirmation of fact concerning the mascara by the defendant, the seller, having a natural tendency to induce her to buy, and an actual reliance upon the affirmation made."

"Mere silence implies no warranty, neither do remarks which should be construed as simple praise or condemnation; but any distinct assertion or affirmation of quality made by the owner during a negotiation for the sale of a chattel, which may be supposed was intended to cause the sale, and was operative in causing it, will be regarded as either implying or constituting a warranty," Parsons, Contracts, Vol. 1, p. 579 (7th ed., 1883).

A wrong statement of law on the part of the seller is not an express warranty. Thus, where a buyer sued a corporation for loss and damages suffered when he was assessed as owner of stock purchased from them, in spite of the agent's statement that "he would not be liable to assessment as the owner of the stock," the Michigan court declared, "the first statement was a statement of law and as such the speaker was mistaken and could not be held. He did not make a knowing representation of law or fact to the plaintiff," Goodspeed v. MacNaughton, Greenwalt & Co., 288 Mich. 1, 284 N.W. 621 (1939). In describing what was not a warranty this court quotes with approval the following from Williston, Contracts (1936) Vol. IV, p. 2692, "if a statement falsely and fraudulently made will not sustain an action of deceit or afford ground for rescinding a contract it is still more clear that it cannot amount to a warranty."

As to the effect of a mistake of fact on the part of the seller the Michigan court has said there would be no warranty in such a case, Goodspeed v. McNaughton, supra. The Wisconsin court seems to stand on opposing ground. In Hoffman v. Dixon, 105 Wis. 315, 81 N.W. 491 (1900), the plaintiff went into a store and asked the defendant if he had rape seed. The defendant said yes. The plaintiff asked for 25 pounds and the defendant took out a sack and weighed out that amount. Neither the plaintiff nor the defendant knew what rape seed looked like and each was wholly unaware of the ignorance of the other. The seeds turned out to be mustard seeds. The court awarded damages for breach of warranty and said, "An affirmation of fact as to the kind or quality of an article offered for sale, of which the vendee is ignorant, but upon which he relies in purchasing such article is as much a binding contract as a formal agreement using the plainest and most unequivocal language on the subject. * * * Knowledge on the part of the vendor is not essential either to actionable fraud or a contract of warranty."

Where the buyer's actual information is equal or superior to the seller's, reliance on the seller's statements is not justified. Under such circumstances the seller's statements are properly deemed mere statements of opinion and not warranties. The seller's statements of value, too, are readily seen to be matters of estimate or interested personal judgment so that without more appearing, they are regarded as not justifying reliance thereon. Similarly, general words of commendation, such as "good, high class, valuable" are regarded, without
more appearing, as mere seller's talk not to be relied upon. Vold, Sales (1931) 447.

The following are illustrations of statements by the seller which were held not express warranties but merely seller's opinions, commonly termed puffing. A clerk's statement that the "cream is pure, beneficial and harmless, and that it would not harm the most tender skin" was held to be a recommendation of the cold cream and not a warranty in Bel v. Adler, 63 Ga. App. Rep. 473, 11 S.E. (2d) 495 (1940). A circular stating the merits of a particular seed corn in Gray v. Gurney Seed and Nursery Co., 57 S.D. 280, 231 N.W. 940 (1930), said, "We claim that it will outyield any variety that will mature in the same time on the same ground." The court held this to be the seller's opinion. The defendant in the case of De Zeeuw v. Fox Chemical Co., 189 Ia. 1195, 179 N.W. 605 (1920), attempted to make a sale by telling the plaintiff, "If he would feed the defendant's worm powder it would improve the growth and physical condition of his hogs." The hogs were poisoned by it, but the court said that the seller's statements were not warranties, but merely opinions. So, also, was the salesman's statement that, "you would make a saving of approximately $800 per year by automatic gas firing," declared to be an opinion in the sale of a gas boiler in Snow Laundry and Dry Cleaning Co. v. Georgia Power Co., 61 Ga. App. Rep. 366, 6 S.E. (2d) 159 (1939). It was held not a warranty to say, "I have the best piece of cloth in the market," even though it had a hole in it in Strauss v. Salzer, 58 Misc. Rep. 573, 109 N.Y.S. 734 (1908). Nor did the court find a warranty in the words of the clerk who said of a fur coat that, "it would wear very good," in Keenan v. Cherry and Webb, 47 R.I. 125, 131 Atl. 309 (1925). Even though the seller was insistent in Smith v. Bolster, 70 Wash. 1, 125 Pac. 1022 (1912), the court said that his statements to the effect that the car was, "in first class condition, as good as any new car, and that he guaranteed the car to go eleven miles to a gallon of gasoline on the average," were opinion or seller's talk. There was no warranty when the seller said that, "The Jenkins stacker would stack hay from fifty cents to one dollar a ton cheaper than the "T" stacker," which the buyer was then using, Carver-Shadbolt Co. v. Loch et ux., 87 Wash. 453, 151 Pac. 787 (1915). The use of words like, "prime elegant merchandise," in the case of shoes, Rosenbush v. Learned, 242 Mass. 297, 136 N.E. 341 (1922); "unsurpassed and unsurpassable," speaking of bicycle parts, League Cycle Co. v. Abrahams, 27 Misc. Rep. 548, 58 N.Y.S. 306 (1899); "they will sell like hot cakes," in the case of vapor stoves, Detroit Vapor Stove Co. v. J. C. Leeter Lumber Co., 61 Utah 503, 215 Pac. 995 (1923), were all termed seller's talk by the courts. In the case of Snow's Laundry and Dry Cleaning Co. v. Georgia Power Co., supra, the court repeated in the form of a test the section of the Sales Act mentioned in the principle case: "the decisive test, in determining whether language used is a mere expression of opinion or a warranty, is whether it purports to state a fact upon which it may fairly be presumed the seller expected the buyer to rely and upon which a buyer would ordinarily rely."

In Mantle Lamp Co. v. Rucker, 202 Kan. 762, 261 S.W. 263 (1924), the test of whether a given representation is a warranty, or a mere expression of opinion or judgment, was said to be "whether the seller assumes to assert a fact of which the buyer is ignorant, or whether he merely states an opinion or expresses a judgment about a thing as to which they may each be expected to have an opinion and exercise a judgment. In the one case it will be deemed a warranty and in the other a mere expression of opinion."

PHILIP W. CROEN.
U.S. SUPREME COURT RULE OF VALUATION AS APPLIED TO CORPORATE REORGANIZATION

Perry Anderson*

FINDING of value may be necessary for a number of purposes. It may be desired to find value for taxation, for condemnation, for inclusion in a balance sheet, for a basis for depreciation, for utility rate-making, for bargaining, for determining the upset price in liquidations or for reorganization. Methods for finding value in the past tended to vary with the purpose for which the opinion of value was to be used. There has been a more recent tendency toward a standardization of method due to comparing the opinion of value found by one method with opinions of value resulting from the use of other methods. This is not a discussion of the merits of various methods of evaluation. Only valuation for reorganization will be discussed though the method may have other applications.

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In reorganization cases it is assumed that the subject business is to continue in operation. It thus is necessary to determine the value of the assets as a part of a going business. The basic question in a valuation for reorganization purposes is how much the enterprise in all probability can earn.\(^1\)

The Federal district courts have not always agreed as to the method by which value is to be found for reorganization. Certain decisions were based on original cost less depreciation, others were based on reproductive cost less depreciation. Some asserted that past earnings should be considered. Sec. 77(e) of the Bankruptcy statute says in part "the value of any property used in railroad operation shall be determined on a basis which will give due consideration to the earning power of the property past, present and prospective, and all other relevant facts. In determining such value only such effect shall be given to the present cost of reproduction new and less depreciation and original cost of the property and the actual investment therein as may be required by the law of the land, in the light of its earning power and all other relevant facts."

The U. S. Supreme Court in the case of Consolidated Rock Products Co. v. Du Bois\(^2\) cleared up much of the uncertainty as to method by stating that the "criterion of earning capacity is the essential one if the enterprise is to be free from the heavy hand of past errors, miscalculations, or disaster." This same decision stated that value for reorganization depends on two factors: (1) the reasonably prospective earnings and (2) the rate of capitalization.

The U. S. Supreme Court decision in the case of Consolidated Rock Products Co. v. Du Bois did not state how these two factors were to be determined. The Securities and Exchange Commission has done much to crystalize opinion as to the method to be employed in determining value in its releases dealing with reorganization and simplification and by statements of staff members in hearings dealing with valuation for reorganization.

**The Method Employed**

Finding of value in reorganization, as has been stated earlier in this discussion, is the result of two factors, namely, the reasonably prospective earnings and the rate of capitalization. In cases where value is being found for a business having a finite life such as a real estate enterprise a third factor, which is really a refinement or limitation of the reasonably prospective earnings, must be given consideration. This is the determination of the remaining useful life of the enterprise. The

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remaining useful life is the span of years in which it can be reasonably demonstrated that the cash income of the enterprise will exceed the cash required to operate the enterprise.

This discussion will deal with a real estate organization since the elements to be dealt with are more static. Each of the two major factors, namely, reasonably prospective earnings and the rate of capitalization together with the further restrictive factor, remaining economic life, will be separately discussed.

**Remaining Economic Life**

The remaining economic life of a real estate enterprise cannot exceed the remaining depreciable life of the structure. If the structure is now fifteen years old and good engineering practice would allow a total depreciable life of fifty years to a structure of this type, the remaining depreciable life would now be thirty-five years. This, of course, assumes that no new capital will be contributed to the enterprise to rebuild or materially extend the depreciable life of the structure. The approach to this problem must be as realistic as possible and unless funds are to be made immediately available an assumption that the owners of the enterprise *may* make the further contribution at a later date is unwarranted.

It may be well to explain at this point a basic difference between a real estate enterprise and an industrial enterprise. The value of a real estate enterprise arises from the earnings which can be derived from the use of the land and from the structure in place. The excess of cash income over cash outlay is the return of capital and return on investment. Even though a portion of this excess is to be set aside to rebuild the structure when it is worn out that amount must be regarded as a contribution to a new enterprise since there is not now any assurance or indication that an identical building costing identically the same as the present building would be warranted at that time or that a satisfactory return could be earned on the investment. To attempt to prognosticate the character and type of a structure which would be acceptable and to estimate the cost of such a structure many years hence and to estimate what the income and expense would then be requires occult powers which few people can claim.

In an industrial enterprise there is no limit upon the remaining life. There are some experts who assert that an industrial enterprise does have a finite life based upon the business longevity of the individuals who now control its destinies. The opinion is not generally accepted since there is much merit to the contention that management equal to the present management is available through training of younger men or can be obtained.
In industrial operations it is necessary that the plant and equipment be maintained at a certain level of efficiency. Repairs and replacements are made as needed and new equipment must be added as improvements are made in the art of manufacture. Thus the plant is kept continually in a good state of repair and the life of the industrial company may reasonably be regarded as unlimited.

The economic or useful life of a particular structure is not dependent upon the character and type of the improvement alone. The age of competitive buildings in the area and their operating condition also affects the economic life of a building which is being studied. It must be learned if the area is stable, if it is improving or if the tendency is away from the neighborhood. American cities are more or less fluid in their growth. The movement oftentimes is so pronounced that even the business district in spite of large investments in commercial and office buildings tends to shift. Shifting and movement in the building into new sections often result in areas of blight where values have greatly diminished. There are few of our larger American cities which have not experienced this tendency. In Milwaukee the center of the business district once was located between Broadway and Milwaukee on Wisconsin Avenue with a definite trend to move north and south. The growth of the city to the west caused the business district to move west on Wisconsin Avenue until today the center of the business district is at North Third Street and West Wisconsin Avenue. This westward growth might have continued had it not been that the growth of residential districts to the north and south has created a counter influence, the effect of which has been to anchor indefinitely the business center at about the present location. During the five years from 1936 to 1940 nearly 55% of all new building construction took place in Milwaukee County beyond the city limits.³

It is necessary to learn the rentals being paid for like space in other buildings, the length of time such rentals have prevailed and the type of tenancy. It is necessary also to study the history of the area in which the building is located and other districts to determine the possibility of a shift in rental preference. The income possibilities of the city must also be studied to determine the permanence of local industries. In the case of properties having store space for rent the character of public transportation must be studied. Today when so many transportation companies are removing street car tracks and operating trackless trolleys it is easier to shift from one street to another and this possibility must not be overlooked. A careful consideration of all of these factors will permit an opinion to be formed as to the relationship of the remaining income producing years or useful life which

³ Proposals for Downtown Milwaukee of the Urban Land Institute at page 21.
may reasonably be expected from the property to the remaining depreciable life. This opinion may not necessarily prevail since the effect of experience trends on the reasonably prospective earnings of the subject property may somewhat alter it.

THE REASONABLY PROSPECTIVE EARNINGS

The determination of the reasonably prospective earnings of an enterprise is possibly one of the most controversial subjects to be considered in a reorganization proceeding. The Securities and Exchange Commission has contributed largely to the development of a method for considering this subject in utility and industrial reorganization as has also the Interstate Commerce Commission in railroad reorganizations though the approach of these two commissions is not necessarily the same. Mr. Hiram L. Jome in an article "The New Schoolmaster In Finance"4 says "Time and again the Schoolmaster (the S.E.C.) has had to call attention to the distinction between reasonably prospective earnings and hoped for earnings." The desire of one group seeking to establish an equity may well be to assert a high rate of future earning power. A mortgage group, on the other hand, may well assert that the rate of future earnings is low and that the resulting value of the property for reorganization forecloses equity groups from participation in the benefits of reorganization.

The first step in the determination of the reasonably prospective earnings should be a careful and detailed analysis of past operating results. Such a study and analysis is necessary in order to establish the causes for the present financial difficulties of the subject company. The causes may be many but if the operation is carefully analyzed and compared with successful companies in the same field these causes will become evident. The effect of these causes upon past earnings having been reasonably well established, the past operating results may be adjusted to give effect to their elimination.

The Securities and Exchange Commission has said "A debtor's record of earnings, adjusted or weighted to give account to unusual conditions and reasonably foreseeable changes, provides a guide to a determination of earnings reasonably to be anticipated in the future."5

Recent earnings are likely to be the best indication of what the future earnings may reasonably be expected to be since many of the same factors affecting present earnings may be anticipated in the future. The earnings should be reviewed for a sufficient period, however, to show the effect of certain trends. The period should be of sufficient duration, also, to reflect the full cyclical effect on earnings.

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Care must be taken to adjust past earnings for conditions then existent which are no longer present or which have been nullified in part in their effect on present earnings. The existence of current high earnings may be noted but should be tempered in the light of past experience and present long term trends. In discussing present high earnings the U.S. Supreme Court in *Ecker v. Western Pacific Railroad Corp.* said, "There are factors in these increased incomes which obviously affect their weight as evidence of continued capacity to produce earnings."

A war even of the proportions of the present conflict is not a permanent state. By the same token the depression of 1929-1933 was not found to be a permanent condition. Since value depends upon the prospective earnings to be realized over the remaining economic life of the property, the evaluator is justified in establishing an average prospective earning which may recognize the presence of a high rate of earnings at present but does not overlook the low earnings which may have existed in the past. The effect given to the earning's fluctuations depends to a considerable extent upon the experience of the evaluator.

Once the present earnings have been adjusted to eliminate past conditions which are no longer present and for new conditions which are now evident the evaluator is ready to project these earnings over the remaining economic life of the property. The projection is not a matter of crystal gazing but merely applies to the adjusted present actual earnings, certain income and expense trends which have operated with other similar properties in the experience of the evaluator.

Studies made of large numbers of commercial, office, apartment, apartment hotel, transient and residential hotel and other income producing properties show that each group has experience trends which are typical of that group. The length of time required for earnings to reach their maximum after completion varies with each group. The economic life of buildings in each group varies not only with the type of structure but with the city and area in a city in which it may be located. The rate of decline for a building from peak income and earnings to the point at which it can no longer be operated profitably may vary with each group. The percentage of occupancy will vary with groups and cities and areas depending upon the competition. Histories of other properties serve as a guide to establishing the experience curve of income for specific properties but must be modified by conditions specifically affecting the subject property.

Careful and detailed analysis of the costs of operation must be prepared. Certain operating costs will increase with the age of the building, others will decrease with the age of the building and still

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others may be little affected by the passage of time. As the building becomes older the cost of repairs is certain in increase. Other items such as real estate taxes are likely to decrease unless there is sufficient showing that the land may improve in value to the extent that depreciation of the building may be offset. It is difficult to forecast an increased land value at the end of the economic life of the building since it is difficult to anticipate the level of general business at that time. If an increase in land value were to be of sufficient magnitude it might well shorten the remaining economic life of the structure as it would cease to be able to produce an income consistent with the earning value of the land when properly improved and hence the existing structure would be removed and an adequate structure put in its place.

The cost of water and electricity varies with occupancy and would be affected only to the extent that occupancy is affected by increasing age of the structure. Similarly, the janitors' wages would not be expected to vary with the age of the building since it is necessary that janitor service be supplied so long as the building is tenanted. The cost of decorating and rehabilitation of the building and equipment are likely to vary with income since adequate outlays cannot be maintained in the face of declining earnings, though failure to do so will accelerate the rate of decline of income.

The projection of earnings, as has been previously stated, cannot contemplate the remodeling of the premises through the contribution of new capital unless provision is made as part of the plan of reorganization. Otherwise it would be difficult to give it much consideration since conditions in the future may be such that the possible income after making the expenditure would not warrant the further investment. Likewise the projection cannot delve into the realm of crystal gazing to reflect a use for the property in the future different from its present use.

To summarize, the projected or reasonably foreseeable earnings are the present earnings adjusted for past conditions no longer existent and for future conditions which are now evident and known including the application of adjusted experience curves of income and the various items of operating expense.

THE RATE OF CAPITALIZATION

The nomenclature which has developed in the field of evaluation has produced certain ambiguities in terms. This has resulted from the use of similar terms being applied without regard for the type of property involved. The earnings of an industrial company after reasonable provision for the replacement of machinery, equipment and buildings through reserves for such depreciation may well be anticipated in per-
petuity. At least, there is now no reasonable method for establishing a definite life even though it may be known that some types of manufacture have completely disappeared with the passage of time. With industrial companies then there is no better method of finding value than to capitalize the anticipated earnings on a straight line. The anticipated annual earnings would be divided by a rate of interest which would represent a fair payment for the risk of investment. To turn this around, the value would be an amount of money which a purchaser would be willing to pay in order to receive the anticipated earnings each year, having in mind the risk attendant upon his investment. The situation is somewhat different with real estate enterprises as will be developed later in this discussion.

If there were no risk involved with an investment, the investor would be entitled to no return for making his investment. Should he lock his money in a safe deposit vault he could collect from no one for leaving it there since it would have served no useful purpose. By the same token if he were to loan it to a business enterprise which dared not risk the funds so loaned in the business through fear of loss the money would likewise be unproductive.

The only place where funds may be loaned today with absolute certainty of the return of the principal is to the Government. If the Government fails money itself has no value. The promise of our Government to pay is unquestioned.

Interest on Government bonds and notes is not a compensation to the investor for risk of investment but is a payment for the use of money as a commodity. A glance at the interest return on short term Treasury notes shows the low use value of money as a commodity. The rate of interest paid on longer term Government bonds or bonds of a Government agency and guaranteed as to payment by the Government is likewise not a payment for risk but is a payment or rental for the use of money for a longer period of time but still with the absolute assurance that the amount of the loan will be repaid when due. The higher rate of interest is merely a compensation for allowing the Government the use of the money for a longer period of time rather than to have it immediately available for use. The longer the period for which it is loaned the greater will have been the opportunity of the investor to use it for other purposes and hence the Government must pay more for this postponement of use by the investor. The greater the opportunities are for the investor to use his money the more the Government must pay to obtain the use of such funds. The obligation of the Government can be converted to the use of the investor readily since other investors are willing to buy the Government’s obligations for their unexpired terms.
There are other forms of investment which are regarded as virtually without risk. These include first mortgages of the type purchased by life insurance companies and certain of the highest grade industrial or utility bonds. There is little question here as to the return of the principal or the payment of interest when due. The investor requires a higher payment for the use of his money from this type of borrower than he does from the Government since to convert his investment to his own use it is necessary that he find another investor who has funds with which to acquire this obligation and who is willing to make an investment in that particular property or company.

Other opportunities for investment are offered where, in addition to the reduced liquidity of the investment, there is some degree of doubt as to the eventual return of the principal or continued payment for the use of funds. This risk is attendant upon most investment in industrial or real estate enterprises. The projection of earnings has attempted to deal as realistically as possible with the risk of income being realized and every known factor has been discounted. However, it is known that in the past there have been unexpected and unforeseen developments which have affected earnings of the subject company and most other companies. Likewise it is known that some of the unexpected and unforeseen developments have had such an adverse effect upon the business and income of companies that they have been unable to survive thus resulting in substantial loss of the principal invested.

Since the investor is aware that there may be these unknown hazards, he requires a payment for the use of his money which he believes will return his investment before any dire eventuality will eliminate the company or unduly affect its earnings. If no such consequences befall the company he will have had more than an ample return for the mere use of the money. The investor should appraise the industry in which it is proposed he shall make the investment to see the trend of earnings and to survey the extent of industrial mortality in that field. He should then examine the particular company to determine as best he can the further risk that may attend investment in that particular company. In the case of real estate enterprises he should study the risk attendant upon investment in a particular type of building located in the particular city and area in which the building is located and the further risk to investment in the subject building. The evaluator likewise has to make the same study since the rate used must be presumed to be one which will be sufficient to attract new capital to the enterprise rather than to compensate partially capital which may already be invested.

It is unlikely that any two evaluators will agree exactly on a rate to be used since the weight they give various risk factors will vary
according to individual experience. On the other hand if each has used the same degree of care in preparing the projection of future income and expense and in determining the remaining useful life it is likely that neither will be able to say that the rate used by the other is unfair. The Securities and Exchange Commission in various of its reorganization division releases has advocated varying rates or ranges of rates depending upon the individual subject company; hence, it is not possible to select any particular range of rates as being advocated by that commission.

Inasmuch as it is the present value of the debtor’s assets which is being ascertained, the value may vary according to current risk rates at the time the study on value is prepared. At present when current interest rates are low in relation to those of a few years ago the rate applied in a finding of value would be expected to be low in comparison with an acceptable rate for a study made in 1934.

**THE OPINION OF VALUE**

Once the two principal factors forming the basis for an opinion of the going value of the subject company has been determined the opinion of value results from the application of mathematical processes.

The going value of an enterprise includes all the elements which are required to produce the anticipated earnings. Thus the opinion of value includes the value of the land, buildings, machinery and equipment, working capital, processes, patents and other necessary assets. The analysis of the operation and financial condition will have disclosed what assets are necessary to the conduct of the business. If the amount of cash on hand, for instance, should exceed the amount normally required in the operation of the business, the excess above the actual requirement could be removed from the business without distorting or affecting earning power. This excess then becomes an added element of value which would be added to the going value of the business since it could be removed by the owner. Should the cash on hand be less than the amount which would reasonably be required a reduction in the going value to the extent of the deficit would be warranted since a reduced scale of operation might result or the going value might have to be encumbered in order to obtain the necessary cash.

Once these elements become known the opinion of value for an industrial enterprise results from a fairly simple mathematical computation. The anticipated annual earning is divided by the risk rate and the result of that computation when added to by the value of assets owned which are not required to produce the anticipated earnings or reduced by the value of assets which must be contributed to produce the anticipated earnings, may reasonably be asserted as the value of the subject company.
The computation in the case of a determination of the value of a real estate enterprise is somewhat more complex although the principles used are much the same. The real estate enterprise may anticipate earning for only a limited period of years. Also the anticipated earnings have been adjusted for experience trends and thus they will vary from relatively high earnings in the earlier years to zero at the end of the economic life of the building. The present value would thus be obtainable by discounting the total anticipated earnings in the amounts and at the time they are anticipated to the present time at the rate of interest which the evaluator believes to be adequate for the degree of risk involved. Since the experience curves of income and expense when applied to the present adjusted earnings will vary the anticipated return from year to year it is logical then to discount the adjusted earnings for each year of remaining economic life to the present time. The total of these adjusted earnings for each of the remaining years of economic life would appear to be a reasonable opinion of the value of the income producing assets if there is an adequate amount of working capital presently included in the assets.

There are other items which must be valued. At present the land has no independent value since its continued use is required to produce the anticipated earnings. At the expiration of the economic life of the structure, however, the land will again be available for use when the present structure is removed. It is thus necessary to form an opinion as to the value of the parcel of land at that time in the future when the building has outworn its present use. To continue to be realistic, the best indication of the future value of the land is the value today of a parcel of unimproved land in the same location, of same size, and adaptable to the same use as this parcel. The current market value might be adjusted in the light of presently foreseeable trends which might make a similar parcel of vacant land more or less valuable at the end of the useful life of the present structure. Now, having established a reasonable future value for this parcel of land when the present improvement is or should be removed the present value of this reversionary interest in the land would reasonably appear to be the reasonable future value discounted to the present time at a rate of discount equal to the interest return which an owner of land would be willing to accept as rent for the use of land. This might reasonably be asserted at the present time to be from four and one-half per cent to five per cent. Many existing leases of land have been made in which the annual rental for the land has been computed at five per cent of the land value at the time the lease was made. Some more recent leases have been made providing for rentals computed as four and one-half per cent of the land value at the date the leases were made.
If the subject property is a hotel or furnished apartment building there would also be a reversionary interest in the value of the furnishings at the time the building ceased to warrant further operation. It may be assumed that the equipment will be maintained in at least its present operating condition and hence the realizable value today would be a reasonable opinion of its future value. That value when discounted to the present at a rate of interest consistent with the risk involved in the rental of furniture would be the value of the reversionary interest in the furnishings.

There is a possibility that there may be some salvage which can be obtained from the sale of the building when it is torn down. This is not ordinarily a likely possibility since in recent years the cost of wrecking has generally exceeded the sales price of salvaged material. If it can be reasonably demonstrated that there will be some salvage that amount when discounted to the present at a fair rate of interest will add to the total value of the enterprise.

Thus the going value of the real estate enterprise may be stated to be the total of the discounted anticipated earnings plus the reversionary interest in the land, the furnishings and fixtures (if any) and the discounted amount of the possible salvage. This total would be added to by an excess of assets over those required to produce the anticipated earnings or deducted from by the value or cost of assets which would be required to be obtained.

It should be observed that determination of value by its very nature cannot be an exact science. It is impossible to assert that a particular enterprise is worth exactly a stated number of dollars and no more or less. It can be appreciated that two equally informed experts could attach varying values or importance to the different factors affecting value. Each would be correct in the light of his own experiences. Generally speaking, the resulting opinions would not be expected to vary widely and a court or interested party would be warranted in believing that the exact value would be within the range of values arrived at by experts all of whom had used this method.

It is as nearly a scientific approach to the determination of value as has been offered and has the advantage of a logical presentation and consideration of the elements of value. "It entails a prediction of future events. Hence, an estimate as distinguished from mathematical certitude, is all that can be made."
The Function of the Valuation Expert in Reorganization

The principle of absolute priority has recently been restated in the U.S. Supreme Court case of *Case v. Los Angeles Lumber Products Co.* The absolute priority rule had earlier been stated in the U.S. Supreme Court decision in *Northern Pacific R. R. v. Boyd* but so many reorganizations later followed the rule of relative priority that it became necessary to clarify and state definitely the rule to be followed in reorganizations. According to the rule of absolute priority, regardless of whether a company is found to be solvent or insolvent, holders of prior claims are to be paid in full for their claims including accrued and unpaid interest either in new securities or in assets or other valuable consideration before anything can be given to security holders of an inferior class. The securities issued under a plan of reorganization need not be of the same grade as were previously held but regardless of the grade they must be equal in value to the full claim of the creditor before junior groups are entitled to any share. This holder of a senior claim is entitled to compensation also for any "step-down" in the position of the security he receives in a reorganization before any consideration can be given to the claims of junior groups of creditors.

It is, therefore, important that a class of creditors be reasonably certain of their right to participate in the ultimate benefits of a plan of reorganization before undertaking a program of action which may involve a considerable outlay of time and expense. The evaluator should therefore be directed to make a preliminary survey and to express a tentative opinion to the creditor group by whom he may be employed.

Once the decision is made to enter the proceedings the evaluator should undertake the formal and detailed study of the elements of value in order to be prepared to testify as to his opinion of value at hearings on value. It is necessary also that the value of the debtor's assets be determined as a step in the preparation of a plan of reorganization. Without a formal finding of value it is difficult to determine the extent to which various groups may be entitled to participate or the manner of their participation. There are instances where an agreement can be obtained that the value of the debtor's assets is so much below the claim of a first mortgage that no exact value need be found since no assertion of a right of participation will be asserted by creditors junior to the first mortgage, but these instances are likely to be rather rare. Even in these cases, while no formal finding of value may be found by the court an appraisal study is desirable as a means to determining the feasibility of a plan unless that plan calls for distribution of common stock, to one class of creditors only.

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9 228 U.S. 482.
The opinion of the evaluator is necessary also in a hearing on solvency. He should be competent to state what assets are necessary to produce the anticipated earnings of the enterprise and the amount of the excess assets or the extent of the deficiency in assets. His opinion as to the value to be assigned to certain of the excess assets is valuable.

When the proposed plan or plans are submitted for consideration the evaluator should again be consulted as to the feasibility of the proposed plan or plans in the light of the anticipated earnings of the reorganized debtor. He should be in position to show the effect of the provisions of various plans as to the distribution of earnings and the availability of earnings for the various classes of securities proposed. If the plans contemplate the issuance of debt securities he should be in position to know whether an amount of securities can be retired from the anticipated earnings which will at least be equal to the depreciation of the structure in order that the ratio of outstanding debt to depreciated property value shall not reasonably be less in the future than at the date of the plan. If the apparent value of securities proposed to be issued is greater or less than the claim of a group is entitled to receive the question of fairness may be raised. In its application, however, the question of fairness is much more likely to be a legal problem rather than a problem for the evaluator. He, of course, is unlikely to be heard as to his opinion unless he is placed on the witness stand and carefully led in the questions asked of him by counsel who understands thoroughly the method used and the effect of the various factors which result in the opinion of value.
RENT CONTROL AND EVICTIONS
UNDER EMERGENCY PRICE
CONTROL

E. P. MCCARRON*

In the language of the 77th Congress, price control was designed in
the "interest of national defense and security," and was necessary to
"the effective prosecution of our present global war." Of all the various
ramifications and aspects of the Emergency Price Control Act, and
price schedules, orders and regulations issued thereunder, one feature
which appears to be more directly connected with the war effort than
others is the restrictions against the removal or eviction of tenants.

Rather than approach the subject of "evictions" abruptly, it might
be well to consider a few of the broader aspects of the Congressional
act which affects our economic structure more so than any other law
enacted heretofore.

Until a year ago, the word inflation had a vague meaning for most
of us. Some thought that it meant the issuance of more "greenbacks"
by the government, or the circulation of useless paper money. The term
did, however, assume a definite meaning immediately after the enact-
ment of the Lease-Lend Bill. Prices began to rise, particularly on
destructible commodities used as War material. And it necessarily
followed that prices on cost of living commodities started to rise also.
Between the date of the Lease-Lend Bill and America's entry into the
War the difference between normal prices and inflated prices on pur-
chases by the government alone, amounted to more than the entire cost
of the last World War. Inflation was on its dizzy and destructive way.
It effects not only government buying, but the public as well. When the
cost of goods increases, the wage earner needs a higher wage or salary,
and his demanding higher wages causes an industrial maladjustment
which in turn results in labor disputes. It hardly seems necessary to
point out the disastrous effects of labor disputes and strikes on pro-
duction. It can be assumed, therefore, that the Congress gave consid-
eration to these facts in declaring the Emergency Price Control Act
necessary to the effective prosecution of the present War.

In addition to its beneficial present effects on the war program,
the control of prices now, is expected to avoid an economic collapse
at some future date, such as was experienced after the inflationary

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1 Public Laws 421, 77th Congress, Ch. 26, Sec. 1.
2 Ibid. Sec. 2 (b).
movement of World War I. It is an attempt to forestall a recurrence of the practices which led to the state of affairs following the economic collapse in 1929. Our highways were crowded with men on foot, traveling from one town to another, looking for employment; breadlines were formed in the larger cities; riots and bloodshed were prevalent; sheriffs, elected by the people, were shot in the State of Iowa in the performance of their duties in connection with foreclosure proceedings, and business failures resulted in suicide. These conditions, and many more, can be attributed directly to the inflationary movement which started during the first World War.

The Emergency Price Control Act of January 30, 1942, created the Office of Price Administration, whose function it is to prevent inflation. The Administrator of the Office of Price Administration was vested with considerable authority, and was directed to issue price schedules, orders and regulations necessary to carry out the purposes and intents of the act. One of the purposes set forth in the Act is to prevent abnormal increases in rents, and to regulate "renting or leasing practices (including practices relating to recovery of the possession) in connection with any defense area housing accommodations." The Price Administrator proceeded to place a ceiling on rents, after having given due consideration to conditions in centers of defense activities, which either resulted, or threatened to result, in increases in rents for housing accommodations. Relevant factors in the Milwaukee Defense Rental Area led to the selection of March 1, 1942, as the "freeze" date. To protect from puncture the ceilings so established, complimentary provisions were inserted in the rent regulation restricting the landlord's statutory right to remove his tenant. The law had to eliminate competitive bidding among tenants for housing accommodations which were all too scarce. That, however, is not the only purpose behind the provisions prohibiting the removal of tenants.

During the last world war 20% of the total manpower in the country was lost to the war effort solely because war workers were forced to migrate from one center of war activity to another in search for living quarters available to them at a price within their means. Our country cannot afford to sustain such a loss during the present war, where capacity to produce war material seems to be one of our greatest weapons. The stability of war workers in their present locations is entirely essential to the war effort and must be maintained. The wheels of production would slow down likewise if the workers responsible for their turning were disturbed and harassed with the threat of dispos-

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4 Public Laws 421, Sec. 1(a).
5 Ibid., Sec. 2(a) (e).
6 Ibid., Sec. 1.
7 Ibid., Sec. 2(b).
8 234.03, .04 Wis. Stats., 1941.
RENT CONTROL AND EVICTIONS

Men cannot perform satisfactorily on a production line with the shadow of eviction at the whim of the landlord hanging over their heads, because they know that an eviction means a long search for other shelter and removal to another town if the search is unsuccessful.

With a full understanding of the background so thoroughly justified, the legal profession can more readily accept the fact that case law and statutory law is asked to step aside and give way to this new federal law, because that is just what the Emergency Price Control Act, and the regulations issued thereunder, demands and requires. The landlord is now limited and restricted in the free use and management of his property such as he enjoyed under the state statutes and case law. An eviction judgment cannot be granted to a landlord plaintiff who desires the removal of his tenant and has complied with the statutory requirements terminating the tenancy. The Federal Rent Regulation is superimposed upon that part of the state laws which is in conflict with it. The language of the Wisconsin Supreme Court, in *Konkel v. State*, "Congress having spoken full on the subject, the power of the State to enact a law on the same subject is suspended" is for the duration of the war applicable to the landlord tenant relationship.⁹

One of the thirteen sections of the Maximum Rent Regulation is devoted to "Restrictions on the Removal of Tenant." Section 6 is set out here in full:

"SECTION 6. RESTRICTIONS ON REMOVAL OF TENANT.—(a) So long as the tenant continues to pay the rent to which the landlord is entitled, no tenant shall be removed from any housing accommodations, by action to evict or to recover possession, by exclusion from possession, or otherwise, nor shall any person attempt such removal or exclusion from possession, notwithstanding that such tenant has no lease or that his lease or other rental agreement has expired or otherwise terminated, and regardless of any contract, lease, agreement or obligation heretofore or hereafter entered into which provides for entry of judgment upon the tenant's confession for breach of the covenants thereof or which otherwise provides contrary hereto, unless:

(1) The tenant, who had a written lease or other written rental agreement, has refused upon demand of the landlord to execute a written extension or renewal thereof for a further term of like duration but not in excess of one year but otherwise on the same terms and conditions as the previous lease or agreement, except insofar as such terms and conditions are inconsistent with this Maximum Rent Regulation; or

(2) The Tenant has unreasonably refused the landlord access to the housing accommodations for the purpose of inspection or of showing the accommodations to a prospective purchaser, mortgagee or prospective mortgagee, or other person

⁹ 168 Wis. 335.
having a legitimate interest therein: *Provided, however,* That such refusal shall not be ground for removal or eviction if such inspection or showing of the accommodations is contrary to the provisions of the tenant's lease or other rental agreement; or

(3) The tenant (i) has violated a substantial obligation of his tenancy, other than an obligation to pay rent, and has continued, or failed to cure, such violation after written notice by the landlord that the violation cease, or (ii) is committing or permitting a nuisance or is using or permitting a use of the housing accommodations for an immoral or illegal purpose; or

(4) The tenant's lease or other rental agreement has expired or otherwise terminated, and at the time of termination the housing accommodations or a predominant part thereof are occupied by one or more subtenants or other persons who occupied under a rental agreement with the tenant; or

(5) The landlord seeks in good faith to recover possession for the immediate purposes of demolishing the housing accommodations or of substantially altering or remodeling it in a manner which cannot practicably be done with the tenant in occupancy and the plans for such alteration or remodeling have been approved by the proper authorities, if such approval is required by local law; or

(6) The landlord owned, or acquired an enforceable right to buy or the right to possession of, the housing accommodations prior to the effective date of this maximum rent regulation, and seeks in good faith to recover possession of such accommodations for immediate use and occupancy as a dwelling for himself. If a tenant has been removed or ejected under this paragraph (a) (6) from housing accommodations, the landlord shall file a written report on a form provided therefor before renting the accommodations or any part thereof during a period of six months after such removal or eviction.

(b) (1) No tenant shall be removed or evicted on grounds other than those stated above unless, on petition of the landlord, the Administrator certifies that the landlord may pursue his remedies in accordance with the requirements of the local law. The Administrator shall so certify if the landlord establishes that removals or evictions of the character proposed are not inconsistent with the purposes of the Act or this Maximum Rent Regulation and would not be likely to result in the circumvention or evasion thereof.

(2) Removal or eviction of a tenant for occupancy by a purchaser who has acquired his rights in the housing accommodations on or after the effective date of this maximum rent regulation, is inconsistent with the purposes of the Act and this Maximum Rent Regulation and would be likely to result in the circumvention or evasion thereof, unless (i) the payment or payments of principal made by the purchaser, excluding any

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10 October 20, 1942.
payments made from funds borrowed for the purpose of making such principal payments, aggregate 33 1/3 per cent or more of the purchase price, and (ii) a period of three months has elapsed after the issuance of a certificate by the Administrator as here-inafter provided. For the purposes of this paragraph (b) (2), the payments of principal may be made by the purchaser conditionally or in escrow to the end that they shall be returned to the purchaser in the event the Administrator denies a petition for a certificate. If the Administrator finds that the required payments of principal have been made, he shall, on petition of either the vendor or purchaser, issue a certificate authorizing the purchaser to pursue his remedies for removal or eviction of the tenant in accordance with the requirements of the local law at the expiration of three months after the date of issuance of such certificate. In no other case shall the Administrator issue a certificate for occupancy by a purchaser who has acquired his rights in the housing accommodations on or after the effective date of this Maximum Rent Regulation, unless he finds that the vendor has or had a substantial necessity requiring the sale and that a reasonable sale or disposition of the accommodations could not be made without removal or eviction of the tenant, or unless he finds that other special hardship would result; under such circumstances the payment by the purchaser of 33 1/3 per cent of the purchase price shall not be a condition to the issuance of a certificate, and the certificate shall authorize the vendor or purchaser to pursue his remedies for removal or eviction of the tenant in accordance with the requirements of the local law.

(c) (1) The provisions of this section do not apply to a subtenant or other person who occupied under a rental agreement with the tenant, where removal or eviction of the subtenant or other such occupant is sought by the landlord of the tenant, unless under the local law there is a tenancy relationship between the landlord and the subtenant or other such occupant.

(2) The provisions of this section shall not apply to housing accommodations rented to either Army or Navy personnel, including civilian employees of the War and Navy Departments, for which the rent is fixed by the national rent schedule of the War or Navy Department.

(3) The provisions of this section shall not apply to an occupant of a furnished room or room not constituting an apartment, located within the residence occupied by the landlord or his immediate family, where such landlord rents to not more than two occupants within such residence.

(d) (1) Every notice to a tenant to vacate or surrender possession of housing accommodations shall state the ground upon which the landlord relies for removal or eviction of the tenant. A written copy of such notice shall be given to the Area Rent Office with 24 hours after the notice is given to the tenant.
No tenant shall be removed or evicted from housing accommodations, by court process or otherwise, unless, at least ten days prior to the time specified for surrender of possession and to the commencement of any action for removal or eviction, the landlord has given written notices of the proposed removal or eviction to the tenant and to the Area Rent Office, stating the ground under this section upon which such removal or eviction is sought and specifying the time when the tenant is required to surrender possession.

Where the ground for removal or eviction of a tenant is non-payment of rent, every notice under this paragraph (d)(1) shall state the rent for the housing accommodations, the amount of rent due and the rental period or period for which such rent is due. The provisions of this paragraph (d)(1) shall not apply where a certificate has been issued by the Administrator pursuant to the provisions of paragraph (b) of this section.

(2) At the time of commencing any action to remove or evict a tenant, including an action based upon nonpayment of rent, the landlord shall give written notice thereof to the Area Rent Office stating the title of the case, the number of the case where that is possible, the court in which it is filed, the name and address of the tenant, and the ground under this section on which removal or eviction is sought.

(e) No provision of this section shall be construed to authorize the removal of a tenant unless such removal is authorized under the local law.”

The foregoing section 6 is an excerpt from the Maximum Rent Regulation applicable to housing accommodations. The same law governs tenancies in rooming houses and hotels, with the exception of hotels or rooming houses renting rooms on a daily basis; dwellings in the two categories are specifically exempted from the restrictions on evictions.

Eviction actions are still brought before and tried in the local courts, but it does not seem amiss to point out the possibility of withdrawing all such actions from the judiciary; it could be done by eliminating paragraphs (a) (1), (2), (3), (4), (5) and (6), thus requiring an Administrator’s certificate on petition of landlord before the commencement of any eviction action. The Price Administrator has not as yet deemed it necessary to assume such rigid control.

It can be noted that the law not only prohibits the removal of tenants from possession, but also prohibits attempts at such removal or exclusion from possession. This provision in the Price Administrator's rent regulation has a corollary in the Emergency Price Control Act which can be found in section 4 under Prohibitions:

"It shall be unlawful for any person to remove or attempt to remove from any defense area housing accommodations the tenant or occupant thereof or to refuse to renew the lease or
agreement for the use of such accommodations, because such
tenant or occupant has taken, or proposes to take, action author-
ized or required by this Act or any regulation, order, or require-
ment thereunder."

Such reprisals on the part of the landlord are apparently of serious
consequence because the Price Control Act prescribes heavy penalties
for any person "who willfully violates any provision of Section 4 of
this Act."

From a practical standpoint the Area Rent Office has been repre-
sented by a member of the legal staff in the eviction courts of Milwau-
kee daily since the enactment of the regulation, August 1, 1942. Upon
receipt of eviction notices, appropriate entries are made in a docket at
the rent office. Cases involving factual disputes become the subject
of field investigations conducted impartially and proper reports on the
results of the investigation are submitted to the trial court.

It is recognized that the notice requirements as well as the substan-
tive law is more highly technical under the rent regulation than under
the Wisconsin statutes. Attorneys who handle eviction actions only
occasionally may consequently deem it advisable to solicit information
on procedure from the Area Rent Office, and thus avail themselves of
a service which the office renders to all attorneys regardless of whom
they represent—the landlord or the tenant.

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11 Public Laws 421, Sec. 205 (b).
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THE CONTINUING IMPORTANCE OF LOCAL GOVERNMENT*

EVER since the transition of the United States from a rural to an urban civilization, local government has been a stepchild. In times of prosperity it was slighted because communal efficiency and savings seemed unimportant in contrast with private gains. In periods of adversity, the ailing waif received only the ill-conceived prescription of diminished revenues and curtailment of essential services, together with, in the last great depression, the worse nostrum of assumption of powers and performance of functions by the federal government. In war periods, the concentration of interest on foreign affairs and the united attack on the alien foe make the citizen unmindful of insidious internal assaults on the very things he is fighting to preserve and low politics, the enemy of good government, entrenches itself and flourishes unresisted.

Local government is the most vital element in a democracy, but it is not generally recognized as such. The terminology, "levels of government," describing federal, state and local government is a misnomer and should be abandoned unless municipal government, in the broad sense, is placed at the top. National government, with us, is, in substance, government in Washington by representatives of local political machines. These groups choose from their numbers the Representatives and Senators comprising the Congress. The local politicians (in the bad sense), masquerading under the name "Republican" or "Democrat," control through patronage and the granting of illicit favors the selection of candidates, the election machinery, the voting and the acts of administrative, legislative and often even of judicial officials. The local bosses become national committeemen and are otherwise influential in the affairs of national parties. In practice, the nominal appointing power yields, for judges, marshals, postmasters, collectors, United States attorneys, etc., to the "recommendations" of the local heads of the national parties. The local independent is an Ishmael so

*It is the purpose of this series of editorials to direct the attention of the legal profession generally to the importance of good local government and specifically to its portion of the task of making local government work as an exhibit of the functioning of democracy.

The opinion of the writers, in which the editorial board of The Review concurs, is that the duty of the legal profession extends beyond the earning of a living by it technical skill; beyond even a zealous regard for the administration of justice uncoupled with a willingness to take an active part in the making of law.

These editorials are directed to the elimination of the narrowness of vision which too often by the unwillingness of good men to engage in "politics" has thrown the field of local government into the hands of incompetents. Comment of readers upon the subject matter of the editorials is invited.
far as concerns the national parties, whose hoplites work actively against attempts on a non-partisan and unselfish basis to improve local government. The cities and counties are regarded as spoils grounds for the fructifying of the national parties. This is made possible largely because "best citizens," persons of means, education and position lend themselves, without shame, for personal gain or in order to attain office, to the machinations of the bosses.

Mr. Rix, in his trenchant leader, "A Widening Horizon," in the February 1943 issue, has pointed out that

"we cannot have good administration of justice in poor or corrupt systems of municipal government."

Judges who are appointed or elected under this system, as a quid pro quo for activity in behalf of the prevailing political group, have no understanding of good local government or sympathy with aspirations and experiments for its improvement and for the efficient workings of the merit system. All these are dealt with repressively in political court decisions, bottomed on the judge's experience as a politician or influenced by "suggestions."

This is a serious accusation against government in our country. It may seem to some an inexcusable jeremiad. But, as a generality, it is not exaggerated. There have been bright spots, but they have not burned for long. The technique of good local government has been developed by study, but the will to bring about good local government has not been infused into the residents of our cities. Democracy must be preserved. It is under attack as never before. Faults which make it vulnerable must be recognized and overcome. There must be general education in schools, colleges and graduate schools respecting the menace and wickedness involved in bad local government. The bench must be removed from all suspicion of political influence. The "political" lawyer and the fixer must be banished by his brethren and an aroused public opinion. The courts and the bar will be restored to public esteem when once they purge their membership of those who profane the temples of justice.

Local government must be made a matter of honor and importance in order that government may properly conduct sound post-war readjustment. Instance of citizen leadership and participation in local governments, such as were mentioned by Mr. Rix, must no longer be "sporadic" but pervasive and constant. Only by education, unselfishness and the development of a high system of public morality will the chinks of bad local government in the armor of democracy be soldered and free institution made invulnerable.

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NOTES

THE CORPORATE PRACTICE OF PROFESSIONS

The decision of the United States Supreme Court in *American Medical Association v. United States* once again brought to the front the problem of the corporate practice of professions.

On February 24, 1937, Group Health Association Inc. was granted a charter in Washington, D. C. By its certificate of incorporation and its by-laws the corporation was empowered to treat its members and their dependents, through hired agents and employees, for any and all diseases and injuries. The certificate expressly provides that Group Health Association, Inc., is “to provide ... for the services of physicians and other medical attention and any and all kinds of medical, surgical and hospital treatment to members here-of and their dependents.” This corporation offered memberships in a risk sharing, pre-payment health plan to certain government employees. It employed two surgeons, one pediatrician, one urologist, and one obstetrician; and through this staff offered to render most types of medical and surgical treatments at a stated annual cost. Besides offering services to individuals, Bit went further and for a lump sum of $40,000 agreed to extend similar medical and hospital services to such employees of the Home Owners Loan Corporation office as paid a monthly fee.

The Medical Society of the District of Columbia opposed this plan on the grounds that it not only contravened the best interests of both the public and the profession, but also violated the principles and ethics of the American Medical Association. Knowing these facts, several members of the Society nevertheless accepted employment of Group Health. One such member was expelled from membership after charges had been brought against him in accordance with the rules and regulations of the Society.

The newspapers took up the story of this struggle and early in 1938, when comment pro and con had attained a national scope,
Representative Scott⁸ offered a resolution in Congress calling for an investigation of the antagonistic activities of the Medical Society of Washington, D. C., and of the American Medical Association.

Because of the notoriety the matter had received and in fear of a quo warranto proceeding by the district attorney for the illegal practice of medicine and by the superintendent of insurance for selling insurance, the Group Health Association, Inc., sought a declaratory judgment as to its right to provide medical services according to its plan. In July, 1938, Justice Bailey, in deciding *Group Health Association, Inc. v. Moor* (D.C.D.C. 1938) 24 F. Supp. 445, held that the corporation through its licensed physicians was not illegally practicing medicine, nor was it within the scope of regulatory insurance laws because it provided services rather than money benefits to its contributing members.

In August, 1938,⁹ Assistant Attorney-General Thurman Arnold warned the American Medical Association and the Medical Society that the expulsion or threatened expulsion of members for allying themselves with Group Health, or for having professional relations with doctors of that organization amounted to forcing its members to participate in an illegal boycott of the Group Health Association's doctors; and the exclusion by Washington hospitals of physicians who were not members of the Medical Society "... may or may not amount to coercion upon them ..."¹⁰ and that, "In the opinion of the Department of Justice, this is a violation of the anti-trust laws because it is an attempt on the part of one group of physicians to prevent qualified doctors from carrying on their calling."

On October 17, 1938, Arnold placed the matter in the hands of the Federal Grand Jury. An indictment was returned in the District Court of the United States for the District of Columbia under Section 3 of the Sherman Anti-Trust Act,¹¹ naming as defendants the American Medical Association, two of its subordinate bodies, the Washington Academy of Surgery, and twenty-one individual doctors, all members of the American Medical Association.¹² The indictment charged that

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⁹ Mimeograph release of the Department of Justice signed by Thurman Arnold, Assistant Attorney General, and approved by Homer Cummings, Attorney General, July 30, 1938, and (1938) 111 J. Am. Med. Ass’n 537.
¹⁰ Ibid.
¹¹ 26 Stat. 209 (1890), 15 U.S.C.A. 3 (1927). "Every contract, combination in form of trust or otherwise, a conspiracy, in restraint of trade or commerce in ... or of the District of Columbia ... is declared illegal. Every person who shall make any contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding $5000 or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."
¹² The Medical Society of the District of Columbia and Harris County Medical Society of Harris County, Texas.
the defendants had combined and conspired together for the purpose of (1) restraining the business of the Group Health Association; (2) restraining the members of the Group Health Association from obtaining by cooperative methods medical care from doctors engaged in such group practice; (3) restraining the doctors of the staff and certain other doctors\(^{13}\) from pursuing their callings; (4) restraining the business of the Washington hospitals. All of the defendants demurred to the indictment and were sustained by the District Court on grounds, amongst others, that neither the practice of medicine nor the business of the Group Health Association is a trade within the meaning of the term as used in the Sherman Act.

Notice of appeal was filed in the United States Court of Appeals for the District of Columbia on July 31, 1939. On hearing the Court of Appeals reversed the District Court, holding that the restraint of trade prohibited by statute may be extended both to medical practice and to the operations of the Group Health Association. *United States v. American Medical Association*, 72 App. D.C. 12, 110 F. (2d) 703, 710, 711.

The case then went to trial in the District Court. Certain defendants were acquitted by direction of the judge. As to the others the case was submitted to the jury which found the American Medical Association and the Medical Society of the District of Columbia guilty. This judgment was affirmed by the Court of Appeals which reiterated its ruling as the applicability of Section 3 of the Sherman Act, considered alleged errors and affirmed the judgments. *American Medical Association v. United States*, App. D.C., 130 F. (2d) 233.

The matter went to the Supreme Court on *certiorari* limited to these questions: (1) Whether the practice of medicine and the rendering of medical services as described in the indictment are “trade” under Section 3 of the Sherman Act; (2) whether the indictment charged or the evidence proved “restraint of trade” under Section 3 of the Sherman Act; (3) whether a dispute concerning terms and conditions of employment under the Clayton and Norris-LaGuardia Acts was involved, and, if so, whether petitioners were interested therein, and therefore immune from prosecution under the Sherman Act.

In affirming the judgments the Supreme Court did not consider the first question, but did answer the second question in the affirmative and the third question in the negative.

In answering the second question Justice Roberts said, “Group Health is a membership corporation engaged in business or trade,” and, “The fact that it is cooperative, and procures services and facili-

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\(^{13}\) Doctors not on the staff of Group Health Association but who engaged in consultations with the staff doctors.
ties on behalf of its members only, does not remove its activities from the sphere of business.”

What is this so-called “trade or business” that Group Health is engaged in?

Justice Bailey having held that it was not the practice of medicine, justified his decision on the grounds that the corporation itself is not prescribing for the sick, but it merely enters contracts with licensed physicians, who in turn prescribe for the members of the corporation, and that these physicians are independent contractors.\(^1\)\(^4\) He attempted to distinguish the admittedly illegal practice of medicine by corporation from mere contracts made by a corporation with physicians for the purpose of securing medicinal services for the members of the corporation; he reasoned that since one person may contract in advance for the services of a physician over a period of time, an incorporated group of persons may do likewise.\(^1\)\(^5\)

It may be seen that both the reasoning and the conclusion of Justice Bailey are unsound; first, because it is evident that under Group Health’s plan the physicians are not independent contractors, but are employees of the corporation; and second, because the existence of the distinction between “practicing medicine” and “furnishing medical services,” while providing grounds for verbalistic conflict, is a nullity in the eyes of a practical thinker, both being mere labels for the same series of acts.

Justice Roberts having held that Group Health is engaged in business or trade said, “The fact that it is cooperative and procures services and facilities on behalf of its members only, does not remove its activities from the sphere of business.” Apparently Justice Roberts means that in spite of the fact that Group Health confines its services to its own members, it is nevertheless engaged in business. That that is true is self evident, but likewise it is evident that he avoided saying just what business Group Health is in. This turns us back to Justice Bailey’s answer—the business of “furnishing medical services,” or as herein submitted, the business of practicing medicine.

That the privilege of practicing a profession is one residing solely in individuals has long been recognized. A learned profession can only be practiced by a duly qualified human being. His authorization to practice is given, not only because of the fact that upon examination he has proved possession of the essential skill and knowledge of the subject, but also because upon appraisal being made of his character

\(^1\)\(^5\) Ibid.
he has proven possession of those moral qualities which merit public trust.\textsuperscript{16}

While for some purposes it is considered legally a person,\textsuperscript{17} a corporation being an artificial entity, existing only in the contemplation of the law, has neither the right nor the power to practice a profession.\textsuperscript{18} A corporation being a fictitious character has no mind and cannot think; consequently, it cannot meet educational requirements. The practice of a profession necessarily involves the intimate and confidential relation of trust and confidence between practitioner and client or patient. The courts hold that a corporation cannot satisfy these considerations.\textsuperscript{19}

Whether or not a corporation may lawfully sell the technical or professional services of its licensed employees depends, in the absence of express statutory language,\textsuperscript{20} on the policy which the court finds embodied in the license statute.\textsuperscript{21} In the case of trade licenses, the sole purpose of the licensing act is to assure technical competence in those who do the work and as early as 1756 it was held that no statutory policy was violated when an unlicensed entity sold the services of licensed artisans.\textsuperscript{22} Similarly, a corporation was allowed to sell the services of licensed architects,\textsuperscript{23} but the policy of the medical license statutes, as conceived by the courts, has been to accord the physician the same professional status as the common law provides to the lawyer.\textsuperscript{24} The analogy found in the practice of law has been applied by the courts to physicians in establishing the general rule that as a corporation lacks ethical standards and is incapable of personal relations,

\textsuperscript{16} State Electro-Medical Institute v. State, 74 Neb. 40, 103 N.W. 1078 (1905).
\textsuperscript{17} In re Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910).
\textsuperscript{18} A corporation is a citizen for the purpose of federal jurisdiction, Doctor v. Harrington, 196 U.S. 579 (1905); however, it is not a citizen within the purview of Article IV, Section 2, of the Constitution to the effect that the "citizens of each state shall be entitled to all of the privileges and immunities of the citizens of the several states." Paul v. Virginia, 8 Wall. 168 (U.S. 1868).
\textsuperscript{20} People v. Merchants' Protective Corp., 189 Cal. 331, 209 Pac. 363 (1922); In re Shoe Manufacturers' Protective Association, 3 N.E. (2d) 746 (Mass. 1936); People v. Pacific Health Corp., 82 P. (2d) 429 (Cal. 1938); People v. United Medical Service, Inc., 362 Ill. 442, 200 N.E. 157 (1936).
\textsuperscript{22} People by Kerner v. United Medical Service, Supra; Painless Parker v. Board of Dental Examiners, Supra; Wm. Messer Co. v. Rothstein, Supra.
\textsuperscript{24} People ex rel State Board of Examiners v. Rodgers Co., 277 Ill. 151, 115 N.E. 146 (1917); People v. Allied Architects' Ass'n., 201 Cal. 428, 257 Pac. 511 (1927).
\textsuperscript{25} In re Co-operative Law Co., 198 N.Y. 479, 92 N.E. 15 (1910).
it not only is unable to receive a medical license, but also it is unlawful for a corporation to sell the services of a licensed physician.\textsuperscript{25}

If a corporation were licensed to practice law or medicine there would be in effect a dual alliance imposed upon the licensed practitioner it employed. Because a corporation can only act through its agents and employees\textsuperscript{26} the practitioners it employed would owe a duty to the corporation\textsuperscript{27} as well as to the patient or client.\textsuperscript{28} Such duties in many instances would conflict. The benefits of a completely individual and personal employment relationship\textsuperscript{29} and the danger of an impairment of professional ethics by a management group\textsuperscript{30} are the two considerations which justify the rule and have made the courts unwilling to accept the analysis of the trade licenses cases and to segregate the business functions of the corporate entity from the professional functions of its licensed employees.

Having herein made a resume of the reasoning from which the rule that corporations are incapable of practicing professions evolved, a consideration of the holding in \textit{American Medical Association v. United States} leaves us with the following question: By what manner of reasoning can it be said that a person or persons who combine to stop a corporation from doing that which under the law it has no right to do, are guilty of a conspiracy in restraint of trade as defined by the Sherman Anti-Trust Act?

\textit{Fredrick H. Fowle.}

\textsuperscript{25} People v. Pacific Health Corp., Supra; People by Kerner v. United Medical Service, Supra; Painless Parker v. Board of Dental Examiners, Supra.
\textsuperscript{26} New York & N. H. R. R. v. Schuyler, 34 N.Y. 30 (1865).
\textsuperscript{27} Restatement of Agency (1938) Section 13.
\textsuperscript{28} Herzog, Medical Jurisprudence (1931) Section 96.
\textsuperscript{29} Stern v. Flyn, 154 Misc. 609; 278 N.Y.S. 598 (1935).
\textsuperscript{30} People v. Pacific Health Corp., Supra.
WISCONSIN'S CHANGING RULE OF MUNICIPAL LIABILITY FOR NEGLIGENCE AND NUISANCE

Important questions concerning the liability of a municipal corporation for the negligence of its servants and for the creation and maintenance of a nuisance in the performance of governmental function seem to be raised anew by the recent decision of the Wisconsin Supreme Court in the case of Robb v. City of Milwaukee.1 Apparently, the effects of the decision are to re-define the phrase “relationship between governor and governed,” to add broad new restrictions to the doctrine that the sovereign can do no wrong, and to carry Wisconsin tacitly into the ranks of the majority of jurisdictions which look with disfavor upon governmental immunity from liability for tortious acts attributable to it.

In the case, a woman passerby was allowed to recover for injuries sustained when she was struck by a ball while using the public way adjoining a municipally maintained baseball field. Though the field had been in use nine years, no proof was made of any injury or property damage other than that occasioned in the present instance. The lower court entered judgment for the plaintiff on a jury verdict which found the city negligent as to the manner in which the field was fenced, and that the field constituted a nuisance. In its decision, the Supreme court, two justices dissenting, based its affirmance solely on the latter theory.

Upon what basis does such a decision rest? Concededly, in operating a play field the city was performing a governmental function;2 and consequently, by standards heretofore applied, between it and the injured party the relationship of governor and governed existed.3 Previously in such a situation, if the theory of action were negligence, Wisconsin courts applied the doctrine which Stason calls the “strict” or “logical”4 view of governmental immunity:

“in the absence of a statute imposing liability, the municipality was not liable for the tortious acts of its officers or servants in connection with the gratuitous performance of strictly public functions imposed by mandate of the legislature or undertaken voluntarily by its permission from which it obtained no special corporate advantage, no pecuniary profit, and no enforced contribution from individuals particularly benefitted.”5

If the theory of the action were that the playfield was a nuisance (and the dissenting justices were of the opinion that it was not as a matter of law)6 the case would seem to fall well within the rule of Virovatz v.

1 6 N.W. (2d) 222 (Wis. 1942).
3 Gianfortore v. New Orleans, 61 F. 64 (1894).
4 STASON, MUNICIPAL CORPORATIONS (1935) p. 564.
5 Bolster v. City of Lawrence, 225 Mass. 387, 114 N.E. 722 (1917).
6 Robb v. City of Milwaukee, 6 N.W. (2d) 222 (Wis. 1942). Dissenting opinion.
City of Cudahy, where it was held that the city in conducting a swimming pool was engaged in a public activity, and did not become liable for the death of a swimmer even though the pool constituted a nuisance. While not overruling the Virovatz case, the court presently admitted that its former judgment "came close to ruling that even though a thing maintained by a municipality constitutes a public nuisance, the exemption from liability would apply where the nuisance is created in the course of performing a governmental function."

Assuming that the Robb case and the Virovatz case are both law, the decisions are reconcilable only on the premise that the concept of the governor-governed relationship is a shifting one, dependent not on the nature of the service which is being performed but rather on the benefits which the "governed" is deriving from the service. Consequently, the municipality would sustain no liability to a person injured while using the ball field, while to the mere passerby, it would become liable. If this is to become the basis of future decisions, the haphazard manner in which the rule has developed will become apparent in its application to persons who, while they are on the premises, are deriving no actual benefit from the function performed; as for instance, would be true in the case of a party injured while a spectator at a ball game at a municipal field.

Further than this, as the court points out in its latter decision, there appears to be arising out of the tendency of the courts to inquire more closely into the nature of the governor-governed relationship a new rule analogous to the one which in this jurisdiction curtails the non-liability of the city for injuries done when the municipality and the injured party stand in the further relationship of adjoining property owner to adjoining property owner. Such curtailment applies whether the injury is one to the property or to the person. Thus though the Virovatz case may still be the law, its effect is confined by the Robb decision to a smaller class of cases than the language used would reasonably encompass. That such a restriction was not in the minds of the justices at the time that the former decision was rendered is apparent from the fact that in the earlier opinion, the court posed the hypothetical case of an injury to a traveler on the public way as an example of a situation in which the corporation would not become liable under the doctrine of exemption for the maintenance of a public nuisance where the relationship of governor to governed existed.

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7 Virovatz v. City of Cudahy, 211 Wis. 357, 247 N.W. 341 (1931).
8 Harper v. Milwaukee, 30 Wis. 365 (1872).
9 Hasslinger v. Hartland, 234 Wis. 201, 290 N.W. 647 (1940).
10 Matson v. Dane County, 172 Wis. 522, 179 N.W. 774 (1920).
It is to be noticed that the appeal in the instant case was apparently decided solely on the jury finding of nuisance. If this be true, the decision, while in conflict with the Virovatz case, does not represent a radical departure from the law as it was conceived to be prior to 1931. As early as 1914, Wisconsin, in Bernstein v. City of Milwaukee, held that a city was liable for an injury done to a citizen when caused by the creation or maintenance of a public nuisance, regardless of the fact that the nuisance was created in the performance of a public function; and similar rules have been laid down by the courts of other jurisdictions. But the implications of the present case seem wider than a mere return to its former position, for there seems to be no case which has defined "nuisance" as broadly as is here construed. As the dissenting opinion points out, it is extremely doubtful that in its widened scope, "nuisance" does not include most negligence as well. Measured by traditional standards, it would seem that an isolated injury occurring in the extended period in which the field was maintained would be insufficient proof of the element of continuing damage and annoyance which are or were previously accepted as the characteristics of the tort of nuisance. Either this doctrine is to be applied to purely negligent acts akin to the misfeasance which unquestionably was present in the Robb case, or it will be restricted to nuisances as the court presently uses the term; in either event the court seems to have created a distinction more academic than real, and by a fiction analogous to that of adjoining property owners, singularly extended municipal tort liability.

The original doctrine of municipal non-liability arose as an extension to its subdivisions of the immunity with which the sovereign states were invested. The rule has been defended at varying times and in various jurisdictions on the ground that to allow recovery would be to sanction a diversion of public funds to a purpose which the state never intended the municipality to bear; that the inconvenience occasioned the public would outweigh the redressing of the wrong; and that the rule encouraged the city to engage in the gratuitous rendition of allowable public services.

Nevertheless, courts have been reluctant to give wholehearted support to the rule. While paying homage to it in general terms, they have engrafted onto the rule exceptions based on theories of pecuniary
profit, special advantage, public nuisance, and adjacent property ownership for the purpose of reaching an equitable result in individual instances. In speaking of the exception in favor of situations arising where the corporation anticipated the return of a profit from its activity, Justice Butler said it was court made law “adopted to escape difficulties, in order that injustice may not result from technical defenses based on the governmental character of such corporations.”

At the present time, the doctrine of non-liability on whatever theory it rests, and the tendency to restrict such immunity by insensible degrees seem hopelessly in conflict. It would seem that the time is ripe for a judicial reexamination of the subject which will in the light of public policy, unequivocally affirm exemption in all cases or impose liability wherever, as Justice Fairchild says, the “governed can be said not to have assumed the risk of injury.”

William Smith Malloy.
PEACEFUL PICKETING AND UNFAIR LABOR PRACTICES

Are sections 111.06(2) (b) and (e) of the Wisconsin Employment Peace Act, which seek to restrict the parties to and the objectives of peaceful picketing, violative of the Fourteenth Amendment of the Federal Constitution? The Wisconsin Supreme Court in Retail Clerks' Union, Local No. 1403, A. F. of L., et al v. Wisconsin Employment Relations Board et al sustained the constitutionality of these sections. In this case the Union made unsuccessful attempts to unionize the employees of the Sears Roebuck store in Racine. None of the store employees attended the meeting, called, with the consent and approval of the employer, for the purpose of organizing them into the local union. Neither the Union nor the employees had any dispute with Sears Roebuck and Company. Peaceful picketing of the store began December 4 or 5, 1940, and continued until February 28, 1941, when it was forbidden by an order of the Wisconsin Employment Relations Board as being in violation of sections 111.06(2) (b) and (e). The circuit court of Racine County upheld the order of the board. Upon appeal, the Wisconsin Supreme Court sustained the judgment of the lower court, and, in the opinion of the writer, if this case comes before the United States Supreme Court, it will, in all probability, declare that sections 111.06(2) (b) and (e) do not violate the Fourteenth Amendment. The trend apparent from recent Supreme Court decisions in picketing cases should logically result in such a holding.

When the United States Supreme Court in Thornhill v. Alabama held picketing to be an exercise of the right of free speech protected by the Fourteenth Amendment, new labor legislation became imperative. If picketing as a mode of expression were not to be made the cover for an attack on and a violation of the property rights of others, restrictions would have to be imposed upon it. However, the state in "drawing the line beyond which picketing may be prohibited or en-

111.06(2) (b). It shall be an unfair labor practice: To coerce, intimidate or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section 111.04, or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.

111.06(2) (e). It shall be an unfair labor practice: To cooperate in, engaging in, promoting or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike.

2 6 N.W. (2d) 699 (Wis. 1941).
3 310 U.S. 88; 84 L.Ed. 1093; 60 S.Ct. 736 (1940).
4 "The dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. We concur with Mr. Justice Brandeis: 'Members of a union might without special statutory authorization by a state make known the facts of a labor dispute for freedom of speech is guaranteed by the Federal Constitution.'" Thornhill v. Alabama, Supra.
joineć’ has the tortuous task of staying within the Fourteenth Amendment. In protecting the right of others the state must not destroy the picket’s right to freedom of speech. The necessary equilibrium is difficult of achievement.

Picketing has three elements: (1) means; (2) parties; (3) aims or objectives. Picketing characterized by violence (show of force, blocking of entrances, etc.) is, of course and necessarily so, prohibited. In *Milk Wagon Drivers’ Union of Chicago, Local 753 v. Meadowmoor Dairies, Inc.*, the United States Supreme Court held that a state court may enjoin picketing in itself peaceful when it is enmeshed with contemporaneously violent conduct. Furthermore, picketing though peaceful may be prohibited, if it is characterized by fraud and misrepresentation. Curbing violent picketing has presented no difficulties because it naturally comes under the police powers of the state. Peaceful picketing, however, presents a more difficult problem and the attempts of the various states to curb it have so far met with little success.

By section 103.535, commonly referred to as the “Stranger Picketing Act,” Wisconsin attempted to restrict picketing to those who were parties to the labor dispute in question. “It shall be unlawful for anyone to picket, or induce others to picket, the establishment, employer, supply or delivery vehicles, or customers of anyone engaged in business, or to interfere with his business or interfere with any person or persons desiring to transact or transacting business with him, when no labor dispute ... exists between such employer and his employees or their representatives.”

In *American Federation of Labor v. Swing* the United States Supreme Court passed on the principle involved in 103.535 and indirectly voided that statute as being violative of the Fourteenth Amendment. The facts of the Swing case were: That unsuccessful attempts were made to unionize Swing’s beauty parlor. That peaceful picketing of the shop followed. That the picketing was enjoined by an Illinois court on the grounds that since there was no dispute between the employer and his employees, the picketing was illegal. In reversing the Illinois courts the Supreme Court declared: “A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The right of free communication cannot be mutilated by denying it to workers in a dispute with an employer even though they are not in his employ.”

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5 312 U.S. 287; 85 L.Ed. 836; 61 S.Ct. 552 (1940).
6 312 U.S. 321; 85 L.Ed. 854; 61 S.Ct. 568 (1940).
7 Ibid. at 326.
Wisconsin through section 111.06(2) (e), the constitutional of which is still in question, also seeks to limit peaceful picketing to the parties involved in the controversy. This section provides that picketing is illegal unless the pickets represent a majority of the employees against whose employer a strike has been called. Therefore, if only fifty or fewer (or none) of the hundred employees of X Company vote to call a strike, picketing by this minority or by others is under any circumstances illegal and enjoinable. Section 111.06(2) (e) reads: "It shall be an unfair labor practice to cooperate in, engaging in, promoting or inducing picketing, boycotting, or any other overt concomitant of a strike unless a majority of the employees of an employer against whom such acts are primarily directed have voted by secret ballot to call a strike."

The constitutionality of 111.06(2) (e) could have been passed upon by both the Wisconsin Supreme Court and by the United States Supreme Court in the Plankinton House case. In this case less than a majority of the Plankinton employees went on strike and began to picket the Plankinton House. The Wisconsin Employment Relations Board issued an order restraining the picketing because it was carried on in absence of a majority strike vote. However, neither the Wisconsin nor the United States Supreme Court decided the case in light of the order. Both courts sustained the injunction on the grounds that the picketing was characterized by violence. The United States Supreme Court relied upon the construction placed upon the Board's order by the Wisconsin court. The fallacy of this lies in the very evident fact that "the Board's order, not the Wisconsin decision, was served upon the pickets, and if the free speech character of picketing is to be given full recognition, the order on its face should have been subjected to appropriate judicial scrutiny."10

In Retail Clerks' Union v. Wisconsin Employment Relations Board11 the Wisconsin Supreme Court sustained the constitutionality of 111.06 (2) (e). In this case the constitutionality of the statute was specifically attacked and the court sustained the cease and desist order which among other findings was based upon the fact that: The defendant union had done or caused to be done acts prohibited by section 111.06 (2) (e), namely, "cooperating in, engaging in, promoting and inducing

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8 236 Wis. 329, 294 N.W. 632 (1941); 315 U.S. 437; 86 L.Ed. 946; 62 S.Ct. 65 (1941).
9 "That the respondent unions are guilty of unfair labor practices by co-operating and engaging in promoting and inducing picketing and boycotting, all being overt concomitants of a strike, without first obtaining the approval of the majority of the employees of the Plankinton House by a secret ballot." 236 Wis. at 335.
11 6 N.W. (2d) 699 (Wis. 1942).
strike, without first obtaining by secret ballot the approval of a majority of the employees of the Sears Roebuck store (the employer) to picketing, bannerin, boycotting, all being overt concomitants of a call a strike."

Will the United States Supreme Court sustain 111.06(2) (e), especially in view of the Swing case? In that case the Court declared: "We are asked to sustain a decree which asserts that there can be no peaceful picketing or peaceful persuasion in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him. Such a bar of free communication is inconsistent with the guarantee of freedom of speech."

The principle of law laid down in the Swing case is that regardless of one's relation to a labor dispute or lack thereof, he has the right peacefully to express his opinion and viewpoint on the labor dispute. If we compare the fact situation of the Retail Clerks' Union case with that of the Swing case, we find the two cases to be almost identical. It would seem reasonable then to conclude that the Supreme Court on appeal will decide the Retail Clerks' Union case in light of the same legal principles and will declare 111.06(2) (e) unconstitutional. Such a decision is inescapable if the Supreme Court adheres to the principle, which was laid down in the Thornhill case and reiterated in the Swing case, that picketing is the exercise of free speech.

But Carpenters & Joiners' Union, Local No. 213 v. Ritter's Cafe and Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Board would indicate that the Supreme Court is tending to emasculate or, perhaps, to end the identification of picketing with free speech. In the Ritter's case the Supreme Court sustained a Texas injunction forbidding picketing before an establishment which industrially had no connection with the labor dispute in question. The Carpenters' Union picketed Ritter's cafe because the contractor building his house, one and a half miles from the cafe, employed non-union labor. In the Allen-Bradley case the Supreme Court upheld an order issued by the Wisconsin Court enjoining the picketing of private homes. The Union maintained a picket line before the home of a non-striking employee of the employer with whom the Union was in dispute. The principle of law laid down in these two cases is that peaceful picketing may be illegal if the pickets and the occupant of the place picketed lack a common business interest. The Supreme Court distinguished the Ritter and the Allen-Bradley cases from the Swing case.

12 Ibid., at 702.
13 American Federation of Labor v. Swing, Supra, p. 325.
on the specious grounds that unlike the former the latter involved parties who were interrelated through a community (nexus) of business interest.

It is difficult to follow the court’s line of reasoning. For if picketing is, as the United States Supreme Court maintains, the exercise of free speech, then have not pickets the right to speak freely in one locality as well as in another (if there is neither trespass nor breach of peace)? If union beauty operators may speak freely in front of Swing’s beauty parlor, even though they have no nexus of employment with him, why may not union carpenters speak freely in front of Ritter’s cafe, even though they have no nexus of business interest with him. The lack of an industrial nexus with Ritter’s cafe is no more a valid reason for depriving the carpenters of their right to freedom of speech before the cafe, than the lack of a racial nexus with whites would be a justification for depriving negroes of their right to freedom of speech before a public forum. The Ritter and the Allen-Bradley cases cannot be brought into accord with the Swing case.

Under the Swing case section 111.06(2) (e) is quite evidently unconstitutional, but the Ritter and the Allen-Bradley cases mark a decided departure from the Swing case toward a willingness to permit the states to restrict the parties involved in picketing. Therefore, the ruling of these two cases should logically result in a sustainal of section 111.06(2) (e). The clear and irreconcilable divergence of the Ritter and the Allen-Bradley cases from the Swing case implies a repudiation of the latter by the United States Supreme Court. It would be sound legal reasoning for the United States Supreme Court to uphold the Wisconsin Supreme Court in Retail Clerks' Union v. the Wisconsin Employment Relations Board.

In addition, the Wisconsin Supreme Court in Retail Clerks' Union v. the Wisconsin Employment Relations Board upheld the constitutionality of 111.06(2) (b). This section provides that picketing is illegal if the objective in view is to force an employer to interfere with the legal rights of his employees. Therefore, if the employees of X Company refuse to join the union, picketing to coerce X Company to force them to do so by threat of discharge or otherwise is illegal and enjoinable. Section 111.06(2) (b) reads: “It shall be an unfair labor practice to coerce, intimidate, or induce any employer to interfere with any of his employees in the enjoyment of their legal rights, including those guaranteed in section [employees shall have the right of self-organization and the right to form, join or assist labor organizations . . . and such employees shall have the right to refrain from any or all of such activities—111.04] or to engage in any practice with regard to his employees which would constitute an unfair labor practice if undertaken by him on his own initiative.” This statute was the
necessary consequence of the *American Furniture* case and the *Senn* case where the courts refused to sustain an injunction against picketing which admittedly sought to compel the employer to coerce his employees to join the union.

The Wisconsin Supreme Court’s decision is legally correct and basically sound for it is realistic and appreciative of the true nature of the picketing enjoined. But will the Wisconsin Court be upheld on appeal especially in light of recent United States Supreme Court decisions and that Court’s interpretation of picketing? This will, in turn, depend upon the Supreme Court’s view of these questions: (1) May state courts enjoin peaceful picketing carried on for an unlawful objective? (2) May the state without violating the Due Process Clause forbid peaceful picketing which has for its objective the compelling of an employer to force his employees to join a union?

A primary principle of the common law is that an individual or a group of individuals may not seek an illegal object through a legal means. Therefore, the common law forbids peaceful picketing which involves a secondary boycott. One may not picket another if his object in so doing is to drive the other out of business or to do him great harm. Wisconsin has made use of this principle to forbid picketing, though peaceful, which seeks an unfair labor practice. While acknowledging and upholding the legality and the right of peaceful picketing, Wisconsin claims jurisdiction “to subject to injunctive relief any labor activity, including peaceful picketing, which conflicts with desirable social and economic policies.”

While there is no United States Supreme Court decision determinative of the issue, it would seem that the United States Supreme Court recognizes the states’ right to enjoin peaceful picketing carried on for an unlawful objective. There is not to be found “in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community.” Since the Supreme Court in the *Ritter* and the *Allen-Bradley* cases allow the states’ right to restrict the locale of peaceful picketing, by analogy one might conclude that the same Court recognizes the states’ right to prohibit certain objectives of peaceful picketing. The dictum in *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*17 seems to imply that state courts may enjoin picketing carried on for an unlawful objective. That case involved a dispute between the union and “vendors”—independent business men who owned their own trucks, purchased goods from manufacturers, and sold them to retailers. The union by picketing the manufacturers sought to compel the

17 *Bakery and Pastry Drivers v. Wohl*, Supra.
vendors to employ union members. An injunction was granted and sustained by the New York courts because no labor dispute was involved under state law. The United States Supreme Court reversed this judgment on the grounds that the lack of a labor dispute under state law did not impair the union’s constitutional right to free expression with regard to the facts of an industrial controversy. Wohl contended that the term “labor dispute” was to be interpreted in light of Opera on Tour, Inc. v. Weber where the New York Court of Appeals, speaking of the Wohl case, stated: “We held that it was an unlawful objective to attempt to coerce a peddler employing no employees in his business and making approximately thirty-two dollars a week, to hire an employee at nine dollars a day for one day a week.” The Supreme Court refused to rely upon this interpretation because “this lacks the deliberateness and formality of a certification” and because the quoted words were “uttered in a case where the question of the existence of a right to free speech under the Fourteenth Amendment was neither raised nor considered.” Apparently, then, the Supreme Court would have ruled otherwise had the New York Court in the Wohl case made a finding that the picketing was for an unlawful labor objective. Finally, freedom of speech is not license as to its objectives. To advocate the violent overthrow of our government or to encourage resistance to the United States in time of war may certainly be prohibited. Now, if peaceful picketing is freedom of speech, it likewise may seek only lawful objectives.

The question as to whether or not the state may without violating the due process clause forbid peaceful picketing which has for its objective the compelling of an employer to force his employees to join a union is still to be determined by the United States Supreme Court. The picketing in the Swing case sought the compulsory unionization of employees who had refused to join the union. The United States Supreme Court impliedly ruled favorably on the objective in that it permitted the picketing to continue. But the Ritter and the Allen-Bradley cases have substantially altered the judicial interpretation of picketing apparent in the Swing case. Texas and Wisconsin were permitted to restrict picketing to the locale involved in the dispute on the grounds that the right to picket may be qualified by considerations of public policy. Moreover, the Thornhill case, which placed picketing under the Fourteenth Amendment, emphatically stated: “The rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject

18 285 N.Y. 348, 34 N.E. (2d) 349 (1941).
19 Ibid., at 363.
20 Bakery and Pastry Drivers v. Wohl, Supra, at p. 774.
21 Ibid., at 775.
to modification or qualification in the interests of the society in which they exist." Wisconsin enacted 111.06(2) (b) to obviate the injustice and detriment to the general welfare occasioned by the *Senn* and the *American Furniture* cases. Beyond cavil, Wisconsin has the right and the duty to protect the rights not only of union employees but also of non-union employees. Section 111.04, giving employees the right to refrain from joining the union, would be nugatory if their unionization could be compelled by coercing the employer through picketing. In addition, the employer is obligated by section 111.06(2) to respect the rights of his non-union employees given them by section 111.04. If the employer is not free to carry out his obligation, then an impasse must result which will be harmful to the common good. Therefore, the general welfare of Wisconsin is best served by forbidding peaceful picketing which has for its objective the compelling of an employer to force his employees to join a union. For these reasons it is the opinion of the writer that the Wisconsin Supreme Court's ruling in *Retail Clerks' Union v. Wisconsin Employment Relations Board* will be sustained.

The unreserved declaration in the *Thornhill* case that peaceful picketing is freedom of speech and its practical effectuation in the *Swing* case placed the United States Supreme Court in an untenable position. The identification of picketing with free speech would prevent any effective restriction of picketing by the states. In effect the pickets could picket for what, against whom, and where they pleased. Knowing that this would work incalculable harm and injustice, the United States Supreme Court tacitly admitted in the *Ritter* and the *Allen-Bradley* cases that picketing is, at most, akin to free speech. In the *Wohl* case, Mr. Justice Douglas in his concurring opinion stated: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of the picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated. Hence, those aspects of picketing make it the subject of restrictive regulation."

Indeed picketing is more than free speech, it is a form of economic pressure. The purpose of the picket line is not to interchange ideas and opinions, but to prevent the delivery and purchase of goods and thereby to force the employer to comply with the union's wishes. Union members will not pass the picket line regardless of their relation to the employer. Customers naturally are reluctant to deal with an embattled business. "The only intellectual conviction to which picketing leads is

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22 *Thornhill v. Alabama*, Supra, at p. 103.
the understanding that if the picketed enterprise does not give in, it will eventually wish it had."24

The realization that picketing is basically coercive in nature and, for that reason, that it must be regulated in terms of such principles of the law of torts as lawful purpose, just cause, and proper parties caused the Wisconsin Supreme Court to sustain sections 111.06(2) (b) and (e) as constitutional. The Ritter, Allen-Bradley, and Wohl cases indicate that the United States Supreme Court is now appreciative of the true character of picketing. If Retail Clerks' Union v. Wisconsin Employment Relations Board comes before the United States Supreme Court, the judgment of the Wisconsin Supreme Court will be affirmed and sections 111.06(2) (b) and (e) will be declared constitutional.

THOMAS MCDERMOTT.

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RECENT DECISIONS

Criminal Law—Criminal Responsibility of Proprietor of Tavern for Illegal Sales of Operator in Proprietor's Absence.—Defendant, a tavern keeper holding a Retail Class B liquor license, had in his employ a bartender, who was licensed as an operator pursuant to Sec. 66.05 Wisconsin Statutes. He was convicted of violation of Sec. 176.05(3) Wisconsin Statutes requiring taverns to be closed for business between 1 A.M. and 8 A.M. of each day, and was fined $1.00 and costs. On June 13, 1942, at 2:08 A.M., the bartender had sold liquor while the defendant was absent from his establishment. Defendant, on appeal, contended that he was not criminally responsible for the act of his bartender when he was not present at the time of the act, because Sec. 176.05(11) Wisconsin Statutes imposes upon the operator licensee the responsibility for acts of all persons serving as waiters or in any other manner any fermented malt beverages or intoxicating liquor to customers; that in the absence of the proprietor licensee the operator licensee on the premises assumes the responsibility and control. It was held that a sale of liquor by a licensed operator during the proprietor licensee's absence does not relieve the proprietor, since intent is not the controlling element and the licensing of an operator in the proprietor licensee's employ is a method of further regulation and not a means of relieving the proprietor licensee from liability. State v. Grams, 6 N.W. (2d) 191 (Wis. 1942).

Since the middle of the 19th century courts in England and America have repeatedly held that criminal intent, or "mens rea" is not required to convict a person of offenses which imperil or jeopardize the public welfare,—crimes that are police offenses of a regulatory nature with punishment less severe than prison sentences. Crimes that do not require "mens rea" include such offenses as illegal sales of intoxicating liquor; sales of impure or adulterated food or drugs; sales of misbranded articles; violations of anti-narcotic acts; criminal nuisances; violations of traffic regulations; violations of motor-vehicle laws; and violations of general police regulations, passed for the safety, health, or well-being of the community. Cases on this subject are legion. The following decisions illustrate the point: A butcher was found guilty of a crime who sold adulterated food without knowledge of the fact that the food was diseased. Hobbs v. Winchester Corporation, 2 K.B. 471. In 1861 a defendant was convicted for being a common seller of intoxicating liquor although he neither knew nor supposed the beverage to be intoxicating. Commonwealth v. Boynton, 2 Allen 160 (Mass.). Defendant company was held responsible for permitting its cars to be run without rear lights, as required by statute, with no proof of guilty knowledge. Provincial Motor Cab Co. v. Dun-
ning, 2 K.B. 599. A seller was convicted for the sale of oleomargarine though he had no knowledge that he was selling oleomargarine. State v. Rogers, 95 Maine 94, 49 Atl. 564 (1901). And, when in violation of a statute the defendant unknowingly employed a child under the age of fourteen, it was held knowledge was not an essential ingredient of the crime and defendant might be punished for the act alone. Kendall v. State, 148 N.E. 367.

The promiscuous and unregulated sale of intoxicating liquor is so obviously contrary to public safety and morals that the legislatures of the states have acted on their police power in restricting traffic in liquor. Weinberg v. Kluesnesky, 236 Wis. 99, 294 N.W. 530 (1940). The public safety and welfare so far outweigh the right of an individual to absolve from punishment for a crime committed without intent that decisions are accepted as correct and necessary which hold against the defendant proprietor for sales of intoxicating liquor, even when he is not present at the time of the sale. In State v. Holm, 201 Minn. 53, 275 N.W. 401 (1937), the court said that proof that the sale with the liquor dealer's knowledge or consent is unnecessary to sustain conviction of a dealer for selling intoxicating liquor to a minor, it being sufficient if the sale is shown to have been made by the dealer's employees or servants. The same principle underlying such decisions was expressed by the Supreme Court of South Dakota in State v. Schull, 279 N.W. 241 in the following language: "In the prohibition or punishment of particular acts, the state may in the maintenance of a public policy provide that he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance. Many instances of this are to be found in regulatory measures in the exercise of what is called the police power where the emphasis of the statute is evidently upon the achievement of some social betterment rather than the punishment of the crimes as in cases of mala in se." Regulations prohibiting the sale of intoxicating liquor to minors (the violation for which defendants were punished in the cases cited above) and regulations requiring retail establishments of the Class B type to be closed during certain hours as in State v. Grams, supra, appear to come within the same category.

Certainly the desire and necessity of protecting the public furnishes sufficient ground for the court's decision holding the proprietor of a tavern responsible for the conduct of his business, whether he is present or not, and the Wisconsin court obviously was motivated by this consideration, as was the court in State v. Sobelman, 199 Minn. 232, when it said statutes are to be so construed as to suppress the mischief and advance the remedy, to promote rather than defeat the purpose of the legislation.
However, when consideration is given to the agency aspect of *State v. Grams*, supra, some doubt might arise as to the soundness of the decision. Reference is made in the decision to several Wisconsin cases, holding the proprietor for acts of his agent, during the absence of the owner. *Conlin v. Wausau*, 137 Wis. 311, 118 N.W. 810, was decided in 1908; *Reismier v. State*, 148 Wis. 593, 135 N.W. 153, in 1912; and *Olson v. State*, 143 Wis. 413, 127 N.W. 975, in 1910. At the time these cases were decided employees of the proprietor were not required to be licensed, so obviously the only way to control the sale of intoxicating liquor was to hold the owner of the establishment as principal for the wrongful acts of his agent.

In 1933 Wisconsin passed the law requiring an operator’s license for “any person who shall draw or remove any fermented malt beverage for sale or consumption from any barrel, keg, cask, bottle or other container in which fermented malt beverages shall be stored or kept on premises requiring a Class B license, for sale or service to a consumer for consumption in or upon the premises where sold.” Sec. 66.05 (10) (a) (6) Wis. Stat., 1941. The requirements for an operator are the same as for a proprietor licensee as to character, citizenship and residency. Sec. 66.05 (10) (i) (1) and Sec. 66.05 (10) (g) (1) Wis. Stat., 1941. And, under Sec. 66.05(10)(i)(2) it is arguable that both the operator and proprietor are on a par as to responsibility since it says “there shall be upon premises operated under a Class B license, at all times, the licensee or some person who shall have an operator’s license and who shall be responsible for the acts of all persons serving as waiters, or in any other manner, any fermented malt beverages to customers. No person other than the licensee shall serve fermented malt beverages in any place operated under the Class B license unless he shall possess an operator’s license, or unless he shall be under the immediate supervision of the licensee or a person holding an operator’s license, who shall be at the time of such service upon said premises.” Sec. 176.05(11), entitled “Restrictions on Premises Under Retail “Class A” or “Class B” license, contains almost word for word the same language as Sec. 66.05(10) (i) (2). It is conceivable that the legislature meant that in the absence of the proprietor licensee the operator licensee is no longer his agent and that the operator assumes responsibility for his own acts and those of others working under him and that the proprietor licensee would not be responsible for violations committed in his absence.

However, when various other sections of the Wisconsin Statutes are examined, they compel the conclusion that the intent of the legislature was to place primary emphasis and responsibility on the proprietor licensee and not on the operator licensee. For instance: A retailer (who is the proprietor licensee) shall mean any person who shall sell, barter,
exchange, offer for sale or have in possession with intent to sell any fermented malt beverages [Sec. 66.05(10)(a)(4)], while an operator shall be one who merely draws or removes any fermented malt beverage for sale or consumption [Sec. 66.05(10)(a)]. The license fee for a Class B retail license shall be determined by the city, village or town in which said licensed premises are located but shall not exceed $100 per year [Sec. 66.05(10)(g)(2)], while the fee for an operator is not to exceed $5.00 per year [Sec. 66.05(10)(i)(3)], thereby implying that an operator's position and a proprietor's as to accountability for offenses on the premises are not comparable. The proprietor licensee is required by Sec. 66.05(10)(g)(4) to display a sign disclosing the brand of beer served, and shall not substitute any other brand for that so designated. No similar duty is placed on the operator. Certainly, then, the proprietor licensee is the one on whom falls the responsibility for keeping the premises closed during the hours designated in Sec. 176.06(3), and is the one who is to be in active control and supervision of his premises, to such a degree that he cannot escape punishment because the operator was also licensed. As said in Hershorn v. People, 113 P. 2nd 680 (1941), "Hershorn cannot escape guilt by attempting to shift the crime to his employee and must stand or fall with those who acted for him. So long as he has the management, direction and supervision of the business and place in which liquor was being sold, he assumes the risk of criminal liability when his agents, working under the circumstances disclosed by the evidence, sold liquor" contrary to statute. Even in Sec. 176.05(11) the language implies that the requirement is primarily directed toward the proprietor licensee by the very wording of the statute.

Not only the language of the statute, but the safeguard of public morals and public policy suggest that any attempt to relieve the proprietor of responsibility for acts done in his establishment and to weaken the long line of decisions which hold him for acts done in his absence and against his instructions be frowned upon. Were the operator licensee alone responsible for a sale of liquor after hours, an unscrupulous proprietor might hire equally unscrupulous operators to serve liquor after 1 A.M. in a Class B retail establishment, take a chance on not being apprehended at once, reap a nice profit for after-hour sales, and in turn promise to pay the operator's fine if and when he be arrested. After the removal of the first operator, he might be followed by a second and a third,—thus allowing a scheme for putting money into the pocket of the proprietor unlawfully, while he went "Scott free," except for the possible payment of an occasional fine, in fulfillment of his part of an illegal bargain. Needless to say, such procedure would defeat the purpose of the legislation and would be cer-
tainly contrary to proper conceptions of correct control and regulation of the liquor business.

With a decision such as *State v. Grams*, supra, as law, proprietor licensees will find it behooves them to hire only honest, reliable operators who will obey all provisions of the law, in order to protect themselves from prosecution.

**Jane O'Melia.**

**Federal Procedure—Applicability of Discovery Procedure under Federal Rules to the United States.**—In an action by the United States, the General Motors Corporation and others were charged with engaging in conspiracy in restraint of trade and commerce. The defendants answered and filed forty-five interrogatories under Rule 33 of the Rules of Federal Procedure, 28 U.S.C.A. following Sec. 723c, which they asked the government to answer. It was contended by the Government that Rule 33 "substitutes interrogatories for a bill of discovery"; that the United States has never consented to be a defendant in such a bill, or to answer interrogatories; and that the rule substantially changes legal rights. The court held that while an action does not lie against a sovereign except by consent and while the United States could not be compelled to make discovery in an action brought for that purpose, still the government in bringing a civil action against an individual may be subjected to the ordinary rules governing procedure in the court in which the suit is brought and that, accordingly, the Government could be required to answer the interrogatories. *United States v. General Motor Corporation*, 2 F.R.D. 528 (N.D. Ill. E.D. 1942).

In the instant case, the court pointed out that although Rule 33 does not specifically include the United States as subject to it, the fact that Rule 37(f) which provides that the payment of attorney's fees imposed for failure to answer interrogatories are not to be imposed on the United States, shows that Rule 33 was meant to apply to the United States. It might further be pointed out that a reading of the Federal Rules as a whole indicates that they were meant generally to apply to the Government as well as any other party to a civil action. Rule 12 specifically extends the time within which the United States may plead to sixty days. Rule 4 makes an exception of the United States in the procedure of service of process on the United States. And most imperative is Rule 81 wherein all the exceptions to the Rules are cited: and nowhere in Rule 81 is the United States exempt from the general application of the Rules. And furthermore, the cases have consistently held that in a civil action the United States takes the same position as any other private suitor. *United States v. National
Some consideration should perhaps be given to the contention of the Government in the instant case to the effect that Rule 33 "substitutes interrogatories for a bill of discovery" and that the United States has never consented to be a defendant in such a bill. Prior to the adoption of the Federal Rules, Equity Rule 58 governed the procedure for obtaining discovery before trial both in suits in equity in which some relief other than discovery was sought, and in suits in equity brought solely for discovery in aid of an action at law. And the practice of the states permitting discovery were not applicable in actions at law in the Federal Courts since it was held that this field was preempted by federal statutes. *Ex parte Fisk* (1855) 113 U.S. 713, 5 S.Ct. 724, 28 L.Ed. 1117; *Carpenter v. Winn*, (1911) 221 U.S. 533, 31 S.Ct. 683, 55 L.Ed. 842. Discovery before trial in an action at law could be obtained by filing a bill in equity for discovery in aid of an action at law. And the party seeking to obtain the discovery had to make the opposing party a defendant to the bill in equity. Here seems to be the basis for the Government's objection to Rule 33 in the instant case. The suit in equity to obtain a discovery was an action separate and distinct from the action at law which such suit was supposed to aid.

Rule 33 embodied for the most part the substance of Equity Rule 58. But under the Federal Rules there are no suits in equity or actions at law as such, but only civil actions. Thus, in a civil action formerly denominated legal or equitable, it is not necessary to institute a separate action for discovery, but either party may obtain discovery before trial either by taking depositions upon oral examination or upon written interrogatories or by serving written interrogatories upon each adverse party. Federal Rules 26 to 33. However, while the new rules render the ancient bill of discovery obsolete for most purposes, still it seems that a bill for discovery would in substance be a proper proceeding under the Federal Rules where the plaintiff cannot without it find out whom he should sue, since the Rules do not provide for discovery before the filing of the complaint. *Pressed Steel Car Co. v. Union Pac. R. Co.*, (S.D. N.Y., 1917) 240 Fed. 135 and 241 Fed. 964; *Arms & Drury, Inc. v. Burg*, (C.A.D.C., 1937) 90 F. 2d 400.

While the court in the instant case makes Rule 33 applicable to the United States, there is no implication that there are no limits to discovery by a party adverse to the United States. In *United States v. Hartmann*, (D.C. E.D. Pa., 1942) 2 F.R.D. 477, the Government brought proceedings for the cancelation of the defendant's naturalization. The
United States claimed that in his oath of allegiance the defendant made representations which were false and fraudulent in that, at the time he took the oath, he did not renounce allegiance to Germany but fraudulently reserved it. The defendant moved for a bill of particulars. The court held that although the office of the bill of particulars is fast becoming obsolete because of the easily available and effective discovery procedure, the motion for the bill of particulars would be granted and the defendant would not be required to resort to the discovery procedure. On this point the court said: "There is of course always the choice between a more definite statement in the complaint and disclosure in discovery proceedings. I can see serious objections to allowing the usual sweeping discovery in a case like the present. I think it much the wiser course to proceed with an amplified statement of the charge, sufficient to give the defendant a fair opportunity to prepare for trial, and with as little searching into government evidence later on as many be possible without doing injustice to the defendant."

ANTHONY J. PALASZ.

Statutes — Filling Vacancy in Office of Governor. — Orland S. Loomis, having been elected governor of Wisconsin by defeating the incumbent Julius P. Heil at the November election in 1942, died after certificate of election had been issued to him but before he had taken the oath of office. Walter S. Goodland was elected lieutenant governor in the same election. An original action for a declaratory judgment was brought in the Supreme Court to determine who was entitled to exercise the powers of the governor during the term for which the deceased had been elected. It was held that under the provisions of the Wisconsin Constitution the powers, duties and functions of the office of governor devolved upon the lieutenant governor, and not on the incumbent. State ex rel. Martin v. Heil, et al., 7 N.W. (2d) 375 (Wis. 1942).

In reaching this vital conclusion the Court took into consideration four main questions:

1. Did the incumbent hold over beyond his two year term of office?
2. If the incumbent did hold over was it only until a special election for governor was held?
3. If the incumbent did not hold over could he appoint a successor as governor?
4. Did the lieutenant governor-elect succeed to the powers and duties of the governor?
Due to the dearth of controlling authority the Court based its decision primarily on a reasonable interpretation of the Wisconsin Constitution and on the debates and proceedings of the Constitutional Convention. For this reason, the arguments of the incumbent, the lieutenant governor-elect, and the amici curiae, as to what the constitutional interpretation should be, will be reviewed rather than the few decisions which are persuasive but none of which are directly in point.

(1) Did the Incumbent Hold Over Beyond His Two Year Term of Office?

The applicable provision of the Wisconsin Constitution is Article V, Section I. "The executive power shall be vested in a governor who shall hold his office for two years; a lieutenant governor shall be elected at the same time and for the same term."

It was argued on behalf of the lieutenant governor that the above clause provides clearly and unambiguously that Governor Heil's term was to last no longer than two years; that in the absence of the clause "and until his successor is elected and qualified" there was no constitutional authority for extending the two-year term of the incumbent. For the latter it was contended that it would be his legal duty to refuse to give up the office of governor to any one except a lawfully chosen successor; that is, one chosen as governor and not for some other office. This argument was based on the premise that where the written law contains no provision, either express or implied, to the contrary, an officer holds his office until his successor is elected and qualified. The incumbent relied also on the case of State ex rel. Pluntz v. Johnson, 176 Wis. 107, 184 N.W. 683 (1922) where the court construed a constitutional provision that a sheriff should be "chosen by the electors of the respective counties once in every two years" (Article VI, Section 4) to mean that one elected sheriff could hold over until a successor was elected and qualified. As regards this case, however, the lieutenant governor claimed a distinction in that there is no constitutional provision for a "lieutenant sheriff" who is authorized to discharge the duties of the sheriff in case of a vacancy in that office. Thus, if the sheriff were not permitted to hold over there would be a suspension of official functions, which situation could not arise as to the governorship since the Constitution has provided for the devolution of the powers upon a lieutenant governor.

(2) If the Incumbent Did Hold Over Was It Only Until a Special Election Was Held?

For the lieutenant governor-elect it was proposed that the constitutional provision as to the election of a lieutenant governor leaves no room for contemplating a special election. Sec. 7.01(4) Wis. Stats. in
providing for special elections to fill vacancies in certain elective offices expressly excepts the offices of governor and lieutenant governor. Attorneys for incumbent argued that although Section 7.01(4) excepts the offices of governor and lieutenant governor, Section 7.02, providing for special elections in particular cases, does not so except these offices and provides that an election shall be held "when the governor, in his discretion, directs such an election to fill any vacancy not provided for by this section and section 7.01." Thus the incumbent would be authorized to call a special election. On behalf of the lieutenant governor it was contended that no special election could be directed until there was a vacancy, that there was no vacancy as long as the present governor continued to be governor, and that after he ceased to be governor he would no longer have power to direct an election.

(3) IF THE INCUMBENT DID NOT HOLD OVER COULD HE APPOINT A SUCCESSOR AS GOVERNOR?

Here the proponents for the lieutenant governor relied to some extent on the same argument as that presented in opposition to the calling of a special election by the incumbent—that there could be no vacancy in the office of governor until after the present incumbent ceased to be governor, that the present incumbent's authority would have ceased before a vacancy occurred and as a result he would have no power to appoint a successor. State v. Roden, 219 Wis. 132, 262 N.W. 629 (1935) was cited as authority for the rule that an appointment may not be made to fill an anticipated vacancy which will not occur until after the one making the appointment has relinquished his authority.

For the incumbent it was argued that under Article XIII, Section 10 of the Wisconsin Constitution ("The legislature may declare the cases in which any office shall be deemed vacant, and the manner of filling the vacancy, where no provision is made for that purpose in the Constitution.") the legislature has been given extensive power to provide for the filling of vacancies; that it has made a provision allowing appointment by the governor of a lieutenant governor to fill a vacancy in that office (Section 17.27(4) Wis. Stats. as construed in State ex rel Martin v. Ekern, 228 Wis. 645, 280 N.W. 393 (1938); and that this same provision, since it would authorize the appointment of an officer upon whom the governor's duties might devolve, would also authorize the appointment of a man to fill the office of governor itself.
(4) Did the Lieutenant Governor-Elect Succeed to the Powers and Duties of the Governor?

This is probably the most important of all the questions presented to the court. The applicable provision of the Constitution is Article V, Section 7. "In case of the impeachment of the governor, or his removal from office, death, inability from mental or physical disease, resignation, or absence from the state, the powers and duties of the office shall devolve upon the lieutenant governor for the residue of the term or until the governor, absent or impeached, shall have returned, or the disability shall cease."

Among the many problems presented by this provision are the following: What is meant by the "residue" of the term? Does the word "governor" as used in the clause include a governor-elect? Does the fact that some of the contingencies listed in the clause cannot apply to a governor-elect mean that the provision was not intended to apply to a governor-elect?

The term "residue," it was argued on behalf of the lieutenant governor, may refer to the whole or any part of the term. It is intended merely to limit the time in which the lieutenant governor may act to the governor's two year term; and is not intended to mean that a portion of the term must have elapsed. Also it was contended that "governor-elect" may well be included in the term "governor" as used in the constitutional provision since "governor-elect" is a statutory and not a constitutional word. Section 7 might reasonably be taken to include one who was elected governor and who had not qualified. One of the amicus curiae briefs stated the proposition that Mr. Loomis, the deceased governor-elect, "was not elected to become governor, he was elected governor." As to the contingencies on the happening of which the duties of the governor devolve upon the lieutenant governor it was argued that the fact that some would apply only to a governor who has qualified (as impeachment or removal from office) does not mean that the other contingencies are so limited.

Another argument on behalf of the lieutenant governor was this: that the people have elected the lieutenant governor with the knowledge that he might become governor; that they intended him as a substitute in the event that the man who was elected governor could not act; and that the lieutenant governor had to become acting governor if the will of the people was to be given expression.

The incumbent contended, on the other hand, that the term "residue" as used in Article V, Section 7 should be taken strictly, to mean that a term had been commenced and interrupted. They also contended that a governor-elect is not included in the term "governor"; and that the contingencies as provided in the Constitution are only such as may
occur after the term of governor has been commenced. The decision in *State v. Whitman*, 10 Cal. 38 upholds this viewpoint.

The Supreme Court's decision was not based entirely on the exact wording of the constitution and of the statutes. "It is extremely important in the interpretation of constitutional provisions," the court says, "that we avoid determinations based purely on technical or verbal argument and that we seek to discover the true spirit and intent of the provisions examined." Thus, where a constitutional clause presents reasonable ground for difference it must be interpreted in a sense which will bring out the meaning intended by those who adopted the clause.

This case is especially interesting not only because its decision is vital to so many people but also because, being without precedent, its decision is based chiefly upon interpretation rather than citation and upon argumentation rather than quotation—a situation rarely encountered at the present time.

JOAN MOONAN.

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**Tort Liability — Charitable Corporations.**—Plaintiff brought an action against the Young Mens' Christian Association of Chicago for injuries sustained while the plaintiff was a guest in the defendant's hotel, alleging the negligent operation of an elevator in which he was a passenger. In the trial court the defendant moved to strike the complaint, which motion was granted. The decision of both the Superior Court of Cook County and of the Illinois Supreme Court was based upon the fact that the defendant was a charitable corporation and as such was not liable for personal injuries caused by the negligence of its servants or agents, although the injured party paid for its service. *Saffron v. Y.M.C.A. of Chicago*, 45 N.E. (2d) 555 (Ill. App. 1942).

Generally a charitable corporation has been defined by the courts as one operated primarily for the benefit of the public rather than for private gain, but which is not a direct agent of the government. The fact that the institution receives payment for its services from its beneficiaries does not affect its charitable character so long as the fees are for the purpose of enabling it to carry out its charitable purposes and are not for private profit.

A number of the states seem to hold charitable corporations liable almost as though they were operating for private profit, and the question of tort-liability is no different than in the case of any other corporation. However the great weight of authority cannot be said to favor such a rule and in many of the states a charitable corporation enjoys an immunity as to wrongs as to certain classes of persons that a corporation generally does not possess. The conflict among the various
states is due largely to the variety of theories upon which the decisions are based.

Many of the courts have based their opinions upon the so-called doctrine of public policy, giving as their reason that such institutions are inspired and supported by benevolence, and devote their assets and energies to the relief for which the corporation was created; and that common welfare demands that they be encouraged and held exempt from liability for tort; that to do otherwise would result in discouraging those inclined to contribute to charities and apply the funds especially contributed for a public charitable purpose to objects not contemplated by the donors, namely, to damage suits. In *Vermillion v. Women's College of Due West*, 10 S.C. 197, 88 S.E. 649 (1916), it was said that the state is most deeply interested in the preservation of public charities, and the questions of public policy must be determined upon the consideration of what on the whole will best promote the general welfare. Substantially similar was the ruling in *Fordyce v. Women's Christian Library Association*, 79 Ark. 550, 96 S.W. 155 (1906).

This public policy theory has been disapproved in a number of cases. In *Bruce v. Central Methodist Episcopal Church*, 147 Mich. 230, 110 N.W. 951 (1907), the defendant church was held liable for injuries to an employee of a contractor under a contract for decorating its church building, the injury having been caused by the negligence of the agents of the defendants in furnishing a defective scaffolding.

Closely connected with the public policy theory is the doctrine of a trust fund upon which many of the earlier cases based their decisions. Under the doctrine it was determined that a charity fund could not be used to compensate injured persons because such compensation would tend to divert the fund to purposes not intended by the donors, and because it would frustrate the purposes of the creators of the fund. Generally this doctrine has been repudiated in the United States; it is said in 13 Ruling Case Law, p. 945, Sec. 9:

"In answer to this argument, however, it has been said that while the public has an interest in the maintenance of a great public charity, it also has an interest in obliging every person and corporation which undertakes the performance of a duty to perform it carefully, and to that extent, therefore, it has an interest against exempting any person and any such corporation from liability for its negligence, and that moreover, it is solely for the legislature, and not for the courts, to say that the former interest is so supreme that the latter must be sacrificed to it."

In the case of *Downes v. Harper Hospital*, 110 Mich. 555, 60 N.W. 42 (1894), it was held that a corporation organized and maintained for no private gain, but for the purpose of care and medical treatment
of the sick and to that end to manage a trust fund created for that purpose, cannot be made liable for injuries sustained by a patient by reason of the negligent acts of its managers and employees. Here the decision was based upon an implied contract with the person injured that he would assume the risk of such torts as may be committed by the charitable institution whose benefits he was receiving. Both in the Bruce case supra, and in Basabo v. Salvation Army, 35 R.I. 22, 85 Atl. 120 (1912), the plaintiff was not a beneficiary of the trust administered by the defendant, but was an employee of the defendant's contractor or of the defendant itself.

Also charitable corporations have been held liable for injuries to their employees, since they are not the recipients of the benefits of the charity. Hughes v. President and Directors of Georgetown College, 33 F. Supp. 867 (D.C. D.C., 1940).

The administrator of the estate of a beneficiary of a charitable institution, organized solely for public benefit, recovered damages for the negligence of a nurse when a patient, in a delirium, jumped from a second story window and was killed. The court based its decision on the theory that immunity to the charitable institution for the tort of its servant would compel the person injured to contribute the amount of his loss to the charity against his will, and that this could not be regarded as socially desirable nor consistent with sound policy, especially in view of the hardship which would result to the widow and children in such a case. Mulliner v. Evangelischer Kiakenneissenverein of Minn. Dist. of German Evangelical Synod of North America, 144 Minn. 392, 175 N.W. 699 (1920).

In Daniels v. Rahway Hospital, 10 N.J. Misc. 585, 160 Atl. 644 (1932), the plaintiff, in driving his automobile upon a public highway, was a complete stranger to the charity. He was involved in a collision with the driver of the defendant's ambulance and the defendant's agent was found to have been negligent. The court, in awarding damages, felt that no one, no matter how elevated his motive or how humane his purpose should be permitted to set up and operate the machinery of his charitable organization with impunity to injure by negligence those unconcerned in and unrelated to that which the donor brought into being.

The doctrine perhaps most generally recognized by the courts is the implied-waiver doctrine, that is, waiver by acceptance of benefits; this doctrine applies only to the beneficiaries of charitable institutions. In the case of Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1917), the Wisconsin court based its decision upon the doctrine that a hospital performs a quasi-governmental function, and for that reason the doctrine or respondeat superior does not apply. The court in deciding the case of Bachman v. Y.W.C.A., 179 Wis. 178, 191 N.W. 751 (1922),
followed the *Morrison* case, supra, and was of the opinion that because of the purposes, nature, and functions of the Y.W.C.A., master and employer of the negligent employee, the liability for the accident must rest on the negligent individual where it primarily belongs. In effect, the Wisconsin cases hold that the doctrine of immunity of a public charitable institution from liability to a beneficiary within its walls from the negligent acts of its servants, under the principle of *respondeat superior*, is applicable as well to one who is a stranger not receiving the services or benefits from the institution. In its firm holding to immunity, the Wisconsin court goes so far as to exempt the charitable institution from liability even in the negligent selection of its employees. In the case of *Schumacher v. Evangelical Deaconess Society of Wisconsin*, 218 Wis. 169, 260 N.W. 476 (1935), the court reasoned that since a charitable hospital is exempt from liability for the negligent acts of its employees committed upon its patients, it should also be exempt from liability for negligence of its managing officers in selecting such incompetent employees. Some courts have held that although the liability of the charity for all torts of its agents cannot be upheld, it is liable if there is negligence in the selection of such agents and employees. This is directly in conflict with the *Schumacher* case supra. In that case the court said,

"Precisely the same reason lies for the exemption in both cases, and it lies precisely to the same extent."

It would appear therefore that in Wisconsin there is immunity of charitable institutions under all circumstances. However, there is an exception where the charitable institution has failed to comply with the statute requiring the maintenance of a safe public building for employees and frequenters. Sec. 101.01, 101.06, Wis. Stat. (1941). The above statutes were held to be applicable to religious corporations regulating liability to one attending a church luncheon who was injured on an unlighted stairway. *Wilson v. Evangelical Lutheran Church of Reformation of Milwaukee*, 202 Wis. 111, 230 N.W. 708 (1930). The state of Minnesota having a similar statute, sustained the liability of the charitable association for injury caused by contact with machinery not guarded as required by statute. *McIverny v. St. Luke's Hospital Association*, 122 Minn. 10, 141 N.W. 837 (1913).

RAZY G. KLETENKA.
BOOK REVIEWS


This 600 page book is not a case-book, not a digest. It is rather a compilation of legal opinions, treatises and discussions on the law applicable to municipalities which are obliged to depart from ordinary municipal problems and perform a variety of undertakings in aid of the national war effort. It contains articles on numerous special problems and questions of policy confronting local municipalities. The editor has included papers by many able and experienced city counsel for large, medium and small cities of the 48 states.

There are many valuable and practical suggestions on the course to be pursued by municipalities in matters affecting civilian defense; state and local defense councils; air raids, black-outs and dim-outs, not only for the coastal cities but also for interior localities; leaves of absence, reinstatement, seniority and annuity rights of city employees entering the armed forces; new revenue and financial problems of cities incident to war activities; defense public housing and the taxation problems incident thereto, and payments by the federal government of sums in lieu of taxes; war damage insurance; the attempted federal control of municipal salaries and wages; the jurisdiction of the War Labor Board over disputes between municipalities and their organized employees; compensation for injuries to private persons participating in civilian defense activities; the legal problems of tax exemption for federally owned and leased establishments for the manufacture of war munitions and supplies; absentee voting by members of the various branches of the armed services; priorities on critical construction and operating materials and equipment needed by municipalities; the unusual demands on local public health service for the prevention of absenteeism by war workers and the control of venereal diseases in cities adjacent to military camps; the varied demands for modification of the city zoning and building restrictions; the mixed federal and local control of municipal airports; public and privately owned utilities, including local transportation facilities; rental control; federal legislation bearing on the competitive bidding statutes applicable to cities and their boards and commissions and city planning for post war emergencies and the accumulation of state, county and city surplus funds for post war public improvement construction to aid in relieving the anticipated unemployment and depression conditions most likely to be prevalent in the period of adjustment from war economy to peace.
This material is based on one year's war experience of cities since Pearl Harbor. It contains reliable information on existing federal wartime statutes and a summary of pending legislation that will affect municipalities.

Old and recent court decisions are cited on many issues of law, especially relating to the powers and limitations of power of federal and state and local governments, particularly in reference to the dual sovereignty of the United States and the several states. The book is well-planned and indexed and should be a handy ready reference for every city and county attorney in the land. It should be of great assistance to the federal officials, military and civil, whose positions require contact with city authorities; it should have a wide appeal to the bar, public officials and the public generally.

It is beyond the province of this review to enumerate or discuss the many subjects and questions covered in the book, but we can state unreservedly that any lawyer, either serving the public or in private practice, faced with a legal problem involving wartime activities of municipalities will find this book to be of invaluable aid.

Omar T. McMahon.*

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One of the most discussed questions today, that of a permanent united nations, is the topic of Mr. Amos Peaslee's new book. The author is neither pessimistic nor optimistic but he does present one of the best arguments in favor of a permanent world government that has been seen recently.

Mr. Peaslee, who is a recognized authority on international law and who has been an American representative at many international conferences including the one at Versailles, first makes an historical review of the various methods employed by nations to formulate international policy, beginning with the Treaty of Westphalia up to the latest Pan American conferences and, most recently, the Atlantic Charter. He points out rather emphatically that the failure in the past, and the possible collapse in the future, lies in the absence of a real world government—self-sustaining and powerful enough to enforce its laws. Mere treaties, mere contracts are not enough; it must be government.

The author outlines a suggested form of government. It should be democratic in form, he says, and should consist of a legislature, a judiciary and an executive office. Although Mr. Peaslee speaks against

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representation based on blocs or groups of nations such as the Balkan states, the slavic states or the English speaking countries, he does not make himself quite clear, it seems, as to the basis of representation he would himself favor. This is perhaps the weakest point in his argument for the practicability of his plan. Further, the author suggests a World Court with jurisdiction confirmed to international disputes and an executive office with police power to enforce court judgments and legislative acts. The punishment for a gross violation of international law by any nation should be the loss of nationality: just as a criminal is deprived of citizenship so should a criminal nation be deprived of nationality. The argument, however analogically correct, remains nevertheless doubtful since the duration of the penalty and the definition of gross violation of international law remain far too obscure. Finally, the basis for the entire government should be a written constitution with a specific bill of rights for the individual nations.

No author could attempt to write this kind of book without exposing himself to much adverse, if not severe, criticism. But Mr. Peaslee, it is reiterated, is no optimist. He is no “quack” doctor treating international diseases with a “cure-all” patent medicine. He expects nations to be slow and even reluctant to accept a superstructural world government. But he insists, and quite reasonably so, that now if ever, after the errors of the past, with the myth of isolationism destroyed and with the interdependence of nations admitted almost as axiomatic, the nations of the world are ready to make this last step.

Anthony Palasz.
A POLICY of life insurance is a contract to pay money upon the happening of an event. It is a chose in action and the general principles of law relating to assignments of choses in action are applicable. It is everywhere assignable except as restricted by law, by the provisions of the policy, or by collateral agreement.

The contract of life insurance has its own characteristics. A distinguishing characteristic is that it must involve an actual "insurance risk." Its purpose is to relieve one or more from loss that may result from the untimely death of the insured. It, therefore, has its beneficiaries who are the persons to be protected, and in its most frequent form is a contract between the insurer and insured for the benefit of persons not parties to it.

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If it were not for this feature of protection from loss resulting from insured’s death, the contract would be a wager based upon the length of another’s life, with no other incentive on the part of the beneficiary than to win the wager, and everywhere contrary to public policy. Therefore, every policy of life insurance must be based upon an insurable interest in the life of the insured.

Naturally the power to appoint beneficiaries is vested in the insured by the form of the policy, either subject to revocation and change or not as may be provided. The policy vests various other powers in the insured, such as to borrow the reserve upon or surrender the policy for its cash surrender value, to determine how dividends upon the policy shall be paid or applied, to determine whether the proceeds shall be paid in cash at maturity or in installments under specified methods of settlement offered to insured and to the beneficiary if the power has not been exercised by insured. Any or all of these powers may be waived or may be vested in the beneficiary who takes out the policy or the beneficiary appointed by, or the transferee of, the insured.

These and other characteristic features or provisions of the policy must be considered in applying general principles of law in respect to the assignment of choses in action. The problems presented to the insurer by assignments of policies generally involve some of these characteristics or special provisions of the contract and this paper is directed particularly to such problems.

Restrictions

In a few of the states no assignment of a policy to one having no insurable interest in the life of the insured is permitted or valid. In some of these states the insured may not designate as beneficiary or assign the policy to one not having an insurable interest in his life even though he continues to control the policy and to pay premiums upon it. In other states a transfer of a policy to those having no insurable interest in insured’s life is not invalid where the insured continues to pay the premiums upon it.

But in most of the states it is considered that as the insured has an insurable interest in his own life, he may transfer a policy taken out by him in good faith upon his life, to anyone he chooses either with or without an insurable interest; and that continuity of insur-

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able interest is not necessary, and, therefore, in all cases where the policy when issued is based upon an insurable interest in the life of the insured, it may thereafter be transferred to anyone even though the assignee has no insurable interest in the life of the insured.\(^4\) However, if the policy is taken out by the insured pursuant to an agreement or understanding that it is to be assigned to one having no insurable interest, it will be considered not taken out by him in good faith and not supported by the insurable interest insured has in his own life, and as a mere attempt to evade the requirement of insurable interest and a wager upon the life of the insured and, therefore, invalid.\(^5\)

There are few attempts of those having no insurable interest to acquire such invalid insurance. Frequently, however, policies are applied for which cannot be issued because of lack of insurable interest. For instance, a corporation may desire to acquire policies on the lives of stockholders to aid in the purchase of their stock in case of their death and proposes that each stockholder shall take out insurance upon his own life and assign it to the corporation. As to the stockholders who are not actually engaged in the business of the corporation and deemed essential to its success, the corporation has no insurable interest in their lives and cannot in that manner secure and hold such policies.

There are instances of regulatory laws which in some of the states restrict the transfer of life insurance policies. The purpose of some of them is to make more secure to married women or wives of parties insured the right to enjoy the benefits of life insurance policies. It is not within the scope of this paper to consider such regulatory laws. Such laws of the various states must ever be borne in mind, but they present no serious difficulties to the insurer in determining the rights of the insured and of the beneficiaries.

Arizona, California, Louisiana, Nevada, New Mexico, Texas and Washington have community property laws under which property acquired during coverture with earnings of either spouse or other community property funds, including policies of life insurance, is community property; the same is true optionally in Oklahoma. The community resembles a partnership of which the husband is the manager. Each spouse has a vested interest in the community property. The husband as manager of the community proper may transfer or assign it for a valuable consideration, but is precluded from giving it away. Therefore, his designation of beneficiaries under or

assignment of community property policies as a gift and not as a sale for full value is subject to the community property interest of the wife unless she expressly waives or joins in the transfer of her interest. Upon dissolution of the community by death of either spouse, the community property interest of the wife descends to her children in some of the states and is subject to testamentary disposition, I believe, in all of them at the present time. If the community is dissolved by divorce, it is made the duty of the court to divide the community property between the spouses, and in the absence of such division by the decree, the divorced husband and wife become owners in common of all property that was community property, including life insurance policies, and the interest of either is assignable. The result is that the insured may not assign or otherwise dispose of the policy on his life without the concurrence of others interested in the policy—perhaps his children or his divorced wife or those who have succeeded them in interest. He may assign his half interest in such a policy.

This law presents difficult questions, for the insurer must make inquiry concerning various questions, such as whether the policy was in fact community property or whether by waiver or assignment it has become the separate property of either husband or wife. And where the policy has become owned in common upon dissolution of the community, serious questions arise under the circumstances, as to the rights of the parties where one of the owners has voluntarily or pursuant to some understanding paid the premiums upon the policy.

Perhaps I may refer to the restriction upon the power of the insured to make a gift inter vivos of a life insurance policy, by the 1942 amendment of Sec. 811(g) of the Internal Revenue Code respecting liability of the proceeds of life insurance, to the estate tax. This law if valid prescribes that if the insured pays premiums upon the policy, he can never escape liability of his estate to the estate tax even though he makes an absolute assignment of the policy. It is the effect of this law that in proportion to the premiums paid by him his estate will be liable to an estate tax, even though he had no incidents of ownership at the time of his death. It is considered also that even if the wife or someone else takes out the policy and there has been no transfer of it by the insured, still the insured's estate will be subject to the estate tax in proportion to the premiums paid by him. This law must be based upon the assumption that a life insurance policy because its benefits are payable upon insured's death, is comparable to a testamentary disposition or that the gift takes effect only upon and by reason of the death of the
insured. This assumption is inconsistent with the fact. An assignment of a life insurance policy by the insured is immediately effective. The beneficiaries are appointees of the assignee and not of the insured. There is no transfer that becomes effective upon death. There is no gift that is not effective immediately upon the assignment. The fact that payment becomes due on the event of death is not characteristic solely of life insurance policies and that fact has nothing whatever to do with the question of title to the contracts. The benefits of a policy are not received by the beneficiary because of the death of the insured, but because the beneficiary has owned all such benefits from the time of the gift of the policy. It is inconsistent with the law which has always recognized gifts *inter vivos* of life insurance policies as perhaps the most common of such gifts. The decisions of the highest courts unanimously hold that such a gift is effective at the time it is made and that from such time the donee is the owner of the policy entitled to all of its benefits and vested with all its powers, and consequently there is no possible basis for considering that there is a transfer of benefits from the insured at or in consequence of his death. This law, it is believed, is unconstitutional as a violation of rights protected by the 5th Amendment, because it is an absurd, arbitrary and whimsical discrimination against a single form of property and the owner thereof.

Restrictions upon the power to assign are frequently found in policy contracts. A very common one, though generally introduced into the contract by an endorsement when the policy is transferred by the insured, is that there shall be no assignment of the policy to one who does not have an insurable interest in the life of the insured. Sometimes there is in the policy an absolute prohibition of any assignment of it. It is interesting to note that such a provision has been held inoperative where the regulatory law declares that life insurance policies shall be assignable. Frequently policies require that assignments shall be made in a prescribed form or manner or only with the consent of the insured or upon notice to it, or that the insurer shall not be bound by any assignment unless it is in writing and filed with the insurer. Such provisions, however, are generally considered solely for the protection of the insurer and not to restrict the legal rights of the policyholders to assign in any manner that the law permits. It is held, therefore, that such provisions may be and frequently are waived by the insurer or that the informal assignment is valid as between the parties and binds the

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6 Immel v. Traveller's Insurance Co., 373 Ill. 256, 26 N.E. (2d) 114 (1940).
7 Cook v. Cook, 111 P. (2d) 322 (Cal. 1941).
insurer if it has actual or constructive notice of it. Where the policy expressly prohibits assignment of it, an assignment may be considered valid as an equitable assignment.\(^8\)

Such restrictions upon the right to assign the policy do not apply to the matter of assignment of the proceeds after the maturity of the policy, but the policy may include restrictions upon the rights of beneficiaries to assign their interests in the proceeds. Where the insured selects a settlement under which the insurer holds the proceeds and pays them in installments according to the settlement, it is a common practice in accordance with a very common desire of the insured to include a provision which precludes the beneficiaries from either voluntarily or involuntarily alienating the installments to which they are entitled. The right of an insured to deprive the beneficiary of any power to assign the benefits is recognized everywhere and the restriction against voluntary alienation is everywhere valid. But it has been considered in some states that to prevent involuntary alienation or to preclude creditors of the beneficiary from reaching installments to which the beneficiary is entitled, is contrary to public policy. In many of the states there are enactments which expressly permit provisions to be inserted that prevent assignments by the beneficiary and his creditors from reaching the installments to which he is entitled. These statutes, of course, express the public policy of the state. It is considered that one should have the right to dispose of his property under such conditions as he chooses. In the states where there is no express authorization for such provision, the insurer is frequently asked to include it. If the spendthrift trust is in any such state not contrary to public policy, it may be considered perhaps that the inclusion of such a provision is valid. It has been so held at least in one case.\(^9\)

Therefore, it is a practice of insurers to include such a provision conditioned upon its not being contrary to law. But such a restriction was not enforced where the spendthrift trust had not been held valid.\(^10\)

**Forms of Assignment**

Conventional forms of written assignments are generally not necessary. Policies may be assigned absolutely or as security by parol.\(^11\) The written assignment may be so informal that it is un-

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10 Chelsea-Wheeler Coal Co. v. Marvin et al., 131 N.J. Eq., 76, 24 A. (2d) 403 (1942).
certain whether an assignment or a change of beneficiary is intended. Sometimes it is held that the instrument is operative as a request for the change of beneficiary, although it is not valid as an assignment, and on the contrary it has been held that an informal instrument intended to effect a change of beneficiary, but not valid in view of the prescribed method for changing the beneficiary, is effective as an assignment. It may not be effective as either. This, however, is purely a matter of construction of the instrument. To be valid the assignment must be made in accordance with the requirements of the law. To be valid as a change of beneficiary, it must comply with the method prescribed in the policy for changing the beneficiary. It must be borne in mind that the right to designate or change the beneficiary is the right to exercise a contract power to appoint, reserved to the policyholder by the provisions of the policy, and it, therefore, must be exercised in accordance with the method prescribed by the policy for effecting the change. The right to exercise such power is unilateral. An assignment, however, is a right secured by law and governed by the principles of law in respect to assignments. It involves two parties—the assignor and the assignee. It requires delivery and a meeting of the minds, but in the case of written assignments, the delivery of the policy is not necessary provided the instrument of assignment is actually or constructively delivered. The delivery may be made to a third party, as, for instance, filed with the insurer for the benefit of the assignee, and in such case it may constitute a valid delivery even though unknown to the assignee, for it may be presumed that as it is beneficial to him he has accepted the act of delivery. However, in the case of parol assignments either intended to transfer the policy or to create a pledge of it, there must be a delivery of the policy itself. But more than delivery is necessary to establish a parol or equitable assignment.

There may be assignments by contract. The appointment of a beneficiary even though no power to change is reserved is not an assignment. The insured under most forms of policies still has interests in them. The forms generally terminate the vested rights of the beneficiary in case of death in the lifetime of the insured. But where insured vests in the beneficiary the right to exercise all pow-

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13 Mutual Life Insurance Co. v. Wright, 153 Wis. 252, 140 N.W. 1078 (1913).
ers and privileges under it and the right to control the disposition of the proceeds in case the beneficiary dies in the lifetime of the insured, or, in other words, where all incidents of ownership are vested in the beneficiary, it is considered equivalent to an assignment of the policy and it is commonly referred to, sometimes in the decisions of courts, as an assignment.

Equitable assignments of life insurance policies seem to be liberally recognized by the courts. The illustrative case and that which most commonly presents problems to the insurer is that of an equitable assignment resulting from the property settlement agreement in anticipation of divorce and the divorce decree. If either or both require the insured to transfer policies upon his life to or for the benefit of the divorced wife or their children by endorsement of the policies, making them irrevocable beneficiaries, or by an instrument of assignment, and neither of these things is done, the courts hold that the agreement and the decree or either of them create an equitable assignment of the policy which not only binds the insured and his beneficiary, but also the insurer if it has actual or constructive notice of the equitable assignment.\(^6\)

Difficult problems often confront the insurer not only when it appears that there has been an equitable assignment and it has permitted endorsements on request of the insured inconsistent with it, but where endorsements intended to conform with the requirements of the agreement or decree are not in harmony with it. Often the endorsements may agree with the requirements of the decree, but still fail to conform with its intent and purpose. For instance, the decree may specifically require him to name his wife or children as irrevocable beneficiaries when it was the intended requirement of the agreement merely to make them irrevocable beneficiaries during the minority of the children. This results from carelessness in preparing either the agreement or the decree. Insured has the right to designate his children as irrevocable beneficiaries of the policies on his life even though he is not required to do so by the decree. In such case they will have vested interests not only during minority, but interests which the insured will have no power to revoke at any time. Therefore, care must be taken by the insurer and by the attorneys representing the parties that the assignment or endorsement exactly complies with the requirements of the decree and the

attorneys for the parties must be careful that both the endorsement and the property settlement agreement or decree are in accord with the intention of the parties and of the court.

**Rights and Interests**

A policy designating insured's executors, administrators or assigns or his heirs as beneficiaries is always assignable by insured unless assignment is restricted by law or contract. Likewise a policy taken out by the beneficiary who is vested with powers to control the policy is assignable by the beneficiary alone. Where the insured reserves no power to change the beneficiary or waives such power, he cannot by assignment or in any other way affect the vested rights and interests of the irrevocable beneficiary. A few decisions seemingly to the contrary are based upon a construction of the contract to expressly give the insured the right to assign, to which the rights of the irrevocable beneficiary are subject. The only real exception to the rule is that recognized in Wisconsin based upon an ancient error to the effect that if the insured takes out a policy designating an irrevocable beneficiary, he may destroy the vested interests of the beneficiary by assignment or otherwise where he has continued to hold the policy and pay the premiums upon it. This, of course, is inconsistent with the well-established rule that the parties to a contract entered into for the benefit of a third party cannot destroy or revoke the interests of the third party without his consent. This erroneous rule, though repeatedly and consistently followed in the Wisconsin decisions, has presented serious questions arising in other states to which the insured while holding the policy has removed. Thus an insured after removing to Iowa attempted to revoke the designation and assign the policy to others than members of his family who were designated irrevocable beneficiaries. They, as well as the assignee, claimed the proceeds. Insurer was uncertain whether the Iowa court would apply the rule of that state which was in accord with the decisions of this state in respect to contracts entered into for the benefit of third parties, and hold that insured had no power to divest the interests of the beneficiaries, or whether it would follow the erroneous and inconsistent Wisconsin rule. The interested parties compromised before an action of interpleader was begun.

Even if the beneficiary is irrevocably designated, the insured usually has rights and interests such as the reversionary right to

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16a Anderson v. Groesbeck, 55 P. 1086, 26 Colo. 3 (1899).
the benefits of the policy and to control the payment of its proceeds in case the beneficiary dies in his lifetime, or perhaps the right to designate contingent beneficiaries and select an optional method of settlement, which rights and interests are assignable by him.

The absolute assignment will vest in the assignee the right to exercise all powers and privileges vested in the assignor unless by the terms of the policy they are expressly personal or their exercise is expressly limited.\(^{18}\)

The interests of the irrevocable beneficiary are vested and assignable unless assignment is restricted. For instance, the irrevocable beneficiary may be precluded from assigning her vested interest during the lifetime of the insured separately from the insured or without his consent. When she joins the insured in an absolute assignment of a policy on his life, every interest in the policy will be vested in the assignee. The assignee, of course, would have the right to substitute any other beneficiary and as a matter of practice should do so. Even though the beneficiary may be stopped by the assignment from claiming the proceeds, the assignment in itself would not effect a change of beneficiary.\(^{19}\) Sometimes absolute assignments are given for the purpose merely of vesting all powers in the assignee, but with no intention or purpose of substituting beneficiaries or contingent beneficiaries for those named in the policy. The circumstances may present a problem and, therefore, in such case it is advisable that the assignment express its purpose to transfer the policy subject to the beneficiary designations and expressly confer the power to revoke and change them upon the assignee. Perhaps this is more important in the case of the revocable beneficiary who has no vested or assignable interest. It has been held that though the revocable beneficiary joined insured in such an assignment and the assignee failed to revoke the designation, the beneficiary and not the assignee was entitled to the insurance proceeds.\(^{20}\) More of the decisions are to the contrary.

In case of the collateral assignment of a policy in which a revocable beneficiary is designated, for purposes of security, the beneficiary should be changed and redesignated subject to the assignment. A few years ago the weight of authority seemed to be that insured alone could not pledge a policy and that the lien of the assignee would be subject to the rights of the beneficiary upon

\(^{18}\) Thompson’s Ex’rx v. Thompson, 190 Ky. 3, 226 S.W. 350 (1920).


ASSIGNMENTS OF LIFE INSURANCE POLICIES

maturity of the policy. On the other hand, a constantly increasing number of cases hold that the insured may assign a policy without the consent or concurrence of the revocable beneficiary and that the effect of his assignment is to subordinate the rights of the revocable beneficiary to the lien of the assignee. These decisions are based upon the theory that as the beneficiary has no vested interests or rights, the insured should not be required to revoke the designation and then reinstate it subject to the assignment. Some cases are based upon the erroneous assumption that the policy gives the insured the right to subordinate the interests of the beneficiary by his pledge of the policy. Where the policy is construed to give the insured that right, the assignee of an absolute assignment may have interests superior to those of the revocable beneficiary. Of course, in those states where the law has not been definitely settled one way or the other, the insured should be required to revoke the beneficiary before assigning the policy. Where the revocable beneficiary joins the insured in an assignment of the policy, particularly where it is for the purpose of security, it may well be considered that she intended to subordinate her rights as revocable beneficiary to those of the assignee.

The purpose and effect of an assignment is always subject to proof. An assignment even though absolute in form or which is absolute by reason of its vesting powers of ownership in the assignee, when given merely for the purpose of security, creates a pledge of the policy or a mere lien upon it, and no matter what the form or conditions of the assignment may be, the relationship between the assignor and the assignee is that merely of pledgor and pledgee. The rights and duties of the parties as such conferred upon them by the common law or public policy or by statute, must be recognized by the insurer. Of course, if the insurer has neither actual nor constructive notice and in good faith is led to believe that the assignment is absolute in fact as well as in form, it will not be liable for conversion of the policy where it accepts the acts of the assignee as owner. But if insurer is chargeable with notice

24 St. Louis Trust Co. v. Dudley, 162 S.W. (2d) 290 (Mo. 1942).
26 New York Life Insurance Co. v. Rees, 19 F. (2d) 781 (C.C.A. 8th 1926); Wheeler v. Pereles et al., 40 Wis. 424 (1876).
of the character of the assignment, it as well as the assignee, may be liable for conversion of the policy. The insurer is surrounded with danger, for it may have in its files information which should prompt inquiry concerning the effect of the assignment. The purpose may be suggested by the assignment itself, by correspondence between the parties interested, or by the fact that insured continues to pay premiums upon the policy. It was held in one case that an assignment to a national bank should be presumed given for collateral security while in another case that fact alone was held insufficient.

The use of an absolute assignment by banks to evidence a mere pledge of policies is common. It is thought that the absolute assignment increases the rights and powers of the assignees, but legally it does not change the powers of the assignee from those of a mere pledgee. On the other hand, it often proves less desirable, for it does not identify the indebtedness secured or provide for indebtedness subsequently created. It fails to provide any remedy for default and in some states this may require foreclosure by action rather than in accordance with the rules of the common law.

It is sometimes considered that these dangers in the use of the absolute assignment form are avoided by an assignment which though stated to be given for purposes of security purports to vest in the assignee powers of ownership such as the right at any time without notice to surrender the policy for its cash surrender value. Insurer will not permit the exercise of such a power, for the exercise of it would clearly be a conversion of the policy. It is inconsistent with the legal rights and interests respectively of a pledgor and a pledgee. Such a provision is invalid under the common law and the statutes of no state permit it. Any provision in a collateral assignment that purports to give the assignee the right to appropriate the property pledged, without notice and irrespective of default is invalid. As a remedy for default the right to surrender the policy may be given the pledgee in lieu of the common law right to sell it where that right has not been changed by statute. But if the power to surrender is given, it should be exercised only upon notice to the pledgor affording a reasonable opportunity to redeem and comparable to the notice of sale required by the common law. The right to surrender a policy for the reserve or its cash surrender value is not the same as the sale of it and, therefore, the power to surrender as a remedy for default must be expressly provided in the assignment. It has been held that the power to surrender as a remedy for default must be exercised strictly in accordance with the power given. For instance, where power to surrender upon de-
fault is given, it may be considered waived and lost unless exercised promptly upon default.27

Problems arise in determining the rights of pledgees in respect to the payment of policies. Pledgees often claim the right, and sometimes their forms of assignment include the right, to receive the entire proceeds even though the secured indebtedness is less. They often claim that where several policies are assigned, they have the right to select the policy the proceeds of which shall be applied to the indebtedness. This claim is made sometimes for the very purpose of favoring the beneficiaries of one assigned policy to the prejudice of those of another. For instance, the pledgee cooperating with the beneficiary entitled to receive the proceeds in a single sum will insist upon the payment of its entire indebtedness from other policies payable to other beneficiaries, perhaps infants, under a settlement requiring the insurer to hold the proceeds for their benefit. Of course, if the indebtedness exceeds the proceeds of all policies pledged to secure the indebtedness, the pledgee is entitled to receive the entire proceeds. Even where there is other collateral not available for immediate application to the indebtedness, the pledgee is entitled to satisfy its indebtedness from the funds available and is not required to await an opportunity of applying the proceeds of other collateral. Therefore, the insurer is entitled to proofs of the interest of the pledgee.

It must be recognized that in respect to some forms of collateral in the nature of choses in action, the pledgee is entitled to receive and does receive the full amounts paid upon such collateral. This right is based upon convenience and not upon any absolute right of the assignee to receive payments in excess of its indebtedness. Its absolute right is merely to recover the secured indebtedness. A life insurance policy generally designates beneficiaries. It sometimes provides, at the election of insured, that the proceeds shall be held by insurer and paid to the beneficiaries in installments. The power to elect such a settlement, if not exercised by the insured, may be exercised by the beneficiary. Surely, the pledgee should not be permitted uselessly to prevent the exercise of such rights. The insurer should not surrender its duty to make payment in accordance with the policy upon the assumption that the pledgee will distribute the proceeds in excess of the indebtedness in accordance with the policy. Of course, it cannot do so where such a settlement has been selected.

Where insured has assigned different policies, perhaps in different companies, and providing for payment to different beneficiaries or in different shares, the pledgee has no power to select the proceeds of particular policies for application to the indebtedness. Immediately upon death the various beneficiaries in such case have vested rights to the proceeds of the respective policies, subject only to the required payment to the assignee. If there are various funds owned by different beneficiaries immediately available for payment of the indebtedness, the pledgee may be required to accept in accordance with the rule in equity for marshalling of assets, or a beneficiary may be subrogated to remedies of the pledgee against others. It is the duty of the insurer to protect beneficiaries of its policies and their rights under the several policy contracts and to insist that the proceeds be applied in accordance with equitable principles, performing as far as possible its contract with the insured.

Similar problems arise in the case of parol and equitable assignments. Regardless of insurer's efforts to relieve itself from liability unless written assignments are filed with it, it will be held responsible to those entitled to the benefits of the policies under such assignments if it has actual or constructive notice of them. The insurer may have notice that there has been a divorce between the insured and beneficiary and a change of beneficiary is asked which apparently is made pursuant to some property settlement agreement or decree of divorce. The insurer who does not examine such an agreement and decree and endorse its policies accordingly, may find itself liable, after payment of its policies to the beneficiaries, to others who are held equitable assignees. It must exercise care not only to determine the rights of such equitable assignees, but to require its policy provisions in respect to payment to accord with the requirements of such agreements and decree. It is confronted with the same difficulties in respect to other contracts that amount to equitable assignments or at least restrictions upon the power of insured to assign policies on his life. To illustrate, the insured may designate trustees of an express trust as beneficiaries of his policies expressly reserving the right to revoke their designation. A valid trust may expressly provide that the insured may recall the policies he has thus placed in trust and the power can be exercised.

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Insured may exercise such power even though the trust agreement has no such provision and is irrevocable. On the other hand, the trust agreement may amount to an actual or equitable assignment of the policies. In some cases the trust agreement employs conventional terms of assignment. In other cases it may effectively provide that the rights of the trustee under the policies may not be revoked, or it may otherwise prevent insured from exercising the power to revoke the designation. In such cases, it may be considered that the power is held by insured only in trust. The trust agreement must be examined before insured is permitted to revoke the designation of trustees as beneficiaries, for the insurer may be considered to have constructive notice of such equitable assignment or limitation upon the powers of the insured.

32 St. Louis Union Trust Co. v. Dudley, 162 S.W. (2d) 290 (Mo. 1942).
HANDLING THE MEDICAL WITNESS

Dr. W. Webber Kelly*

It is not my intention to attempt to discuss in detail the exhaustive subject of expert medical testimony. Such a detailed discussion lies within the province of one trained in the law. My purpose is merely to set forth some of the personal experiences and impressions gained from 35 years of continued and frequent attendance in court as a medical witness. My opportunity to observe the workings of the wheels of justice has not been confined to the American form of jurisprudence—it has also extended to the English system from whence it derives. These long and tedious vigils in the halls of justice have given me ample opportunity to observe and evaluate court procedures in general, attorneys in particular and, incidentally, witnesses and jurors. It has been a most interesting psychological study. Any references to the legal problems concerned with the appearance of a medical witness in court are culled from a somewhat thorough investigation of the literature on the subject. The reason for this investigation was that I might be more intelligently informed in the matter, and thus acquire a better understanding of my duties and responsibilities, as well as the limits within which my testimony would be competent. It is my personal belief that medical schools fail to devote sufficient attention to medical jurisprudence insofar, at least, as it applies to the physician’s appearance in court. As a result, doctors called upon to testify as experts are unaware of the bounds within which their testimony may be given, as well as the latitude which permits them to give full effect to their opinions.

Having lived under two flags, I have naturally compared the American system of jurisprudence with that pertaining in British courts of law. While deeply impressed with the pompous dignity, the wigs and gowns, the medieval ceremonials and the more rapid administration of justice which characterize the courts of England, the conviction remains that notwithstanding its contrasting informality and comparative slowness of action, the American procedures are more fitted to our democracy, and maintain a closer relation to the original idea of trial by one’s peers. In the exercise of broader powers and discretionary attitude of its presiding judges, as well as the authority assumed in the conduct of the trial, comments on the weight of evidence and instructions to the jury, the

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federal court follows more closely the English pattern. Throughout the British Empire, all courts of justice are held in very high regard. Respect for the law and fear of the swift consequences of its violation dominate the mind of the average British citizen. Criticism of the honesty of English jurists, in or outside the court room, is considered lese majeste, and is punished severely. The unfortunate incidents which occasionally mar court trials in America tend to shock the foreign observer. True, these incidents are isolated cases, but, if the prestige of the courts and of the law is to be upheld and preserved, all attorneys must at all times unite in maintaining the high standards of their calling and continue to foster the dignity of trials. To the lay observer, state court procedure appears to require some modification. One cannot escape the conviction that judges are handicapped in the performance of certain duties which appear clearly to lie within their province. Legal limitation and fear of judicial error are no doubt at fault. In marked contrast to the practice of our federal courts, state judges are deterred from commenting upon the weight of evidence or the credibility of witnesses. It follows that juries, admittedly ill equipped, receive little or no guidance in these matters. This rule is not as rigidly adhered to in all of the states. In California the trial court may comment upon the evidence as a whole or upon the testimony or credibility of the witness providing the courts comment is temperate and fairly made. Thus, the comment of the court is not confined to a colorless recital by way of summing up the facts. My information reveals that in federal trials, while the court may not direct a verdict of guilty in criminal cases, it may at all times either directly or indirectly analyze and comment upon the weight of evidence, and express its views with regard to the testimony of witnesses leaving the ultimate determination of the issues of fact fairly to the jury. The reaction of the layman to these divergencies is that some middle ground could be found which would expedite trial and promote justice to a greater degree.

**Expert Testimony**

The original purpose of expert testimony is obvious. It is permitted in order to aid in the elucidation of certain issues in the case, which elucidation is only possible by the testimony of witnesses possessing special knowledge not to be obtained from the average individual. The general rule is that opinion evidence is not admissible; in other words, the witness must testify to facts within his knowledge or those derived from his own perception. While it is

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true that from necessity the conclusions of certain witnesses are admissible in matters of identity, quantity, value, time, distance, velocity, heat, cold and others; as well as questions concerning various mental and moral aspects of humanity; namely, temper, anger, fear, excitement, intoxication, veracity and general character: such testimony is conclusion evidence and based upon evidentiary facts. The general rule of opinion evidence is flagrantly broken in the case of expert medical testimony. Such testimony permits the consideration and credence by the jury of opinions and conclusions based upon facts not necessarily within the knowledge or observations of the expert, but introduced in evidence by other witnesses and presumed to be true. Its limitations appear to be very broad. Once having qualified and while his competency remaining unchallenged, it permits the witness by hypothesis and assumption of facts either testified to at the time of his direct examination, or upon promise of later proof, an expression of opinion not only as to the injury or episode being the proximate cause of the present disability and a belief as to the permanency of the litigant's present condition; it also allows statement of belief as to the probable or even possible future onset of remote effects. At this point, therefore, medical expert testimony enters the field of prophecy. It has appeared to me that this matter of prophecy is at times permitted to go too far. Belief as to probable exacerbations or remote results in the individual's mental and physical state without evidence that such a development is already apparent, appears unreasonable and is obviously double speculation. Thus, to say that any nervous disorder resulting from an injury or shock may at some distant future time probably or possibly result in insanity, is to assume the role of prophet. Medicine is a changing and progressive science, and the last word in therapeutics today may not be the last word tomorrow; however such speculation appears to be permissible.

**Hypothetical Question**

Webster defines hypothesis as "A tentative theory or supposition provisionally adopted to explain certain facts, and to guide in the investigation of others." This definition defines the mechanics, at least, of hypothetical inquiry. As I understand it, the theory and supposition must be in the case, and the facts supporting them must

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2 Block v. Milwaukee Street R. Co., 89 Wis. 371, 61 N.W. 1101 (1895); Hanton v. Omro, 122 Wis. 337, 99 N.W. 1051 (1904); Faber v. Reiss Coal Co., 124 Wis. 554, 102 N.W. 1049 (1905); Sundquist v. Mad. R. R., 197 Wis. 83, 221 N.W. 392 (1928).

3 SCHWITZER, NEGLIGENCE ACTIONS, p. 376, n. 1; Griswold v. N. Y. etc. R. C., 115 N.Y. 61, 21 N.E. 226 (1889).
have been testified to, before a basis may be established for the propounding of the hypothetical question. The groundwork for such question is, of course, a simple matter for the attorney whose purpose it is to offer it later in the trial. In framing such an interrogation a great deal of care and effort must be spent. To attempt to recite extemporaneously the facts desired is often a confusing and unsatisfactory method of handling it. While in court I usually hear two constant objections by opposing counsel to the hypothetical questions submitted to me. First, that the question recites facts not shown in the evidence, and second, that the question does not contain all of the facts in the case. A promise to introduce the missing facts later in the case appears to be sufficient to invalidate the first objection. As to the second, it would appear that the question need not include any particular number of facts, it may assume any one or more facts whatsoever, and need not cover all of the factors which the questioner alleges in his case. The questioner is entitled to the witness' opinion in any combination of facts that he may choose. It is often convenient and even necessary to obtain that opinion upon a state of facts falling short of what he or his opponent expects to prove because the questioner cannot tell how much of the testimony the jury will accept; . . . For reasons of principle then, and to some extent of policy, the natural conclusion would be that the questioner need not cover in his hypothesis the entire body of testimony put forward on that point by him or by the opponent, but may take as limited a selection as he pleases and obtain an opinion on that basis. Such is the orthodox doctrine as applied to most courts. On the other hand, other authorities are of the opinion that generally speaking a hypothetical question should state all the facts relevant to the formation of an opinion . . . there is no exclusive formula . . . and the matter of form is largely discretionary to the trial court. At this point may I, as a layman, offer a word of caution as to the length of the hypothetical question. Often one hears a question covering several pages of foolscap and containing so much material that the attorney himself cannot remember it. Under these circumstances it is difficult to believe that the jury at its conclusion is in any better position. Limited to essential facts, clearly and intelligently cited, upon which the jury may know the premises upon which the opinion is to be given, it appears to be more effective. One prominent trial lawyer tells me that he adopts the rule of writing the question carefully and as concisely as possible, committing

1 Wigmore, Evidence, § 682, p. 778.
2 3 Jones, Evidence, p. 2427-28.
it to memory and then tearing up the written version. His argument is that unless he can remember it, he is certain that the jury cannot do so. The effect of medical expert testimony upon the jury has intrigued me. After speaking to many jurors, I am now convinced that its effect is greater than I formerly believed. This, of course, depends a great deal upon the manner in which this evidence is given, and is concerned with the apparent honesty of the witness, the firmness of his conclusions and, above all, his employment of language as intelligible as possible to laymen serving as jurors. Many expert witnesses forget that the jury exists, and address their answers to the questioner. His replies should be directly aimed at the jury, and he should, if necessary, change his position in the witness chair in order that they may hear distinctly what he says.

At this point let me discuss that individual who is at once the trial and despair of judges and opposing counsel, and the white haired boy of the trial attorney who engages his services.

**The Expert Witness**

It must be born in mind that a physician who qualifies as an expert must expect to be judged by a different standard than the physician who gives evidence as an ordinary witness. By this is meant that from the latter we have no right to expect more than average knowledge of the issues in the case. From the former we have a reason to demand an opinion based upon a larger personal experience and scientific familiarity with the issues involved. An interesting point occurs in connection with this latter statement. Objection may be raised to an expert witness as to the bookish source of his knowledge; first, because it implies a lack of skill and experience as affecting his expert capacity for judgment; and second, because it involves accepting as a knower of a given fact one who has not really observed it for himself, but is trusting in the opinions of others. In other words, it is an objection against the witness' experience on the quality of his knowledge. To deny the competency of a physician who does not know his facts from personal observation in similar cases is to reject medical testimony almost in its entirety... Medical science is a mass of transmitted data; general relations are rare which are the result of one man's personal observations exclusively; and the law cannot expect its petitioners to obtain these rare persons.\(^6\)

There appears to be no precise general rule as to how the skill of a witness must be acquired. According to decisions in Michigan

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\(^6\) *Wigmore, Evidence*, § 687, p. 782.
a witness may express an opinion upon certain matters even if his knowledge is derived from study alone.\(^7\) Wigmore agrees with the above rule, feeling apparently that the knowledge however acquired is a question relating only to the weight of the evidence given.\(^8\) The Supreme Court of Wisconsin holds that the opinion of an expert must, in addition to knowledge, be derived from experience. The logic of this position is that since books themselves cannot be read in evidence, extracts from them should not be permitted from the lips and memory of the expert.\(^9\) I raise this question because of an occurrence in a personal injury suit within my knowledge. The question involved a case of a rare pathological condition of the eye in which an expert from Milwaukee was called to testify by the plaintiff. Upon admission that the witness had never seen a similar case in his experience, a plea of lack of competency was upheld and the witness was not permitted to testify. The decision of the trial court as to competency lies within its own discretion, and unless founded upon some error of law, serious mistake or abuse of discretion, its ruling is not reversible.\(^10\) Relative to competency, it must be remembered that section 147.14(2) (Wis. Stat. 1941) provides "that no person shall have the right to testify in a professional capacity except when duly licensed in Wisconsin; except those licensed in other states may testify in Wisconsin, when such testimony is necessary to establish the rights of residents of this state in a judicial proceeding and expert testimony of licensed practitioners of this state sufficient for the purpose is not available."

Another difficulty encountered by the expert witness is the objection that his opinion given as the result of his examination of the plaintiff or defendant, as the case may be, is in part based upon hearsay; in that he must rely upon the patient's own statements as to the history and symptoms and that such hearsay testimony is not valid. Such limitation is apparently the rule in Wisconsin, although in other states the rigidity of this practice does not pertain. As Wigmore logically states, the exclusion of information so obtained and its basis in the formation of the expert's opinion does in strictness exclude all medical testimony based upon personal examination.\(^11\) Thus the witness is confined in testifying only as to the objective symptoms. A qualified expert can, however, overcome

\(^8\) 1 Wigmore, Evidence, § 569.
\(^9\) Soquet v. State, 72 Wis. 659, 40 N.W. 391 (1888); Zuesdorf v. Grotsky, 195 Wis. 253, 218 N.W. 186 (1928).
\(^10\) 3 Jones, Evidence, § 1317-1318.
\(^11\) 1 Wigmore, Evidence, § 688, p. 783-784 . . . "Those who object to testimony of the sort where considered must expect to surrender the medical witness stand to veterinary surgeons exclusively."
This handicap by enumerating many of the subjective findings and by increasing his powers of observation and giving proper expression to them. It would appear to be a case of much ado about nothing as an experienced attorney can readily present the history, symptoms and any other missing facts in hypothetical form for the expert's conclusions.

Prerequisites for the Medical Expert

It goes without saying that he should be absolutely honest and unbiased in his testimony, and thoroughly familiar with the medical aspects of the case in which he is testifying. This should be done by preparing himself by looking up the general literature on the matter and for his own information familiarizing himself with the opinions of authorities who may have written upon the subject. To this must be added his professional background and standing in the community in which the action rests, or his medical reputation throughout the state if he is from the outside. He should display ready understanding and even anticipation of the questions propounded, and possess sufficient ability to take care of himself as far as possible without protection from the attorney engaging his services. He must, however, avoid the delusion that he is a medical jurist. He should at all costs retain great composure and control of his temper, and be definitely courteous and patient under cross examination. He should, as previously stated, speak distinctly and slowly, and in terms as intelligible as possible to the jury. Technical terms, unless explained, are lost upon jurors and nullify the effect of his testimony. In enumerating the qualifications I would emphasize preparation. To my mind this is very essential. One should never enter a lawsuit as an expert witness without thoroughly acquainting himself not only with the gross medical facts involved, but with the anatomy, physiology and other allied subjects connected with them. My personal preparation includes an effort to anticipate the possible questions that may be asked me by the opposing attorney. Needless to say most of these questions are never asked, but should they be, I expect to be in a position to have a ready answer. It may appear paradoxical, but it is nevertheless true that many intelligent and well educated physicians fail to make good witnesses. This results from shyness, fear, or lack of ability to express themselves logically. On the other hand, many physicians of mediocre attainments, with alert minds and plenty of self assurance may make a good showing. The danger in the latter case lies in the possibility of disaster at the hands of an attorney who is well prepared medically and with experience in this type of cases. Wise
cracking and other forms of subtle humor should be strictly avoided by the witness. On the other hand an attitude of abject humility or what may be termed the “Uriah Heap complex” is equally to be deplored.

**The Question of Partisanship**

The question of partisanship, as evidenced by the invariable conflict of opinion by experts on both sides of the case, has often been discussed. A physician should refuse to testify in cases where any doubt exists in his mind as to the correctness of the position assumed by attorneys or other medical witnesses. I am glad to say that having advanced my views and objections to the medical theory of the case, no attorney has ever insisted in his demands for my services or attempted to influence my convictions or decisions to testifying. As a general rule no one has a right to question the honesty of the medical witness. It is true that one may unconsciously become partisan, due, no doubt, to the fact that he is certain that whatever conclusions he testifies to will be contradicted by the doctor testifying on the opposite side. There may be, and are, many honest differences of opinion in medical matters, and it is very hard to get away from one’s own convictions. Some witnesses become dogmatic and are unwilling to admit that any opinion other than their own can possibly be correct. The contradictory form of expert testimony as evidenced by those testifying on opposite sides of the case has become proverbial, and several suggestions have been made for its correction.

I find that under Section 357.12 of the Wisconsin Statutes, the judge of the trial court in criminal cases may, after notice to the parties and a hearing, appoint one or more disinterested qualified experts, not exceeding three, to testify at the trial. Under this section, these experts are required to subscribe to a special oath and their compensation is fixed by the court and paid by the county upon the court’s order constituting a part of the costs of the action. They are, of course, subject to cross examination by both parties who may also summon other expert witnesses at the trial. Why this practice cannot be extended, even in modified form, in civil cases is hard to fathom. For many years efforts by eminent members of the bar and the several professions have endeavored to have enacted by the various legislatures, laws authorizing the court to appoint its own experts, especially when there appears, as is frequently the case, wide differences between the experts for the plaintiff and defendant, differences which tend to completely confuse and confound both the court and the jury.
In certain foreign countries, as in Germany for example, the expert is chosen by the court from a list of scientific and highly qualified members of the various professions. A penalty is attached for disregarding the summons, and the commonwealth provides a moderate fixed compensation, together with expenses, for appearance and testimony in court. The medical expert's position becomes thereby an official one; in fact he is thus made an officer of the court. It is regarded an honor and distinction to be so designated, and there is attendant on the office every courtesy and dignity to which its responsibilities entitle it. The utmost care is observed in the selection of physicians and surgeons as official experts, so that only men of known special scientific attainments, personal integrity and possessing the ability to clarify complex problems, are chosen. Section 1871 of the California Code of Civil Procedure provides: "When it shall be made to appear to any court or judge thereof, either before or during the trial of any action or proceeding, such court or judge may, on motion of any party, or on motion of such court or judge, appoint one or more experts to investigate and testify at the trial of such action or proceeding relative to the matter or matters as to which such expert evidence is, or will be, required, and such court or judge may fix the compensation of such expert." The commission on the administration of justice in New York State has proposed similar legislation, and it would appear that the trend is definitely in the direction of the appointment of experts by the courts.

Qualifications Admitted

I believe that many attorneys err in failing to emphasize the qualifications of their expert. "Qualifications admitted" has come to have a familiar sound to me. This short cut method of qualifying an expert has two principal objections. First, the counsel whose witness you are misses an opportunity to impress the jury with any qualifications including medical training, membership in recognized medical societies, period of practice, general experience; as well as familiarity with the issues in similar cases. Secondly, "It must be born in mind that once having stipulated the witnesses qualifications the opposing attorney is barred from later attempting to impeach the competency of the expert and complaint cannot be made on appeal that he was not qualified."  

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HANDLING THE MEDICAL WITNESS

CROSS EXAMINATIONS OF EXPERTS

Unless properly prepared the average attorney is gambling with odds in the cross examination of a competent medical expert insofar, at least, as the technical medical details of the case are concerned. Attorneys frequently engaged in personal injury cases are of course an exception to this statement. Proper preparation with the aid of some competent medical man prior to the cross examination is imperative. I do not mean by this that the opposing attorney should entirely refrain from cross examination. Inconsistencies and contradictions and conclusions clearly illogical should be questioned and questioned severely.

"Yes or No"

The medical witness is frequently instructed to answer a question "yes" or "no." Compliance with such a demand may be impossible. If such is the case, the witness should so state. If ordered by the court to do so without being permitted to give the reasons for his answer, it is a simple matter for counsel to ask him on redirect to give the reasons for such an answer, and to explain the conclusions or premises which required him to do so. Such an opportunity cannot be withheld.

The common law rule is that scientific books may not be read to the jury as evidence, because the statements therein contained are wanting in the sanctity of an oath, are made by one not present, and who is not liable to cross examination. While the common law rule has been modified by statute in many states to allow certain scientific books to be received in evidence, the rule of exclusion still prevails as to medical books.14 Mortality tables for estimating of the probable life of a party, the given age, chronological tables, tables of weights, measures and currency and the like, are admissible to prove facts of general notoriety and interest in connection with such subjects as may be involved in the trial of a cause.15 But medicine is not considered as one of the exact sciences: it is of the character of inductive sciences which are based on data which each successive year may correct and expand, so that what is considered a sound induction last year may be considered an unsound one this year.16 In some jurisdictions it has been held that the medical witness may reinforce his opinion from a stated condition by showing that certain textbooks upon the subject are in accord with his views.17 Such a practice in my opinion is dangerous, for the witness

14 MUNDO, THE EXPERT WITNESS, p. 87.
15 Wagar v. Schuyler, 1 Wend. 553 (1827).
16 WHARTON, EVIDENCE, § 665.
may be discredited upon cross examination from extracts read from such authorities and contradictory statements or those subject to varying interpretations are to be found in the same textbooks. It is generally held, however, that the use of medical texts to prove a fact in issue is improper. It has been my lot on several occasions to face attempts by opposing counsel to read statements from textbooks by authorities about whose standing there could be no question, and then requested to state whether I agreed or disagreed with the theories they embrace. A competent witness will refuse to be drawn into any such trap. Counsel must be expressly limited in references to only such treaties as have been used or referred to by the witness upon his direct examination.\footnote{Schweitzer, \textit{op. cit.}, p. 386-387, n. 1, 388, 389.}

The witness may refresh his memory by referring to X-rays, charts made by him or under his direction and notes taken by him at the time when the matter was fresh in his memory. The rule respecting notes is that the witness is allowed to refresh his memory by anything written by himself or under his direction at the time when the fact occurred, immediately thereafter or at any time when the fact is fresh in his memory. Unless necessary, notes should not be used. If notes are used, they must be produced so that the adverse party may see them and cross examine the witness upon them as he chooses. They may be read to the jury.\footnote{Mundo, \textit{op. cit.}, p. 47; Braxten v. Brown, 197 Minn. 511, 267 N.W. 489 (1936); Wright v. Upsilon, 303 Ill. 120, 135 N.E. 208 (1922); People v. Schepps, 217 Mich. 405, 186 N.E. 598, 21 A.L.R. 658 (1922).}

Before leaving the subject of expert testimony, may I suggest the abandonment of a policy which I think is undesirable. I have reference to having counsel’s own medical witness sitting behind him and coaching him during the examination of the other attorney’s medical expert. Physicians regard this as not being strictly ethical, and there is no question in my mind that it has a distinctly injurious psychological effect upon the jury. Not only is it unsatisfactory in technique, but it is an admission of counsel’s own weakness, and gives the impression of not being good sportsmanship.

\textbf{The Lawyer From the Layman’s Viewpoint}

May I begin by saying that collectively and individually I hold the members of the legal profession in the highest regard. In my contacts with them throughout the state, I have been impressed by their high character and honesty of purpose. It is my belief that the State of Wisconsin is outstanding in the caliber and professional integrity of its Bar. This is in great part due to the judiciary, for the character and ability of the judge reflect upon the members of
his circuit. Among lawyers there appears to me to be a great degree of consideration for each other and a large absence of the petty jealousy that exists in other professions, including the medical fraternity. Personally, I have experienced nothing but courtesy and kindness from the Bar as a whole, and while I know that to many of them I have at times been very trying, they have never failed to treat me with respect and consideration. Therefore, anything that I may say will indicate no desire on my part to be disrespectful or unkind. It is sometimes interesting, however, and even profitable to see ourselves as others see us. Hence these observations of a layman.

**Preparation**

One thing is apparent with some attorneys, and that is their lack of preparation. This arises either from the fact that they are too busy and have insufficient help, or from neglect. They enter court without definite strategic plans and even familiarity with the legal angles involved, as well as an absence of understanding as to what their own witness will testify to. In some cases cross examination has all the earmarks of a fishing expedition and some of them should be members of the Isaac Walton League. Many attorneys of mediocre ability can make a conferee with definitely greater legal experience look sick by the simple expedient of thoroughly preparing his case. The most successful members of the Bar of my acquaintance are usually those with whom preparation is a ritual. I would much prefer not to be associated with the attorney who calls me up the night before a case to discuss the important matter of the medical testimony. On the other hand, it is a joy to work with one who is sufficiently interested to discuss these details two or three times before putting me on the witness stand.

**Over Examination**

Another matter that has intrigued me greatly is the yen some attorneys possess for over examination. How frequently one sees witnesses tied up completely and with the record in excellent shape, only to have the effect of their answers destroyed by continued questioning. Having obtained an answer that is entirely satisfactory to his case, some attorneys persist in asking the same question in several different forms, until finally the answer is so modified as to be hardly recognizable. A satisfactory answer is an asset worth preserving. Why attempt to paint the lily? Equal danger appears to lie in failing to sufficiently examine the witness. This was brought forcibly to my mind in a murder case in which I was retained by the state. An eminent psychiatrist and excellent witness
was on the stand. In spite of advice to the contrary, the prosecutor read to him two long detailed hypothetical questions, and instructed him to answer "yes" or "no" to both. His strategy was then to turn him over to counsel for the defense in the full expectation that he would be cross examined, and in this way enabled to elaborate his answers. These were the only two questions asked him. The result was unfortunate. The attorney for the defense simply said, "No questions, doctor" and the witness left the stand. Thus the testimony of an outstanding expert, brought many miles for the specific purpose of tearing the defense apart, was completely thrown away. Moral: don't depend on the other fellow to try your case.

Another thing that is noticeable to an onlooker is the eternal leading that goes on in the examination of witnesses. My rough guess is that a large majority of the questions asked are leading. This has become such a habit with some attorneys that when they are called on it, they are often at a complete loss to frame the question in a non-leading manner, and are often aided by the court in their dilemma.

Conscientious Objectors

A psychological understanding of the judge, as well as the jury would appear essential. Many attorneys acquire psychological knowledge from experience, but often at the expense of many disasters that might have been avoided. No doubt legal psychology is a part of the curriculum of every law school. If not, it should be, and also emphasized. Some attorneys seem to have an affinity for objecting and objecting eternally. To one who is not versed in legal lore, most of these objections appear to be trivial. An experienced trial attorney of my acquaintance, when asked by me why he did not object to a certain question, informed me that no matter how irrelevant or immaterial, he never objected so long as the question did no harm to his case. He felt that he got along with the judge a great deal better by following this rule. It is used by some attorneys to confuse and confound opposing counsel. Whether this is effective or not I do not know. It is not only the constant objections which delay the trial and tire the judge, but the exceptions to the judge's ruling one occasionally hears that are irksome and annoying. Since exceptions are, in this state deemed taken to adverse rulings, they are unnecessary—why rub his Honor's fur the wrong way?

With the passing of the years, it has been noticeable that the explosive and noisy type of oratory is gradually fading from the scene; it seems to have disappeared with the crinoline and the political torch light parades. Occasionally one still hears it, but it has
lost much of its former effectiveness. Side remarks made by one attorney to another, remarks that are intended to be humorous but which are frequently bitter and vindictive are still with us. Beyond causing momentary amusement, they have little favorable effect upon the average juror. This type of vaudeville would never be permitted in an English court room. It tends to lower the dignity of the court. Some judges, strange to say, are very tolerant in this regard.

**Cross Examination, Material and Otherwise**

An expert witness needs a long memory, for one is not infrequently confronted with prophecies made at previous trials. A somewhat amusing, but nevertheless tragic, incident occurred a short time ago which illustrates this point. It occurred in federal court in a case with which I was associated. One of the witnesses for the government, an eminent and distinguished professor of one of our large universities, was on the stand. The opposing counsel (with no text books in sight) read to him a long statement which he had written on his scratch pad. The question covered a theory closely related to the issue in the case. When he had finished he asked the witness whether he did not believe that the statement was a fair one, and covered the situation thoroughly. The witness could hardly wait for the completion of the statement and question, and immediately replied, “I utterly disagree with that theory—in my opinion it is not correct.” The attorney looked at him intently for a moment and then said, “You are sure, doctor, that you disagree entirely with that statement?” The witness answered, “Yes.” “That is strange, doctor, because that is an exact copy of a paragraph contained in a text book of which you are the author, and which is in general use among medical students and practitioners.” The judge immediately called for the book, which was produced, and the witness was required to read the paragraph in question and state whether it did not coincide word for word with the excerpt which had been read to him.

I have had my full share of questions that are irrelevant and immaterial. It has often amazed me not only that these questions should be asked, but that they should be permitted by the trial judge. Some of them call for a facetious answer, although this should be avoided if possible. The classic answer of Dr. Joseph Collins of New York is an example: Q. “As a matter of fact, doctor, you are an alienist pure and simple?” A. “Yes, an alienist moderately pure, but not simple.” Let me quote one or two irrelevant queries which come to my mind. Q. “You testify in all of Attorney Jones’s cases, don’t you doctor?” A. “I am not in a position to an-
swer that question intelligently, because I am not aware of how many cases Attorney Jones has. Q. "How far North, how far South, how far East and how far West have you traveled to testify for Attorney Smith?" Where is the relevancy in a question of this type? Q. "You are a personal friend of the attorney on the other side, are you not doctor?" The implication in such a question is obvious, and the answer equally illuminating. The question as to the size of the fee the expert witness expects to get in a given case, while not frequent, occasionally present itself. Its object is evidently to demonstrate interest and bias, and in that respect is, of course, proper. In the majority of cases, the matter of compensation has not been discussed between the attorney and the witness at the time of the question, but an answer to this effect does not appear to be sufficient. Then comes the query, "How much are you in the habit of receiving for testifying in court?" This would appear irrelevant, as the compensation received in some previous trial has certainly no bearing on the present case. The best way to handle this question is to answer it frankly and responsively, and let the matter end there. Occasionally one runs into trick questions and the witness must be on his guard. In a certain case I had testified that in my opinion the injury in question was permanent, and I knew of no treatment or operation that could correct it. On cross examination the opposing attorney asked me these questions — "You say, doctor, that nothing can be done to cure this man?" My answer was "Yes"—"You don't believe that Christian Science could do anything for him?". My answer was—"I really couldn't say, for though I have a deep respect for Christian Science, I am not familiar with its operation in conditions of this nature." This apparently did not satisfy him. "Will you say positively that Christian Science could not cure him?" My answer was—"I would make no such statement, because as I have already stated, I am not familiar with it, although I have heard of some remarkable results that it has accomplished." As I stepped down from the stand and passed the attorney I whispered to him—"How many Christian Scientists have you on the jury?" He smiled and answered—"Only two." This was a clear case of fishing, but my legal friend had forgotten the repeated admonition and cardinal rule for fishermen, enunciated by the late Isaac Walton,—"First, know your fish." (—the gentleman apparently mistook me for a sucker.) The question was, of course, improper and should have been objected to. No expert of one school of healing can be questioned about any other school with which he is unfamiliar.
My purpose in presenting this paper has been to record some of the experiences, impressions and reactions derived from a close observation of court procedures over a period of many years. It is only proper that a medical expert witness should be concerned with those phases of the law regarding competency, the use of medical texts, opinion evidence, hypothetical inquiry and other legal questions which directly affect him as a witness. Such knowledge, even though lacking in profundity, is in my opinion necessary to enable a medical expert to perform his function intelligently and effectively provide his services, and to aid the court and jury in promoting justice.
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GOOD SYSTEM—GOOD CITIZENS—GOOD GOVERNMENT

THIS is a continuation of the discussion started by Mr. Rix, and continued by Mr. Seasongood. As suggested by the former, I shall attempt to widen the horizon by discussing our national government in some of its aspects. Basic governmental philosophy, if not national politics, (largely eliminated in local affairs), should underlie all government in America.

One of the increasing difficulties is the number of people in administrative positions in government, public utility or other employment, who under the law or civil service rules, or the rules of the organizations they serve, can take no active part in political affairs. But of those who are entirely free to do so, comparatively few give any attention to government, except to criticise its officials or their official acts.

As to the claimed corruption and inefficiency of government and the indifference of citizens to political duties, may I say, that, in my experience and observation, the great mass of people have their time largely taken up by their daily tasks necessary to earn the money with which to live, and feel justified in using their spare time in some recreation, perhaps involving wife or children, or some avocation, art, or personal project, or in attending meetings or performing duties with respect to some religious, fraternal, or charitable organization or service club, which commands their especial interest. They therefore have little time left in which to give any attention to local, state or nation politics and the party organizations on which they are based, but on the honest and proper management of which their right to live in peace as a free citizen of a free country depends. They just have not time. And, too, "Politics is such a dirty pool" that it is to be avoided by them. Often they pride themselves on being non-partisan. Some fear loss of business.

Thus they rationalize to themselves and others, in order to excuse themselves from doing their duty as voters, which on a little thought should be plain to them. And they account themselves as among the best citizens and, to enable their organization to function in harmony, they exclude discussion of political subjects at their meetings.

These "best citizens" must be induced to prove themselves and to give the necessary time to help make self-government function satisfactorily, or some day they will find themselves living under some autocratic government which does not need their organizations or their services, but only requires their slavish obedience to orders given by it.

I do not think it will be denied, however, that any system of government, whether the one we have, or some other kind set up in its
place in the years to come, for any reason, will be operated by the same kind of human beings we have now, (but let us hope with improvement and more interest in government), with the same traits and motives, and the same tendencies to do wrong under some conditions, but possibly with better control of themselves. A sound system, however, tends to minimize the faults and keep our liberties.

Because of these human traits and tendencies, a people who desire individual freedom require a system which holds the extremists and political wrongdoers in check. Just as both former editorials suggest, however, the people must be aroused in some way to the danger, not only of corruption in local government, (of which we have little in Milwaukee), but of the far greater danger, as it seems to me, of losing our liberties entirely by a change of systems. They must be aroused to elect honest and courageous statesmen to Congress, and also honest and courageous men to office, high and low. That must help in obtaining good government, locally or nationally, or anywhere between.

Both they and we, however, must not forget that corruption, bungling, and inefficiency are the price of liberty. But more corruption, more bungling, and more inefficiency: are the price a free people pay for their indifference to government affairs. The greatest danger, however, to self-government is the failure of the most intelligent, educated and cultured citizens, (those having the greatest stake in a government of free men), to really understand the philosophy of their government, or, if they do, to take any proper interest in political matters, except possibly for a few days before election, when they suddenly find themselves compelled to make their choice between two unwanted candidates who are the result of a primary in which they took no interest whatever.

These are some of the things which make self-government "walk with a crutch," and cause it to be so severely criticized in its results. Washingtons do not invite themselves to run for public office. The best citizens should be able to find among themselves the best men for official positions, and should pledge support and induce them to serve and also to make the necessary financial and other sacrifices; but this is seldom done. Most candidates act on their own inspiration.

Because of these human weaknesses or faults, and this general indifference, is it not plain that the most important thing in self-government is a good system? Should we not see that we keep the best system which has ever been known for free men, especially in view of the general neglect of political affairs?

It seems clear to me at least, after many years of experience, and with political affiliations which depend on principles instead of any party label, that the American system of government is the best ever known for a people who want to be free and to govern themselves.
This is because of the way in which our government was organ-
ized to balance or minimize those human traits which tend to interfere
with good government,—by the separation of powers granted, and
also by the careful balancing of power against power.

The basis of all our government, national, state and local, is our
Constitution, whose basic theory is this balancing of power, as stated.
Perhaps it is pertinent to recall that among those balances as to the
national government are:—

All states to have equal representation in the Senate, proportional
in the House;
The Senate balances the House in making laws, and vice versa;
All financial measures must originate in the House;
The resident balances both Houses by veto power;
The Congress balances the President by passing laws over his veto;
but

As the supreme balance against both Congress and resident, there
was authorized to be created an independent judiciary, every
judge of which must take an oath to make that Constitution the
Supreme Law of the Land, just as it is declared to be.

Plainly, no valid law can be made which conflicts with that Consti-
tution, or the law instead of the Constitution would be the Supreme
Law. It is the plain and sworn duty of the judge to declare it void for
that reason. By this system of guaranties and balances of power, the
guaranties of liberties of the Constitution are made real in the lives
of free men.

What is this government? A Democracy? Never was it so intended
or conceived. It was just what Franklin said it was, when asked that
question,—"A Republic if we can keep it."

That is what we call it when we salute the flag, and we say, "and to
the Republic for which it stands." It may be preferable and permissible
to some to call it a democracy, provided they means a democracy which
has tied its own hands by our Constitution, as well as those of its
elected representatives, against depriving individuals or minorities, of
rights guaranteed to them by that instrument, namely, a DEMOC-
RACY WITH SELF-CONTROL. IT IS THIS SOUND SYSTEM
WHICH KEEPS US FREE,—A REPUBLIC.

But some will ask, Are we in any danger of losing our national
system of good government?

I will answer that anyone who has done any reading in the past
ten years especially, must be aware of the great strides which have
been made in this country in convincing people that our capitalistic
form of government is only for the benefit of the rich men and the
owners of great industries, and that the Constitution protects them,
and not the poor men. Many lawyers themselves have been guilty of the failure to vigorously combat this fundamental falsehood, for different reasons, a few for the sake of honest sympathy with poor men, but mostly, I believe, for political advantage because of the votes they would receive for some office.

Many people believe that the will of the majority is or should be supreme. The President once announced his belief that the three branches of the government should be a "three-horse team" pulling together, and complained that the Supreme Court was not cooperating; that the people in the last election had spoken the will of the majority in America, and that its will should be accepted by all, *the Courts included*. This would mean that laws made by Congress, and not the Constitution, would be the Supreme Law.

The people have been told by many political leaders in order to win their favor and get their votes, that for a court to declare a law void because in conflict with the provisions of the Constitution was an usurpation of power by them. What wonder should it be then if people very generally believed that our government was a democracy in which the will of the majority in any matter whatever, regardless of the Constitution, should prevail; that any interference with that result was wrong.

In recent years, too, they have been told that there must also be "democracy in industry" in order to make democracy in government work properly. This means, if it means anything, that the private ownership of industries should be more or less subject to the will of those employed in it. Whatever it means, must we not ask, What effect has such a theory upon the continuatio nof private enterprise and the right of private property? Does it dissuade men from investing in industry? If the ultimate end is to destroy private industry, then what becomes of the free government (or democracy) which cannot live unless based on the existence of private property?

Also, for some years, we have seen city and county officials, and employees also, organized into unions and affiliated with the great national labor unions. Strikes called by them in a neighboring city some time ago paralyzed the local government until their demands were met.

The question therefore in such city at least, is whether citizens elect public servants to act according to law made before their election, or elect public masters who are above the law; officers who organize to serve their own interests above those of the people who elected them.

If so, what has become of self-government, locally, at least, in such cities? Are these activities progress in American life and good local government? Are they evidence of good government, or are they a step toward the loss of self-government? If these activities are not
in harmony with good government, it might be expected that those promoting them would, after due consideration, avoid them. Let us hope they will.

Lawyers, by their education and training, if they will do it abstractly and impersonally, are best able to solve those questions, and they must more and more take upon themselves that duty, and fearlessly speak their conclusions, regardless of its possible influence on any professional business. If we lose Constitutional Government, lawyers will not be needed by anyone, and their business will be gone. Then, the only important advice will be given by an agent of the government who has been instructed what advice to give. Lawyers, of all citizens, should take a keen interest in political affairs.

In order to meet the stupendous tasks ahead,—winning the war and preserving our free institutions,—both vital to the very soul of American life, we need the active cooperation of every loyal American, lawyers and laymen, taking inspiration and encouragement perhaps from some lines from the pen of Edward Everett Hale:

"I am only one
But still I am one.
I cannot do everything,
But still I can do something.
And because I cannot do everything
I will not refuse to do the something
That I can do."

If we keep this Constitution and its system for America, we shall need to revive the spirit of those who gave it to us. "Liberty or death" should be the motto of every real American, for he would not care to live without he could live in freedom.

DeTocqueville, in his book on "The Society of France prior to the French Revolution," well described the "attraction of freedom" as follows:

"* * * its native charms independent of its gifts—the pleasure of speaking, acting and breathing without restraint, under no master but God and the law. He who seeks in freedom aught but herself is fit only to serve."

With the adoption as a people of the spirit of those quotations, combined with our political and economic system which gives freedom a chance to exist here, in spite of human faults, we should have reasonably good government everywhere in America, such as should be acceptable to all who are privileged to live under it.

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NOTES

IMPLEADER—A COMPARISON BETWEEN THE WISCONSIN AND THE FEDERAL PRACTICE

One of the procedural devices available to both the plaintiff and defendant in an action in state courts, including Wisconsin, is that of Third Party Practice or "Impleader." It becomes available to a party to an action upon a motion to bring into the suit a third party who is liable for all or a part of the claim asserted against the moving party.

"A defendant, who if he be held liable in an action, will thereby obtain a right of action against a person not a party may apply for an order making such a person a party defendant and the court may so order."¹

The provisions of Rule 14 (a) of the Federal Rules of Procedure covering Impleader in the federal courts are much more extensive than Impleader in the state practice, in that the Rule permits the defendant to ask for bringing in not only of a person liable to him, but also of a person "liable to the plaintiff" for all or a part of the plaintiff's claim.² Under this provision the original defendant, by the third party complaint, may tender to the plaintiff another defendant, who, it is alleged, is liable for all of the claim asserted against the original defendant.

Impleader, although a comparatively modern innovation in law and equity, prevailed for many years in admiralty practice under the Admiralty Rule 56. Under the Conformity Act, Impleader was applied in Federal Courts in actions at law when it was allowed in state procedure.

Impleader is permitted in four distinct instances: (1) In cases of vicarious liability;³ (2) in cases of contribution; (3) in subrogation cases under the equitable principles; and (4) in indemnity cases as in the case of liability insurers.⁴

Commencing with the decision in Ellis v. Chicago and North Western Railroad,⁵ the Wisconsin courts have efficiently put into operation this advanced system of procedure in contribution cases. In that case a judgment was rendered against both a railway company and a traction company for damages on account of personal injuries sustained as a result of a collision between a train and an interurban car; the court based its decision upon the reasoning that although both were negligent, the one in failing to ascertain that the train was coming, and

¹ Wis. Stat. (1941) Sec. 260.19(3).
⁵ Ellis v. C. & N. W. R. Co. 167 Wis. 392, 167 N. W. 1048 (1918).
the other in running the train at an unlawful rate of speed, yet it ap-
peared that there was no wilful or conscious wrong upon the part of
either negligent party, and that therefore the company which pays the
judgment might compel contribution from the other. The Wisconsin
Court considered the decision in the English case of Merryweather v.
Nixon, which held that the law would not imply contribution between
wrongdoers, but followed the reasoning which distinguishes between
wrongs intentionally committed through inadvertance and negligence.
In respect to offences in which there is involved any moral delinquency
or turpitude, all parties are deemed equally guilty and courts will not
inquire into their relative guilt. But where the offense is merely malum
prohibitum and is in no respect immoral, it is not against the policy of
the law to inquire into the relative delinquency of the parties and to
administer justice between them although both parties be wrongdoers.

Before 1939 when the present statute was enacted, the Wisconsin
courts allowed a defendant, who would show by an affidavit that if he
would be liable in an action he would have a right of action against a
third person not a party to the action for the amount of the recovery
against him, upon due notice to such person and the opposing party, to
make an application to the court for an order making such third person
a party defendant in order that the final rights of all parties might be
completely settled in one action. Then the court in its discretion might
make such an order. The present statute enacted in 1935 still continues
this discretionary power. An examination of the statute in Wisconsin
reveals that the defendant in an action may not bring in a third party
who would be solely liable to the plaintiff, but the defendant himself
must be liable in part and seek a partial recovery from the party whom
he seeks to implead. However under the present day practice in Wis-
cconsin, which differs in this respect from that of New York and other
code states, a defendant is not forced to rely upon a joint judgment
before he can seek contribution from a joint-tortfeasor.

In the Federal Courts, by the provision of Rule 14(a) Impleader is
more extensive than in the most liberal code-state practices. The pur-
oppose of Impleader is to avoid circuity of action and to dispose of the
entire subject matter in one litigation and to accomplish ultimate justice
with the least number of trials possible. For this reason, under the
Federal Rule 14(a), the defendant may bring in not only a person who

7 6 R. C. L. 1055.
8 Supra, note 7.
10 Supra, note 9.
11 Supra, note 1.
12 N. Y. Stat. (1935) 211(a)
13 Supra, note 2.
may be liable to him for a part of the judgment rendered against him, but also a person claimed by the defendant to be solely liable to the plaintiff for the entire amount of the plaintiff's claim. In *Crim v. Lumbermen's Mutual Casualty Company*, the plaintiff sought to hold the defendant insurance company liable in alternative causes of action: first, upon an oral promise to pay if she would refrain from prosecuting her claim against the decedent's personal representative; and second, on a claim of having been induced to abandon her cause of action by practice of fraud on the part of the defendant insurance company. The defendant made its motion for Impleader, to make the plaintiff's attorney, a third party, on the ground that it was through his negligence that the plaintiff lost her right of action against the personal representative of the deceased, and that such a third party is liable to the plaintiff for all of the plaintiff's claim against the defendant and the third party plaintiff. The judgment that was demanded was one against the third party for all sums that might be adjudged against the defendant and payable to the plaintiff. The holding of the court sustaining the motion was based upon the reasoning that since the plaintiff might have joined the third party defendant originally, in proceeding against both him and the insurance company in the alternative, the defendant insurance company might bring in the attorney as a third party defendant.

Under the Federal Rule, it was further held that a store sued for injuries could file a third party complaint against the owner of the store on the ground that the owner and mortgagee were solely liable for the injuries. And in an action by an occupant of an automobile against a township and a county for injuries resulting from improper construction and maintenance of a highway across a railroad track, the occupant could not object to the addition as third party defendants of the railroad company and the owner of the automobile, on the ground that Rule 14(a) did not permit joinder of third party defendants if the substantive law of the state does not permit reimbursements, as between tortfeasors, where the township and county did not ask reimbursement but merely that any judgment recovered be against the railroad company and the owner of the automobile and not against the township and county.

The plaintiff himself is not compelled under either state of Federal practice to assert a claim against a third party defendant impleaded by the original defendant. He has the privilege of amending his complaint, but not the obligation to do so. If he does not avail himself of the

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15 Supra, note 14.
16 Supra, note 14.
privilege he may assert his claim against the third party defendant in an independent action. However the procedure followed if the plaintiff does amend his complaint so as to include the third party defendant as a co-defendant, is precisely the same as if the plaintiff had sued them as co-defendants originally. If the plaintiff does not amend, the defendant may file his cross-claim and the sued defendant prosecutes the third party on the cross-claim exactly as the plaintiff in turn prosecutes him; the same witnesses and testimony are used in this prosecution because the purpose of the cross-litigation is to prove the third party's negligence toward the plaintiff. The two claims are litigated at the same time and all issues are submitted to the jury. Any rights of appeal which exist between the plaintiff and the original defendant are also available to the third party defendant, but the plaintiff is not hindered from withdrawing from the action and executing his several judgment as soon as possible. Under such practice the plaintiff cannot complain that he is being deprived of his right to sue the party whom he wishes, and again he is not precluded from subsequently asserting his claim in an independent action. When an impleaded joint tort-feasor is dismissed from an action in which no issue of contribution was raised between the defendant and the third party, the judgment is not res adjudicata on the issue of contribution between the defendant and the third party.

The plaintiff in an action also has a right to bring in a third party when a counter-claim is asserted against him by the defendant, this practice being allowed under any circumstances when the defendant would be similarly entitled to do so.

The device of Impleader arises only from a common liability and therefore the Wisconsin court, in Zutter v. O’Connell, refused the defendant’s motion where a third party to be impleaded was the father of the minor plaintiff who actually concurred in the negligent act for which the defendant truck driver was being sued. However, since a wife may bring a suit against her husband in Wisconsin, in Wait v. Pierce, the defendant could have contribution from the plaintiff’s husband conditioned upon the payment of more than one half of the judgment.

The Wisconsin, as well as the Federal practice of Impleader is a logical development of the idea of disposing of all of the subject matter incident to a cause of action based upon the same facts in a single litigation with economy of litigation by avoiding two actions which should be tried together.

\[\text{NOTES}\]

23 Zutter v. O’Connell, 200 Wis. 601, 229 N. W. 74 (1930).
24 Supra, note 22.
A new rule of evidence to be followed in Federal Courts has been enunciated by the Supreme Court of the United States in two recent appeals of criminal convictions. The decisions deal with convictions resulting from confessions obtained while the parties accused were illegally detained without arraignment before a judicial officer in contravention of certain statutes.

In neither case, did the decision rest upon the ground that the confessions were not voluntarily made, and that hence the prisoners were compelled to testify against themselves contrary to the provisions of the fifth Amendment to the Federal Constitution; in fact, the Court, speaking through Justice Frankfurter, specifically laid the argument of constitutional questions to the side and declared that it would exclude the confessions in the exercise of its powers of supervisory control over inferior Federal tribunals. How great a change in the rules governing the admissibility into evidence of confessions in criminal cases is wrought by these decisions can only be estimated by first considering the facts of each case.

The McNabb case involved three members of a mountaineer clan accused of shooting a Federal Alcohol Tax Division officer. Freeman and Raymond McNabb were arrested shortly after the shooting; the third of the trio surrendered the next day. All three were young, possessed of only a fourth grade education, and none had ever traveled beyond the limits of the McNabb settlement. None of the three were arraigned before a judicial officer as required by the alcohol tax administration acts or by the provisions of the general criminal code. All were held incommunicado and subjected to protracted questioning both singly and as a group. Finally Benjamin, told by officers that his cousins had accused him of having fired the fatal shot, repudiated his earlier denials, admitted the shooting and claimed he had done it at the instigation of the other two. In the face of this confession, the brothers admitted that they were present at the time of the shooting.

The confessions constituted the government case, and though they were repudiated in open court, a conviction was obtained upon the strength of them and the conviction was sustained in the Circuit Court of Appeals. Upon certiorari, counsel for the appellants laid stress in

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2 Liquor tax law violators are required to be taken before a judicial officer in the county where apprehended.
3 "It shall be the duty of the marshal, his deputy, or other officer who may arrest a person charged with crime to take the defendant before the nearest U. S. commissioner or nearest judicial officer having jurisdiction for hearing, commitment, or the taking of bail." 18 U.S.C. 595.
the oral argument on the constitutional issue involved, contending that the forcible detention of the prisoners without arraignment until they had confessed amounted to duress, and that in admitting the confessions the court had compelled the prisoners to give testimony against themselves.

The court, speaking through Justice Frankfurter, found that it was not necessary to decide the constitutional issue thus raised, but that the court would order the confessions excluded in the exercise of its supervisory power over inferior Federal courts. In this connection it was said:

"Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

The reasoning of the tribunal seems to be that legislation directed to bringing the accused before a magistrate immediately upon his being taken into custody, while it does not confer any right rising to the dignity of a constitutional right, does evince a legislative intent to protect an individual from examination by authorities until cause has been shown for holding him. To admit a confession obtained in violation of provisions requiring speedy arraignment would make the courts accomplices in a willful breach of the spirit of the law. The word "spirit" is used advisedly because Congress has not forbidden the use of confessions obtained in this manner.4

Anderson v. United States, supra, decided concurrently with the McNabb case, originated in the Federal court for the District of Tennessee, and involved a prosecution of eight miners for violence growing out of a labor dispute. Federal authorities joined with local police in investigating the case because of the destruction of power cable towers belonging to the Tennessee Valley Authority. The prisoners were arrested by the local sheriff without warrant, though such arrests could not be summarily made because the destruction of power lines is merely a misdemeanor.5 Parties thus arrested were held in custody and questioned individually for periods varying from 5 days to overnight, until under the impression that the others had confessed all had signed statements admitting guilt. In excluding these confessions and reversing the convictions obtained the court made two extensions upon the doctrine of the McNabb decision. Confessions so obtained are to be excluded though obtained by state officers with the mere tacit con-

4 See Justice Frankfurter's statement to this effect in opinion.
5 Sec. 11515 Michie's code, 1938.
sent of federal authorities; and convictions of those implicated in confessions obtained in this manner will be reversed as readily as the convictions of those who themselves made the confessions.

While the court rested its decision in the Anderson case upon its reasoning in the former decision the following language used in describing the prisoners seems to be a reversion, perhaps unconsciously, to the idea that the confinement was a species of duress:

"Unaided by relatives, friends or counsel, these men were unlawfully held, some for days, and subjected to long questioning in the hostile atmosphere of a small, company dominated mining town."

Such language is at least as consistent with the theory of unconstitutional duress as with the announced basis of the McNabb decision.

Where does this decision place the Federal courts in relation to state courts? It has been a quite frequent occurrence that prisoners accused of crimes have, under prolonged police questioning before arraignment, made confessions which have subsequently been repudiated in open court. Because in such circumstances charges of duress are frequently made when the prisoner has merely suffered a change of heart after making a voluntary confession, the problem has received, as might be expected, rather full judicial consideration.

It has been said that the courts have taken three positions as to the admissibility into evidence of a confession made by a party illegally in custody. They may be summarized as follows:

1. The practice of holding a prisoner without arraignment is so reprehensible that any confession obtained under such circumstances is inadmissible;
2. While such practice is undesirable, statements which have been freely made cannot be rejected by the court;
3. The procedure is not only to be condoned, but is useful and desirable.

The second view is the rule of England and of the vast preponderance of American states; though a New York decision under a similar statute makes it incumbent upon the trial judge to charge the jury that "any unnecessary delay in arraignment is forbidden by law, and is to be considered by them in determining what weight they will give the confession." The second view was also accepted as the law in the Inferior Federal courts and seems to have been tacitly admitted.

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7 2 Jones Evidence 893 (1926).
8 2 Hawkins' Pleas to the Crown (8th ed.) 595 sec. 34. But see Reg. v. Thornton 1 Moody C.C. 27 (1824) holding in seven to three decision that confession was admissible on a fact situation comparable to present cases.
9 People v. Alex, 265 N. Y. 192, 192 N. E. 289 (1934).
to be the law by the Supreme Court in decisions involving the question of unconstitutional duress.\textsuperscript{11} Such view is born out by the emphasis which apparently was laid in the oral argument of the present case upon the constitutional question involved.

By the present decisions, the Federal courts are now committed to a recognition of the first doctrine rather than the second.

The effect of this decision, insofar as the Federal courts are concerned, would seem to be to burden a confession obtained while authorities held a party unreasonably long before arraignment with an irrefutable presumption that it was obtained under duress and consequently the same result is obtained as if the admission thereof would be in violation of the Fifth Amendment. Inasmuch as the reversals were put on the power of the Supreme Court to supervise the procedure in inferior Federal courts rather than on constitutional grounds, the decision will affect directly only the Federal courts, no question being raised about possible extension to the State courts by the 14th amendment; although the decision may have great persuasive power in state courts. "The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice,"\textsuperscript{12} and it seem probable that state courts will continue to operate much closer to Justice Frankfurter's "minimal standard" by continuing to inquire solely into the voluntary nature of the confession.

\textbf{William Smith Malloy.}

\textsuperscript{12} Owenby v. Morgan, 256 U. S. 94, 41 S.St. 435, 65 L.Ed. 837, 17 A.L.R. 873 (1921).
SUPERVISORY EMPLOYEES AND THE NATIONAL LABOR RELATIONS ACT

Section 2(3) of the National Labor Relations Act in defining the term "employee" to include any employee save farm labor, domestic help, and individuals employed by their parents or spouses impliedly places supervisory employees under the Act. However, section 2(2) of the same Act in defining the term "employer" to include any person acting in the interest of an employer, directly or indirectly, would seem to exclude supervisory employees from the provisions of the National Labor Relations Act. Therefore, there has been, since the enactment of the Act in 1935, considerable doubt and controversy as to whether or not plant superintendents, foremen, and other supervisory employees have the legal right to participate in a collective bargaining unit or to organize themselves into one, to become members of the union representing the employees of their particular industry or to form a union themselves. Is the employer guilty of an unfair labor practice who discharges or demotes a supervisory employee because of union membership or activities? Is such an employee within the jurisdiction of the National Labor Relations Board?

By its decision in the Maryland Drydock Company case, given May 17, 1943, the National Labor Relations Board reversed previous rulings and ruled negatively as to the questions above propounded. In this case the Industrial Union of Marine and Shipbuilding Workers petitioned the Board for the right to represent temporary supervisory employees either in the same unit to which subordinate employees belonged or in separate units. The Board dismissed the petition, finding that supervisory employees are not proper parties of a separate unit for collective bargaining nor of an all-embracing unit, on the grounds that such practice would disrupt managerial and production technique and might, very well, have a coercive effect on the rank and the file of the employees. The soundness of this ruling is apparent from the following cases, which preceded Maryland Drydock Company v. National Labor Relations Board.

In National Labor Relations Board v. Christian Board of Publications the Court sustained a Board ruling which held that supervisory employees may be included in an appropriate unit for collective bargaining. Here, the defendant was charged with an unfair labor practice in that the supervisory employees formed a company collective bargaining unit which stifled all true union activity. The defendant pleaded that since the supervisory employees were within section 2(3) of the Nation-

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1 N.L.R.B. release R-5517.
2 113 F.(2nd) 678 (C.C.A. 8th, 1940).
3 44 N.L.R.B. 31.
al Labor Relations Act, the doctrine of *respondeat superior* did not in this instance apply. The Board admitted the status of the supervisory employees but denied the defendant's contention.

*National Labor Relations Board v. Skinner and Kennedy Stationery Company* placed supervisory employees under both section 2(3) and section 2(2) of the Act. Here, Eckert, a foreman of the defendant, was discharged because of union activities. The defendant demurred to the jurisdiction of the Board on the grounds that Eckert was not an employee under the Act, but more properly was an employer. The Board ruled that Eckert was an employer under section 2(2) of the Act as to those under him, but that he was also an employee under section 2(3) of the Act and for that reason had the right to become a member of an employees' union.

The question of whether or not supervisory employees come under the employee provisions of the National Labor Relations Act was explicitly decided in the affirmative by *In the Matter of the Union Collieries Coal Company and the Mine Officials Union of America*; and the controversy seemed to be finally determined. Here, supervisory employees, foremen, weigh bosses, and fire bosses, were authorized by the Board to form their own union for purposes of collective bargaining. It was ruled that section 2(3) of the Act was sufficiently broad to include all supervisory employees. The Board felt that this was necessary to prevent coercion of such employees by employers and through them of subordinate employees.

However, in *General Motors Sales Corporation v. U. M. W. of America, Local 216* the National Labor Relations Board came to its decision by a process of reasoning which would eventually, and naturally, result in the ruling of the *Maryland Drydock Company* case. In the instant case the defendant demoted Franke, a shipping supervisor, because of his refusal to relinquish union membership. During a strike Franke had engaged in union activities in that he caused shippers to boycott the Company under the threat: "If you pick up any goods now, after the strike I will see to it that you get no more." Franke allotted consignments to the shippers. While granting that Franke was an employee under the Act, the Board ruled that the act of the defendant was not discriminatory nor an unfair labor practice. This because Franke had abused his position of trust and responsibility with the Company to work against its interest. The Board recognized the right of the Company to require adherence of supervisory employees to its policies.

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4 113 F(2nd) 667 (C.C.A. 8th, 1940).
5 34 N.L.R.B. 1052.
7 N.L.R.B. release R-5517.
The decision in the *Maryland Drydock Company* case that supervisory employees may not join or form a collective bargaining unit is for the best interests of industry, labor, and the public. As the facts of the *General Motors* case made so evident, membership of supervisory employees in unions tends to destroy the sense of responsibility and company loyalty which managerial and production techniques require of such employees. The industrial discipline and morale necessary for a continued advance of the labor movement would be seriously impaired by the presence of foremen, supervisors, plant superintendents and the like within collective bargaining units. Supervisory employees must be responsible agents of the particular industry or the welfare of the public will not be served. It is difficult for supervisory employees to maintain a sense of responsibility to their employers and to be loyal to their particular union... the interests of the two are so often divergent. Today, when the war effort demands the maximum in production achievement, supervisory employees, because they are in charge of so many vital operations, should not be permitted to become involved in labor controversies.

Thomas McDermott.

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8 Supra, note 2.
9 34 N.L.R.B. 1052.
Code Practice—Directed Verdicts Under the Comparative Negligence Statute.—Action was brought by the plaintiff against the defendant Transport Company for personal injuries sustained from a collision between a truck driven by the plaintiff and defendant's trolley bus. Plaintiff's truck was east-bound on East Knapp street and defendant's trolley bus was north-bound on North Milwaukee street in the city of Milwaukee. The collision occurred at the intersection of these streets. A stop sign governs traffic of vehicles running east and west on East Knapp street. The jury found the operator of the trolley bus guilty of negligence as to the rate of speed at which he entered the intersection and as to the manner in which he controlled the movement of the trolley bus after it entered the intersection. Plaintiff was found negligent as to the manner in which he controlled his truck after he entered the intersection. The proportion of the plaintiff's causal negligence was set at 33 1/3 per cent, defendant's at 66 2/3 per cent. Upon appeal the defendant Transport Company claimed that the plaintiff's causal negligence was, as a matter of law, equal to or greater than that of the defendant's operator. The Supreme Court held that no rule of thumb can be laid down with respect to the apportionment of negligence between a plaintiff and a defendant and that in this case the court could not hold, under the evidence, that the plaintiff's negligence was as a matter of law equal to that of the defendant. Campanelli v. Milwaukee Electric Ry. & Transport Co. 8 N. W. (2d) 390 (1943).

The rule set down by the court in the instant case is consistent with every decision handed down since the passage of the Comparative Negligence Statute Sec. 330.045 Wis. Stats. in 1931. The general rule with respect to directed verdicts under this statute is, perhaps, best stated in the language of the court in Hansbury v. Dunn, 230 Wis. 626, 284 N. W. 556 (1939): "It is true that the court may be able to determine from the record that two items of negligence of the same character are equal in quality or that as a matter of law one of them is greater than the other. This is more apt to be possible in cases where speed, lookout, or violation of some particular rule of the road is involved. It is less apt to be possible in cases involving findings of negligence with respect to management and control. In any event, it must be possible from all the circumstances of the case as disclosed by the record for this court to be able to say that the negligences are equal in quality and that is why this court has said that it can rarely come to this conclusion. We are satisfied, however, that the court may not adopt a rule of thumb that will check off automatically lookout against lookout, control against control, etc., holding these items equal in every case."
While it is certainly clear from the language quoted above that each case must rest upon its own facts and circumstances, the cases, looked upon as units, point to a few general rules. The first, and, perhaps, the broadest of these is that whenever the character and quality of the negligence of the plaintiff and defendant are different it is a matter for the jury alone. In the case of *Honore v. Ludwig*, 211 Wis. 354, 247 N. W. 335 (1933), the defendant was found negligent as to speed, lookout, and control, and the plaintiff as to lookout, control and disregard for other users of the highway. The court held that although the charges of negligence were equal in number, the character of the charges were different and the matter should, in such cases, be left for the jury. The same conclusion was reached in the following cases: *Brown v. Haertel*, 210 Wis. 345, 244 N. W. 630, (1932); *Steidle v. Caliebe*, 215 Wis. 582, 254 (1934); *McGuiggan v. Hiller Brothers* 209 Wis. 402, 245 N. W. 97, (1931); *Bent v. Jonet*, 213 Wis. 635, 252 N. W. 290; *Doepke v. Reimer*, 217 Wis. 49, 258 N. W. 345 (1935).

Another group of cases indicate that where the plaintiff and the defendant are negligent in an equal number of respects, the negligence of one will be held equal to that of the other so long as the quality of the one does not outweigh the other. In the case of *Peters V. Chicago, Milwaukee, St. Paul & Pacific RR. Co.*, 230 Wis. 299, 283 N. W. 803, (1939), the plaintiff was found negligent in failing to look out before entering upon a railroad crossing, and the defendant was found negligent in failing to give a signal. The court held the negligence of both equal as a matter of law. Again, in *Geyer v. Milwaukee E. R. & L. Co.*, 230 Wis. 347, 284 N. W. 1, (1939), the negligence of the plaintiff in failing to yield the right of way was held equal to that of the defendant who failed to keep a proper lookout. Decisions to like effect are: *Sikora v. Great Northern RR. Co.*, 230 Wis. 283, 282 N. W. 588, (1939); *Evanich v. Milwaukee E. R. & L. Co.* 237 Wis. 111, 295 N. W. 44, (1941); *DuBois v. Johnson*, 238 Wis. 161, 298 N. W. 590, (1941). In cases where the charges of negligence are equal in number but where the particular kind of negligence on the part of one outweighs that of the other, the courts will hold such negligence to be greater as a matter of law. Such was the case of *Beatti v. Strosser*, 240 Wis. 65, 2 N. W. 2nd 713 (1942), in which the plaintiff, a minor child, ran out between parked cars and was struck by the defendant's car. Both parties were found negligent as to lookout but the negligence of the plaintiff because of its peculiar character was held greater as a matter of law.

Still another group of cases may be viewed as a unit to discover that even though one party may be found negligent in the greater number of respects, yet his total negligence will be held less as a matter of law than one who is guilty of the fewer charges of negligence but whose negli-
gence is of such outrageous character as to completely outweigh all the charges against the other. A good example within this class of cases is Hustad v. Evetts, 230 Wis. 292, 282 N. W. 595, (1939). In this case, the plaintiff was an experienced milk man. He stepped from his wagon without looking for traffic and was found negligent in this respect. The defendant whose automobile struck the plaintiff as he did so step off his wagon was found negligent as to speed, lookout and management. The court held that the plaintiff’s negligence, by its very character, was as a matter of law greater than that of the defendant. The following cases are similar in effect: Wedecky v. Grimes 229 Wis. 448, 282 N. W. 593, (1938); Noyes v. Milwaukee E. R. & L. Co., 237 Wis. 141, 294 N. W. 63, (1941).

Lastly there are a few cases which stand as individual holdings and do not, from the point of their outcome, fall into any of the groups of cases indicated herein. In Patterson v. Chicago, St. Pa., Milwaukee & O. R. Co. 236 Wis. 205, 294 N. W. 63, (1940), the plaintiff was at a place to board the defendant’s train. In order to do so he had to cross certain tracks. He was struck and injured. Plaintiff was found negligent with respect to lookout. The defendant was found negligent in failing to keep a proper guard for the protection of the defendant. The court held that the negligence of the plaintiff was as a matter of law equal to that of the defendant. There was a strong dissent by three judges in this case. A like decision with a dissent is Hoskins v. Thenell, 232 Wis. 97, 286 N. W. 555, (1939).

ANTHONY J. PALASZ.

Federal Jurisdiction—Common Law Crimes Against the United States.—In United States v. Jerome, 87 L. Ed. 433 (1943), —U.S.—, S. Ct. —, the defendant was charged with violating section 2(a) of the bank robbery act (May 18, 1934) 48 Stat. 783 c. 304 (August 24, 1937) 50 stat. 749, c. 747, 12 U.S.C.A. 588b which provides in part that “whoever shall enter or attempt to enter any bank or any building used in whole or in part as a bank with intent to commit in such bank or building or part thereof, so used, any felony or larceny shall be fined not more than $5,000.00 or imprisoned for more than twenty years or both.” The defendant was an army officer who while attempting to borrow money from a National Bank was informed that he would be required to obtain the signature of an officer of at least equal rank as surety upon his note. The defendant forged the signature of an officer of superior rank. The United States Supreme Court reversed the decision of the United States Circuit Court of Appeals and quashed the indictment on the grounds that the crime of forgery, although a felony under the laws of Vermont,
was not a felony within the meaning of the statute, it not being a felony under the statutes of the United States. The Court said, "We must generally assume, in absence of plain indication to the contrary, that congress when it enacts a statute is not making the application of the Federal act dependant on the state law. That assumption is based on the fact that Federal legislation is nationwide, and at times on the fact that the Federal program would be impaired if the state law were to control."

The court indicated that caution should be exercised in extending the provision of a Federal statute to state crimes because the double jeopardy provision of the Fifth Amendment does not stand as a bar to Federal prosecution though a state conviction on the same cast has already been obtained.

The United States Supreme Court has therefore affirmatively decided in favor of a second punishment where an act is both a crime against the state and against the United States. Said Chief Justice Taft in United States v. Lenza, 260 U. S. 377, 382; 43 S. Ct. 141, 142; 67 L. Ed. 314: "We have here two sovereignties deriving power from different sources, capable of dealing with the same subject under the same territory. Each may without interference from the other enact laws to secure prohibition with the limitation that no legislation can give validity to act prohibitive by the same amendment. Each Government in determining what shall be an offense against its dignity and peace is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each."

It has been consistently held that there are no common law crimes against the United States. All Federal crimes must be specifically provided for by statute. While there are no common law offenses against the United States resort may be had to the common law for the definition of terms by which offenses are designated by statute, Pettibone v. United States (1893) 148 U. S. 197; 13 S. Ct. 542; 37 L. Ed. 419.

The regulations issued by the several Governmental departments and administrative agencies cannot make acts criminal which congress has not made criminal. In United States v. George (1913) 228 U. S. 14; 33 S. Ct. 412; 57 L. Ed. 712, the defendant was indicted for perjury, charging him with falsely and corruptly taking his solemn oath in a proceeding wherein a law of the United States authorized an oath to be administered before the register of the United States land office. The particular statute under which the defendant was charged provided that "If . . . the person making such entry . . . proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for a period of five years . . . and makes affidavit that no part of such land had been alienated . . . and that he, she, or they will bear true allegiance
to the Government of the United States, then in such case he, she, or they . . . shall be entitled to a patent. The Secretary of the Interior in this instance required the applicant to take such oath himself wherein it will be noted the statute merely required proof by two credible witnesses. The defendant falsely swore that he had made certain improvements on the land. The defendant demurred to the charge alleging that where the charge is of crime it must have clear legislative basis. The court held that the Secretary of Interior had no authority to demand such oath where it was not required by statute. The court said "It is manifest that the regulation adds a requirement which that section does not require and is not justified."

In *United States v. Eaton* (1892) 144 U. S. 677; 12 S. Ct. 764; 36 L. Ed. 591, the defendant, a wholesaler, was indicted for failure to keep books showing receipts and sales for oleomargarine. The statute provided that all manufacturers were required to keep such records, but contained no such provisions for a wholesaler. The court ruled that "the Secretary of the Treasury cannot alter or amend a revenue law to regulate the mode of providing to carry into effect what congress has enacted."

Although the principle that there is no common law of the United States has long been recognized in the field of Federal criminal law it has only recently been recognized in Federal civil law. Plaintiff in *Erie Railway Company v. Tompkins*, 304 U. S. 364; 58 S. Ct. 17; 82 L. Ed. 1189 (1937), was injured while walking along defendant's right of way by a boxcar door that was negligently left open, said injury occurring in the state of Pennsylvania. The action was brought in the federal district court in New York. Under the laws of Pennsylvania plaintiff was a trespasser and defendant owed plaintiff no duty except not to wilfully injure him. The lower court gave judgment to the plaintiff holding that under the common law of the United States it was the duty of defendant railway not to negligently injure plaintiff. Reversing the judgment the Supreme Court of the United States said, "Except in matters governed by the Federal constitution or by acts of congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of Federal concern. There is not Federal general common law. Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or part of the law of torts. And no clause in the constitution purports to confer such power on the Federal Courts."

*John L. Gray*
War—Exemption from Military Service.—The appellant, a member of the Jehovah's Witnesses religious organization, failed to report for induction on the ground that he should have been exempted from military service by virtue of his position as minister. The court held that he was not a minister within the meaning of the statute; 50 U.S.C.A. 305(d). that ordination is not sufficient to bring an individual within such meaning; that the term “minister” implies the same relationship to the Jehovah's Witness organization as in older denominations; and that the commission of each member of this group to make converts does not constitute such member eligible for exemption within the meaning of Congress. Seele v. United States, 133 F.(2d) 1015 (C.C.A. 8th, 1943).

At the basis of the decisions is the fact that exemption from military service because of religious convictions or activities is not a constitutional right. The power of Congress to declare war and to raise and support armies embraces authority to make all laws necessary and proper for carrying such power into execution. U.S.C.A. Const. Art. 1, sec. 8. Implied in the power is the right of Congress to draft any men who may be needed. Speaking of the deferment of ministers and the consideration shown conscientious objectors, it has been said, “Immunity arises solely through Congressional grace in pursuance of a traditional American policy of deference to conscientious objection and holy calling.” Rase v. United States, 129 F. (2d) 204 (C.C.A. 6th, 1942). Since exemption is a privilege rather than a right, the burden is not upon the government but upon one claiming exemption to bring himself clearly within the excepted class. Seele v. United States, supra.

It follows also that the obligation of a local draft board to grant the registrant a fair hearing does not mean a trial in any strict or formal judicial sense. In the case of error, the remedy of appeal is provided within the administrative set-up. Review by the courts is granted only when the local draft board has acted arbitrarily and capriciously. United States v. Grieme, 128 F. (2d) 811 (C.C.A. 3rd, 1942). This is in keeping with the doctrine that when Congress establishes fact finding bodies, the decision of the director are final. The courts will only review if the action is arbitrary and without basis on the theory that the board has exceeded its authority. Bates and Guild Co. v. Payne, 194 U. S. 106, 24 S.Ct. 629, 48 L. Ed. 894.

Seele's case was heard in the District Court on an appeal from criminal prosecution. This is not the only means of obtaining judicial review. If the registrant has exhausted his administrative remedies, on proof that the investigation has not been fair or that the board has abused its discretion by a finding contrary to all substantial evidence, relief may be granted by the courts under a writ of habeas corpus. Rase
v. United States, supra. A registrant who has already been inducted into military service may by writ of habeas corpus obtain a judicial determination as to whether the local draft board acted in an arbitrary manner. United States v. Grieme, supra. The case cited held that the writ of habeas corpus was the only way to obtain judicial review of the decision of the local draft board, that the only point in issue in a criminal prosecution for failure to report for induction was whether the registrant intentionally failed to report, that arbitrary action of the draft board was not a defense to a criminal prosecution for failure to comply with the order. United States v. Grieme, supra.

The theory underlying the decision in the case of United States v. Grieme would seem to be that the registrant must submit himself to the order of the draft board. Therefore, a writ of habeas corpus would be in order. The theory of the Seele case in allowing the point of the validity of the draft board decision to be brought into issue would seem to be that the registrant has some degree of choice as to whether or not he will submit himself to the order of the draft board. Whatever the underlying theories, both methods of getting a review are well established and probably will be continued in use, though seemingly in contradiction with one another.

MERRIAM LUCK.

War—Rights of Enemy Aliens in Our Courts.—Petition for a writ of mandamus in the Supreme Court of the United States to compel the District Court of the United States for the Southern District of California to vacate a judgment dismissing an action on the ground that the petitioner, a resident of the United States, is an alien enemy, and to proceed to trial of his action.

The petitioner in this case, one Kumezo Kawato, was born in Japan, but became a resident of the United States in 1905. On April 15, 1941, he brought an action in libel against the vessel RALLY in the District Court for the Southern District of California, claiming damages for wages due him for services as seaman and fisherman on the RALLY. He also alleged that he had sustained severe injuries while engaged in the performance of his duties and sought an allowance for maintenance and medical expenses.

The owners of the vessel RALLY moved, on January 20, 1942, to abate the action on the ground that Kawato, by reason of the state of war then existing between Japan, his native country, and the United States, had become an enemy alien and therefore had no right to "prosecute any action in any court of the United States during the pendency of said war." The District judge granted the motion.
The petitioner sought mandamus in the Circuit Court of Appeals for the Ninth District to compel the District Court to vacate its judgment and proceed to trial of his action. This motion was denied. Leave was then granted to file in the United States Supreme Court. In the Supreme Court the writ of mandamus was issued, thereby granting the petitioner the right to proceed with trial of his action, the court upholding the plaintiff's contention that he had the right under the common law and treaties to proceed with his action, and that his right is not limited by the statutes. *Ex parte* Kumezo Kawato, 63 Sup. Ct. 115 (1942).

This decision raised a very pertinent question—that of the rights of resident enemy aliens in our courts while a state of war exists between the United States and their native country.

An enemy alien has been judicially defined as "one who owes allegiance to an adverse belligerent nation." *Dorsey v. Brigham*, 52 N.E. 303,304; 177 Ill. 250, 1898. Thus, for example, a citizen of Japan, residing in the United States at the time of the beginning of hostilities, automatically becomes an "enemy alien" and is subject to the restrictions imposed on such class. A distinction must be made, however, between enemy aliens and enemies of the United States. Thus, it was held in *Vowinckel v. First Federal Trust Company*, 10 F. (2d) 19, App. D. C. California, 1926, that an immigrant from Germany returning to Germany in 1915, and entering the service of the German army as a Red Cross surgeon was not an enemy of the United States. German citizens, residents of the United States during war were held not to be enemies of the United States within the Trading with the Enemy Act. *Reising v. Dampfschifffahrts-Gesellschaft Hansa*, 15 (2d) 259; (E.D. New York, 1926).

The term "alien enemy," as used in the Trading with the Enemy Act, is deemed to mean:

(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business with such territory.

(b) The government of any nation with which the United States is at war, or any political or municipal subdivision thereof, or any officer, official, agent, or agency thereof.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United
States, wherever resident or wherever doing business, as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term enemy. Trading with the Enemy Act, Section 2: Definitions, 50 U.S. C.A. 189.

At common law an enemy alien resident could prosecute a civil action. Petition of Bernheimer, 130 F (2d) 396 (E.D. Penn. 1941). Again a distinction must be made, however, between resident aliens and non-resident aliens. In the case of the Industrial Commission of Ohio v. Rotar, 179 N. E. 135 (1931), the court said "it is an elementary fact that, when a state of war exists, an alien enemy cannot prosecute any claim in the courts of a country at war with his country." In this case, the plaintiff, the widow of an employee killed in the course of employment and seeking an award from the Industrial Commission, was a resident of the Austro-Hungarian monarchy with which the United States was at war. It was this fact which prevented her bringing an action in the courts of the United States until hostilities had ceased. In this case the court reasserts the common law rule that if the parties to the litigation are residents of belligerent nations, one residing in one, the other in the opposing contry, then the right of action is suspended until the close of the war, at which time it may be asserted by the alien.

In Stumpf v. A. Schreiber Brewing Company, 242 Fed. 80 (W.D. New York, 1917), the court held that the plaintiff, who became an alien enemy, cannot continue an action at law or equity, or institute further proceedings, until the war is ended, save in certain exceptional instances, as, for example, where commerce between nations at war is continued, or where the plaintiff in actions for debt becomes an enemy alien after verdict and judgment has been rendered. In the case here mentioned, the plaintiff was a resident of Germany. His action was begun before war was declared between Germany and the United States, but the judgment in the case had not been rendered when a state of war was declared to exist between his native country and the United States. This decision is in accord with the principle that a suit, properly brought by an alien against a citizen, will not be dismissed because of a subsequent declaration of war between the United States and the government of which the plaintiff is a subject, but may be suspended during the war. Plettenberg, Holthaus & Co. v. I. J. Kalmon & Co., 241 Fed. 605 (S.D. Georgia, 1917).

The reason for a former rule denying a resident alien who is a citizen of a country with which the United States is at war the right to bring an action in the courts of the United States, namely, that the money recovered would be withdrawn and added to the funds available to aid the alien’s country in the prosecution of the war no longer exists
in view of legislation providing for seizure of property belonging to enemy aliens situated in the United States with licensing restrictions governing their subsequent access to it. According to the Trading with the Enemy Act, Section 6, the President may appoint an alien property custodian who shall be empowered to receive all money and property within the United States due or belonging to an enemy, or ally of the enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of the Act. 50 U.S.C.A. 189.

The generally accepted rule, with which the present case is in accord, is that the courts of the United States remain open to citizens of an enemy nation who are residing peaceably in the United States and under its laws. Only non-resident aliens are barred from prosecuting action. *Uberti v. Miatico*, 44 F. Supp. 724 (D.C. of D.C., 1942); *Anastasio v. Anastasio*, 44 F. Supp. 725 (D.C. of D.C., 1942); *Stern v. Ruzicka*, 44 F. Supp. 726 (D.C. of D.C., 1942).

One final point might be made in connection with the terms "enemy" and "ally of the enemy." In the case of *Sundell v. Lotmar Corp.*, 44 F. Supp. 816 (S.D. New York, 1942), it was held that since Finland, although formally at peace with the United States, was actively in concert with Germany in war against Russia which was an ally of the United States, residents of Finland were "allies" of the enemy and enemies of the United States and could not prosecute actions in the United States for injuries sustained by negligence.

The principal case, then, is in accord with the weight of authority in the United States, and restates several fundamental principles regarding alien's right as they are restricted in times of war:

1. Any person, residing in the United States but not a citizen of the United States, automatically becomes an "enemy alien" upon declaration of a state of war between the United States and his native country.

2. Resident enemy aliens may still enjoy the right of the use of the federal and state courts of the United States, even though a state of war exist between the United States and their native country.

3. Non-resident enemy aliens may not begin an action in any court of the United States while a state of war exists between the United States and their native country.

4. Actions pending in any court of the United States between a non-resident enemy alien and a citizen of the United States when a state of war is declared to exist are abated until the war is over and may then be revived.

KENNETH E. MILLER
BOOK REVIEWS

*Burby on Real Property*, by William E. Burby, Professor of Law, University of Southern California. Published as a textbook by West Publishing Co., St. Paul, Minn. Containing 656 pages, including the index; bound in red fabricoid.

This book contains a concise up to date statement of the modern law of real property with sufficient of the historical background to make it understandable to the average student. Theoretical discussion is conspicuously absent, although upon points on which the courts are not in agreement, the conflict is stated with the leading cases that sustain each point of view. The footnotes, while ample, do not contain a mere cumulation of cases in an attempt to cite all the available ones. This policy has proved of advantage in keeping down the size of the volume, while retaining the advantage of citing all the cases necessary to illustrate the text.

A further innovation is a departure from the blind footnote idea; sufficient facts of many of the footnote cases are stated to make resort to the report unnecessary to determine whether the decision is in point.

The editors have confined the scope of the book to the main topics which are taught in most law schools as the course on real property; the topics usually treated in separate courses such as mortgages, trusts and wills being omitted. This is advantageous in avoiding an unnecessarily large volume and duplication of subject matter which is available in separate texts. Other assets worthy of mention include a useful table of cases and an excellent index. The book should be a convenient teaching tool, and where the case method is in use should be helpful for review and filling in any gaps that may occur. I have personally found it very useful in finding cases to supplement my case book.

*Willis E. Lang.*


This book represents an effort to correct a major problem in the administration of justice—that part lying within the scope of courts trying traffic violations cases. With figures gathered from personal observations in the courts of municipalities of the forty-eight states and from the answers to questionnaires submitted to magistrates, chiefs of police, and prosecutors, Mr. Warren has compiled and presented without sensationalism a survey of the factors which have made the traffic

*Professor of Law, Marquette University.*
courts the *terra incognita* of the judicial field. He has gone farther and
has shown what the maladministration has cost, both in material losses
of life and property in traffic accidents, and in the less tangible loss
of respect for all law in jurisdictions where the practices of the traffic
courts do not command respect. He has traced back to their foun-
tainhead in the thought processes of the bar and public and in physical
factors the conditions which he found prevalent; and, finally, he has
embodied in 57 concrete recommendations a program of improvement
which has won the support of various organizations interested in traffic
law enforcement.

No better measure of the worth of the book can be gained than by
consideration of the importance of the traffic courts to the whole of the
field of the administration of justice. The opening chapter of the author,
and the prefacing remarks of Mr. Arthur T. Vanderbilt, chairman of
the Advisory Committee on Federal Rules of Criminal Procedure,
point out that the traffic courts are “visited” annually by an estimated
one out of every eight persons in the country. In the great majority of
cases, the parties haled before the magistrate have no other contact
with judicial tribunals. Consequently, their impressions, derived in the
traffic courts, have been universalized into respect or disrespect for all
judicial institutions; and the factors which the survey disclosed have
done little to inculcate respect in the minds of the public. At the other
end of the scale, the practice of “fixing” tickets has had a blighting
effect on law enforcement. In the words of Mr. Vanderbilt: “the field
is one which cannot be neglected without grave risk to the body politic.”

The book is not merely a statistical treatment of conditions as the
author found them. Interesting as the picture which they present is, the
great contribution is Mr. Warren’s recommendations for the improve-
ment of this phase of the machinery of justice. His 57 resolutions cover
traffic laws, courts, violations, bureaus, personnel, court procedure, and
the elimination of the “fix.” Approval of their scope has come not only
from the sponsoring organizations but also from the American Bar
Association, the National Safety Council, and the International Asso-
ciation of Chiefs of Police.

All in all, Mr. Warren’s book presents a highly readable, pain-
stakingly careful, and comprehensive research into the problems of a
heretofore neglected field. It is a distinct contribution to the bringing
of the element of enforcement into line with advances in engineering
and education in the joint undertaking to reduce the terrific cost of
traffic accidents. An even higher recommendation is that it is written
by a man sincerely anxious to make traffic court procedure conform to
standards which will breed respect for all American judicial institutions.

*William Smith Malloy.*