NOTES

EXTENT OF NON-CUMULATIVE SHAREHOLDERS' CLAIM OF PRIORITY UPON CURRENT EARNINGS WHERE PAST EARNINGS ARE KEPT IN SURPLUS—The rights of holders of non-cumulative preferred shares of stock, a security picturesquely referred to as the "waif" of the stock exchanges,[1] have undergone some critical examination.[2] As a result, the *a priori* assumption implicit in the older cases that preferred shares which have been labelled "non-cumulative" may never receive the benefit of any earnings, once a dividend period has passed without a dividend declaration,[3] has now largely disappeared. Of course any differences between preferred and common shares rests ultimately on contract, and the extent of any variation between them as to dividend distribution is basically a question of construing those contracts.[4] The modern tendency of the law has been characterized

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[1] Berle, *Non-Cumulative Preferred Stock,* (1923) 23 COL. L. REV., 358.

[2] The need for re-examination was first expressed by Berle, *op. cit. supra* note 1, reprinted in BERLE, STUDIES IN THE LAW OF CORPORATE FINANCE (1928) 92 *et seq.* It is an interesting commentary on the significance of periodical literature as a growing factor in Anglo-American jurisprudence (*Cf.* CARDOZO, GROWTH OF THE LAW (1924) 13) that after the publication of that article, and as the author confesses "perhaps as a result of the publication" a number of cases (which will be referred to in this note) followed in rapid succession. It is not certain that the doctrine announced by the author was accepted in every case, but it is certain that a clearer analysis of the interest of non-cumulative preferred shareholders in earnings has been achieved. For annotations of these decisions see the following notes: (1927) 27 COL. L. REV. 53; (1925) 23 MICH. L. REV. 779; (1925) 74 U. OF PA. L. REV. 605; (1925) 11 VA. L. REV. 553; (1925) 34 YALE L. J. 657; recent cases: (1925) 25 COL. L. REV. 231; (1925) 14 GEORGETOWN L. J. 109; (1925) 38 HARV. L. REV. 686; (1925) 19 ILL. L. REV. 460.

[3] Hazeltine v. B. & M. L. Ry. 79 Me. 411, 420, 10 Atl. 328, 332 (1887); Burke v. Ottawa Gas & Electric Co. 87 Kans. 6, 123 Pac. 857 (1912). A note in (1926) 11 CORN. L. Q. 230, at 233, makes the same assumption.

CONYNGTON, CORPORATION PROCEDURE (1927) 370, indicates that if the shares give greater rights they are not "strictly" non-cumulative. He attributes the results reached in recent cases to "defective wording of the creating provision" which has given some of the shares a hybrid nature.

This assumption is the rationale of the rule generally enunciated that courts are more likely to compel a declaration of dividends where the preferred shares are non-cumulative than when they are cumulative. See 1 COOK, CORPORATIONS (8th ed. 1923) 920; 1 MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) § 459.

[4] See for example, Lyman v. Southern Ry. Co. 149 Va. 274, 141 S. E. 240 (1928). To ascertain these contractual rights the charter provisions, by-laws and certificate clauses must all be considered. Continental Ins. Co. v. Minn. St. P. & S. M. Ry., 283 Fed. 276 (D. C. Minn. 1922) *aff'd,* 290 Fed. 87 (C. C. A. 8th, 1923). A clear statement, envisaging the possibility of a corporate surplus being built up, would prevent any litigation such as that involved in this note. Thus in the consolidation agreement involved in Continental Ins. Co.

as a swing back to a standardization of relations and contracts so as to remove the result as far as possible "from the control of the accident of power in individual bargaining." [5] That the clear enunciation of a standard in this type of case is still a *desideratum* of the law is emphasized by the divergent judicial opinions concerning non-cumulative preferred shares in *Barclay v. Wabash Ry. Co.*[6]

In that case, holders of preferred *A* shares were entitled under the charter provision "to receive preferential dividends in each year up to the amount of five percent before any dividends shall be paid upon any other stock of this company; but such dividends . . . shall be non-cumulative." The company for a number of years earned more than sufficient to pay five percent on all of this class of shares outstanding, but full dividends were not declared. The net earnings so withheld were carried as a surplus account and expended in permanent improvements and extensions, which working assets the company still owns and maintains. In 1927 the corporation had large net earnings. It thereupon announced a dividend policy of paying five percent to preferred *A* shares and five percent to junior shares each year "out of earnings and surplus," and declared such dividends out of that year's earnings. Preferred *A* shareholders brought a bill to restrain the payment of this dividend, and to enjoin payment of any dividend to the junior shares [7] until the preferred shares were first paid dividends to the extent that they were not paid five percent in past years, though there were sufficient earnings to make such payments. The federal district court dismissed the bill, but the Circuit Court of Appeals reversed the decree and granted the relief sought.

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v. Minn. St. P. & S. M. Ry., *supra*, there is an express denial of any interest in earnings not actually distributed as dividends. But the clause in the reorganization agreement involved in Continental Ins. Co. v. U. S., 259 U. S. 156, 42 Sup. Ct. 540 (1922) providing (at 178) that "no dividend shall in any year be paid upon such stock out of *net profits of any previous fiscal year* in which the full dividends shall not have been paid on the first and second [non-cumulative] preferred stock" leaves unsettled the exact question raised in this note. The cases arose however on quite a different point.

[5] Isaacs, *Standardization of Contracts*, (1917) 27 YALE L. J. 34. An analogous study attempting to evolve a standard for determining the preferred shareholders' right to participate with common in dividends is contained in Thompson, *Respective Rights of Preferred and Common Shareholders in Surplus Profits* (1921) 19 MICH. L. REV. 463.

[6] 30 F. (2d) 260 (C. C. A. 2d, 1929), *rev'g* 23 F. (2d) 691 (S. D. N. Y., 1928). *Certiorari* was granted March 11, 1929.

[7] The junior shares was Preferred B shares, convertible into common shares, and common shares. Since their position with regard to Preferred A shares is identical, they will be referred to merely as common shares.

Difficult problems beyond the scope of this note may arise in any case as to what are "net profits" for a year. Income bonds, and securities with return contingent on earnings have given rise to this kind of litigation. For discussion of the problem as to whether profits include anticipated but unrealized gains see Park v. Grant Locomotive Works, 40 N. J. Eq. 114 (1885) (guaranteed dividend); REITER, PROFITS, DIVIDENDS AND THE LAW (1926) *passim*. As to distribution of losses in allocated surplus see BERLE, *op. cit. supra* note 2, at 124 *et. seq.*

The decision of this case involved two questions: (1) whether the non-cumulative shareholders had any interest in the corporate surplus made up of earnings in prior years, but reasonably and fairly withheld for corporate purposes; (2) whether that interest, if recognized, was such as to require the payment of all back earnings attributable to non-cumulative preferred shares, out of current earnings, before the common shares could receive any dividend. The various answers given on the basis of the same "dividend clause" illustrate the difficulty of forecasting the result in this type of litigation. The district court answered the first question in the negative, making a consideration of the second question unnecessary. In refusing to recognize that the shareholders had any interest in withheld earnings, it differentiated all the decided cases that did recognize such interest on the ground that the specific contracts and statutes present required such construction. The majority opinion of the Circuit Court of Appeals, in reaching its conclusion, necessarily answered both questions in the affirmative. No argument seems to have been made upon the second point, and when the court was presented with the alternative of depriving the shareholder of all his interest in past earnings or granting the relief, it chose the latter. The dissenting judge [8] inferentially answers the first question in the affirmative for there is a concession that "if the directors propose to reduce working capital accumulated out of past earnings they would probably be obliged to declare as preferred dividend the amount so withdrawn." But his answer to the second question is emphatically in the negative. Two reasons are given. The first is that literal interpretation of the charter clause "which limits the declaration out of earnings of any year to five percent" precludes any other conclusion. The second is that the situation does not reasonably make necessary the process of "gratuitously marshalling the proposed common dividend against earlier earnings and using current earnings to make up the deficit so created"; which means that even though there may be an allocated or "earmarked" portion of surplus attributable to the preferred shares, its existence does not give rise to a "dividend credit" or priority claim equal in amount which must first be satisfied before any junior shareholder can take any part of surplus.

With regard to the first question little more need be said than that it has been generally conceded that, in absence of a controlling clause requiring a different result, "non-cumulative preferred shareholders acquire inchoate rights up to the amount of earnings which might have been, but were not, used to pay their dividends." [9] The gist of the arguments in support of such a theory is as follows: to deny the right has fraud possibilities and from the business and economic

[8] Mr. Justice Learned Hand was the dissenting judge. An indication of his attitude with regard to this type of shares was given in American Brake Shoe & Foundry Co. v. New York Railways Co. (S. D. N. Y., 1925) unreported. The language of Mr. Hand is quoted and apparently misconstrued in BERLE, *op. cit. supra*, note 2 at 109 n.

[9] BERLE, *op. cit. supra* note 2, at 114.

view is not reasonable;[10] the word "non-cumulative" does not require a denial of such rights;[11] to deny such rights is to give into the control of the board of directors the power of determining which group of all the associates in the enterprise shall enjoy the benefit of any dividend-earning period. When thus confronted with a rule which would prevent the discretion of the board of directors from increasing the common shareholders' participation at the expense of the preferred, most courts capitulated,[12] although one jurisdiction flatly denied the rule in absence of legislative action.[13]

On the second question the affirmative answer has usually been assumed as a corollary, by the protagonists of the "inchoate rights" theory.[14] However it is apparent that the interest in a corporate sur-

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[10] CONYNGTON, CORPORATE ORGANIZATION AND MANAGEMENT (4th ed. 1919) 82, concedes that the existence of non-cumulative preferred shares, under the view he takes, "is a standing inducement to the improper passing of dividends." It is to remove such inducement that the rule contended for has been adopted.

The circumstances under which this type of share is issued varies. It may be issued to the investing public for new money or may arise as a result of a reorganization agreement, so that it is difficut to generalize as to the purpose for which such stock is created. But it can be demonstrated that the "controller" of the corporation ordinarily has interests adverse to the non-cumulative preferred shareholders, who may be mere investors often without voting rights. Though it is sound policy to allow the corporation to withhold a distribution of profits, permanent rights must be given in the accruing profits, or non-cumulative shareholders are at the mercy of the "controller."

[11] The lucid note in (1925) 34 YALE L. J. 657 explains that the word "non-cumulative" does not negative necessarily the "right to arrearages" which is perhaps the most striking of the cumulative shareholders' legal relations; it merely negatives the right to cumulate each year the expectant interest in earnings for that year because in past years there were *no earnings.*

[12] Thus the directors are permitted in later years to pay to non-cumulative preferred shareholders dividends out of withheld earnings, *nunc pro tunc.* Bassett v. U. S. Cast Iron Pipe & Foundry Co., 75 N. J. Eq. 539, 73 Atl. 544 (1908); Moran v. U. S. Cast Iron Pipe & Foundry Co. 95 N. J. Eq. 389, 123 Atl. 546 (1924) *aff'd,* 96 N. J. Eq. 689, 126 Atl. 329 (1925); Collins v. Portland Electric Power Co., 7 F. (2d) 221 (D. Ore., 1923) *aff'd,* 12 F. (2d) 671 (C. C. A. 9th, 1926); see Morse v. Boston & Maine R. R. Co., 160 N. E. 894 (Mass. 1928). See also cases cited *infra* notes 20, 24.

[13] Norwich Water Power Co. v. Southern Ry. Co., reported in 11 Va. L. Reg. (N.S.) 203 (Law and Equity Court of the City of Richmond, 1925). The language of the charter was such as to compel the decision, but the court used language opposed to the principle under discussion. The opinion cites several law review articles which it supposes are arguments in favor of legislative action that would prevent any type of non-cumulative preferred shares, but that which would give the rights contended for. But it would seem that by an enlightened judicial process, the desired result could be reached without such legislation.

[14] None of the rules suggested by BERLE, *op. cit. supra* note 2, at 96 *et seq.,* cover the situation. He supposes (p. 110) "A courageous court could, presumably, thereupon inquire why it was impossible for the directors to protect the holders of non-cumulative preferred stock by declaring a dividend in stock, scrip or other paper, protecting the rights of these shareholders in surplus, but permitting the continued use of the funds. Or, putting it negatively, the court might enjoin the distribution of *these earnings* as dividends on any junior stock." (Italics are writer's.)

plus which may preclude the possibility of enjoyment of this surplus by any class of security but non-cumulative preferred, yet which may be equally unavailable to that class until final distribution if surplus remains invested until that time, is much different than the interest which results in a corporate obligation whose redemption is contingent on the existence of distributable earnings. To argue from assumed definitions of the words "preferred" or "non-cumulative" is unfruitful,[15] in deciding which alternative is the correct one. Functionally the problem is this: what group of associates shall be made to furnish to the enterprise the additional working capital which will be used to benefit the entire corporate group?

No decided case seems squarely to have decided the question. The only pertinent English cases [16] involve dividends on preferred shares "payable as regards each year out of the profits of that year only." They substantiate the rule that the preferred shareholders' earnings may never be used as increased capital for the corporate enterprise. These cases in effect deny any discretion in the directors to withhold dividends when there are profits for the year, hence they proceed on a different theory from the American cases.

Of the American cases which involve non-cumulative preferred shares, only those are pertinent which involve the right of the preferred shareholders to enjoin payment to the common shareholders until withheld dividends are paid. The cases refusing to compel the board of directors to pay earned but withheld dividends involve an entirely different legal right.[17] Likewise those cases upholding the

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In 74 U. OF PA. L. REV. and 11 VA. L. REV, *supra* note 2, the contention is that a "dividend credit" arises which must first be redeemed before any other dividends are paid. The alternative rule is not considered. The problem under consideration was given detailed and separate treatment in the note in 27 COL. L. REV., *supra* note 2.

[15] "Preferred" shares mean no more than this: A particular portion of the capital shares have been endowed with certain rights, privileges and limitations which other shares do not have. "Preferential dividends in each year" may obviously either mean that the shareholder obtains an equitable interest in all the earnings of a year up to the stipulated portion, or it may merely mean that in any years the stipulated amount must be paid preferred stock before common stock may participate. So also the word "non-cumulative" used alone does not compel any single result.

[16] Dent v. London Tramways Co. 16 Ch. Div. 344 (1880); see Staples v. Eastman Photographic Materials Co., [1896] 2 Ch. 303; Thornycroft & Co. v. Thornycroft, 44 T. L. R. 9 (Ch. Div., 1927).

[17] The immediate unconditional right to receive a distributive portion of surplus in a going corporation is conditioned on a declaration of dividends by the directors whose discretion will not be interfered with in absence of fraud or unfairness, or a contract precluding discretion. A refusal to declare dividends on non-cumulative preferred shares was upheld in New York, Lake Erie & Western R. R. v. Nickals, 119 U. S. 296 (1886); McLean v. Pittsburgh Plate Glass Co. 159 Pa. 112, 28 Atl. 211 (1893); Morse v. Boston & Maine R. R., *supra* note 15. The cases involving other classes of shares are collected in 6 FLETCHER, CYCLOPAEDIA CORPORATIONS (1919) 6074, n. 77. In the following cases a declaration of dividends on non-cumulative preferred shares was com-

power of the board of directors to pay back dividends in the face of common shareholders' objections,[18] though they recognize some interest of the preferred shareholders in surplus, are not decisive of the point in question.

In *Norwich Water Power Co. v. Southern Ry.*,[19] the preferred shareholders sought to restain payment on the junior shares of any dividend, until earnings for prior years were distributed to the non-cumulative preferred shareholders. The defense of the corporation, that such earnings were lost to the non-cumulative shares when a period passed without a dividend declaration, was sustained. The withheld dividends were in the form of fixed assets, and the injunction involved the distribution of current earnings, but this fact was not considered under the theory of the court. In *Day v. U. S. Pipe & Foundry Co.*,[20] a preferred shareholder's bill was sustained enjoining payment of dividends to common shares out of current earnings under similar circumstances. A New Jersey statute involved [21] was construed as enunciating a legislative policy to have a type of security "with many of the attributes of bonds." It was held that the obligation to pay the contingent-upon-profits interest on this type of security must be satisfied before common shareholders receive any dividends. Although some of the language of the court substantiates an opinion that the same result would have been reached without the statute,[22] the case has been considerably discredited as an authority.[23] However, relying on that case, an injunction was granted in similar circumstances in *Collins v. Portland Electric Co.*[24] There was no allegation that the withheld earnings were required in the corporate enterprise, and from the opinion it is impossible to ascertain the source of the proposed dividend. The case may therefore either be an adop-

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pelled: Burke v. Ottawa Gas Co., *supra* note 3; Star Publishing Co. v. Ball, 192 Ind. 158, 134 N. E. 285 (1922); Hazelton v. B. & M. L. Ry., *supra* note 3.

[18] See cases *supra* note 12.

[19] *Supra* note 13.

[20] 95 N. J. Eq. 389, 123 Atl. 546 (1924) *aff'd* by divided court 96 N. J. Eq. 736, 126 Atl. 302 (1925).

[21] NEW JERSEY CORPORATION ACT OF 1896 § 18.

[22] See the language of Backes, V. C., 95 N. J. Eq. at 393: "The statute is nothing more or less than a definition of the equitable rights of the preferred stockholders arising out of the company's obligation to pay the yearly fixed dividend." But this language probably refers to the later part of the statute which requires the payment of not more than 8 per cent. per annum "before any dividends shall be set aside or paid on common." The company's obligation under the statute is to pay a fixed dividend if there are earnings. The right to enjoin payment to common before this fixed dividend is paid is therefore said to be a definition of this equitable right. Such interpretation of the language makes the decision turn ultimately upon the existence of the statute. But in Basset v. United States Cast Iron Pipe & Foundry Co., *supra* note 15, the statute was not relied on.

[23] Norwich Water Power Co. v. Southern Ry. Co., *supra* note 13, at 216; CONYNGTON, *op. cit. supra* note 3, at 371.

[24] 7 F. (2d) 221 (D. Ore. 1925) *aff'd* 12 F. (2d) 671 (C. C. A. 9th, 1926).

tion of the New Jersey statutory rule upon principles of equity, or if the attempt was made to distribute withheld surplus, may merely constitute a holding that in the division of this withheld surplus, the equitable interests of the various groups of shareholders must be recognized.

The question has never been raised in the Supreme Court of the United States, though a *certiorari* has been granted in the *Barclay* case. In *Continental Insurance Co. v. U. S.*,[25] a case likely to be relied on by either side to the controversy, the rights of common shareholders in surplus were examined. The case was an appeal from a decree dissolving a combination as one in restraint of trade. In the distribution of assets of one of the companies involved, the common shareholders demanded, to the exclusion of preferred shareholders, all that portion of the surplus made up of earnings which might have been paid to common shareholders (the preferred dividends having been paid), but which were withheld for corporate purposes. The court refused the claim on the ground that when the board of directors failed to exercise their power to declare dividends, before dissolution, all withheld earnings were to be distributed as assets in dissolution.[26] This case may decide nothing more than that even up to distribution, the directors' discretion will not be interfered with, in the absence of fraud. If so, the case is not pertinent to the present inquiry. On the other hand it may mean that surplus will not be "earmarked" or "allocated" according to the scheme of dividend distribution, the contract as to dividends merely governing a distribution of each year's earnings and nothing more. If this is the rule, it may be argued that *a fortiori* the Court will not create a lien on subsequent earnings because of withheld earnings. On the other hand, it may be contended that if the Court will not recognize allocation of surplus on dissolution, there are strong equitable reasons for allowing non-cumulative preferred shareholders to claim priority as to current earnings in full for withheld earnings, otherwise the whole priority of the preferred shares becomes illusory.

From a practical point of view there are many considerations that seem to favor the adoption of the rule in the *Barclay* case. If the non-cumulative preferred shareholders are made to furnish the additional working capital to the corporate enterprise, the only return

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[25] *Supra* note 4.

[26] With regard to distribution the court sustained the contention that preferred and common share alike in absence of contract. However it may be observed that with regard to "earmarked" surplus a distinction can be drawn between a going concern and one which is about to be wound up; so that conceivably the court may not object to "earmarking" when it decides the Barclay Case. But common shareholders' claim to surplus in a going concern made up of earnings attributable to common stock have been denied. Englander v. Osborne, 261 Pa. 366, 104 Atl. 614 (1918); Lochwood v. General Abrasive Co., 210 App. Div. 141, 205 N. Y. Supp. 511 (1924) *aff'd*, 240 N. Y. 592, 149 N. E. 719 (1925). See Stevens v. U. S. Steel Corp., 68 N. J. Eq. 373, 59 Atl. 905 (1905).

they receive is the greater assurance that their limited preference [27] is realized each year. The detriment to them, besides the fact that there is a postponed enjoyment of the earnings, consists in the danger that the preferred shareholder is exposed to, in the form of business losses. There is a reasonable argument that a class of shareholders which has accepted a limited but more probable return, security-holders who are more like lenders than entrepreneurs, should not be made to bear such risks. Again, accounting difficulties are encountered when an attempt is made to trace "earmarked" surplus from year to year, for the physical property which represents surplus is repaired, replaced and fluctuates in value. Furthermore, the right to cumulative dividends in years in which there are earnings is a legal relation which is more familiar to the investing public than rights to an "allocated surplus," and one which courts are more likely to enforce when faced with express contract provisions regulating the distribution on dissolution, or permitting the corporation to redeem. It would therefore appear that for ease in administration, for practical considerations, as well as because it is consistent with recognized legal principles, the rule of the *Barclay* case will be generally adopted.

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COMMERCE CLAUSE RESTRICTIONS ON STATE REGULATION OF MOTOR VEHICLE CARRIERS—Though the Commerce Clause [1] of the Federal Constitution impliedly grants to Congress wide powers in dealing with interstate commerce,[2] it is well settled that the states may, to a limited extent, acting under the residuum of powers which they have not given up, pass measures directly affecting such commerce, except where Congress, by the exercise of one of the granted powers, has expressly or impliedly forbidden them. The clearest illustration is afforded by the cases where peculiar local conditions necessitate special governmental action of a non-regulatory nature, or special regulations over commerce.[3] However, even where the conditions calling for regulation are not restricted to particular states, so that a uniform system of rules is undoubtedly preferable, still the failure of Congress to provide such rules has been held to permit the states, where it may be done in the exercise of their retained powers, to impose regulations

[27] This argument would not apply to participating shares. *Cf.* note (1929) 42 HARV. L. REV. 805.

[1] U. S. Const. Art. 1, § 8, Clause 3.

[2] BURDICK, AMERICAN CONSTITUTION (1922) 216-42. See, for example, Second Employers' Liability Cases, 223 U. S. 1, 32 Sup. Ct. 169 (1912); Lottery Case, 188 U. S. 321, 23 Sup. Ct. 321 (1903) (illustrating the Federal "police" power); Houston, E. & W. T. Ry. v. United States, 234 U. S. 342, 34 Sup. Ct. 833 (1914) (the power to regulate other matters affecting interstate commerce).

[3] Gilman v. Philadelphia, 3 Wall. 713 (U. S. 1865); Cooley v. Port Wardens, 12 How. 299 (U. S. 1851).

of their own.[4] While the opinions have generally employed many vague descriptions to denote the limitations upon such state action,[5] a true statement of the rule would seem to be as follows: assuming that they do not go so far as to discriminate against interstate commerce,[6] state laws affecting such commerce are constitutional if they satisfy these two requirements: first, that they constitute a *reasonable* [7] exercise of the police power [8] or some other conceded state power,[9] and secondly, that they do not *unduly* [10] disturb the public interest outside the state. The latter requirement underlies the recognized rule that the state cannot legislate where uniformity of regulation is necessary.[11] To apply both requirements involves "a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved, and the actual effect on the flow of commerce." [12] The result will depend on the court's attitude toward what is fundamentally a question of policy, and due to this, as well as the unlimited number of factual situations, decisions have a limited value as a precedent, except in the field represented by the particular case.[13] It is the purpose of this note to examine the application of the rule to state legislation affecting interstate motor vehicle carriers.

It is necessary first to discover what powers have concededly

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[4] See 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1267-81; BURDICK, *op. cit. supra* note 2, at 244-48.

[5] For example, a conclusive distinction is sometimes drawn between laws which primarily regulate the manner of carrying on commerce, and those which only affect commerce incidentally. For an interesting discussion of the general utility of such distinctions, see Powell, *Current Conflicts between the Commerce Clause and State Police Power* (1928) 12 MINN. L. REV. 321, 321-25.

[6] An actual discrimination against persons engaged in interstate commerce is necessarily invalid. Weimar Storage Co. v. Dill, 143 Atl. 438 (N. J. Ch. 1928) (reasonable tax for use of highways levied only on interstate carriers held unconstitutional); *cf.* Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 Sup. Ct. 230 (1928) (permitting a special tax on interstate carriers where the intrastate carriers have been taxed for the same purpose in other ways); Welton v. Missouri, 91 U. S. 275 (1875).

[7] See the Court's discussion of state train-stopping statutes in Lake Shore, etc. R. R. Ohio, 173 U. S. 285 19 Sup. Ct. 465 (1898); and of blow-post laws, Seaboard Air Line Ry. v. Blackwell, 244 U. S. 310, 37 Sup. Ct. 640 (1917).

[8] See cases *infra* note 36, for laws going beyond police power.

[9] As the power to fix intrastate railway rates, see Minnesota Rate Cases, 230 U. S. 352, 33 Sup. Ct. 729 (1913); as the power to build bridges, Gilman v. Philadelphia, *supra* note 3; *cf.* cases *infra* notes 15 and 27.

[10] See *infra* note 40 for illustrations of undue disturbance.

[11] Minnesota Rate Cases, *supra* note 9, especially at 399-403 (containing a complete review of the subject); Cooley v. Port Wardens, *supra* note 3.

[12] Stone, J., in DiSanto v. Pennsylvania, 273 U. S. 34, 43, 47 Sup. Ct. 267, 271 (1926).

[13] Bikle, *Judicial Determination of Questions of Fact* (1924) 38 HARV. L. REV. 6, 9-11; Brandeis, J., in DiSanto v. Pennsylvania, *supra* note 12, 273 U. S. at 37, 47 Sup. Ct. at 269.

been retained by the states, and what kind of legislation is invalid as an attempted exercise of one of the granted powers. The clearest state power under which interstate motor vehicles may be regulated arises from the fact that the highways are owned and maintained by the states.[14] It is often argued that this should permit the states to regulate or condition their use as they please. But state ownership has as yet produced no extraordinary principles. It has justified a registration tax upon all motor vehicles using the state highways, as compensation for deterioration caused by such use, or in the nature of a toll.[15] By reasonable regulations, the weight of motor vehicles may be governed,[16] and their routes may be determined.[17] But beyond measures like these, state regulation cannot be upheld under this source of power.

It is conceded that the states have the power to protect the interest of the public in having their persons and property free from direct physical injury. Speed [18] and safety appliance [19] laws may be passed, qualifying tests and licenses may be required of drivers,[20] registration of all automobiles may be required,[21] and a charge, no greater than the cost of supervision may be made,[22] regardless of the interstate movement of the vehicles affected. The operators may also be required to provide a bond or liability insurance to cover injuries caused by the negligent operation of their machines.[23]

A new and increasingly important element of public interest, which the states have the power to protect, is to have the roads free from congestion, so as to make possible an efficient use thereof. This not only justifies parking and routing regulations,[24] but contains great

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[14] The fact that Congress may have aided in the construction of roads does not evince an intent that the states should not pass their own regulations. Morris v. Duby, 274 U. S. 135, 143; 47 Sup. Ct. 548, 550 (1927); Liberty Highway Co. v. Michigan Pub. Util. Com., 294 Fed. 703, 709 (E. D. Mich. 1923).

[15] Clark v. Poor, 274 U. S. 554, 47 Sup. Ct. 702 (1927); Kane v. New Jersey, 242 U. S. 160, 37 Sup. Ct. 30 (1916); Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140 (1914); Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 48 Sup. Ct. 230 (1928).

[16] Morris v. Duby, *supra* note 14.

[17] See Penn-Jersey Rapid Transit Co. v. Camden, 142 Atl. 821 (N. J. 1928).

[18] Erb v. Morasch, 177 U. S. 584, 20 Sup. Ct. 819 (1900); see Kane v. New Jersey, Hendrick v. Maryland, both *supra* note 15.

[19] Atlantic Coast Line Ry. v. Georgia, 234 U. S. 280, 34 Sup. Ct. 829 (1914).

[20] Kane v. New Jersey, Hendrick v. Maryland, both *supra* note 15; New York, etc. Ry. v. New York, 165 U. S. 628, 17 Sup. Ct. 418 (1897).

[21] Kane v. New Jersey, *supra* note 15; *cf.* Hess v. Pawloski, 274 U. S. 352 (1927).

[22] American Motor Coach System v. Philadelphia, 18 F. (2d) 991 (E. D. Pa. 1927), *aff'd*, 28 F. (2d) 736 (C. C. A. 3d, 1928). See (1928) 52 A. L. R. 533.

[23] Packard v. Banton, 264 U. S. 140, 44 Sup. Ct. 257 (1924); *In re* Opinion of the Justices, 251 Mass. 569, 606-7, 147 N. E. 681, 698 (1925).

[24] Penn-Jersey Rapid Transit Co. v. Camden, *supra* note 17.

potentialities as a justification for legislation of a less local character.[25] In the interest of the public convenience, the nature of service of common carriers may be regulated, permitting reasonable rules as to the routes interstate common carriers may take, and as to the number of passengers they may carry.[26] The clear justification for all these measures is the state police power.

The states concededly have the power to regulate the intrastate business conducted by interstate carriers to the same extent as they may regulate intrastate carriers, regardless of the effect on the interstate business of such carriers, except, possibly, where it would make the interstate business entirely impracticable.[27] And, finally it is noteworthy that the states may under any of the powers heretofore discussed, impose on interstate carriers, as distinguished from vehicles not being used for such business purposes, special regulations,[28] even to the extent of exclusion, it would seem, if the congestion of the roads should warrant it.[29]

But another group of powers have clearly been relinquished to Congress. Among these are the power to tax interstate commerce as such,[30] and those governmental powers which pertain peculiarly to such business, like that of a common carrier, which is affected with a public interest. So the state may not regulate interstate rates or competition. This principle dates from *Gibbons v. Ogden*,[31] and has been properly applied in the recent case of *Buck v. Kuykendall*,[32] which held that a state may not deny to an interstate carrier a certificate of public convenience granting the right to operate upon its highways, on the ground that adequate facilities for conducting interstate

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[25] See *infra* note 47.

[26] Haselton v. Interstate Stage Lines, 82 N. H. 327, 133 Atl. 451 (1926); Newport Electric Corp. v. Oakley, 47 R. I. 19, 129 Atl. 613 (1925). See (1927) 47 A. L. R. 230, (1927) 49 A. L. R. 1203.

[27] So a license may be required to permit the carriage of intrastate passengers. Interstate Busses Corp. v. Holyoke Street Ry. Co., 273 U. S. 45, 47 Sup. Ct. 298 (1927), discussed in (1927) 75 U. OF PA. L. REV. 565.

[28] A special tax may be imposed for use of the highways; Clark v. Poor, *supra* note 15. Special license laws, applying only to carriers, may be passed; American Motor Coach System v. Philadelphia, *supra* note 22.

[29] See Frost v. Railroad Com. 271 U. S. 583, 46 Sup. Ct. 605 (1926), inferring that certificates of public convenience may be required of private intrastate carriers. See especially dissent of Holmes, J., 271 U. S. at 600, 46 Sup. Ct. at 609, and Rosenbaum and Lilienthal, *Motor Carrier Regulation* (1926) 26 COL. L. REV. 954.

[30] A mere occupation tax is unconstitutional. Sprout v. South Bend, 277 U. S. 163, 48 Sup. Ct. 502 (1928).

[31] 9 Wheat. 1 (U. S. 1824). See Wabash, etc., Ry. v. Illinois, 118 U. S. 557 (1886).

[32] 267 U. S. 307, 45 Sup. Ct. 324 (1925). To the same effect, Bush Co. v. Maloy, 267 U. S. 317, 45 Sup. Ct. 326 (1925); People v. Yahne, 195 Cal. 683, 235 Pac. 50 (1925).

commerce already exist.[33] While this decision has received considerable adverse criticism,[34] a contrary view could only be accepted upon a new construction of the Commerce Clause.[35] Such regulation from its very nature must be either uniform or non-existent. But even where the regulation is primarily local, and country-wide uniformity would not seem to be essential, still it may not be passed in the exercise of this group of powers. So, unless justified under the police power, a state may not pass regulations for the convenience of those dealing with interstate carriers, such as compulsory insurance laws to protect the shippers of goods.[36]

It is now necessary to examine how state regulation under one of the conceded state powers may be invalid on the ground that it unduly affects the public interest outside the state, thus violating the second requirement of the basic rule suggested. It is almost axiomatic that while a state may regulate under its police power, it may not exclude,[37] or impose conditions [38] upon the right to do an interstate business. To illustrate from one field, the state may punish a broker who sells fraudulent steamship tickets,[39] but may not pass license laws which would permit the state to keep him from further pursuing this business.[40] It would seem to follow under such a principle that while a state may ordinarily impose upon persons engaged in interstate movement the same penalties for violation of its police laws as are imposed upon those moving intrastate,[41] and so may punish an interstate carrier whose drivers have consistently violated the speed laws, it may not

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[33] But such a certificate may be required in order to confer jurisdiction, and to impose reasonable rules and charges, provided it is granted to all who apply. Newport Electric Corp. v. Oakley, *supra* note 26.

[34] McReynolds, J., dissenting in Buck v. Kuykendall, and Bush Co. v. Maloy, *supra* note 32, 267 U. S. at 325, 45 Sup. Ct. at 327; Strong, *Constitutional Aspects of State Regulation* (1928) 3 TEMPLE L. Q. 17; Gavit, *State Highways and Interstate Motor Transportation* (1927) 21 ILL. L. REV. 559.

[35] *Cf.* the ferry cases, where extraordinary principles have been applied due to the local nature of the business, to permit rate-fixing. Port Richmond Ferry v. Hudson County, 234 U. S. 317, 34 Sup. Ct. 821 (1914). But the state may not require a license. Mayor of Vidalia v. McNeely, 274 U. S. 676, 47 Sup. Ct. 758 (1927).

[36] Liberty Highway Co. v. Michigan Pub. Util. Com., *supra* note 14, at 708; Michigan Pub. Util. Com. v. Duke, 266 U. S. 570, 577, 45 Sup. Ct. 191, 193 (1925); McNeill v. Southern Ry., 202 U. S. 543, 26 Sup. Ct. 722 (1906); Hall v. deCuir, 95 U. S. 485 (1877).

[37] Buck v. Kuykendall, *supra* note 32; Sprout v. South Bend, *supra* note 30, 277 U. S. at 171, 48 Sup. Ct. at 505; BURDICK, *supra* note 2, at 246.

[38] International Book Co. v. Pigg, 217 U. S. 91, 30 Sup. Ct. 481 (1909).

[39] *Cf.* Hygrade Provision Co. v. Sherman, 266 U. S. 497, 45 Sup. Ct. 141 (1925).

[40] DiSanto v. Pennsylvania, *supra* note 12. Nor may a state subject to its license laws the agents of interstate express companies. Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851 (1890). See Real Silk Co. v. Portland, 268 U. S. 325, 45 Sup. Ct. 525 (1925); McCall v. California, 136 U. S. 104, 10 Sup. Ct. 881 (1890).

[41] See cases *supra* notes 20 and 26.

authorize a ruling taking from it the right to continue its business.[42] Yet the Supreme Court of Ohio has recently upheld such a ruling.[43] As merely a punishment for having violated the laws of the state, this decision is not sustainable.[44] It must be justified, if at all, as a quarantine measure in pursuance of the police power. But while a state may pass inspection and quarantine laws,[45] and under this power may license automobile drivers, and exclude from operation any vehicles over a certain weight, or improperly equipped, even though this may result in the inability of a particular interstate carrier to carry on his business,[46] the Ohio decision goes much further than any of the decided cases in that it permits the exclusion of an entire business from interstate commerce. While the situation is factually a new one, it is believed that this result is not warranted by prior cases.

It is conceivable, however, that the congestion of the highways of a state may reach such a point as to make them comparatively useless. Long before such a condition is reached, state ownership of the roads will assume a new significance,[47] and the public interest will be so tremendously increased as to require the application of new principles. But as yet the courts do not recognize that such a point has been reached.[48] Before they do, it is likely that Congress will legislate,[49] and, by occupying the field, will greatly restrict even the present sphere of permissible state activity.

S. F.

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[42] For various grounds for the revocation of licenses of *intra*state carriers, see Rosenbaum and Lilienthal, *Regulation of Motor Carriers in Pennsylvania* (1927) 75 U. OF PA. L. REV. 696, 718-19.

[43] Detroit-Cincinnati Coach Line v. Public Utilities Com., 164 N. E. 356 (Ohio 1928).

[44] See, however, the court's language at 358: "We are of the opinion that the right of revocation and prohibition is necessary to the maintenance of a proper respect for state laws and state institutions." This is especially indicative of the real reason for the decision in view of the fact that the carrier had apparently been primarily charged with unlawfully picking up intrastate passengers. Such misconduct would not in itself justify the revocation of an interstate license. See St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 35 Sup. Ct. 99 (1914).

[45] R. and Nav. Co. v. Washington, 270 U. S. 87, 46 Sup. Ct. 279 (1926); COOLEY, *op. cit. supra* note 4, at 1270-72.

[46] Morris v. Duby, *supra* note 14.

[47] Many more of the public interests would assume a strictly local character, making the rule of Gilman v. Philadelphia, *supra* note 3, applicable. So the state may clearly regulate the number of lines of poles or conduits installed by interstate telegraph companies wishing to use its roads for such purpose. Western Union Teleg. Co. v. Richmond, 224 U. S. 160, 171, 32 Sup. Ct. 449, 452 (1911); City of St. Louis v. Western Union Teleg. Co., 148 U. S. 92, 98-99, 13 Sup. Ct. 485, 487-88 (1893).

[48] For opinion *contra*, see *supra* note 34. See Frost v. Railroad Com., *supra* note 29, especially the dissents, to see how such considerations have influenced the decision of cases under the 14th Amendment.

[49] For possible and contemplated action by Congress, see Rosenbaum and Lilienthal, *supra* note 29, at 984.

THE STATUS OF THE NEGOTIABLE INTEREST COUPON AND ITS STATUTE OF LIMITATIONS—For sixty years, since the much-quoted case of *City of Kenosha v. Lamson*,[1] American courts have regarded it as settled law that the statute of limitations applicable to a negotiable interest coupon is the same as that covering the sealed instrument, that is, the bond to which it is attached.[2] But in *Dickerson v. Wilkes-Barre & Hazleton Ry.*,[3] the New Jersey Court of Errors and Appeals ignored the long line of unbroken precedents and decided that the applicable statute of limitations is the shorter one governing simple contracts. This decision occasions an analysis of the problem of the legal status of the negotiable interest coupon.

The coupon has been defined as "an instrument attached to an interest-bearing bond, representing the installment of interest due at a stated period."[4] Unlike the bond to which it is attached, it bears no seal,[5] a circumstance which creates the problem of this note. The coupon serves the double purpose, first, of enabling the holder to collect interest without presentation of the bond, and second, of allowing

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[1] 76 U. S. 477 (1869).

[2] Kelly v. Forty-Second St. Ry., 37 App. Div. 500, 55 N. Y. Supp. 1096 (1899); MacDowell v. North Side Bridge Co., 251 Pa. 585, 97 Atl. 97 (1916). *Cf. In re* Cornwall Minerals Ry., [1897] 2 Ch. 74, occasionally cited for the same proposition, but actually decided because the debt was "statutory." See LIGHTWOOD, TIME OF LIMITATION OF ACTIONS (1909) 195.

The unity of bond and coupon was so emphasized in the Kenosha case, that, together with City of Lexington v. Butler, 81 U. S. 282 (1872), it created the erroneous impression that the statute of limitations did not begin to run against the coupon until the bond matured. Meyer v. Porter, 65 Cal. 67, 2 Pac. 884 (1884), overruled in California Safe Deposit Co. v. Sierra Valleys Ry., 158 Cal. 690, 112 Pac. 274 (1910); First National Bank of Greeley v. Park, 37 Col. 303, 86 Pac. 106 (1906). Waln v. Huntingdon & Broad Top R. R., 16 Phila. 21 (1883), *aff'd*, 105 Pa. 195 (1883), is cited for the same view in 2 FLETCHER, CYCLOPEDIA OF THE LAW OF CORPORATIONS (1917) § 1060, n. 45; and in Note, ANN. CAS. 1912 A, 733. However, the situation does not arise in the case, and the opinion is too general in its terms to be cited as dictum. See also Williamsport Gas Co. v. Pinkerton, 95 Pa. 62, 64 (1880). The clear majority rule today is the logical one that the statute begins to run from the time the coupon is due, as at that time the cause of action accrues. Koshkonong v. Burton, 104 U. S. 668 (1881); City of Galveston v. Loonie, 54 Tex. 517 (1881).

[3] 103 N. J. L. 175, 143 Atl. 618 (1926). The decision was by a vote of eleven to two.

[4] Kenosha v. Lamson, *supra* note 1, at 483. See, for history of the coupon, CHAMBERLAIN, PRINCIPLES OF BOND INVESTMENT (1911) 2. The coupon may take the form of bill, note, or check. City of Lexington v. Butler, *supra* note 2; Mercer Co. v. Hubbard, 45 Ill. 139 (1869); Arents v. Com., 18 Gratt. 750 (Va. 1868). But whatever its form, the coupon is generally given the effect of a promissory note. Williamsport Gas Co. v. Pinkerton, 95 Pa. 62 (1880); 2 DANIEL, NEGOTIABLE INSTRUMENTS (1913) § 1490.

[5] ABBOTT, PUBLIC SECURITIES (1913) § 183. Occasionally the "bond" likewise bears no seal, in which case the problem of this note does not arise. Such a "bond" is merely a corporate promissory note with interest coupons attached. Best v. Davis Sewing Machine Co., 65 Hun 72, 19 N. Y. Supp. 731 (1892).

him to realize the interest due or to become due by negotiating the coupon.[6]

The negotiable coupon generally carries with it all the incidents of the older negotiable instruments,[7] *e. g.*, negotiation by delivery or endorsement,[8] the superior rights of a holder in due course,[9] and method of suit.[10] However, upon the allowance of interest upon the coupon after maturity,[11] and also upon the allowance of days of grace,[12] there has been less agreement.

The solution of our problem—which statute of limitations applies to the coupon—depends upon whether the coupon is in law part of the bond. Unfortunately the relationship of the coupon to the bond has not yet been worked out with logical completeness.

From its very definition and purpose it is evident that the negotiable coupon is independent of the bond to the extent that it may be negotiated separately, mature earlier, and be sued upon without reference to or presentation of the bond.[13] Suit may be brought even without complying with the conditions recited in the bond.[14]

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[6] City of Kenosha v. Lamson, *supra* note 1; Arents v. Com., *supra* note 4. To fulfill the second purpose the coupon must be negotiable, and its negotiability has sometimes been upheld even though words of negotiability were absent. McCoy v. Washington Co., 3 Wall., Jr. 381 (C. C. 3d, 1862). *Contra:* Woods v. Lawrence Co., 1 Black 386 (U. S. 1861); Evertson v. Newport Natl. Bank 66 N. Y. 14 (1876). The latter decisions have been followed by a similar requirement of precise compliance with the negotiability requirements of the Negotiable Instruments Law. King Cattle Co. v. Joseph, 158 Minn. 481, 198 N. W. 798 (1924); Borough of Montvale v. People's Bank, 74 N. J. L. 464, 67 Atl. 67 (1907); BIGELOW, BILLS, NOTES AND CHECKS (3d ed. 1928) § 54 n. 1. *Contra:* BRANNAN, NEGOTIABLE INSTRUMENTS LAW (4th ed. 1926) 7, 8; Aigler, *Recognition of New Types of Negotiable Instruments* (1924) 24 COL. L. REV. 563; Note (1925) 25 COL. L. REV. 71; *cf.* Chaffee v. Middlesex R. R., 146 Mass. 224, 16 N. E. 34 (1888). For general background, see Wright, *Opposition of the Law to Business Usages* (1926) 26 COL. L. REV. 917. The English Bills of Exchange Act excluded coupons from its purview. CHALMERS, BILLS OF EXCHANGE (8th ed.) 362.

[7] 2 DANIEL, *op. cit, supra* note 4, § 1500.

[8] City of Lexington v. Butler, *supra* note 2.

[9] Spooner v. Holmes, 102 Mass. 503 (1869).

[10] 4 COOK, CORPORATIONS (8th ed. 1923) 3516, n. 1.

[11] See *infra* notes 20, 21, 27 and 30.

[12] Days of grace were held applicable to coupons in Wood v. Consolidated Electric Light Co., 36 Fed. 538 (C. C. S. D. N. Y. 1888); and in Evertson v. Natl. Bank of Newport, 66 N. Y. 14 (1875). *Contra:* Chaffee v. Middlesex R. R., *supra* note 6; Arents v. Com., *supra* note 4. *Cf.* Alabama Mfg. Co. v. Robinson, 56 Fed. 690 (C. C. A. 5th, 1893); and McLoon v. Smith, 49 Wis. 200, 5 N. W. 336 (1880), both distinguishable upon their facts.

[13] Bailey v. Co. of Buchanan, 115 N. Y. 297, 22 N. E. 155 (1889); Beaver v. Armstrong, 44 Pa. 63 (1862).

[14] Manning v. Norfolk R. R., 29 Fed. 838 (C. C. E. D. Va. 1887). Of course where reference is made in the coupon to conditions in the bond, they are binding upon the bondholder. See McClelland v. Norfolk Southern R. R., 110 N. Y. 469, 18 N. E. 237 (1888), where it was properly held that such conditions made the coupon non-negotiable.

On the other hand, there are several clear links between the coupon and its bond. Where the bond is secured by a mortgage, the coupon, even though detached, shares ratably in the mortgage.[15] Furthermore, reference in a coupon to conditions in the bond, makes those conditions part of the coupon contract, and if the coupon states the contract imperfectly, the bond controls.[16] The coupon is sufficiently part of the bond to be affected by infirmities in its execution.[17] The law of sales recognizes that in the absence of express stipulation, unpaid coupons accompany the transfer of the bond.[18] Finally, and highly exaggerated in importance, is the fact that the coupon springs from the promise to pay interest contained in the bond and rests upon the same consideration.[19]

Yet none of the above features of a coupon conclusively shows that it is part of the bond, and should parasitically receive the protection of its seal. Were a bond issued with no other provision for the payment of interest than the simultaneous delivery of individual unattached promissory notes, maturing at semi-annual periods, the same superficial connections with the bond would generally be present, yet unquestionably, the instruments would be totally distinct at law.

The individuality of the interest coupon is emphasized by the fact that it draws interest after non-payment at its maturity, just as if it were a separate instrument. This is the federal rule[20] and that adopted by the great majority of the states.[21] Yet in the majority of large commercial jurisdictions, interest, not represented by a separate instrument, does not draw interest after its non-payment.[22]

A peculiar intermediate view is that of the New York courts. They consider the coupon, while it remains in the hands of the holder

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[15] Bailey v. Co. of Buchanan, *supra* note 13; Real Estate Trust Co. v. Penna. Sugar Refining Co., 237 Pa. 311, 85 Atl. 365 (1912). The latter case declares, at 315, 85 Atl. at 366, "the holder of the coupon becomes equitably an owner of a proportion of the bond."

[16] 2 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS (1917) § 1050.

[17] BURROUGHS, PUBLIC SECURITIES (1881) 582.

[18] Farmer's Loan & Trust Co. v. Oregon R. R., 585 Fed. 639 (C. C. D. Ore. 1893); Fox v. Hartford & W. H. R. R., 70 Conn. 1, 38 Atl. 871 (1897).

[19] This point is argued in the dissenting opinion in the Dickerson case, at 179, 143 Atl. at 619.

[20] Aurora City v. West, 7 Wall. 82 (U. S. 1868).

[21] Harper v. Ely, 70 Ill. 581 (1873); North Penna. R. R. v. Knight, 54 Pa. 94 (1867). For rate of interest, necessity of demand and burden of proof, see 3 THOMPSON, CORPORATION (3d ed. 1927) § 2415.

[22] Leonard v. Villars, 23 Ill. 377 (1860); Howard v. Farley, 26 N. Y. Sup. 308 (1865); Stokley v. Thompson, 34 Pa. 210 (1859). The payment of compound interest is never implied. Force v. Elizabeth, 28 N. J. Eq. 403 (1877). Even an express provision for compound interest is invalid in some states if made in advance. Lee v. Melby, 93 Minn. 4, 100 N. W. 379 (1904).

of the bond, even though physically detached, to be a "mere incident of the bond," [23] "a mere evidence of accruing interest," [24] its negotiability depending entirely upon that of the bond,[25] thus not an independent obligation,[26] and therefore non-interest-bearing.[27] But when transferred to one not the holder of the bond, the coupon becomes, under the New York view, a fully independent obligation,[28] free of the conditions in the bond and mortgage,[29] bearing interest in its own right,[30] and losing the benefit of a third party's guarantee of the bond, which before the transfer included the coupon.[31]

Three situations which have arisen in federal cases emphasize the separateness of bond and coupon. In the first,[32] the court held the amount of the interest coupon competent to be included in addition to the amount of the bond to make up the sum necessary to give the federal court jurisdiction, even though the statute [33] specifically forbade the inclusion of "interest" in the jurisdictional sum. Still stronger evidence is presented by the second decision, to the effect that cancellation of the bond before maturity does not in any way invalidate previously negotiated coupons.[34] The third significant decision was that payment of a coupon does not stop the running of the statute of limitations against the other coupons or against the bond; [35] yet ordinarily,

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[23] Bailey v. Co. of Buchanan, *supra* note 13.

[24] Hudson Valley Ry. v. O'Connor, 95 App. Div. 6, 88 N. Y. Supp. 742 (1904).

[25] Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. Supp. 353 (1906), *aff'd*, 190 N. Y. 167, 82 N. E. 1108 (1907); Greene v. Minzesheimer, 110 N. Y. Supp. 429 (1908).

[26] "Its obligation would have been precisely the same if no coupons had been executed." Bailey v. Co. of Buchanan, *supra* note 13, at 302, 22 N. E. at 156.

[27] Williamsburgh Savings Bank v. Town of Solon, 13 N. Y. 465, 32 N. E. 1058 (1893).

[28] This view makes the status of the coupon somewhat similar to that of a note payable to maker, which is not an instrument until indorsed to another. See Arant, *Notes Payable to the Maker* (1927) 76 U. OF PA. L. REV. 29.

[29] Haskins v. Albany R. R. & Power Co., 74 App. Div. 31, 76 N. Y. Supp. 667 (1902).

[30] Long Island Loan & Trust Co. v. Long Island C. & N. R. R., 85 App. Div. 36, 82 N. Y. Supp. 644 (1903), *aff'd*, 178 N. Y. 588, 70 N. E. 1102 (1904). But plaintiff must allege and prove that he is not a bondholder in order to recover interest upon the coupons. Klein v. East River Co., 33 Misc. 596, 67 N. Y. Supp. 922 (1901).

[31] Clokey v. Evansville & Terre Haute R. R., 16 App. Div. 304, 44 N. Y. Supp. 631 (1897).

[32] Edwards v. Bates Co., 164 U. S. 269, 16 Sup. Ct. 967 (1896).

[33] 25 STAT. 434 (1889), 28 U. S. C. § 41 (1) (1926).

[34] Clark v. Iowa City, 87 U. S. 583, 589 (1874); Miller v. Town of Berlin, 13 Blatchf. 245, 250 (C. C. N. D. N. Y. 1876); Griffin v. Macon Co., 36 Fed. 885 (C. C. E. D. Mo. 1888). A contrary view of the law upon this point is the basis of one argument in the dissenting opinion in the Dickerson case, at 179, 143 Atl. at 619.

[35] New Paddock-Hawley Iron Co. v. Fayetteville, 207 Fed. 786 (W. D. Ark. 1913).

payment of interest arrests the running of the statute against the principal.[36]

It would therefore seem that in all but its more superficial aspects, the negotiable coupon is independent of its bond. Therefore, it should not share the seal upon the bond.

In arriving at this recognition of the separateness of the coupon, New Jersey cases show a distinct progression. The original New Jersey view was that of the unity of bond and coupon, so that a statute governing suits on a bond was held to apply to its coupons as well, with the result that recovery upon the coupon barred the remedy upon the already matured bond just as if they constituted one debt.[37] This decision was soon overruled, although doubt still remained as to the allowance of interest upon the coupon.[38] The next step freed the coupon from the conditions in the bond, where the coupon was detached, even though still in the hands of the bondholder.[39] Thereafter, the coupon was recognized as an independent instrument bearing interest after maturity.[40] The present *Dickerson* case [41] represents another step forward, the burial of the fiction of the "carrying over" of the seal. One more advance remains to be made, the recognition that on principle it makes no difference whether the coupon is detached or not.[42]

The *Dickerson* case finds further support in the present marked tendency to accelerate the limitation of action, both by statute [43] and by judicial decision. An example of the latter is the choice of the shorter tort statute to bar an action which arises from what is simultaneously a breach of contract and of tort duty.[44] But admittedly, the public policy behind that choice, arising from the impermanency of the evidence, the difficulty of keeping witnesses available, and the danger of fraud, is absent in the case of the coupon. The evidence of the coupon indebtedness is lasting. Practical considerations might favor the corporation in its desire to have its unfunded indebtedness quickly eliminated, as opposed to the interests of the habitually lazy investor who allows his coupons to accumulate in a safe deposit box.

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[36] Wallace v. Coward, 79 N. J. Eq. 243, 81 Atl. 739 (1911); Chestnut St. Trust & Fund Co. v. Record Publishing Co., 227 Pa. 235, 75 Atl. 1067 (1910).

[37] Holmes v. Seashore Electric Ry., 57 N. J. L. 16, 29 Atl. 419 (1894).

[38] Jones Co. v. Guttenberg, 66 N. J. L. 659, 51 Atl. 274 (1902).

[39] Mack v. American Telephone Co., 79 N. J. L. 109, 74 Atl. 263 (1909).

[40] Fidelity-Mutual Life Insurance Co. v. Wilkes-Barre & Hazelton Ry., 98 N. J. L. 507, 120 Atl. 734 (1926).

[41] *Supra* note 3.

[42] The physical connection or lack of it between bond and coupon should not affect its legal status. Amy v. City of Dubuque, 98 U. S. 470, 476 (1878); Williamsburgh Savings Bank v. Town of Solon, *supra* note 27; McDowell v. North Side Bridge Co., 251 Pa. 585, 97 Atl. 97 (1914).

[43] BANNING, LIMITATION OF ACTIONS (3d ed. 1906) 2.

[44] Krebenios v. Lindauer, 175 Cal. 431, 166 Pac. 17 (1917); Webber v. Herkimer Ry., 109 N. Y. 311, 16 N. E. 358 (1888).

Should bond houses demand it, the corporation can give the investor the same assurance he had before the *Dickerson* case, by the simple device of placing a seal upon each coupon and declaring it a specialty. But such a device will only serve to emphasize the growing separateness of bond and coupon, and the tendency to interpret the coupon solely by what appears upon its face.

E. M.