YALE LAW JOURNAL

Published monthly during the Academic Year by the Yale Law Journal Co., Inc.
Edited by Students and members of the Faculty of the Yale School of Law.

SUBSCRIPTION PRICE, $3.00 A YEAR SINGLE COPIES, 50 CENTS

Canadian subscription price is $3.50 a year; foreign, $3.75 a year.
If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

POST-DATED CHECKS

The recent appearance of a new edition of Brannan on the *Negotiable Instruments Law* with its helpful discussion of problems arising under but not definitely settled by that law, suggests comment on another field of negotiable instruments which is seldom covered. Ordinarily negotiable instruments are treated as falling into two classes, bills of exchange and notes. Checks are considered as one form of bill of exchange. Post-dated checks, as such, are not considered at all by the Negotiable Instruments Law except in so far as section 12 provides that "the instrument is not invalid for the reason only that it is . . . post-dated." But what effect is to be given the instrument pending its appearance as a fullfledged check is left to be determined.

It is of particular interest to note the differences which may distinguish a bill of exchange from a check. The latter is defined as being "a bill of exchange drawn on a bank and payable on demand,"[1] and that, except as to the time for presentment[2] and the effect of certi-

[1] N. I. L. sec. 185.

[2] N. I. L. sec. 186.

fication,[3] "the provisions of this act applicable to a bill of exchange payable on demand apply to a check." This does not touch the question of form. Nothing is clearer than that a bill of exchange may be drawn on a bank and payable on demand and still not be a check. In which case the slight differences of form found in practice between the two instruments may become of great importance in determining what effect is to be given to the instrument. What would be an unreasonable time for presentment in one case and thereby discharge the drawer to the extent of the loss,[4] might discharge the drawer entirely in the case of the other.[5] As a matter of practice, the difference in wording is usually well understood by all parties and the question seldom comes up. A check carries the words "Pay to" while a demand bill usually has the words "At sight" or "On demand" preceding the order to pay.

But when the instrument is, on a check form, properly dated as of the day of issue, but containing the statement "Pay to A or order Jan. 1," the question is squarely presented. Many courts have held that the intention of the parties that the instrument should be and operate as a check on and after Jan. 1, should control.[6] To hold the instrument a bill would allow the payee to present at once for acceptance and, on protest for non-acceptance, would allow an immediate action against the maker, which would be entirely contrary to the intention of the parties. The better ruling, however, places the emphasis on form and for the sake of certainty and convenience in business treats such instruments as time bills of exchange.[7]

Where the instrument is wholly in the usual form of a check, except that it is post-dated, it is not to be confused in form with a bill of exchange. It is a check in everything except that it is not payable on demand. Consequently by definition, it is not a "check," nor is it a bill of exchange allowing of presentment and dishonor. It might much better, in legal effect, be compared to a time note made payable at a bank. Both operate as orders on the bank, if presented on the day of payment,[8] and both, up to that date, represent the maker's unqualified promise to pay.[9] But the time note must be presented on the date of its maturity in order to charge indorsers,[10] while it is well settled that a post-dated check becomes a check with all its incidents

---

[3] N. I. L. sec. 187-8.

[4] N. I. L. sec. 186.

[5] N. I. L. sec. 70.

[6] *Champion v. Gordon* (1872) 70 Pa. 474; *In re Brown* (1843, C. C. D. Mass.) 2 Story, 502; *Way v. Towle* (1892) 155 Mass. 374, 29 N. E. 506; *Westminster Bank v. Wheaton* (1856) 4 R. I. 30.

[7] *Harrison v. Nicollet National Bank* (1889) 41 Minn. 488, 43 N. W. 336; *Morrison v. Bailey* (1855) 5 Oh. St. 13; *Mintern v. Fisher* (1854) 4 Calif. 35; *Ivory v. State Bank* (1865) 36 Mo. 475; *Bowen v. Newell* (1853) 8 N. Y. 190.

[8] N. I. L. sec. 87.

[9] *Camas Prairie State Bank v. Newman* (1909) 15 Ida. 719, 99 Pac. 833.

[10] N. I. L. sec. 70.

when the due day arrives,[11] and thus has an extra period for presentation. It is that period in the interim when the instrument certainly is not a bill of exchange, in the sense that it can be accepted or protested, and when just as certainly it is not a check, not being payable on demand, that is peculiar. The Negotiable Instruments Law provides for no class of instruments intermediate between a check and a bill of exchange. A post-dated check has elements of both, but during the time preceding its date, while it may be said to be a "check in abeyance," it is yet distinctive, and to liken it to either may tend to confuse.

The only way to determine the exact rights, privileges, powers and immunities that may pertain to a post-dated check, to decide just what a post-dated check is, is not to give the instrument the one name or the other, but to look to the decisions on each particular question which may be raised in regard to it. It goes almost without saying that post-dated checks are valid and negotiable. Section 12 of the Negotiable Instruments Law would suffice to settle this, but it is fully backed up by decisions.[12] Early in their existence it was held that they are not drafts payable on demand, but are payable at a future day and therefore require the same stamp tax as any time instrument.[13] In cases where they have been treated simply as bills of exchange, a distinction would not have been material to the decision.[14] The use of post-dated checks is so well accepted that there is nothing in the fact that it is post-dated to put one on notice.[15] And so negotiation before maturity to a *bona fide* holder for value cuts off all personal defences existing between the maker and his payee.[16] That a post-dated check cannot be "paid" in advance of its date, so as to extinguish *pro tanto* the bank's debt to its depositor, seems reasonable. A refusal on the part of the bank to honor the instrument before its due date, is in no sense a dishonor allowing an immediate action against the maker.[17] The bank can only debit the depositor's account by payments at the time, to the person, and for the amount authorized by him.[18] And where the bank has paid the check before date, it is still liable to the depositor for the amount.[19] Though, like a drawee

---

[11] *Wilson v. McEachern* (1911) 9 Ga. App. 584, 71 S. E. 946; *Mohawk Bank v. Broderick & Powell* (1834, N. Y. Ct. Err.) 13 Wend. 133; *Gough & Herring v. Staats* (1835, N. Y. Sup. Ct.) 13 Wend. 549.

[12] *Frazier v. Travis P. and B. Company* (1881, N. Y. Sup. Ct.) 24 Hun. 281.

[13] *Allen v. Keeves* (1801, K. B.) 1 East, 435. They have since been held properly stamped as bills payable on demand. *Royal Bank v. Tottenham* [1894] 2 Q. B. 715.

[14] *Cf. Forster v. Mackreth* (1867) 16 L. T. N. S. 23.

[15] *Brewster v. McCardel* (1832, N. Y. Sup. Ct.) 8 Wend. 478.

[16] *Mayer v. Mode* (1878, N. Y.) 14 Hun. 155; *Symonds v. Riley* (1905) 188 Mass. 470, 74 N. E. 926.

[17] *Wilson v. McEachern, supra.*

[18] *Cf. Wheeler v. Guild* (1838, Mass.) 20 Pick. 545.

[19] *Godin v. Bank of the Commonwealth* (1856, N. Y. Super. Ct.) 6 Duer, 76.

discounting a bill, it could have held the checks until their date and thus had the same claim against the maker as any endorsee for value.[20] In fact, a post-dated check held by the drawee bank for collection has priority of payment, on penalty of the bank being liable to the extent of the shortage, if other paper is paid during the day depleting the funds.[21] But a change in date accelerating payment is material and the bank cannot thereafter charge its depositor's account though it paid in ignorance of the change.[22]

A nice question appears as to the effect of a post-dated check given in payment of a pre-existing debt. If the analogy of the post-dated check to a time note is to prevail, the usual rule would be that such payment should bar suit on the original cause of action until the due date had arrived.[23] On the other hand, ordinary checks given in payment of a debt are, in the absence of agreement to the contrary, held to be a discharge of the indebtedness only when paid.[24] The question as to whether they suspend a right of action on the debt until presented for payment does not seem to be considered. Logically, a post-dated check, pending its due date, should suspend the creditor's right of action on the debt.[25] Certainly, where the payee has negotiated the instrument to a holder for value without notice the drawer's debt is not subject to garnishment by the payee's creditors until after the date of the check and its dishonor.[26]

The question of certification of a post-dated check does not arise very often. Usually the maker is out of funds and it is, if only for that reason, ordinarily difficult to secure certification. But where a cashier duly authorized to certify checks acts in fraud, the instrument is enforceable against the bank by a holder in due course.[27] The difficulty with a post-dated check bearing a certification across its face of a date earlier than the due date is that it carries notice of lack of authority in the cashier; the presumption being that it was drawn on no funds. Therefore, a subsequent taker cannot recover of the drawee bank.[28] And it was so held, even though the holder secured

---

[20] See *Swope v. Ross* (1861) 40 Pa. 186; *Desha Shephard & Co. v. Steward* (1844) 6 Ala. 852.

[21] *Washington Second National Bank v. Averill* (1894, D. C.) 2 App. Cas. 470.

[22] *Crawford v. West Side Bank* (1885) 100 N. Y. 50, 2 N. E. 881.

[23] *Martens-Turner Co. v. Mackintosh* (1897) 17 App. Div. 419, 45 N. Y. Supp. 275.

[24] *United States National Bank v. Shupak* (1918) 54 Mont. 542, 172 Pac. 324; *Kinard v. First National Bank* (1906) 125 Ga. 228, 53 S. E. 1018.

[25] A very unsatisfactory decision allows an action by the creditor on returning the post-dated check before its due date. *Lockwood Trade Journal v. N. Y. Silicate Book Slate Co.* (1904, Sup. Ct.) 88 N. Y. Supp. 152.

[26] *Wilson v. McEachern, supra.*

[27] *Farmers & Mechanics Bank v. Butchers & Drovers Bank* (1857) 16 N. Y. 125; *Detroit National Bank v. Union Trust Co.* (1906) 145 Mich. 656, 108 N. W. 1092.

[28] *Clark National Bank v. Bank of Albion* (1868) 52 N. Y. 593.

the bank president's promise that the check would be met.[29] However, if the certification carried no date and the transfer was made by the holder on or after the due date, there would be no actual notice and it would follow the bank would be liable.

But certification at the instance of the maker presents a different problem. It has been held that on such certification the bank must appropriate sufficient funds of the depositor at once to meet the check.[30] And in such a case the presumption is that there were funds and a subsequent taker can enforce the check against the drawee bank.[31] This presumption of regularity should allow a taker before date to stand on the same footing as if he had taken after the due date without notice. But if the transfer is made by the payee before date it is impossible for the indorsee to tell who had it certified. Very probably an indorsee in such case will be held to take at his peril.

Practically, post-dated checks are in wider use and better repute than is usually accredited them. They possess all the advantages of payment by check coupled with a time element. It would seem very unwise for a maker to have his post-dated check certified, however, as he loses control of his deposit and interest and, if the bank were to fail, probably would not be discharged of the debt. But from the maker's standpoint an ordinary post-dated check is better than payment by time bill because it cannot be dishonored and protested with an immediate demand of payment. It should also, as has been shown above, amount to a suspension of the creditor's claim on the original debt. From the taker's standpoint, there is an advantage in that presentment need not be made on the exact day in order to charge the drawer or indorsers. Hence it is submitted that post-dated checks should find fuller recognition and come to fill their particular place of usefulness among the different types of commercial paper.

REVERSED JUDGMENT AS EVIDENCE IN MALICIOUS PROSECUTION

In a suit for malicious prosecution the plaintiff must prove both the termination of the original action brought by the present defendant and a want of probable cause to justify the institution of that action. If the original prosecution resulted in a conviction the plaintiff suing for malicious prosecution would find himself offering in evidence a fact from which an inference might be drawn that there was probable cause, thus fortifying the case of the defendant. The probative force

[29] *Swenson Bros. Co. v. Commercial State Bank* (1915) 98 Nebr. 702, 154 N. W. 233.

[30] *Smith v. Fields* (1911) 19 Ida. 558, 114 Pac. 668. This court held that the bank became liable immediately on certifying the check and that payment could be demanded at any time on presentment.

[31] *Merchants & Planters Bank v. First National Bank* (1914) 116 Ark. 1, 170 S. W. 852.

of evidence of a conviction which was subsequently reversed is still the subject of a rather complicated discussion. Recently, in *Kennedy v. Burbridge*,[1] the Utah Supreme Court, although abusing the terms employed, followed the weight of authority and held that the plaintiff, by alleging and proving that there had been a conviction followed by a reversal, had presented evidence, the effect of which was to support the defendant's contention that there was probable cause, which would be overcome only by proof that the judgment was obtained by fraud, perjury, or subornation.

Early courts were anxious to protect prosecutors and gave great weight to the decision and circumstances of the original prosecution, whatever its termination. In 1748, in *Reynolds v. Kennedy*,[2] it was held that a condemnation of articles by sub-commissioners of revenue was conclusive of probable cause in any subsequent suit for maliciously bringing the proceedings, though later the articles were ordered returned by the commissioners. A while later the courts gave equal weight to the mere fact that a jury had paused before rendering an acquittal, although the defendant had not been put "on his defence."[3] But a reaction followed, and some courts were soon found holding that even a conviction by a jury, if subsequently reversed, was only "strong presumptive" evidence of probable cause.[4] Considerable confusion resulted, since courts failed to classify carefully either the amount of weight to be given the judgments, or the differences in the kinds of judgments they were noticing.

As to the weight of the judgments—one court held that a mere record of the earlier conviction, even though reversed, was final, and was even prepared to reject evidence that a judgment was obtained by fraud.[5] On the other hand it was held that a reversal created a *status quo ante* and that consequently evidence of the conviction had no probative value.[6] But the majority of the courts contented themselves with declaring that the reversed judgment had the weight of "conclusive," or else of *"prima facie,"* evidence, without defining those terms.[7] It is clear, however, that the courts use the terms in

[1] (1919, Utah) 183 Pac. 325.

[2] (1748, K. B.) 1 Wils. 232.

[3] *Smith v. MacDonald* (1799, N. P.) 3 Esp. 7; followed in *Grant v. Duel* (1842) 43 La. 17; see also 2 Starkie, *Evidence* (1st ed. 1826) 916.

[4] *Goodrich v. Warner* (1852) 21 Conn. 431, 443.

[5] *Griffis v. Sellars* (1837) 19 N. C. 492, 31 Am. Dec. 422, note.

[6] *Richter v. Koster* (1874) 45 Ind. 440.

[7] The result has been amusing. The Minnesota court, in *Skeffington v. Eylward* (1906) 97 Minn. 244, 105 N. W. 638, divided the cases into three classes, and, using the word "conclusive" to mean "conclusive if not overcome by fraud," found that its classes one and two were the same. Then the Utah court, in *Kennedy v. Burbridge, supra,* after citing the Minnesota court at length, and adopting its classification, used *"prima facie"* in a sense that included its predecessor's use of conclusive, and decided that classes two and three were the same. The result was a mathematical demonstration that the words "conclusive" and "prima facie" were synonymous.

two clearly different senses: evidence of a judgment is "conclusive" if it is final unless judgment be shown to have been obtained by fraud; it is *"prima facie"* evidence if other evidence beside that of fraud in obtaining the verdict is admissible. The rather extraordinary holdings mentioned above can be disregarded, and it is safe to use the terms "conclusive" and *"prima facie,"* as defined above, in classifying judgments and the weight they deserve.

Findings which do not result in a formal conviction by a jury or a justice of the peace are nowhere held to have more than *prima facie* force.[8] Among the decisions that do have such force, however, are a finding by a justice of probable cause in issuing a warrant,[9] binding over to trial,[10] commitment,[11] indictment by a grand jury,[12] and a commitment to an insane asylum.[13] It is evident that the holdings that the mere fact that a jury paused before rendering an acquittal is conclusive are anomalous, as a disagreement after twenty-seven hours of deliberation is not now given such weight.[14] But if there be a conviction, and no subsequent reversal, the judgment is conclusive, whether it resulted from a trial by jury,[15] a justice of the peace,[16] or a police court.[17] The conviction must, however, have been of the offense for which the plaintiff was prosecuted by the defendant, and not for a lesser one.[18]

What is the effect of a reversal? In answering this question, it is necessary to regard the nature of both the "reversal" and the original conviction. Merely the granting of a new trial will not terminate a

---

[8] *Bacon v. Towne* (1849, Mass.) 4 Cush. 217; *Spalding v. Lowe* (1885) 56 Mich. 366, 23 N. W. 46; *Ash v. Marlowe* (1851) 20 Ohio, 119; *Raleigh v. Cook* (1883) 60 Tex. 438, and cases *infra.*

[9] *Ross v. Hixon* (1891) 46 Kan. 550, 26 Pac. 955. If there is a waiver of the preliminary examination the effect is the same as if there had been a finding. *Hess v. Oregon Baking Co.* (1897) 31 Ore. 503, 49 Pac. 803.

[10] *Bacon v. Towne, supra; Bechel v. Pacific Express Co.* (1902) 65 Neb. 826, 91 N. W. 853.

[11] *Ewing v. Sanford* (1851) 19 Ala. 605; *Bauer v. Clay* (1871) 8 Kan. 580; *Ganea v. Southern Pac. R. R.* (1875) 51 Calif. 140; *Diemer v. Herber* (1888) 75 Calif. 287, 17 Pac. 205.

[12] *Casey v. Dorr et al.* (1910) 94 Ark. 433, 127 S. W. 708; *Ricord v. Central Pac. R. R.* (1880) 15 Nev. 167; *contra, Peck v. Choutean* (1886) 91 Mo. 138, 3 S. W. 577.

[13] *Kellog v. Cochrane* (1892) 87 Calif. 192, 25 Pac. 677.

[14] *Barker v. Scott* (1894) 92 Iowa, 52, 60 N. W. 497.

[15] As the plaintiff must aver the termination of the original action in his favor, evidence of a final conviction is conclusive as to *two* facts which he must prove.

[16] *Witham v. Gowen* (1837) 14 Me. 362; *Payson v. Caswell* (1842) 22 Me. 212.

[17] *Morrow v. Wheeler Mfg. Co.* (1896) 165 Mass. 349, 43 N. E. 105.

[18] *Labar v. Crane* (1883) 49 Mich. 561, 14 N. W. 495. It is clear that if the defendant prosecuted the plaintiff for assault with intent to kill and he was convicted of assault and battery, that conviction would not warrant an inference as to the causes justifying the bringing of the prosecution for assault with intent to kill.

prosecution (and the plaintiff must prove termination), but the prosecution may be ended before the appellate court, either by a judgment for the defendant and his consequent discharge, or by order for a new trial followed by the entry of a *nolle prosequi.*[19] The courts have not distinguished between these "reversals" except in the rare cases which hold that peculiar significance should be given to a reversal of judgment on the finding of fact.[20] But different weight has been given the "reversed" judgments of trials by juries and by justices of the peace. The former are practically always held conclusive;[21] but only a respectable majority of the cases give such weight to the conviction by a justice if reversed.[22] The classification above disposes of most possible conclusions of a prosecution, except an acquittal on retrial. There is authority for the holding that the original conviction then has the weight of *prima facie* evidence only,[23] but it is difficult to see why such an acquittal in a second trial should more effectively overcome the inference to be drawn from the prior conviction than would an acquittal by an appellate court on the findings of fact, a reversal followed by a discharge, or the granting of a new trial followed by the entry of a *nolle prosequi.*

Barring inevitable minor inconsistencies, the actual ruling of courts on the question of probable cause has been more uniform than a hasty reading of their opinions would indicate. By giving to proof of a

---

[19] One case, it is true, holds that "nothing short of an acquittal will answer where the prosecution has progressed to a trial by a petit jury." *Kirkpatrick v. Kirkpatrick* (1861) 39 Pa. 288. But the court's difficulty related to the question of the necessity of an averment that the prosecution ended *in favor of* the plaintiff. Evidently only an acquittal has that weight—a new variation of the idea of Scotch verdict.

[20] *Nehr v. Nobbs* (1896) 47 Neb. 870, 66 N. W. 866.

[21] *Griffis v. Sellars, supra* (conclusive even if fraudulently obtained); *Parker v. Farley* (1852) 64 Mass. (10 Cush.) 279; *Carpenter v. Sibley* (1908) 153 Calif. 215, 94 Pac. 879. In *Goodrich v. Warner, supra,* when there had been a previous conviction by a jury, it was not held conclusive. In *Knight v. International C. G. N. Ry.* (1894, C. C. A. 5th) 61 Fed. 87, it was held that the evidence had at least the weight of a *prima facie* case, there being no need to find more to establish grounds for a reversal.

[22] Conclusive: *Whitney v. Peckham* (1818) 15 Mass. 243; *Herrman v. Brookerhof* (1839, Pa.) 8 Watts, 240; *Cloon v. Gerry* (1859, Mass.) 13 Gray, 201; *Phillips v. Kalamazoo* (1884) 53 Mich. 33, 18 N. W. 547; *Adams v. Bicknell* (1890) 126 Ind. 210, 25 N. E. 804; *Saunders v. Baldwin* (1911) 112 Va. 431, 71 S. E. 620. *Burt v. Place* (1830, N. Y.) 4 Wend. 591 recognizes the doctrine, but holds that evidence that the defendant knew that there was no cause, like evidence of fraud, will overcome the effect of the conviction.

Prima facie: Nicholson v. Sternberg (1901, N. Y. Sup. Ct.) 70 N. Y. Supp. 212; *Skeffington v. Eylward, supra.* In *Womack v. Circle* (1877, Va.) 29 Gratt. 192, there was an even division of the court, two of the judges considering evidence of the conviction conclusive, and two arguing that it had only the weight of *prima facie* evidence.

[23] *MacDonald v. Schroeder* (1906) 214 Pa. 411, 63 Atl. 1024. See also *Palmer v. Avery* (1864, N. Y. Sup. Ct.) 41 Barb. 290, 296.

valid conviction the weight of conclusive evidence, they afford practical protection to prosecutors and curtail a large amount of what would probably be futile litigation, and logically it is perfectly sound to give great weight to the inference to be drawn from evidence of a conviction, even if it is later reversed. But one criticism is certainly warranted—that legal terms have been carelessly used and abused. And it is due to this abuse that some of the decisions cannot be fully understood, for example, those of the minority which are authority for the proposition that if the plaintiff, in showing termination of the original prosecution, proves a conviction by a justice of the peace, an acquittal, and a discharge, he is making out a *"prima facie"* case of probable cause for the defendant. By a *"prima facie* case," most courts mean sufficient evidence to justify a verdict for the party introducing it, without the introduction of other evidence. But here the burden of proof of want of probable cause and, with it, the burden of proceeding with the evidence is on the plaintiff anyhow. Consequently, in the absence of any evidence at all, the defendant is entitled to a verdict. To conclude that the introduction of evidence of the previous conviction makes out a *"prima facie"* case, means that the defendant has, in the absence of contrary evidence, a second claim to a verdict, and the first is adequate. What is meant by courts? Simply that, in proving the conviction and subsequent reversal, in order to satisfy the requirement that proof be given of one of the essential facts: unsuccessful termination of the original prosecution, the plaintiff has given strong evidence of the existence of probable cause. This evidence he must proceed to overcome in order to make out even a *prima facie* case—and it with any other evidence in order to sustain the burden of proof—as to that second necessary fact—want of probable cause. How strong the evidence is—whether almost conclusive, or almost negligible—no court has attempted to decide. The resort to the term *"prima facie,"* which has covered a multitude of meanings, is responsible for this.

RULES OF CONFLICT AND OF CONSTRUCTION IN APPLYING FOREIGN STATUTES

When a foreign statute is offered as governing a particular matter in suit, the court of the forum may be required to perform two fundamentally different functions: first, the resolution of conflicts between rival systems of law thus offered; second, the investigation of the intrinsic meaning of the particular statute. In the former problem the court uniformly applies the local rules of conflict;[1] in the latter it ordinarily adopts the construction of the highest court of the enacting

[1] *Pickering v. Fisk* (1834) 6 Vt. 102; *Marshall v. Sherman* (1895) 148 N. Y. 9, 24, 42 N. E. 419; Story, *Conflict of Laws* (8th ed. 1883) sec. 36.

jurisdiction.[2] A boundary dispute between these two subjects may therefore be decisive of a case. Where does the problem of conflict end and the problem of construction begin? A recent federal case[3] reveals in a new light the elusive character of this problem.

An action was brought on a contract made in Michigan for the lease of property situated in New York. Both Michigan and New York have statutes of frauds applicable to contracts of this kind.[4] The memorandum of the contract in suit complied with the requirements of the New York statute; it was not shown to have complied with the more stringent requirements of the Michigan statute. The latter was pleaded in defence. The court, sitting in the state of New York, overruled the defence, holding that under the New York decisions which the court was bound to follow in the construction of a New York statute, either the *lex fori* or the *lex rei sitae* must govern.

If the court had committed itself to the *lex rei sitae* rather than to the *lex fori,* we should not hesitate to recognize the problem as one merely of conflict of laws. While the constitutional power of a particular legislature to control a matter in suit is often much more extensive than the province of control accorded to the same jurisdiction by rules of conflict,[5] and therefore it is sometimes necessary to inquire at the outset how far a particular legislature could go and has gone in resolving questions of conflict of laws in favor of its own enactments, we should not be troubled by such an inquiry in this case. Neither the Michigan statute nor the New York statute has been or reasonably could be construed to decide the issue between the *lex loci contractus* and the *lex rei sitae.*

Both statutes might be held, by virtue of their intrinsic force, to go to the substance of the contractual relation. Beyond this both would be intrinsically neutral. The issue would have been exclusively between the contract law of Michigan as a whole including the Michigan statute of frauds, and the contract law, or the real property law, of New York as a whole including the New York statute of frauds. We should then be left merely with the inquiry why the federal court did not apply the rules of conflict of its own choice rather than to resort to the law of the state in which it sat.[6]

---

[2] *Van Matre v. Sankey* (1893) 148 Ill. 536, 36 N. E. 628.

[3] *Hotel Woodward Co. v. Ford Motor Co.* (1919, C. C. A. 2d) 258 Fed. 322.

[4] Mich. Comp. Laws, 1897, ch. 257, sec. 8; N. Y. Real Property Law, 1909, sec. 259, Cons. Laws, ch. 50.

[5] *Green v. Van Buskirk* (1866, U. S.) 5 Wall. 307, 18 L. ed. 599.

[6] *Guernsey v. Imperial Bank of Canada* (1911, C. C. A. 8th) 188 Fed. 300; *McCue v. Northwestern Mut. Life Ins. Co.* (1908, C. C. A. 4th) 167 Fed. 435; *U. S. Savings etc. Co. v. Harris* (1902, C. C. E. D. Ky.) 113 Fed. 26; *McIlwaine v. Ellington* (1901, C. C. A. 4th) 111 Fed. 578; *Dygert v. Vermont Loan & Trust Co.* (1899, C. C. A. 9th) 94 Fed. 913; *First National Bank v. Mitchell* (1899, C. C. A. 2d) 92 Fed. 565; *Evey v. Mexican Cent. Ry.* (1897, C. C. A. 5th) 81 Fed. 294.

In fact, however, the issue between the *lex rei sitae* and the *lex fori* was expressly left open.[7] It is possible, therefore, that the New York statute was procedural in character. Admittedly a local rule of procedure is applicable to suits in the federal court.[8] But how could this determine the non-applicability of the Michigan statute, the provisions of which had not been complied with and which was pleaded in defence to the action? If the latter question was one of construction, the New York decisions were irrelevant; if it was one of conflict, they were not controlling.[9] If, then, the court found that the Michigan statute was substantive in character and that the law of Michigan was primarily applicable to the contract, why should not that statute have been applied, notwithstanding the fact that the New York procedural statute may have been also applicable? Does the mere fact of statutory duplication itself present a conflict of laws?

Clearly such a double application of statutes presents no unparalleled or anomalous situation. Many of the modern death statutes provide a temporal limitation applicable to the substantive right, and suits under these statutes are sometimes brought in other jurisdictions.[10] The latter surely have procedural statutes of limitations of their own, and these sometimes allow a period longer than that permitted by the substantive statute. The contention that the local limitation excludes the operation of the other has not been sustained.[11]

How can the case of concurrent substantive and procedural formal requirements be distinguished from that of the temporal limitations just mentioned? It is equally impossible in either case to extract from the local procedural statute a rule of exclusion directed against the foreign substantive statute. In neither case does the fact of duplication of regulations involve the necessity of a choice between them. Both substantive and procedural statutes may be applicable and each may be applied independently of the other. The procedural rule has indeed nothing upon which to operate in the event that the substantive rule has defeated the substantive right. But this is merely the normal case of a contract void or defective by the governing substantive law, brought in suit in a jurisdiction under the law of which it would have been valid.[12]

We must therefore reject the doctrine that the overlapping application of two similar statutory provisions requires the exclusion of one of them from control. It follows that the operation of the Michigan statute could not be affected by anything enacted or decided in New York.

---

[7] *Hotel Woodward Co. v. Ford Motor Co., supra,* 329.

[8] *Buhl v. Stephens* (1898, C. C. D. Ind.) 84 Fed. 922.

[9] See note 6, *supra.*

[10] *Missouri Pac. Ry. v. Larussi* (1908, C. C. A. 7th) 161 Fed. 66; *International Nav. Co. v. Lindstrom* (1903, C. C. A. 2d) 123 Fed. 475.

[11] *Stern v. La Compagnie* (1901, D. C. S. D. N. Y.) 110 Fed. 996.

[12] *Accord,* 64 L. R. A. 121, note.

Were, however, the New York decisions controlling even with respect to the application of the New York statute? With deference to the contrary opinion expressed in the principal case,[13] it is submitted that statutory construction and statutory application may in this connection present fundamentally different problems. It is possible, indeed, that the New York court which held the local statute applicable to all actions brought in the New York courts did so by a mere construction of the statute. But it is at least equally possible that the court first determined the concrete effect of the statute and then proceeded to characterize it on a strictly conflict of laws basis of classification.[14] Admittedly the court found in the intrinsic force of the statute itself its effect in withholding the remedy on a defective contract without extinguishing the contract itself. But where did it obtain the further premise, that statutes which merely produce these enumerated effects are "procedural" and not "substantive" in character? The latter proposition has no meaning except with reference to the solution of a conflict of laws question. Did the court impute to the legislature the intention to make this conflict of laws classification? Or did it make the classification itself? If the former, it was indeed construing the statute throughout the entire course of its reasoning. If the latter, the statutory construction ceased at the point where the substantive-procedural classification began, and all that followed was purely a judicial solution of a problem in the conflict of laws.

It seems contrary to all reasonable presumptions to ascribe to the legislature an intention to make such a conflict of laws classification in the absence of a genuine expression of intention such as is seldom to be found.[15] All judge-made rules of law are intrinsically neutral with respect to such classifications.[16] Why should not statutory rules be presumed to maintain a similar neutrality? Our insistence, however, is confined to the point that the question itself can not be evaded without grave possibility of error, that it can not be answered without a careful distinction between the intrinsic force of a statute and its

---

[13] *Hotel Woodward Co. v. Ford Motor Co., supra,* 329.

[14] The following cases recognize this distinction: *Converse v. Meers* (1908, C. C. W. D. Wis.) 162 Fed. 767; *Leyner Engineering Works v. Kempner* (1908, C. C. S. D. Tex.) 163 Fed. 605; *Whitlow v. Nashville, etc. Ry.* (1904) 114 Tenn. 344, 84 S. W. 618. But see *Hood v. M'Gehee* (1911, C. C. Ala.) 189 Fed. 205.

[15] *Leroux v. Brown* (1852, C. P.) 74 E. C. L. 801, and cases following it, in making the conflict of laws distinctions turn upon mere verbal differences between different sections of the statute of frauds, have not met with general approval. *Heaton v. Eldridge* (1897) 56 Oh. St. 87, 46 N. E. 638; *Townsend v. Hargraves* (1875) 118 Mass. 325; *Cochran v. Ward* (1892) 5 Ind. App. 89, 29 N. E. 795, 31 N. E. 581; *Miller v. Wilson* (1893) 146 Ill. 523, 34 N. E. 1111.

[16] See Lorenzen, *The Renvoi Theory and the Application of Foreign Law* (1910) 10 COL. L. REV. 190, 202 ff.

"application," into which conflict of laws elements may have entered,[17] and that the result should not be influenced by the immaterial element of statutory duplication.

A GOVERNMENT'S LIABILITY FOR BRIGANDAGE AGAINST ALIENS

The *Jenkins* case in Mexico has served to produce considerable difference of opinion between the Department of State on the one hand and certain newspaper editors, on the other, as to the liability of Mexico for the acts of the bandits who seized and held Jenkins, an American consular agent at Puebla, for a large ransom. The newspapers urged an immediate ultimatum and the exaction of redress from the Mexican Government; the State Department was more disposed to follow legal principles. The second phase of the case, namely, the alleged malicious prosecution of Jenkins by the Mexican Government, involves a different principle, to be discussed presently.

It seems that Jenkins was taken from his house by several bandits who held him about a week for the ransom which Jenkins' attorney ultimately paid. The newspapers urged that the Mexican Government be forced immediately to repay the ransom and to pay an indemnity for the injury to Jenkins. The State Department stated that such demands could only be made if the negligence of the Mexican Government could be shown. The case is not without precedents, and it may be of interest to discuss it from the point of view of international law.

Individuals, whether singly or in groups or in mobs, are not authorities of the State whose torts upon aliens immediately engage the responsibility of the Government. To bring that about there must be some independent delinquency of the Government itself, a failure, after opportunity afforded, either to prevent the injury or to punish the guilty. A government is not, as is so often assumed, a guarantor of the security of aliens. Under ordinary circumstances, it is merely under a duty to furnish governmental machinery which normally would protect the alien in his person and property. This does not mean that this machinery must be so efficient as to prevent all injury to aliens, but merely that it must be so organized that a violent assault by one individual upon another is only a fortuitous event and that under the particular circumstances all reasonable measures have been taken to prevent the injury and punish the guilty. As a corollary to this principle, a government's duty and consequent responsibility for breach are measured by its *ability* to protect the alien in a given case.[1]

[17] For examples of the difficulty of determining when a court is merely construing a statute and when it is applying to the statute a rule of conflict, see *Langworthy v. Little* (1853, Mass.) 12 Cush. 109; *Emery v. Clough* (1885) 63 N. H. 552, 4 Atl. 796.

[1] *Bowley (U. S.) v. Costa Rica,* July 2, 1860, Moore's *Arb.* 3032; Calvo, *Droit international* (6th ed.) sec. 1274, makes the "facilities at hand" the test of responsibility. Mr. Hay, Sec'y of State, to Mr. Dudley, Min. to Peru, Sept. 5,

Commissioner Wadsworth in the United States-Mexican arbitration of 1868 expressed the opinion that the test of a nation's responsibility for injuries committed upon aliens in its territory by private persons, is the enforcement of the laws "with reasonable vigor and promptness to prevent violence when practicable, or failing in that to punish the offenders criminally, or to indemnify the injured party by (its) remedial civil justice."[2]

To render the Government liable, therefore, it has been deemed necessary for the claimant to prove some manifestation of actual or implied governmental complicity in the act, before or after it, either by directly ratifying or approving it,[3] or by an implied, tacit or constructive approval in the negligent failure to use "due diligence" to prevent the injury,[4] or to investigate the case, or to prosecute and punish the guilty individuals,[5] or to enable the victim to pursue his civil remedies against the offenders.[6]

The "due diligence" rule, of which a few applications have been enumerated, naturally depends upon the circumstances of the case, and is sometimes expressed by the phrase that "ability is the test of responsibility." In the *Jenkins* case, in order to hold Mexico liable for the ransom, it would be necessary to show either that Mexico had had warning of the presence of bandits, as in the *Baldwin* case[7] in 1887, and had failed, though having the opportunity, to take reasonable police precautions to prevent the kidnapping or to apprehend the marauders, or that some other want of "due diligence" is imputable

---

1899, 6 Moore's *Dig.* 806. But the apprehension and punishment of the guilty will be demanded. Borchard, *Diplomatic Protection of Citizens Abroad* (1915) secs. 86, 87.

[2] *Mills (U. S.) v. Mexico,* July 4, 1868, Moore's *Arb.* 3034.

[3] Kane's notes on arbitration convention with France, 1831. Phila., 1836, p. 31. *Piedras Negras claims (Mexico) v. United States,* July 4, 1868, Moore's *Arb.* 3035.

[4] *Hubbell et al. v. United States* (1879) 15 Ct. Cl. 546 (Chinese indemnity); *Alabama claim (U. S.) v. Great Britain,* May 8, 1871, 6 Moore's *Dig.* 999; *Evertsz (Netherlands) v. Venezuela,* Feb. 28, 1903, Ralston, 904. The recent case of "Pussyfoot" Johnson in London, where the police without resistance, it seems, permitted a mob to assault this individual, illustrates the rule of governmental liability.

[5] *De Brissot (U. S.) v. Venezuela,* Dec. 5, 1885, Moore's *Arb.* 2868; *Poggioli (Italy) v. Venezuela,* Feb. 13, 1903, Ralston, 869; *Renton claim v. Honduras,* For. Rel. 1904, p. 363 (refusal to diligently prosecute and punish). Incidental grounds would be: inadequate punishment (*Lenz claim v. Turkey,* Mr. Hay, Sec'y of State, to Mr. Strauss, Mar. 25, 1899, For. Rel. 1899, p. 766); negligently permitting offender to escape (*Lenz* and *Renton* cases, *supra*); inexcusable delay in investigating the facts (*Ruden (U. S.) v. Peru,* Dec. 4, 1868, Moore's *Arb.* 1655).

[6] Unjustifiable pardon to the offenders (*Montijo (U. S.) v. Colombia,* Aug. 17, 1874, Moore's *Arb.* 1421, 1444. *Cotesworth and Powell (Gt. Brit.) v. Colombia,* Dec. 14, 1872, *ibid.,* 2050, 2085.

[7] *Baldwin claim v. Mexico,* 1887, 6 Moore's *Dig.* 801.

to her.[8] In better organized states this "diligence" has been measured by the Government's "ability" in the particular circumstances.

Notwithstanding this general rule, cases have not been infrequent where a more rigorous test of liability has been imposed, notably against more poorly organized or weak states like China, Turkey, Morocco and formerly Greece. Here liability for assaults by private individuals has been predicated, not on any imputed governmental complicity or negligence, but on the mere failure to prevent the injury.[9] Disregarding thus a certain assumption of risk on the part of an alien in visiting notoriously unstable countries or regions, the local government is apparently placed in the position of an insurer of the safety of aliens, at least of those that can claim the citizenship of powerful countries. The weaker countries, notwithstanding their lesser ability to protect aliens, are thus held to a higher degree of responsibility for their safety than strong states. This departure from principle has been strongly influenced by that factor in international relations which weights arguments according to the physical power of their proponents.

While a consular agent is usually only a local resident business man who exercises minor consular functions, he has, nevertheless, been deemed to be entitled to a measure of special protection by the local authorities not enjoyed by the ordinary private alien.[10] His official

---

[8] Marauders in Peru, 1899, 6 Moore's *Dig.* 806; Case of Miss Ellen Stone in Turkey, For. Rel. 1902, 997-1023. Inasmuch as Jenkins was taken from his house in a populous city like Puebla, the presumption of negligence against Mexico is much stronger than if the capture had been made in an unsettled region. This factor was emphasized in 1907 by the British government in its demand on Turkey for reimbursement of the ransom paid for the release of Robert Abbott. Reimbursement of ransoms paid has been demanded from defendant governments when actual or implied complicity or negligence has been alleged, e. g., in the failure to take proper steps to suppress brigandage. *Synge* and *Sutor* cases *(Gt. Brit.) v. Turkey,* in 1881, 72 St. Pap. 1167. Borchard, *op. cit.,* secs. 88, 171.

[9] Numerous cases of private murder of aliens in China, reported in For. Rel. 1880. Japanese subjects murdered in China, 1874, Moore's *Arb.* 4857; Dreyfus, *Arbitrage international,* 176, 177; *Lieut. Cooper claim (Gt. Brit.) v. Turkey,* 1888, 81 St. Pap. 178; *Caldera (U. S.) v. China,* Nov. 8, 1858, Moore's *Arb.* 4629; *Hubbell v. United States, supra* (based principally on treaty obligation); *Russia v. Turkey,* 1826 (Turkey held liable for depredations of Moorish pirates) 13 St. Pap. 899, 16 St. Pap. 647, 657. Five cases of British subjects injured in Greece, about 1850, by acts of individuals, Baty, 116-118; *Marcos v. Morocco,* 1900 (1901) 28 Clunet, 205. Murder of Italian soldier in Crete, 1906 (1907) 1 A. J. I. L. 158; (1906) 13 R. G. D. I. P. 223; *Montijo (U. S.) v. Colombia,* Aug. 17, 1874, Moore's *Arb.* 1421ff. (absence of power considered equivalent to omission to use it). Turkey and Morocco held responsible for acts of pirates from their shores on three occasions, (1905) 12 R. G. D. I. P. 563-565. "Insufficiency of the protective measures afforded," an alleged ground of liability in certain cases in Turkey, For. Rel. 1897, p. 592.

[10] Attacks on German consulate in Havre, 1888, in Messina, 1888, and in

position alone, however, should not serve to make the local government an insurer of his safety, although that doubtless renders it more difficult for the government to overcome the presumption of negligence ordinarily attaching to a notorious act of brigandage in a populous town.

The second phase of the *Jenkins* case involved his arrest on the charge, subsequently dropped, of collusion with his captors, and the later charge that he had committed perjury in the course of the judicial proceedings. The State Department, which must have evidence that has not been made public, has taken the position that the charge of perjury is without foundation, prompted by malice against Jenkins, and has demanded his "immediate release." We shall leave aside the incidental questions raised concerning Mexican constitutional law in the matter of the separation of powers and removal of causes. It is a fundamental principle that every nation, whenever its laws are violated by anyone owing obedience to them, whether citizen or alien, is privileged, free from interference by other states, to inflict the penalties incurred by the transgressor if found within its jurisdiction, provided that the laws themselves, the methods of administering them, and the penalties prescribed are not in derogation of modern standards of civilized justice.[11]

The criminal procedure of foreign countries frequently contains harsh features and is deficient in many safeguards which American law provides for the benefit of the accused. This constitutes no ground for diplomatic complaint, the right of the United States being confined to a demand that its citizens be given the full and fair benefit of the system which does exist, without discrimination in favor of natives or other aliens.[12] An alien must submit to the inconvenience of proceedings that may be brought in accordance with law upon any *bona fide* charge that an offense has been committed, even though the

---

Warsaw, 1901 (1889) 16 Clunet 250; Borchard, *op. cit.*, secs. 86, 90. French and German consuls murdered in Salonica, 1876, 67 St. Pap. 917; 5 Moore's *Dig.* sec. 704, discusses cases in Venezuela, Peru, Nicaragua, Santo Domingo and United States. See the following authorities: Vattel, Chitty's ed., Bk. IV, ch. VI, sec. 75, p. 460; Phillimore, II, sec. 246, p. 263; Pradier-Fodéré, IV, sec. 2108.

But see case of Servian Vice-consul assassinated in Turkey, 1890, Baty, 224 and *Wipperman (U. S.) v. Venezuela,* Dec. 5, 1885, Moore's *Arb.* 3041, which were not taken out of the general rule of non-liability.

[11] Mr. Marcy, Sec'y of State to Mr. Jackson, charge at Vienna, Jan. 10, 1854, 2 Moore's *Dig.* 88; *Ballis (U. S.) v. Venezuela,* Feb. 13, 1903, Morris' Report, Sen. Doc. 317, 58th Cong. 2d sess., 375. Borchard, *op. cit.*, sec. 42.

[12] Mr. Marcy, Sec'y of State, to Mr. Jackson, Apr. 6, 1855, 2 Moore's *Dig.* 89; 6 *ibid.*, 275. See also the illuminating opinions in *In re Neely* (1900, C. C. S. D. N. Y.) 103 Fed. 626 and in *Neely v. Henkel* (1901). 180 U. S. 109, 21 Sup. Ct. 302 (by Justice Harlan).

charge may not be sustained.[13] The issue in the *Jenkins* case arises on the point of the *bona fide* nature of the charge. The State Department evidently regards the arrest as without probable cause, and dictated by malice. If that is so, there is no doubt of the duty of Mexico to release him and to pay an indemnity.[14] Jenkins' original refusal to give bail and his subsequent release on bail given by another does not weaken his case—though it might reduce the indemnity—if his allegations of fact are sustained. But the facts are disputed by Mexico. The case is purely a matter of law and unless other considerations dictate another policy, it would seem that arbitration should be resorted to. Unless the United States is absolutely certain of the facts, and even if it is, the policy of self-help involves consequences conducive neither to the peace of the world nor to the orderly development of international law. It is one of the defects of international law that self-help is admitted as a legal method for the redress of injuries, the plaintiff state constituting itself judge and sheriff. The political consequences of such measures, or course, cannot be predicted. Austria's insistence upon the privilege to resort to self-help in the redress of an alleged grievance against Servia brought about the World War.

E. M. B.

FREE SPEECH IN TIME OF PEACE

The question of freedom of speech under the Constitution comes again before the country with the notable decision in *Abrams v. United States* (1919) 40 Sup. Ct. 17. On this case, and on those of *Schenck, Frohwerk and Debs*,[1] further legal discussion of the restriction of speech must, in the main, be based.

Certain things are clear at the outset. There are principles at the base of our form of government on which all Americans can agree. The majority is to rule, and the minority is to obey. Correlative to this is the proposition that the minority shall have reasonable opportunity to object before laws are passed, and to turn itself, by peaceful conversion, into a majority if so be it can. Finally, the minority may properly be restricted to action that is peaceable and non-destructive; it is not to object nor to persuade by blackjack nor by sabotage. Commonplace though these propositions are, it is well to state them.

---

[13] Elihu Root in (1910) 4 AM. J. INT. LAW, 527. *Trumbull (Chile) v. United States*, Aug. 7, 1892, Moore's *Arb.* 3255, and the following cases before the United States-Mexican commission of July 4, 1868: Collier (*ibid.* 3244), *Atwood* (*ibid.* 3249), Cramer (*ibid.* 3250). See also *White (Gt. Brit.) v. Peru* (1864) *ibid.* 4967 and *"LaForte" (Gt. Brit.) v. Brazil* (1863) *ibid.* 4925.

[14] *Jonan (U. S.) v. Mexico*, July 4, 1868, Moore's *Arb.* 3251; *Pratt (Gt. Brit.) v. United States*, May 8, 1871, *ibid.* 3280; *Underhill (U. S.) v. Venezuela*, Feb. 17, 1903, Ralston 45, 51.

[1] (1919) 249 U. S. 47, 204, 211; 39 Sup. Ct. 247, 249, 252; all the opinions were by Justice Holmes.

During the war the matter of restriction on speech was much before our lower federal courts in the shape of prosecutions under the Espionage and Sedition Acts. These acts made criminal the advocacy or urging of certain classes of conduct, such as forcible resistance to a law of the United States;[2] also the publication of matter intended to cause insubordination in the fighting forces of the United States, or to obstruct the recruiting service.[3] Clearly we are dealing here with offenses involving criminal intent; clearly also, the validity of the enactments depends on their relation to the First Amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press." The acts were properly held constitutional. "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 which Congress has a right to prevent."[4] "By the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech" that falls within the above description.[5] There is no cause to quarrel with this view of the law. As long as only such words are made punishable as produce or are intended to produce *a clear and imminent danger that they will bring about evils forthwith*—so long the principle of free speech is safe. In practice, now and again, free speech may nonetheless be penalized. Laws are administered by men. Men's feelings influence their judgments, as to the meanings of words, as to the imminence of danger. This is inevitable. But as long as the tests of constitutionality and of criminality are chosen carefully, in times of repose, and carefully laid down in the courts in times of stress, all has been done that can be done to safeguard liberty. The test laid down by Justice Holmes in the above passages is that of common-law incitement to crime. It is a sound test. The Constitution was never intended to privilege such incitement.[6]

But what constitutes criminal incitement, or urging, or advocacy? In the lower federal courts words were held criminal for "counselling evasion" of, e. g., the Selective Service Act.[7] The test of criminality

---

[2] Espionage Act, Title 12, sec. 3.

[3] *Ibid.*, Title 1, sec 3.

[4] *Schenck v. United States, supra.*

[5] Holmes, J. in *Abrams v. United States.*

[6] On this, and on the historical background of the First Amendment generally, see an article by Fred G. Hart, *Power of Government over Speech and Press,* to appear in the JOURNAL for February.

[7] *Fraina v. United States* (1918, C. C. A. 2d) 255 Fed. 28, 33, per Hough, J. No attempt is made in this comment to cite the authorities in the lower federal courts, nor to group or analyze them. They are exhaustively collected and digested by Thomas F. Carroll (1919) 17 MICH. L. REV. 621. The questions involved have also been examined by Professor Zechariah Chafee, Jr., with his usual power and lucidity in 17 NEW REPUBLIC, 66 (Nov. 16, 1918) and (1919) 32 HARV. L. REV. 932. The writer accords wholly with Professor Chafee's conclusions. See also G. Henderson, 21 NEW REPUBLIC 50 (Dec. 10, 1919).

which was upheld time and again was such *tendency* of the words used, in the circumstances in which they were used.[8] But tendencies may be remote or immediate. To state that two notorious persons who have just been convicted of conspiracy to induce persons not to register under the Conscription Act, "have made themselves elemental forces akin to the rocks and trees and rivers, ... the inference being that their greatness grows out of their offense, ... is equivalent to saying that their unlawful conduct is worthy to be followed."[9] And, to carry the thought to its conclusion, to say that their conduct is worthy of admiration is to urge others to imitate it, and is an offense within the act. In such a case the words are properly read with a view to the surroundings in which they were used; a possible, or even perhaps probable, tendency to encourage criminal resistance to the law is thus established; the necessary intent to encourage such resistance is inferred from the use by a reasonable man of such words in such circumstances; and the offense is made out. But no requirement is even hinted at, that *"only present danger of immediate evil or an intent to bring it about* can warrant Congress in setting a limit to the expression of opinion where private rights are not involved."[10] The difference is vital. It is somewhat hard to see how the most law-abiding citizen can agitate against a law to effect its repeal, without using words that have some possible tendency to induce violation of that law. And if such a tendency can be made criminal in time of war, it can be made criminal in time of peace. In the *law* in war-time and peace-time there is in this matter no difference. The difference is solely one of fact: words which when men's minds are at rest would have but a remote tendency to arouse them to violence, may in times of high tension produce an immediate danger of such violence. A jury, too, may in times of stress find in words an instant danger which in other times the same jury would not see. These are differences in fact and in administration; they do not militate against the validity of "immediate danger" as the only proper test of criminality of words. It is not, therefore, a cause for concern simply that convictions took place under the war measures which to-day appear to be miscarriages of justice. In part these have, now that conditions in men's minds are more nearly normal, been corrected on appeal.[11] In part they are of the sort which must always accompany the administration of justice by men: the accused failed to use his right to

---

[8] The test of common-law incitement, ably contended for by Learned Hand, J., in *Masses Publishing Co. v. Patten* (1917, S. D. N. Y.) 244 Fed. 535, and *United States v. Scott Nearing* (1918, S. D. N. Y.) 252 Fed. 223, was, with or without intention, overruled and the test of tendency was upheld in *Masses Publishing Co. v. Patten* (1917, C. C. A. 2d) 246 Fed. 24, esp. at 38.

[9] *Ibid.*, 35.

[10] *Cf.* Holmes, J., in the *Abrams Case.*

[11] See (1919) 29 YALE LAW JOURNAL, 107.

appeal; or times were such that evidence told against him which normally the jury would have disregarded in large measure. But in another thing there is some cause for concern: that study of the reported cases leads to a decided belief that many of the convictions would not and could not have been obtained, if the court at the time of trial had had available, and had impressed upon the jury, the language of Justice Holmes in the *Schenck* and *Debs* and *Frohwerk Cases.*

Even so, if the criminality of speech because of its remote tendencies were to be limited to times of war, one might still look upon it with comparative equanimity. One is willing to endure silence, as he is to suffer taxes or the reek and mud of the field, that war may pass and victory be gained. When thousands go to their death it may be of little moment that some few go to prison. But we know, in normal times, that party feeling, too, runs high—and class feeling; that an unrestrained majority is prone to leave minorities but little elbow room. It is that elbow room that the First Amendment was intended to safeguard. In the *Abrams Case* Justice Holmes, restating and reinforcing his opinions in the prior cases, makes this fact plain indeed.

In that case the defendants had been convicted and sentenced to twenty years for "language intended to incite, provoke and encourage resistance to the United States" in the war with Germany; and for conspiring during that war "wilfully, by . . . writing and publication, to urge, incite and advocate curtailment of production of things [ordnance and ammunition] . . . essential to the prosecution of the war." To oppose participation by our country in the campaign against the Bolshevik government the accused had secretly prepared and attempted to distribute in New York City pamphlets couched in language exceedingly abusive of the President: these pamphlets urged, e. g., immediate general strike as the workers' means of letting capitalistic governments—including that of the United States—know that the workers "would not betray the splendid fighters of Russia." "In order to save the Russian Revolution we must keep the armies of the allied countries busy at home." The conviction was affirmed, Justice Clarke writing for the majority: "The plain purpose of this propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution in this country for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe." On the interpretation of the facts of the case Justices Holmes and Brandeis differed from the majority.

The dissent may be shortly summarized:

"It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion when private rights are not involved. Congress certainly cannot forbid all effort to change the mind of the country. Now nobody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms."

And to constitute a criminal attempt, under the act, to hinder the success of the government arms, Justice Holmes thought an actual intent to be necessary to hinder or cripple the United States in the prosecution of the war. He thought in the instant case that no such intent had been proved.

But the importance of his dissent does not lie in its interpretation of the facts. Let him be wrong on that; his opinion remains a landmark in the law. "Even if I am technically wrong and enough can be squeezed from these poor and puny anonymities to turn the color of legal litmus paper; I will add, even if what I think the necessary intent were shown; *the most nominal punishment seems to me all that possibly could be inflicted, unless the defendants are to be made to suffer not for what the indictment alleges but for the creed that they avow.*" And, as to constitutionality, the passage already quoted: *"It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion . . ."*

We need to know the limits of Congressional power in this matter. The Espionage and Sedition Acts have been found insufficient to curb radical agitation;[12] not only is their duration limited to the war, but they are war measures, and the offenses covered by them relate chiefly to hindrance of the successful prosecution of the war—although there is the section making criminal the "publication of any matter advocating or urging forcible resistance to any law of the United States."[13] The Attorney-General has submitted a bill to remedy these faults. That bill, in Section 1, makes criminal the commission, or attempt or threat to commit any act of force against any person or any property with intent to cause the change of the Government of the United States or any of the laws thereof, or to oppose or hinder the execution of any law of the United States; such an offense is "sedition," and punishable by fine and imprisonment up to twenty years.[14] And

[12] See Attorney-General Palmer, as reported in the New York *Times* for Nov. 16, 1919, page 1.

[13] See *supra*, n. 2.

[14] "Section 1. Sedition. *Whoever, with the intent* to levy war against the United States, or *to cause the change,* overthrow, or destruction *of the Government, or of any of the laws or authority thereof,* or to cause the overthrow or destruction of all forms of law or organized Government, *or to oppose, prevent, hinder or delay the execution of any law of the United States,* or the free performance by the United States Government or any one of its officers, agents, or employes of its or his public duty, *commits, or attempts, or threatens to commit any act of force against any person or any property,* or any act of terrorism, hate, revenge, or injury against the person or property of any officer, agent, or employe of the United States, *shall be deemed guilty of sedition,* and, upon conviction thereof, shall be punished by a fine not exceeding $10,000 or by imprisonment for a period not exceeding twenty years, or by both such fine and imprisonment in the discretion of the court." The text is taken from the New York *Times,* Nov. 16, 1919, p. 21. The italics are the writer's.

to aid or abet the making or circulation of any word, argument, or teaching which advises, advocates, teaches or justifies any act of such sedition or any act which tends to incite such sedition, is, by Section 2, to be the crime of "promotion of sedition," and punishable by fine or imprisonment up to ten years.[15]

There is little exception to be taken to the first section. We do not want our laws changed by acts of force against person or property, nor by attempts at nor by threats of such acts; and to make such things criminal is a proper exercise of the legislative function.[16] But the second section is of another color. To begin with—surely through haste in its drafting—that section omits any intent clause: the *use of words is made a crime regardless of the intent with which they were used.* It is hardly conceivable that the bill will be enacted without the correction of such an error. And, in the second place, "promotion of sedition" may under this section be committed *by the use of words which justify an act which tends to incite sedition.* This would mean an incorporation into the statute, of *criminality solely for and because of tendency,* without regard to whether there was present danger of immediate evil. Justices Holmes and Brandeis believe such legislation to be unconstitutional. Whether or not it is, no one can say. Justice Clarke's opinion in the *Abrams Case* nowhere directly touches that question; it neither agrees nor disagrees with the view of the First Amendment so cogently put forward in the dissent. The *Abrams Case* may therefore some day be explained as a mere disagreement on the interpretation of the particular facts

---

[15] "Section 2. Promotion of sedition. *Whoever makes,* displays, writes, prints or *circulates, or knowingly aids or abets the making, displaying,* writing, printing *or circulating of any sign, word,* speech, picture, design, argument *or teaching which advises, advocates, teaches or justifies any act of sedition as hereinbefore defined, or any act which tends to incite sedition as hereinbefore defined, or* organizes or assists or joins in the organization of, or *becomes or remains a member of or affiliated with any society or organization, whether the same be formally organized or not, which has for its object in whole or in part, the advising, advocating, teaching or justifying of any act of sedition* as hereinbefore defined, *or the inciting of sedition* as hereinbefore defined, *shall be deemed guilty of promoting sedition,* and, upon conviction thereof, shall be punished by a fine of not exceeding $10,000, or by imprisonment of not exceeding ten years, or by both fine and imprisonment in the discretion of the court."

[16] It is not intended to intimate by this that this proposed bill or any similar measure is or is not politic at the present time. How far such measures in fact serve the purpose of their enactment depends on the conditions of the day, and of the particular measure, and on the method of their enforcement; whether a given measure is worth its price, considering its means of enforcement and the various occasions it offers for unwise or prejudiced exercise of administrative authority; how far excited speech is a safety-valve and how far a source of explosion; how far the regulation of such matters can better be left to the states—these are questions of legislative policy not immediately connected with the main point here under discussion but which should receive their due attention before the enactment of a speech restriction.

involved. But there is some ground for fear that it will not be so explained. The general tone of the opinion gives such ground. To Justice Clarke the distinction seems merely a technical one that "may perhaps be taken:" between language intended to bring into contempt the *form* of our government—our basic institution of republican, representative government—and language intended to produce like results directed against the President and Congress—a man and a body of men whom a true citizen may, at any given time, in war or out of it, dislike and distrust and feel it his duty to oppose. And the course of decision in the lower federal courts, treating words as criminal for their mere tendencies, even though the tendencies be remote, and finding the requisite criminal intent in the mere use of words having such tendencies, must have been known to the majority of the Supreme Court. They did not declare that under such an interpretation the war measures would be unconstitutional. Yet some hope lies in the fact that they avoided passing on that question.

On certain things, it was submitted at the outset of this paper, all Americans can agree. The minority is to obey; in its efforts to change the law it is to refrain from violence. But it is fundamental to our institutions that a minority shall be free to express itself in words, to be heard in peaceable objection, and in peaceable persuasion. The First Amendment has been thought to secure the minority this privilege. It may be that impression is mistaken. Even so, it is believed to be a policy fraught with heavy danger to impair that privilege. Repression of expression has in the past meant disorder; stern repression, long-continued, has meant revolution.[17] Post-war problems are upon us, neither light nor simple; there is small reason to hope that their full scope and sweep is yet apparent. We shall need, and need sorely, whatever help discussion can bring. Surely we have need to remember with Justice Holmes that "time has upset many fighting faiths;" that the theory of government under our Constitution has been that men should believe "even more than they believe the very foundations of their own conduct that the ultimate

[17] When conditions are favorable, there may be, instead of violent revolution, merely a sudden peaceable displacement of the repressors; as when the old Sedition Act, coupled with its partisan enforcement, joined in 1800 with the split in the Federalist Party to effect the removal of that party from our politics forever. But such favorable conjunction of forces is rare. The final effect of repression must, on thought, be clear to any man. Conditions are not unchanging; growing dissent from any established order is inevitable, increasing as conditions change. To choke off dissent embitters the dissenter without converting him. As dissenting opinion grows, to refuse it opportunity to make itself felt in our political institutions is to progressively estrange those institutions from the human conditions they are supposed to govern, and whose proper government is the condition of their own existence. In the end a readjustment is inevitable, to make the government conform to the governed. If that readjustment is prevented from taking its normal, gradual, constitutional course, it will be forced into a course extra-constitutional and violent.

good desired is better reached by free trade in ideas—that the best test of truth is the power of thought to get itself accepted in the competition of the market, and that truth is the only ground on which their wishes can safely be carried out."

K. N. L.

GRIST FROM THE LAW MILLS

Indicative of a certain trend[1] of decisions in Equity is *Stark v. Hamilton* (1919, Ga.) 99 S. E. 861, in which the defendant, who had debauched the plaintiff's minor daughter, was restrained from longer associating with or communicating with her. No property right was involved, except the technical right of the father to the services of his minor child, and it was frankly recognized that the real injury lay in the humiliation of the father and the damage to the reputation of the family. The court, however, felt no obstacle either in the absence of precedent or in the novelty of incident, and was content to say that the protection of property should not be placed above similar protection of personal rights. With this statement no one will quarrel. Undoubtedly the dogma, "Equity protects only property rights," must be abandoned;[2] in the past it has been invoked to cover a palpable miscarriage of justice.[3] But as the pendulum swings in the other direction, must we not pause to consider the expediency of the *exercise* of jurisdiction, the *existence* of which may be conceded? That is the real problem in the present case. Unfortunately it received no consideration.[4]

There is much to be said for the distinction sometimes made between artful knaves and guileless fools, even in civil suits where the fool is seeking recovery of the shekels of which he has been mulcted in some illegal game.[5] Certainly the distinction is well taken when the subject of it is a defendant accused of a crime in which intent is a vital factor. In *Crane v. United States* (1919, C. C. A. 9th) 259 Fed. 480, the defendant had been convicted of using the mails in a fraudulent scheme to obtain money. He was the prophet of a new religion; he was the one man who could exorcise (by absent treatments) the thirteen devils who produce human misery; and he could be persuaded to accept pecuniary offerings when that service had been

---

[1] *Cf. Vanderbuilt v. Mitchell* (1907, Ct. Err.) 72 N. J. Eq. 910, 67 Atl. 97; *Ex parte Warfield* (1899) 40 Tex. Cr. App. 413, 50 S. W. 933.

[2] *Cf. Pollard v. Photographic Co.* (1888) 40 Ch. D. 345, 354.

[3] *E. g. Hodecker v. Stricker* (1896, Sup. Ct.) 39 N. Y. Supp. 515; *Roberson v. Rochester Folding Box Co.* (1902) 171 N. Y. 538, 64 N. E. 442.

[4] The authorities are collected and carefully examined by Dean Pound in a notable article, Equitable Relief Against Defamation and Injuries to Personality (1916) 29 HARV. L. REV. 640.

[5] See (1919) 27 YALE LAW JOURNAL, 1090.

performed. The instruction which the appellate court upheld stressed the defendant's good faith as the crux of the case. There is every reason to commend the ruling; if the defendant was an artful knave, we are well rid of him. But no reason appears why one *bona fide* fool should not without criminal liability give another thought "treatments"—at sufficient distance—for devils or for anything else; even for pay, if they so agree.[6] It is perhaps a question whether such thought, being paid for, may fairly be dubbed "free"; but surely it falls within that freedom of thought with which the law seeks not to interfere.[7]

Give some doctrines rope enough and they will hang themselves; the trouble is that they tangle up the law considerably in the process. Under the law merchant no consideration was necessary to support the promises on a negotiable instrument. When the common law undertook to force into negotiable instruments its own rules on consideration, there was, for a time, confusion. Finally, with the aid of presumptions, some *prima facie,* some "conclusive," and with certain wrenchings and strainings in the matter of antecedent debt, a set of rules crystallized out of the chaos which, although anomalous, was reasonably clear cut and workable. Suddenly, with the Negotiable Instruments Law, a new factor was injected into the calculation. "The validity and negotiable character of an instrument are not affected by the facts that it . . . bears a seal."[9] This makes sealed notes negotiable; necessarily it abrogates all common-law rules inconsistent with such negotiability. But does the section make it possible, by adding a seal to the maker's signature—(together, possibly, with a recital thereof)[10]—to create a note enforceable by an immediate party, regardless of consideration or duress? That it does, is the doctrine of *Kennedy v. Collins* (1919, Del. Super. Ct.) 108 Atl. 48. It has been currently thought that the only reason for sealing a note was to bring the instrument under the longer period of limitation sometimes provided for such cases.[11] And it is believed that the better policy, now

[6] *Quaere,* whether recovery might be had by such a person as the defendant, for services rendered under a contract. There is the question of illegality, in "practicing medicine" without a license; and there is perhaps a question whether an absent treatment would be good consideration.

[7] It may be observed in passing that most of us desire much more than freedom from interference in our thoughts and beliefs; we desire active protection in them, at the expense of other people. If I believe chiropractic efficacious, when you run over me I wish not only to be free to have a chiropractor treat me; I wish to have the damages cover his charge for his services. This has been allowed. *Cf.* (1919) 28 YALE LAW JOURNAL, 615. But it may be doubted whether the same rule would hold, of the price of one of the defendant's exorcizings.

[9] Sec. 6.

[10] *Cf.* 1 Daniel, *Nego. Instr.* (6th ed. 1913) sec. 32.

[11] 8 C. J. 111.

that the rules on consideration in negotiable paper have become settled for better or worse,[12] is not to threaten new confusion by allowing a seal to have this particular one of its common-law effects.[12a] Indeed, some sanction for such a view may even be squeezed from the inadvertent language of the act; for if a seal should foreclose the question of consideration the seal would decidedly "affect the *validity* of the instrument." At least, the act does *not* provide that validity shall be *effected* by the seal.

The reasoning of the court in *Dalrymple v. Randall, Gee and Mitchell Co.* (1919, Minn.) 174 N. W. 520 brings up again for discussion the conflict between common-law and the mercantile views on the sale of chattels. A sold to B a carload of grain; resales took place at once, to C, and then to D. All the parties were members of the Minneapolis Chamber of Commerce, and the sales took place under the rules of that organization: delivery to be made at the buyer's instructions, price to be subject to the state weigher's report; bill to be presented and payment made by two P. M. of the day of the weigher's report; and the whole transaction to be considered a "cash sale." B was insolvent; the issue came up between his trustee and A, to recover the proceeds of the grain, which C paid into court; the court properly held such proceeds to belong to A. By "cash sale" it seems clear that a sale was meant in which "title does not pass" until payment.[13] The general ruling in such cases is that delivery

[12] Viewed on its merits, as *res integra*, the doctrine that consideration is essential to the validity of a contract is not altogether satisfying, especially as regards negotiable paper. It is not found under the civil law, and its absence does not seem to greatly hinder the course of business. *Cf.* (1919) 28 YALE LAW JOURNAL, 621, esp. 640 ff. Of course no consideration is on the Continent necessary to the validity of a bill of exchange. Lorenzen, *Conflict of Laws Relating to Bills and Notes* (1919) 28. That our own *mores* require more promises to be enforceable than are covered by the current academic definition of consideration is proved by some of the developments in the law of trusts; by the pugnacious persistence of the sealed instrument; and especially by the steady extension of "consideration" to cover new sets of fact. So, e. g. the development of the looser estoppel concepts to require the "making-good" of promises—on which see Anson, *Contracts* (3d Am. ed. by Corbin, 1919) 124, n.—and (a situation which closely resembles an *ex post facto* specific performance) the "shutting of the mouth" of one who would set up a state of fact other than that on which his adversary is taken to have relied: for instance, in a suit by a conditional vendor against a subvendee, under acts requiring record of conditional sales. Ewart, *Estoppel* (1900) is suggestive and full of illlustration of the tendency.

[12a] So *Lacey v. Hutchinson* (1909) 5 Ga. App. 865, 64 S. E. 105. It will be remembered, however, that the N. I. L. has not been adopted in Georgia. The Georgia rule also conduces to uniformity, now that the law of sealed instruments has become so multiform by statutory change.

[13] The most notable phenomena of the "passing of title" are of course (1) that the seller can recover from the buyer the full purchase price, and cannot

before payment raises a presumption, and is itself evidence, that the seller waived the condition, and that title therefore has passed. But the question is one of fact; where it has been found that there was no such waiver, recovery has been allowed even from a subvendee, when the vendee had procured delivery by "payment" with a check later dishonored.[14] It is hard to agree with the policy behind such a recovery. It is hard to reconcile it with the law on fraudulent sales, or on vendors in possession, or even with the law on conditional sales at common law. At the worst, the vendee in a cash sale is after delivery in the position of a conditional vendee; but where a conditional vendee is "authorized to put the goods in his stock or otherwise make it seem that the goods are his," even he, though he "does not have title," has power to pass title to a *bona fide* purchaser for value;[15] the analogy to brokers and consignees, dealing in their own names with specific carloads of grain, seems hardly escapable. Such a doctrine would not in any way impugn the court's intimation in the principal case that an action for conversion would lie against C or D; for it might well be held that members of an exchange whose custom was to make sales after a certain manner cannot claim to have taken without notice of a prior vendor's rights. But should not a non-broker be protected, who had bought in good faith from B?

The injunction granted by Judge Anderson against the coal strike can hardly be said to have served a very fruitful purpose. Indeed,

recover, in the event of the buyer's insolvency, either the specific goods or their proceeds; and (2) that the seller cannot recover either the goods or their proceeds from a bona fide subvendee. (2), which may of course exist without (1), is primarily under consideration in the text.

[14] *National Bk. of Commerce, v. Chicago, etc. Ry.* (1890) 44 Minn. 224; 46 N. W. 342. The situation does not appear to be changed by the Uniform Sales Act, sec. 23. It is submitted that the common method of discussion of the courts, treating the question as one of fact, and making the decisive fact the actual intent of the parties that the condition be waived or be not waived, obscures the fundamental issue at stake. As between seller and buyer, intent may perhaps properly be made a crucial operative fact (though even here such a test presents embarrassing difficulties, as in the matter of mistake); but when the question is, whether a *bona fide* subvendee for value is to be protected against the vendor, the problem becomes wholly one of policy: under what states of fact are we going to protect such a purchaser? The seller's intent, of one kind or another—his willingness to let the buyer take possession of the goods, or mingle them with his stock, or resell them, or whatnot—may properly be one of these operative facts; but surely it is not the only one, nor always the most important; and that nothing necessarily follows from the mere fact that no title passed to the original buyer, is shown by the illlustrations in the text.

[15] Williston, *Sales* (1909) sec. 329; *cf.* also sec. 325. In sec. 346, the author argues strongly in favor of delivery under a cash sale, "with intent that the buyer may immediately use" the goods "as his own," concluding the seller, on the question of title, in the absence of pretty clear evidence showing an intention to reserve the title." Benjamin, *Sales* (7th Am. ed. 1899) 299f. and 1 Mechem, *Sales* (1901) secs. 552-7, do not discuss the policy involved.

so far as the public is concerned, far from producing any coal, the injunction itself seems to have embittered the miners to a point making the problem more difficult of solution and to have raised a political issue likely to trouble the country for some time to come. In England a more efficacious remedy is available in the action for a declaration of rights or declaratory judgment which, had it been available in the coal strike case, would have achieved all the useful results obtained by the injunction, namely, a decision that the strike was in violation of the Lever Act prohibiting limitation of production during the war, and would have avoided its irritating disadvantages. True it is that the Attorney General wished in this case not merely to have a determination that the law was being violated, but also desired to have coal produced, and therefore felt the need of specific relief. But it might have been surmised from experience that no injunction would compel the miners to dig coal. The final settlement of the strike has been brought about rather in spite of than because of it. It seems clear, therefore, that a declaratory action, apart from its other valuable uses, would have been a most desirable remedy to have available in the coal strike. It would have informed the miners that they were legally in the wrong, yet would not have carried with it any order such as was embodied in the injunction, or raised the political issues consequent thereon. A bill amending the Judicial Code, introduced by Senator Fletcher, to enable the Federal courts to render declaratory judgments, is now pending before the Senate Judiciary Committee. Possibly this illustration of its utility will stimulate the approval and passage of the bill. The legislatures of Michigan, Florida and New Jersey have recently empowered their courts to render declaratory judgments.[16]

Now and again the cleverness of a trick excites one almost to wish that it had succeeded. But it is gratifying to find the courts clear-sighted and equal to the trickster. In *Wintler Abstract and Loan Co. v. Sears* (1919, Wash.) 184 Pac. 309, what seems to be a novel point of chattel mortgage law was decided, and decided well. An abstract company had given the plaintiff a chattel mortgage on its plant, including its abstract books. When foreclosure proceedings were begun, the company proceeded to make photographic copies of its books and records, and after foreclosure sold the copies to the defendant, who took them with notice of all the facts. The plaintiff bought the original books in at the sale, started an abstract company, discovered competition,—and then sued to recover possession of the copies. Although in Washington such a mortgage gives only a lien on the chattels, the court held that the making and sale of the copies had been in viola-

[16] The remedy is exhaustively discussed by Professor Borchard in (1918) 28 YALE LAW JOURNAL, 1, 105.

tion of duty. "The same rule of law, which would permit a mortgagee to enjoin any act which would wholly or partially destroy the mortgaged property, should also permit him to enjoin any act which would wholly or partially destroy the value of that property." Such recognition that the value of the security lay largely in the right that the information contained in the books should remain secret, is altogether sound. The plaintiff failed, to be sure, in the particular action, because the foreclosure decree and the sheriff's bill of sale had given an itemized description of the chattels sold, and had failed to include the photographs among the items. But the court intimates very strongly that an action of another sort would be maintainable—"one to enjoin the use of such copies, or for their destruction, or a straight action for money damages;" perhaps, even, at the outset, a suit treating the copies as included within the mortgage. The latter suggestion would seem to indicate a novel and interesting extension of the law of accession; the former ones would certainly be sustainable under the existing rules on unfair competition.

There is a tradition that even great Jove sometimes nodded on his throne; small wonder if courts sometimes do the like. In *McClendon v. Heisinger* (1919, Calif. App.) 184 Pac. 52, a corporation had given a note to one of its directors; he procured the guaranty of his fellow-directors on the back of the note, promising them orally that he would stand his own share of any loss they might thereby incur. The note being unpaid at maturity, he brought suit on the guaranty. Recovery was allowed, of the full amount due on the note. The court reasoned that the parol evidence rule barred the defendants from showing the oral agreement to vary the terms of their written guaranty; that the oral agreement could not be used as a collateral contract because (although a mere promise of partial indemnity) it was a promise to pay the debt of another within the statute of frauds; and that even if such were not the case, the collateral contract was inadmissible as a counterclaim because, until judgment in the instant suit had been rendered and paid, the defendants would have no "existing" cause of action under the statute of the state. This last recalls the reasoning of Coke; it has not, in recent years, been thought good policy to force two law-suits to grow where one grew before. The case is in its day unique. *Requiescat oblitus in pace.*