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# Discussion of Recent Decisions

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## DISCUSSION OF RECENT DECISIONS

CARRIERS — PERSONS LIABLE FOR CHARGES — LIABILITY OF A CONSIGNEE WHO RECONSIGNS WITH DIRECTIONS TO COLLECT CHARGES FROM RECONSIGNEE. —The defendant corporation, consignee for five cars of gasoline shipped over the plaintiff railroad by uniform bill of lading in which the consignor had executed the standard clause excusing himself from liability for the charges, reconsigned the cars before arrival, directing the plaintiff by letter to deliver to the reconsignee on payment of freight charges. The plaintiff delivered on credit, releasing its lien, and, on subsequent failure of the reconsignee to pay its account, sued the original consignee. The United States Circuit Court of Appeals for the Seventh Circuit held for the defendant,[1] accepting its contentions that reconsignment was not such an act of acceptance as to show ownership with attendant liability and that its directions to the carrier imposed a duty on the carrier to collect the charges from the reconsignee as directed. The theory of a contrary New York case,[2] to the effect that (1) the act of reconsignment

1 New York Central Railroad Co. v. Transamerican Petroleum Corp., 108 F., (2d) 994 (1939).

2 New York Central Railroad Co. v. Warren Ross Lumber Co., 234 N.Y. 261, 137 N.E. 324, 24 A.L.R. 1160 (1922).

amounted to acceptance, which raised a presumption of ownership in the defendant consignor, so that it then entered into the contract expressed in the bill of lading under which the consignee was to pay the charges, and (2) the carrier was not bound by the direction of the consignee to collect before delivery to the reconsignee, since in this transaction the consignee stood in the position of the consignor, and such instruction by a consignor is treated as an option to collect rather than a contractual obligation to collect from the consignee, is expressly rejected by the court in the instant case.

Since the rules governing liability in the consignor-consignee relation are applied as the basis for liability in the consignee-reconsignee relation, an examination of them is pertinent to a discussion of the principal decision. Liability of the consignor depends upon his contract with the carrier, but a direction to collect charges from the consignee is considered to be for the benefit of the carrier, unless this stipulation is such as to amount to an express agreement.[3] The direction is considered to be in recognition of the carrier's right to retain the shipment until his lien is satisfied. Under the revised form of the Uniform Domestic Bill of Lading as amended August 1, 1930, however, the consignor can protect himself by executing a stipulation on the face of the bill that the shipment must not be delivered without payment of all lawful charges. Execution of this clause leaves the consignor liable only on his implied warranty that the consignee will accept the shipment.[4]

In cases where the consignee accepts physical possession of the goods his liability is generally conceded, with certain exceptions.[5] This liability is based on an implied contract—the consignee's promise to pay, based on the consideration in giving up its lien.[6] Or it is implied from the acceptance under a bill of lading which specifies that charges are to be paid by him.[7] And liability is also raised from the inference of ownership in the consignee as manifested by his acceptance of them.[8]

As to charges accrued up to the point of redirection, the consignee who reconsigns with directions to collect from the reconsignee is treated in similar manner with the ordinary consignee by most of the courts which hold him liable, in the absence of clear and unmistakable directions to the carrier showing facts sufficient to remove the presumption of

[3] Cleveland, C. C. & St. Louis R. Co. v. Southern Coal & Coke Co, 147 Tenn. 433, 248 S.W. 297 (1923); Pennsylvania R. Co. v. Marcelletti, 256 Mich. 411, 240 N.W. 4, 78 A.L.R. 923 (1932).

[4] Chesapeake & O. R. Co. v. Southern Coal, Coke & Mining Co., 254 Ill. App. 238 (1929), cert. denied 282 U.S. 860, 51 S. Ct. 34, 75 L.Ed. 761 (1930).

[5] As where consignee accepts with notice to carrier that he accepts as agent only.

[6] Union Pacific R. Co. v. American Smelting and Refining Co., 202 F. 720 at 723 (1912).

[7] Louisville & N. R. Co. v. United States, 267 U.S. 395, 45 S. Ct. 233, 69 L.Ed. 678, (1925); see also notes, 24 A.L.R. 1163 at 1167; 78 A.L.R. 926 at 929.

[8] Pittsburgh, C. C. & St. Louis R. Co. v. Fink, 250 U.S. 577, 40 S. Ct. 27, 63 L.Ed. 1151 (1919); New York C. R. Co. v. Warren Ross Lumber Co., 234 N.Y. 261, 137 N.E. 324, 24 A.L.R. 1160 (1922).

ownership. Since the carrier has not given up its lien by accepting the reconsignment order, it is plain that one ground for raising an implied promise to pay has failed. The cases which analyze the relationship, then, base the implied promise to pay on the mere fact of ownership.[9] This may be actual or apparent—raised from the act of reconsignment by the consignee, which act is construed as evidence of ownership making the consignee contractually liable under the terms of the bill of lading.[10] Since this ownership is implied from the fact of reconsignment, founding an implied promise on this sometimes results in the mounting of a presumption on a presumption, a very strained result.[11]

As to the charges accruing subsequent to the act of reconsignment, courts which hold the consignee liable do so by applying to this situation the rules governing the liability of a consignor[12]—again exempting him from liability where he has clearly demonstrated to the carrier that he is not the owner. As we have seen, the direction of a consignor to a carrier to deliver and collect charges is treated, except where it is an executed stipulation in a bill of lading, as an option in the carrier which he is not bound to follow. The result is that under this theory, though the consignor can protect himself, the reconsigning consignee cannot, since he does not execute a bill of lading.[13]

Cases which hold for the consignee in regard to charges accrued up to the point of reconsignment do so on the ground (1) that the consignee was not in fact the owner and that the carrier had no right to believe that he was, as where the bill of lading shows that he is not,[14] or (2) that reconsignment was not such acceptance as could raise a presumption of ownership.[15] Courts which have extended this freedom from liability to

[9] Pennsylvania R. Co. v. Lord & Spencer, 3 N.E. (2d) 231, 105 A.L.R. 1211 (Mass., 1936); see also note, 105 A.L.R. 1216; New York C. R. Co. v. Platt & Brahms Coal Co., 236 Ill. App. 150 (1925).

[10] N. Y. C. R. Co. v. Warren Ross Lumber Co., 234 N.Y. 261, 137 N.E. 324, 24 A.L.R. 1160 (1922); see also note, 105 A.L.R. 1216.

[11] Davis v. Allen, 124 S.C. 297, 117 S.E. 547 (1923).

[12] N. Y. C. R. Co. v. Warren Ross Lumber Co., 234 N.Y. 261, 137 N.E. 324, 24 A.L.R. 1160 (1922); Pere Marquette R. Co. v. American Coal & Supply Co., 239 Ill. App. 139 (1925).

[13] It is interesting to note the language of the court in Dare v. N. Y. C. R. Co., 20 F. (2d) 379 (1927): "There must be some effective substitution by novation, or otherwise, so that the new debtor would become legally bound to the carrier for freight before the consignee is freed."

[14] Chesapeake & O. R. Co. v. Southern Coal, Coke and Mining Co., 254 Ill. App. 238 (1929); Cleveland, C. C. & St. Louis R. Co. v. Southern Coal & Coke Co., 147 Tenn. 433, 248 S.W. 297 (1923). Even under the New York rule, where the carrier knows that the consignee is not the owner, consignee who reconsigns will not be liable. Merian v. Funck, 4 Denio (N.Y) 110 (1847), where goods were shipped under a bill of lading directing shipment to the consignee or his order. St. Louis Southwestern R. Co. v. Browne Grain Co., 166 S.W. 40 (Tex. Civ. App., 1914), where the shipment was under a bill of lading containing a stipulation that "the owner or consignee" should pay the freight, the court holding that "owner" meant owner at time of delivery.

[15] Pere Marquette R. Co. v. American Coal and Supply Co., 239 Ill. App. 139 (1925); Union P. R. Co. v. American Smelting & Ref. Co., 202 F. 720 (1912).

charges following the reconsignment, have, as a rule, not recognized any difference between these two types of charges but have indicated that, since the consignee is not the owner, the rules covering the consignor's liability cannot be applied to the consignee but rather that liability is to be determined from the terms of the contract embodied in the reconsignment order.[16] One case has held that although the consignee was not the owner so as to be held for charges to the point of reconsignment, the reconsignment order amounted to a contract by which the carrier undertook to collect the charges on delivery of the shipment.[17]

The court in the instant case chose to attack the fundamental basis for imposing liability on the consignee—the application of the rules governing the consignor-consignee relation to the reconsigning consignee. The court refused to presume such unconditional acceptance by the consignee as to show ownership from the act of reconsignment, pointing out that the main reason for raising such a presumption—that acceptance was consideration for the carrier's releasing its lien—had failed. The court does not negative the rule that reconsignment is acceptance, but seems to indicate that, even if it be held to be acceptance, there is no reason to raise the implied promise to pay. That this construction might not have been intended, however, is indicated by the fact that the court found support in the stipulation that at the time of delivery the defendant was not the owner. On the other hand, the court stated that its interpretation of the contract of carriage was that charges were to be collected upon actual delivery and not from the consignee "merely because during the course of transit it might perform some act construed to be a conditional acceptance."

The court also held that a contractual relation was created by the reconsignment order, rejecting the interpretation that the direction was an option only. This seems to be a recognition of the fact that, since the reconsigning consignee cannot protect himself as the consignor can by executing a clause in the bill of lading, the policy which dictated the inclusion of this clause in the bill to overcome the harshness of the "option" rule will be extended in aid of such consignee.

It would seem unnecessary for the court to hold both that there is a duty created in the carrier by the bill of lading to collect from the ultimate recipient and that there is also a duty created by the contract with the consignee—and in addition that such duty is created by law. It is suggested that the principle of the instant decision would be susceptible to more ready acceptance in other courts were the legal basis for this duty more definitely established. For example, it might be found in the bailment relation of the simple contract of carriage wherein the carrier undertakes to deliver the shipment and collect therefor in consideration of the consignee's promise, implied from the reconsignment order, that

[16] Chesapeake & O. R. Co. v. Southern Coal, Coke and Mining Co., 254 Ill. App. 238 (1929).

[17] Pere Marquette R. Co. v. American Coal & Supply Co., 239 Ill. App. 139 (1925).

it would guarantee acceptance of the shipment by the reconsignee and in default thereof make good all charges. Perhaps the simplest construction would be to construe the original carriage contract as requiring collection not necessarily from the consignee named in the bill of lading but from the actual recipient of the shipment. The court suggested but did not definitely accept this theory. This would be no hardship on the carrier, who had under the original contract of carriage but one person to hold for charges anyway. Or, in analogy to the situation created by assignment by a bailor of his interest in warehoused goods, subject to charges, it could be held that the carrier like the warehouseman must exercise his lien and collect charges on delivery or be estopped from seeking to collect them from the original bailor. It cannot sensibly be contended that this is too great a burden to put on the carrier, and there is actually less chance for discrimination here than where the carrier is allowed to treat the direction to collect as an option. As the court said in the instant case, to allow the carrier to treat the direction to collect charges as an option would allow the carrier to safely extend credit to the reconsignee, since he had the consignee to fall back on, whereas he could not safely extend credit to a consignee who actually received the shipment, since the consignor can prevent recourse upon himself by executing the stipulation in the bill of lading.

The importance of this case lies in the fact that the court suggests that although the consignee might be considered as having assumed ownership by the reconsignment order, a simple direction to the carrier is sufficient to relieve him of this liability. The weakness of the case, viewed in the light of its influence on future decisions, lies in the fact that the court has not placed the duty of the carrier to observe this direction on a clearly defined legal basis. This would seem to be necessary if the case is to influence the courts which have indicated that an actual novation would be necessary to relieve the consignee of liability.

D. G. MACDONALD

CONTRACTS—CONSTRUCTION—RIGHTS OF THIRD PARTY BENEFICIARIES AS CONTROLLED BY TERMS OF CONTRACT.—In a contract to purchase land from the United States, the defendant agreed to pay all taxes and assessments levied on the land by the plaintiff borough. The contract also contained a provision whereby all rights of action on the contract were to be reserved to the United States Shipping Board, which held title to the property. Plaintiff sought to recover back taxes on the ground that it was a third party beneficiary to the contract. The Court of Errors and Appeals of New Jersey, in affirming dismissal of the suit, agreed that performance of the contract would be a benefit to the plaintiff, but pointed out that, by the express terms of the contract, all rights of action for breach of the contract were reserved to the United States, and, therefore, intention to benefit the plaintiff was lacking.[1]

The doctrine of third party beneficiary contracts requires little

[1] Borough of Brooklawn v. Brooklawn Housing Corp., 11 A. (2d) 83 (N.J., 1940).

enlargement here. The fundamental doctrine of *Lawrence* v. *Fox*[2] is still the base from which all interpretation and construction must start. There must be a valid contract between the parties made with the intent to benefit or create a legal obligation in favor of a third person. It is only after such rights have come into being by virtue of the contract itself that the law furnishes the remedy by allowing such third party to sue direct. This intention need not be an intention to benefit, but it must be an intention by the promisor to assume a legal obligation to the beneficiary.[3] Therefore, beneficiaries, even if otherwise parties to the contract, acquire no better right than the contract gives them. A provision stating that the contract was made for the benefit of another, or that such other person should have a right of action, would clearly indicate the necessary intention; conversely, a provision such as the one in the instant case, clearly shows an intent to exclude such third party from acquiring any rights under the contract.

In the instant case, counsel for the plaintiff attacked the clause because of the motive and purpose behind the exclusion clause. Such a line of reasoning seeks to substitute the subjective intention of the parties for the intention which is clearly shown by the wording of the contract itself. The doctrine that the rights of third party beneficiaries arise out of and are controlled by the terms of the contract is by no means new,[4] but the decision in the instant case seems to provide a safe method for avoiding needless litigation. C. G. DOYLE

CRIMINAL LAW—WRIT OF ERROR CORAM NOBIS—RIGHT OF TRIAL COURT TO SET ASIDE CONVICTION AFTER AFFIRMANCE ON APPEAL.—The Illinois Supreme Court, in the case of *People* v. *Dabbs*[1] decided that a motion in the nature of a writ of error coram nobis[2] will lie to set aside a conviction notwith-

2 20 N.Y. 268 (1859).

3 Carson Pirie Scott & Co., v. Parrett, 346 Ill. 252, 178 N.E. 498, 81 A.L.R. 1262 (1931); Ochs v. M. J. Carnahan Co, 42 Ind. App. 157, 76 N.E. 788 (1906); Fidelity and Deposit Co. v. Rainer, 220 Ala. 262, 125 So. 55, 77 A.L.R. 13 (1929).

4 Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 178 N.E. 498 (1931); Byram Lumber & Supply Co. v. Page, 109 Conn. 256, 146 A. 293 (1929); Knapp v. Heidritter Lumber Co., 99 N.J. Eq. 381, 131 A. 909 (1926).

1 372 Ill. 160, 23 N.E. (2d) 343 (1939).

2 In common law days, both in civil and criminal cases, a remedy by writ of error coram nobis was provided wherever by a judgment obtained by duress or fraud, or where by some excusable mistake or ignorance of the accused and without negligence on his part, he has been deprived of a defense which he could have used on his trial and which, if known to the court would have led to the opposite result. 2 R.C.L. 307, §262; People v. Green, 355 Ill. 468, 189 N.E. 500 (1934); People v. Crooks, 326 Ill. 266, 157 N.E. 218 (1927); People v. Bruno, 346 Ill. 449, 179 N.E. 129, (1931); People v. Long, 346 Ill. 646, 178 N.E. 918 (1931). Such was also the case in the early days in Illinois. Mitchell v. King, 187 Ill. 452, 58 N.E. 367 (1900); Sloo v. State Bank of Illinois, 1 Scam. (Ill.) 428 (1837); People v. Drysch, 311 Ill. 342, 143 N.E. 100 (1924). In 1872 the writ of error coram nobis [use of which was available for twenty years after judgment, People v. Murphy, 296 Ill. 532, 129 N.E. 868 (1921)] was abolished by statute in civil cases and the present method of motion in the nature of a writ of error coram nobis was substituted and made available for only five years after judgment (Ill. Ses-

standing the prior affirmance of the judgment by the Supreme Court on appeal therefrom. Dabbs was convicted of an infamous crime against nature, and on appeal his conviction had been affirmed.[3] Eight months later he filed his petition in the nature of a writ of error coram nobis in the trial court, relying on the alleged concealment by the State's Attorney of the fact that the sole witness of the state was not sane at the time he testified. From a finding by the trial court that such was not the case, he appealed. The State's Attorney moved to dismiss the appeal on the ground that no further review was possible after the conviction had once been reviewed. The Supreme Court held that such was not the law, though affirming the trial court's ruling on the facts.

The court pointed out that a motion in the nature of a writ of error coram nobis is really the filing of a new suit, is civil in nature,[4] and does not constitute a direct attack on the original judgment; hence the problem does not come within the inherent power of the court to protect its appellate jurisdiction by preventing further review thereof. In this respect, the earlier cases forbidding subsequent review of an affirmed conviction by the use of habeas corpus are distinguishable in principle.[5]

The use of the writ of error coram nobis as a device to correct errors of fact after a conviction has been affirmed has been questioned in only a few jurisdictions and the decisions are not wholly uniform. In Indiana it was held in *Partlow* v. *State*[6] that the writ comes too late after affirmance of the conviction, the court stating that the writ would not lie in England[7] in the same situation; and they felt they were governed by such precedents. Kentucky, in the case of *Robertson* v. *Com-*

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sion Laws 1872, 338, §66). In the Practice Act of 1907, Section 89, and again in 1933, this newer remedy was carried over into the Civil Practice Act (Ill. Rev. Stat. 1939, Ch. 110, §196), which by its terms is confined to civil cases (Ch. 110, §125), the old law having been repealed. No comparable statute was ever adopted in regard to criminal cases, though the Illinois Supreme Court has apparently asserted in a number of criminal cases that the older remedy is now gone and the modern substitute in civil cases applies alike to criminal prosecutions on the theory that the proceeding is civil in nature. People v. Green, 355 Ill. 468, 189 N.E. 500 (1934); People v. Crooks, 326 Ill. 266, 157 N.E. 218 (1927).

3 People vs. Dabbs, 370 Ill. 378, 19 N.E. (2d) 175 (1939).

4 People v. Green, 355 Ill. 468, 189 N.E. 500 (1934).

5 People v. Circuit Ct. of Will County, 369 Ill. 438, 17 N.E. (2d) 46 (1938); People v. Superior Court, 234 Ill. 186, 84 N.E. 875 (1908).

6 194 Ind. 172, 141 N.E. 513, 30 A.L.R. 1414 (1923).

7 The English cases relied on by the court and others appearing in the books were all civil cases. Lambell v. Pretty John, 2 Strange 690, 93 Eng. Rep. 786 (1726); Horne v. Bushell, 2 Strange 950, 93 Eng. Rep. 961 (1733); Burleigh v. Harris, 2 Strange 975, 93 Eng. Rep. 978 (1734); Prior v. . . . , 1 Ventris 208, 86 Eng. Rep. 140 (1684); Hopkins v. Prior and Riglesworth, 3 Keble 28, 84 Eng. Rep. 576 (1673); Hopkins and Prior v. Weigglesworth, 2 Lev. 39, 83 Eng. Rep. 443 (1673). The reason that such practice does not appear to have arisen in criminal cases prior to the settlement of the Americas was probably because of the difficulty of securing appellate review in the first instance. Holdsworth, History of England, I, 215. It is hardly likely, then, that there would be much chance for the subsequent use in England of the writ of error coram nobis after an affirmance.

*monwealth*[8] followed with approval the stand taken by Indiana, and Washington[9] has also followed this strict interpretation. Other jurisdictions illustrating a trend toward greater liberality permit the use of the motion in the nature of a writ of error coram nobis provided the consent of the appellate court that affirmed the conviction is secured.[10] Prior to the present decision in Illinois, Mississippi was the only state in the Union to allow the writ as a matter of right, resting the decision on the same grounds as those presented by the instant case.[11] One state, California, has heard such cases apparently without questioning the propriety of the action taken, though in each instance the proceedings have been unsuccessful from the standpoint of the defendant.[12] It would seem that this relief should be allowed in a proper case, as the matter relied upon will not appear in the appellate record, and it cannot, therefore, be claimed that the prior appellate proceedings have already given the convicted person his day in court. L. LEIDER

DAMAGES—LIQUIDATED DAMAGES AND PENALTIES—APPLICABILITY OF PROVISION FOR LIQUIDATED DAMAGES FOR DELAY IN THE COMPLETION OF CONTRACTUAL PERFORMANCE WHERE PERFORMANCE HAS BEEN ABANDONED.—The Clemente Construction Corporation and the P. T. Cox Contracting Company, Incorporated entered a contract whereby the construction corporation was to complete certain work by May 6, 1936. The contract contained a liquidated damages clause which provided that, if the construction corporation should not complete the work by May 6, 1936, it would pay to the contracting company the sum of $150 for each day (Sundays and legal holidays excepted) that the work remained incomplete and unfinished. Work was begun February 20, 1935, and continued until December 31, 1935, when the construction corporation ceased all performance of the contract. On January 3, 1936, the contracting company engaged another construction firm, which completed the work on November 9, 1936. In a suit by the construction corporation against the contracting company[1] for work done before the plaintiff abandoned performance, the defendant successfully counterclaimed for (1) the amount which it paid for completion of the work in excess of the amount stipulated in the contract to be paid to the plaintiff, and (2) the amount named in the liquidated damages clause of the abandoned contract.

8 279 Ky. 762, 132 S.W. (2d) 69 (1939); Jones v. Commonwealth, 269 Ky. 779, 108 S.W. (2d) 816 (1937).

9 Wilson v. State, 46 Wash. 416, 90 P. 257 (1907).

10 State v. Hudspeth, 191 Ark. 963, 88 S.W. (2d) 858 (1935); Hydrick v. State, 103 Ark. 4, 145 S.W. 542 (1912); Land v. Williams, 12 Smedes & M. (Miss.) 362, 51 Am. Dec. 117 (1849); Strang v. United States, 53 F. (2d) 820 (1931); Washington v. State, 92 Fla. 740, 110 So. 259 (1926); House v. State, 130 Fla. 400, 177 So. 705 (1937); Lamb v. State, 91 Fla. 396, 107 So. 535 (1926); State v. Stanley, 225 Mo. 525, 125 S.W. 475 (1910).

11 Buckler v. State, 173 Miss. 350, 161 So. 683 (1935).

12 People v. Reid, 195 Cal. 249, 232 P. 457 (1924); People v. Kelly, 96 P. (2d) 372 (Cal., 1939).

1 Clemente Const. Corp. v. P. T. Cox Contracting Co., Inc., 16 N.Y.S. (2d) 483 (1939).

In thus enforcing a liquidated damages clause of an abandoned contract, the decision is contrary to the law of New York[2] and numerous decisions of courts throughout the United States.[3] These decisions are based upon the courts' ascertainment of the intention of the contracting parties. The courts, in refusing to give effect to such a clause when performance of the entire contract has been abandoned, base their decisions upon the view that the parties do not contemplate an absolute abandonment of the work, that the *sine qua non* of the applicability of the liquidated damages clause for delay is the completion of the work by the obligor, and that the per diem allowance is not to be paid in lieu of performance but upon performance after the time fixed in the agreement.

It would seem that the foregoing constitutes an accurate interpretation of the intention revealed by the words of the liquidated damages clauses of construction contracts generally used. To bind the obligor to completion of the work by a certain date, and then to stipulate for the payment of a per diem sum as damages for each day that the work remains unfinished beyond that date can be commonly understood to mean "for each day that the work remains unfinished as a result of the slowness of the obligor in doing his work." An intention to bind the obligor to the payment of the per diem sum after he has abandoned the contract, when the work is no longer in his control, would, presumably, be manifested in words more directly designed to embrace the contingency of total abandonment.

In *Village of Canton* v. *Globe Indemnity Company*[4] the court pointed out that it would be anomalous to permit an owner to recover liquidated damages for delays in the completion of a contract which the owner itself completed. Nor, in the court's view, is it persuasive of a different result that the owner has prosecuted the contract to completion without any unnecessary delay. For, the court holds, the provision for liquidated damages must be construed, not in the light of the fact that there has been no unnecessary delay by the owner, but in the light of possibilities permitted by such construction; most significantly in the light of the constant temptation for the owner not to hasten the work to completion.

[2] As expressed in Gallagher v Baird, 66 N.Y.S. 759 (1900), affirmed without opinion in 170 N.Y. 566, 62 N.E. 1095 (1902); Murphy v. United States Fidelity & Guaranty Co., 91 N.Y.S. 582 (1905), affirmed without opinion in 184 N.Y. 543, 76 N.E. 1101 (1906); Village of Canton v. Globe Indemnity Co., 195 N.Y.S. 445 (1922).

[3] Fidelity & Deposit Co. v. Robertson, 136 Ala. 379, 34 So. 933 (1903); Shields v. John Shields Const. Co., 81 N.J. Eq. 286, 86 A. 958 (1913); Moses v. Autuono, 56 Fla. 499, 47 So. 925, 20 L.R.A. (N.S.) 350 (1908); Light, Heat & Water Co. v. City of Jackson, 73 Miss. 598, 19 So. 771 (1895); Bacigalupi v. Phoenix Bldg. and Const. Co., 14 Cal. App. 632, 112 P. 892 (1910); Gillett v. Young, 45 Colo. 562, 101 P. 766 (1909); Garey v. City of Pasco, 89 Wash. 382, 154 P. 433 (1916); Moore v. Board of Regents, 215 Mo. 705, 115 S.W. 6 (1908); Burke Const. Co. v. Board of Improvement of Paving Dist. No. 20, 161 Ark. 433, 256 S.W. 850 (1923); City of Rainier v. Masters, 79 Or. 534, 154 P. 426, L.R.A. 1916E, 1179 (1916); Mason v. Continental Supply Co., 99 Okla. 32, 225 P. 381 (1924). Also see 3 Williston Contracts (rev. ed. 1936), §785.

[4] 195 N.Y.S. 445 (1922).

In the case under examination, Justice Pecora attempts to support his position with two New York cases,[5] both of which antedate *Village of Canton* v. *Globe Indemnity Company*. But those cases are not satisfactory authorities for the proposition that a liquidated damages clause for delay retains its enforceability despite the abandonment of the performance of the contract of which it is a part. The point contested and decided in the Comey case was that a clause limiting the time within which suit for a particular breach can be brought does not apply where the contract of which it is a part has been abandoned; while the McKegney case is of negligible importance, because the court contented itself merely with the citation of the Comey case.[6]

There exist, however, although not in New York, four decisions holding the same way as the instant case.[7] In two of these cases, *Southern Pacific Company* v. *Globe Indemnity Company*, and *Six Companies of California* v. *Joint Highway District No. 13 of State of California*, the courts attempted to justify their departure from the precedent by professing to see a distinction between the cases with which they were confronted, wherein the owners affirmatively asserted liquidated damages clauses, and some cases upholding the majority view, where decisions were rendered against contractors who attempted to defend against claims for actual damages by pleading liquidated damages clauses, despite the prior abandonment of the contract. But there is no valid distinction here; for no matter whether owner or contractor asserts the liquidated damages clause when the contract has been abandoned, the same considerations apply. To concede the applicability of such a clause where performance has been abandoned when the owner asserts it and deny its applicability when the contractor asserts it is to adopt an entirely novel conception of the mutual rights and obligations created by a contract.

The courts following the view expressed in the decision in the main case misconstrue the intention of the contracting parties, and are led to their invocations of liquidated damages provisions of abandoned contracts by an unnecessary eagerness to facilitate the obligee's proof of damages at the cost of doing violence to the contractual intent of the

[5] McKegney v. Illinois Surety Co., 167 N.Y.S. 843 (1917); Comey v. United Surety Co., 217 N.Y. 268, 111 N.E. 832 (1916).

[6] In the McKegney case, the court also mentions as supposed authority for its holding Kidd v. McCormick, 83 N.Y. 391 (1881), and Morrell v. Irving Fire Insurance Company, 33 N.Y. 429, 88 Am. Dec. 396 (1865). The inappositeness of these cases may be judged from the fact that the contracts involved did not even contain a liquidated damages clause.

[7] Southern Pacific Co. v. Globe Indemnity Co., 21 F. (2d) 288 (C.C.A. 2d, 1927); Six Companies v. Joint Highway District No. 13, 24 F. Supp. 346 (D.C., N.D., Cal., S.D., 1938); Watson v. DeWitt County, 19 Tex. Civ. App. 150, 46 S.W. 1061 (1898); School District No. 3 of Ford County v. United States Fidelity & Guaranty Co., 96 Kan. 499, 152 P. 668 (1915). Also see McCormick, Damages, §155. The court in the main case also cites Bankers' Surety Co. v. Elkhorn River Drainage District, 214 F. 342 (C.C.A. 8th, 1914), but that case is not in point, the court there having found that there had been no abandonment of performance.

parties. This solicitude for the obligee is unnecessary in view of the fact that actual damages for delayed completion may be incorporated into the verdict for general damages arising from the total breach without requiring from the obligee much more proof than he is required to show in order to prove that the liquidated damages clause is not, in fact, a penalty.

These minority decisions also conjure up for us the spectacle of an obligor who purposely abandons performance to escape the effect of the liquidated damages clause for delay. Fortunately, this spectacle does not, in reality, exist, for there is no contractor who would abandon performance in order to assume the liability of expenses incurred by the owner in excess of the contract price merely to save himself the relatively small amount of liquidated damages for delay. It is obvious that the amount of the liquidated damages must be small compared with the cost of the work. Otherwise, in most instances, no court would apply it because of its penal character. H. P. COHEN

GRAND JURY—SECRECY OF PROCEEDINGS—REFUSAL BY WITNESS TO TAKE OATH OF SECRECY AS CONTEMPT.—In a recent case,[1] the defendant was subpoenaed as a witness before a federal grand jury then investigating possible violations of the Sherman Anti-Trust Act. On appearing, the defendant was tendered the oath of secrecy, to wit: "You do solemnly swear that you will keep secret the testimony you are about to give before the grand jury, and that you will testify to the truth, the whole truth and nothing but the truth." Defendant refused to take such oath because of the requirement of secrecy contained therein and was held for contempt under a statute[2] which gave the court "power to impose and administer all necessary oaths" and which also gave it discretionary power to punish contemptuous disregard of its authority. On appeal the lower court's judgment was affirmed, the upper court holding that the practice of requiring witnesses before the grand jury to take an oath of secrecy, while not specifically authorized by such statute, was a logical method of effecting the general policy of secrecy in respect to proceedings before the grand jury.

The case, apparently one of first impression, reached a result compatible with a policy long recognized concerning grand juries. From the earliest times it has been the policy of the law that the proceedings of the grand jury should be kept secret,[3] and to that end the grand jurors themselves have always been sworn to keep their own counsel and that of

[1] Goodman v. United States, 108 F. (2d) 516 (1939). The defendant was the daughter and employer of one of the persons whose conduct was under investigation.

[2] §268 Judicial Code; 28 U.S.C.A. §385.

[3] Clark, Criminal Procedure (2d ed.), 142. See also State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54 (1879); Jenkins v. State, 35 Fla. 737, 18 So. 182, 48 Am. St. Rep. 267 (1895); Gitchell v. People, 146 Ill. 175, 33 N.E. 757 (1893); People v. Hulbut, 4 Denio (N.Y.) 133, 47 Am. Dec. 244 (1847); Macklin v. People, 115 Ill. 312, 3 N.E. 222 (1885).

the State or the King.[4] The courts and text writers have advanced various reasons for this rule of secrecy.[5] At the English common law the violation of the oath by the grand jurors was both a contempt and a crime.[6] Nowadays in the absence of a special statute providing for a different punishment,[7] a grand juror may be held in contempt for disclosing grand jury proceedings to an outsider.[8]

While every person before the grand jury was bound not to disclose what took place before the grand jury, it was apparently the English rule that witnesses were not sworn to secrecy.[9] In this country, the case authority is divided on the question of whether or not an oath of secrecy is to be administered to witnesses. In some of the states the administration of the oath is required by statute, while in others the practice has grown up from usage adopted by the courts. So, for example, the state of Texas by statute[10] requires that an oath of secrecy be taken by grand jurors, bailiffs, and witnesses before the grand jury. In an early case,[11] therefore, the Texas court held that a witness was bound to keep secret all proceedings in the grand jury room. Similarly the State of Missouri by statute[12] has also provided that a witness before a grand jury should be sworn to secrecy, and that a violation of the oath was properly punishable by the courts.[13] In the second group of states which have no statute requiring the imposition of an oath, there is apparently some conflict of authority. Early in New Jersey the court intimated, in *State* v. *Fish*,[14] although the problem was not directly in

[4] For an example of an oath given to the grand jurors, see Wigmore on Evidence (2d ed. 1923), V, §2360, 146. Substantially the same oath was given by Justice Field in his charge to grand jury. 2 Sawyer 667, Fed. Cas. No. 118255 (1872).

[5] See Wigmore on Evidence (2d ed. 1923) V, §2360, 151, wherein he states the reasons are four in number, to-wit: (1) security of grand jurors from apprehension of subsequent disclosure of their opinions and votes, (2) freedom from apprehension of future disclosure of complainants and witnesses, (3) to prevent the guilty accused from being provided with clues so as to assist him in defeating justice, (4) and freedom of the innocent accused from compulsory disclosure of the fact that he was falsely accused. See also Clark, Criminal Procedure (2d ed., 1918), 143 et seq.; State v. Broughton, 29 N.C. 96, 45 Am. Dec. 507 (1846); United States v. Providence Tribune Co., 241 F. 524 (1917).

[6] Blackstone's Commentaries, IV, 1124; Anonymous case, 27 Liber Assisarum pl. 63 (K. B. 1352).

[7] Texas and Missouri appear to have statutes making it a misdemeanor for a witness to disclose grand jury proceedings. See Rev. Stat. of Mo. 1929, §3518, Texas Code of Cr. Proc. 1895, Arts. 404, 406, 427. See also Ill. Rev. Stat. 1939, Ch. 38, §720, forbidding grand jurors, officers or other persons from disclosing that an indictment has been found, or is about to be found in certain cases, and forbidding grand jurors alone from other types of disclosure.

[8] In re Summerhayes, 70 F. 769 (D.C., N.D., Cal., 1895); United States v. Providence Tribune Co., 241 F. 524 (1917).

[9] Chitty, Criminal Law, I, 317; 12 R.C.L. 1037.

[10] Texas Code Cr. Proc. 1895, Art. 427.

[11] Gutgessell v. State, 43 S.W. 1016 (1898). This holding has been reinforced by later decisions in Misso v. State, 61 Tex. Cr. R. 241, 135 S.W. 1173 (1911); Addison v. State, 85 Tex. Cr. R. 181, 211 S.W. 225 (1919).

[12] Mo. Stat. Ann. 1932, Ch. 29, §§3517, 3518.

[13] Ex parte Welborn, 237 Mo. 297 at 309, 141 S.W. 31 (1911).

[14] 90 N.J. L. 17, 100 A. 181 (1917).

issue, that a witness before the grand jury was not bound to secrecy, saying, "A witness before the grand jury is under no legal obligation to refrain from stating what was said to him and by him while there." This view was followed in a later case[15] in the same jurisdiction, the court again in dictum approving the attitude of the court in the previous case. Opposed to the apparent view of the New Jersey courts is the view as set out by the Connecticut court in *State* v. *Kemp*,[16] wherein it was held that a witness before the grand jury was required to take an oath of secrecy notwithstanding the absence of any statute requiring it. This latter view has been sanctioned in at least thirty-seven federal districts under the jurisdiction of the United States District Courts, where it has been the practice, now amounting almost to a custom, to impose such oaths.[17]

Paralleling the diversity in the cases on the question of whether or not an oath should be imposed, there is a similar division regarding the right of a witness who testified without taking any such oath to disclose what transpired at a grand jury investigation. In New York it was early determined that such witness was not bound to keep the proceedings secret. Thus in *People* v. *Naughton*[18] it was held that there is no secrecy imposed upon a witness before the grand jury either as to the fact of being called before them or as to what he testifies to and that the only obligation of secrecy imposed was that specifically required by the oath or statutes. Contrasted with this view is that displayed by the Connecticut courts in the case of *State* v. *Fassett*.[19] In that case the objection was raised that since the witnesses before the grand jury had not taken an oath of secrecy they could testify as to what had transpired at the hearing. In overruling the objection, the court said,[20] "Such a practice would nullify the rule, if it be the object of the law to keep secret the proceedings before the grand jury it is necessary that the law should impose silence upon those whom it has compelled to be before them."[21] Illinois also apparently follows the view expressed by the Connecticut court. Thus, in *Gitchell* v. *People*,[22] the court said: "The same principle which forbids disclosure by the grand jurors, applies to all persons authorized by law to be present in the grand jury room." Although the case did not expressly include witnesses as a member of the group upon

[15] State v. Borg 8 N.J. Misc. 349, 150 A. 189 (1930).

[16] 124 Conn. 639, 1 A. (2d) 761 (1938).

[17] Counsel for the government in the principal case in his brief listed 37 such districts where oaths of secrecy have been imposed on witnesses. Among those listed is the Northern District of Illinois.

[18] 38 How. Pr. 430 (N.Y.Ct. of Oyer & Ter. 1870). See also Matter of Osborne, 62 Misc. Rep. 575, 117 N.Y.S. 169 (1909).

[19] 16 Conn. 457 (1844). [20] State v. Fassett, 16 Conn. 470 et seq. (1844).

[21] The Connecticut court in State v. Hamlin, 47 Conn. 95, 36 Am. Rep. 54 (1879), approved the Fassett case and followed the rule set down therein. See also Greenleaf, Evidence, I, §252, 321, wherein he says that the rule of secrecy includes not only the grand jurors themselves, but their clerk or prosecuting officer if he is present.

[22] 45 Ill. App. 116 (1892), affirmed in 146 Ill. 175, 33 N.E. 757 (1893); approved in People v. Goldberg, 302 Ill. 559, 135 N.E. 84 (1922).

which secrecy is imposed, it seems reasonable to assume that they would be so included.[23]

In reviewing the problem raised by the principal case, it can readily be seen that the question is one clouded by some uncertainty. The very meager case authority helps little in determining what is the prevailing view. The better view seems to be the one imposing the duty of secrecy, irrespective of statutory authority. In support of it we have the stringent policy of the courts, disclosed from earliest time, that the grand jury investigations should remain secret. Against this we have the problem of mere inconvenience and hardship on the part of the witness, coupled with the specious argument that to impose the oath would be violating the right of free speech, which has long been decided to be a qualified one.[24] The view adopted by the present case is a logical, and often frequently necessary, extension of the universal rule that grand jurors themselves must swear to secrecy. Considerations of mere convenience or hardship on the part of the witness should not outweigh the need for secrecy in respect to grand jury investigations. I. BIRNBAUM

INTOXICATING LIQUORS—INJURIES TO PERSONS—RECOVERY UNDER BOTH DRAM SHOP LAW AND INJURIES ACT.—In the case of *Hyba* v. *C. A. Horneman, Inc.*,[1] the plaintiffs, who were the parents, and a brother and sister, of the person deceased brought an action against a dram seller to recover for injury to their means of support occasioned by the death of their daughter and sister, Mary Hyba. Mary Hyba died as a result of an accident alleged to have been caused by the intoxication of one Wilson B. Lowery, with whom she was riding as his guest. Prior to the institution of the present action, her father, as administrator of her estate, brought an action against the said Wilson B. Lowery for her wrongful death, which action was terminated by a settlement in the nature of a covenant not to sue. The Supreme Court held that the present action is independent of the action under the Injuries Act and the outcome therein should have no bearing on the instant case.

Both the Dram Shop Law and the Injuries Act give rise to actions which did not exist at common law.[2] The action under the Injuries Act is not the same action that the injured person could have brought had he lived.[3] It is independent of it except that it may not be brought

23 Newspaper publicity has been held punishable as a contempt in obstructing justice by violating the secrecy of the grand jury. United States v. Providence Tribune Co., 241 F. 524 (1917).

24 In the principal case the defendant raised the defense of violation of free speech, which was dismissed by the court, citing Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919).

1 302 Ill. App. 143, 23 N.E. (2d) 564 (1939).

2 Chicago v. Major, 18 Ill. 349 (1857); Dougherty v. American McKenna Process Co., 255 Ill. 369, 99 N.E. 619 (1912); Buntin v. Hutton, 260 Ill. App. 194 (1917).

3 The action of the person killed has died with him, and the action for wrongful death has replaced it. Ohnesorge v. Chicago City Railway Co., 259 Ill. 424, 102 N.E. 819 (1913), in which contributory negligence of the father, suing as administrator of his infant son's estate, was held to be a bar to his action; Prouty v. City of

unless an action by the decedent would have lain had he lived.[4] Similarly, in the case of the Dram Shop Law, no remedy existed at common law against the dram seller for injuries to means of support occasioned by the intoxication of liquor purchasers.[5] However, the fact that the purchaser could bring no action is immaterial, and does not bar a recovery.[6]

Contributory negligence of the decedent is a valid defense under the Injuries Act.[7] So also is the contributory negligence of the parties for whom the action is brought.[8] Under the Dram Shop Law, contributory negligence of the party suing perhaps is not a valid defense;[9] the contributory negligence of the purchaser is, however, no defense.[10] The Dram Shop Law is thus more lenient in respect to contributory fault.

In both actions, injury to means of support is an element of damages.[11] Under the Dram Shop Law, it does not have to be legal support, but there must be loss of actual support.[12] In one case the action is brought by the administrator on behalf of the widow and next of kin;[13] in the other, by the persons injured.[14] The recovery under the Injuries

Chicago, 250 Ill. 222, 95 N.E. 147 (1911). Statute of Limitations in the action for wrongful death runs from the death of the decedent, not from the time he received the injury which resulted in his death.

4 This is so by express provision of the statute. Ill. Rev. Stat. 1939, Ch. 70, §1; ". . . and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof. . . ."

5 Buntin v. Hutton, 260 Ill. App. 194 (1917).

6 The Dram Shop Law, Ill. Rev. Stat. 1939, Ch. 43, §135: "Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving alcoholic liquor, have caused the intoxication, in whole or in part, of such person. . . ." No limitation is created as in the Injuries Act, footnote 4, supra.

7 Newell v. C. C. C. & St. L. Ry. Co., 261 Ill. 505, 104 N.E. 223 (1914).

8 Hazel v. Hoopeston Danville Motor Bus Co., 310 Ill. 38, 141 N.E. 392, 38 A.L.R. 491 (1923); Ohnesorge v. Chicago City Ry. Co., 259 Ill. 424, 102 N.E. 819 (1913); Bennett v. Bennett, 252 Ill. App. 333 (1929).

9 This has not been positively decided. Contributory acts go in mitigation of damages. Reget v. Bell, 77 Ill. 593 (1875); Freese v. Tripp, 70 Ill. 496 (1873). Bennett v. Auditorium Bldg. Corp., 299 Ill. App. 139, 19 N.E. (2d) 626 (1939), seems to hold it a valid defense. Nobody seems quite sure what the case holds. The facts were complicated by an admission of the plaintiff that she was intoxicated, which appeared in a pleading (complaint) which was withdrawn. The court in broad language, in addition to other grounds, held her contributory negligence would bar a recovery.

10 Ill. Rev. Stat. 1939, Ch. 43, §135, footnote 6, supra.

11 Confrey v. Stark, 73 Ill. 187 (1874); Kellerman v. Arnold, 71 Ill. 632 (1874) (Dram Shop Law). Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N.E. 1109 (1902); Chicago & Eastern Ill. R.R. Co. v. Beaver, 199 Ill. 34, 65 N.E. 144 (1902); Goddard v. Engler, 222 Ill. 462, 78 N.E. 805 (1906); Sutherland on Damages (4th ed.), V, §1265, p. 4875.

12 Dobler v. O'Connor, 209 Ill. App. 548 (1918).

13 Ill. Rev. Stat. 1939, Ch. 70, §1.

14 Ill. Rev. Stat. 1939, Ch. 43, § 135. It need not be a legal right of support the means of which are injured. Dobler v. O'Connor, 209 Ill. App. 548 (1918).

Act is limited to $10,000.00;[15] and only actual damages may be recovered.[16] Under the Dram Shop Law, exemplary damages may be recovered where the circumstances warrant, after actual damages have been shown.[17] Aside from these differences, the measure of damages is identical in both cases, the Dram Shop Law allowing a greater recovery. However the actions are based on different powers of the commonwealth. The Dram Shop Law is based on the police power;[18] the Injuries Act on inherent power to provide remedy for injury. The Statute of Limitations in the action for wrongful death is one year.[19] In the case of the Dram Shop action, the limit presumably is that of personal torts, generally two years.

In an ordinary case, these differences would be sufficient grounds for holding the actions to be distinct and independent. It is only in the case where the purchaser is himself a tort-feasor that any duplication of actions can possibly arise. In such a case, the intoxicated person can be sued as well as the dram shop keeper. The actions are independent in the sense that one action cannot bar the other. This is true because (1) the rights are given by separate statutes and are founded on different bases, (2) the actions are brought by different persons, (3) the damages assessed may be greater in one case than in the other. Aside from these, it is apparent that in some cases, as in the instant case, the recoveries collected in each action will overlap. That problem was not considered in the case under discussion. The court relied on *Hackett* v. *Smelsley*,[20] an earlier Illinois case. In that case, no action for wrongful death had been brought, nor could it have been brought because the action arose from the death of the intoxicated person. The language relied on therefore merely decided that one could elect to bring a valid action under the Dram Shop Law rather than an invalid one under the Injuries Act. This was a natural conclusion.[21]

However, where both actions are brought successively, there may arise the question of double recovery for the same injury. The solution, had it been argued, might reasonably have been that the recovery in either action should be mitigated to the extent of the recovery in any prior action based on the same injury. This principle, analagous to suits against persons severally liable, ought to be applied in all cases where a duplication in actions under the Injuries Act and the Dram Shop Law occur.

15 Ill. Rev. Stat. 1939, Ch. 70.

16 Chicago v. Major, 18 Ill. 349 (1857); Chicago & R. I. R. Co. v. Morris, 26 Ill. 400 (1861); Conant v. Griffin, 48 Ill. 410 (1868).

17 Freese v. Tripp, 70 Ill. 496 (1873); Meidel v. Anthis, 71 Ill. 241 (1874).

18 O'Connor v. Rathje, 368 Ill. 83, 12 N.E. (2d) 878 (1937).

19 See Prouty v. City of Chicago, 250 Ill. 222, 95 N.E. 147 (1911).

20 77 Ill. 109 (1875).

21 It must be here noted that no judgment had been given in the instant case in the action for wrongful death, but the case had been settled by a covenant not to sue. Apparently, the instant case merely holds that one has a right to elect between the actions and that the actions are independent and distinct for that purpose. However the language of the decision goes much further.

Although it is true that the cause of action under the Injuries Act is single, the respective shares of the widow and next of kin are mathematically ascertainable.[22] Thus if the action for wrongful death is brought first, and subsequently one or all of the beneficiaries brings an action under the Dram Shop Law, the amount that he received in the prior action can easily be deducted from his recovery under the Dram Shop Law by appropriate instruction to the jury. If the Dram Shop Law action is brought first, it would seem that because the recovery in an action under the Dram Shop Law includes every phase of the damages assessable under the Injuries Act and may even exceed it, the beneficiary of the Dram Shop action ought not to receive any share of the recovery under the Injuries Act. The inherent difficulty is that the recovery in an action for wrongful death is distributed "in the proportion provided by law" to the widow and next of kin.[23] It is doubtful whether such a statutory provision could be altered without legislation even though it be desirable to prevent double recovery. R. RICHMAN

LANDLORD AND TENANT—FORFEITURE OF TERM FOR YEARS—TENANT'S "EQUITY OF REDEMPTION" AFTER FORFEITURE FOR NONPAYMENT OF RENT.—The plaintiff-lessee filed a complaint in chancery, alleging the following facts and asking that the defendant-lessor be enjoined from declaring a forfeiture of the leasehold estate and from taking any action to recover possession of the demised premises. Money damages were also requested. The term extended from October 1, 1937, to September 30, 1940, and the rent was $4,500, payable in advance in monthly installments of $125. Time of payment was stated to be of the essence of the agreement. The lease also gave the tenant an option to renew and contained, among others, the following provisions: "In case of the non-payment of the rent reserved hereby, or any part thereof, . . . lessee's right to possession of the demised premises, thereupon shall terminate, with or without any notice or demand whatsoever, . . . and if the Lessor so elects, but not otherwise, and with or without notice of such election or any notice or demand whatsoever, this lease shall thereupon terminate. . . . The acceptance of rent, whether in a single instance or repeatedly, after it falls due, or after knowledge of any breach hereof by Lessee, or the giving or making of any notice or demand, whether according to any statutory provision or not, or any act or series of acts except an express written waiver, shall not be construed as a waiver of Lessor's right to act without notice or demand or of any other right hereby given Lessor, or as an election not to proceed under the provisions of this lease." The plaintiff paid the rent installments, sometimes as they came due and sometimes several days late without any protest from the landlord. On September 6, 1938, the plaintiff sent a check for that month's rent which the defendant received

[22] Rules of intestacy apply to distribution of the recovery under the Injuries Act. Ill. Rev. Stat. 1939, Ch. 70, §2; Hazel v. Hoopeston-Danville Motor Bus Co., 310 Ill. 38, 141 N.E. 392, 38 A.L.R. 491 (1923); Bennett v. Bennett, 252 Ill. App. 333 (1929).

[23] Ill. Rev. Stat. 1939, Ch. 70, §2.

the next day and retained. On the eighth of September, the defendant sent to the tenant a purported notice of termination of the leasehold for the failure to pay the September rent in advance and an invitation to retain possession of the premises under a month-to-month tenancy at $125 a month. Thereafter, the plaintiff declared that he retained possession under the original lease. After this declaration, on October 6, the landlord cashed the check for the September rent. Then he refused the proper tender of the October rent and served a five day notice for failure to pay that installment. Within five days, the tenant again tendered the October rent, which was again refused. Thereafter the November and December rents were tendered in advance, each tender including all back rent due at that time. The trial court dismissed the complaint, and the Illinois Appellate Court reversed and remanded.[1]

Where a landlord by express language, or by his conduct, indicates that prompt payment of the rent will not be required, and where the tenant, relying on such assurance and before retraction thereof, fails to pay according to the terms of the lease, the landlord, having waived the provisions of the lease contract, may not forfeit the lease on that ground.[2] It has been said by the courts that the landlord's failure to protest late payment of several installments of rent is sufficient assurance to the tenant to justify the invocation of this doctrine,[3] but this has been denied in some decisions,[4] and the cases which have actually held such inaction to be a waiver have so held in the light of additional facts which tended to show a course of dealing between the parties which contemplated tardy payment.[5] This doctrine of waiver proceeds on the theory that the landlord is estopped to assert the breach of covenant after having induced it by his promise that he would not enforce the provision. The rule is an application of promissory estoppel.[6]

Where a violation of the lease contract has occurred because rent was not paid when due, a right of forfeiture may be nullified by subsequent events. Tender of the amount due before a required notice of forfeiture would result in the defeat of the right of termination,[7] and

1 Famous Permanent Wave Shops, Inc. v. Smith, 302 Ill. App. 178, 23 N.E. (2d) 767 (1939).

2 Donovan v. Murphy, 217 Ill. App. 32 (1920).

3 Sixeas v. Fogel, 253 Ill. App. 579 (1929); Donovan v. Murphy, 217 Ill. App. 32 (1920); Bernstein v. Weinstein, 220 Ill. App. 292 (1920).

4 McKinney v. Mulvey Mfg. Co., 157 Ill. App. 339 (1910).

5 Donovan v. Murphy, 217 Ill. App. 32 (1920): "In the present case the landlord saw fit to accept rent for the premises on the 10th day of each month and not upon the 1st day of the month as provided for in the lease. The tenant was led to believe, by a course of dealings with the landlord, that payment on the 10th of the month would be a compliance with the conditions of the lease." Bernstein v. Weinstein, 220 Ill. App. 292 (1920): "The evidence of . . . one of the defendants, is that . . . the plaintiff had always said that if he were around the first or second of the month he (the defendant) could give him a check but, if not, that he could mail the check. . . ."

6 Williston on Contracts (Rev. ed., 1936), III, 1987 et seq., §689.

7 Hopkins v. Levandowski, 250 Ill. 372, 95 N.E. 496 (1911); North Chicago St. R.R. Co. v. Le Grand Co., 95 Ill. App. 435 (1900).

tender within the time stipulated in such notice would have the same effect.[8] However, where the lease contains a provision that the estate shall terminate immediately without notice upon breach of one of the covenants, such tender, after breach, would be ineffective in a court of law.[9] Furthermore, the landlord may waive his right to terminate after it has arisen. Where a statutory notice has been given, although none was required under the provisions of the lease, the landlord is deemed to have waived his right of termination under the lease, and he may thereafter terminate the tenancy only in accordance with the terms of the notice.[10] The acceptance of a tardy tender of rent, in the absence of some provision in the lease, would be a waiver of the right to forfeit for the breach in regard to that installment.[11]

In equity the landlord's right to forfeit, whether granted by statute or by lease, has suffered curtailment. Equity will, of course, enjoin an unwarranted termination by the lessor where there is no adequate remedy at law.[12] But the doctrine has been extended further, and relief has been granted against forfeiture for nonpayment of rent where the tenant was actually in default but where he could show some reasonable excuse therefore, as for example, that he relied on a void court order.[13] The reason given for such holdings is that equity regards the right of forfeiture as a security device to enforce the payment of the rent.[14] Therefore, it has been concluded, where the tenant offers to pay the rent and other costs[15] of the landlord occasioned by the default and where the tenant has done equity in that his breach was not wilful and in that he has not breached his obligations as a tenant in other ways,[16] equity should relieve against forfeiture. There seems to be a tendency to extend the doctrine to situations where the tenant can show no excuse for his nonpayment, as long as it was not wilful.[17] Thus it would seem that

8 Chadwick v. Parker, 44 Ill. 326 (1867); Chapman v. Kirby, 49 Ill. 211 (1868); Foster v. Rudis, 196 Ill. App. 174 (1915); Sixeas v. Fogel, 253 Ill. App. 579 (1929).

9 McKinney v. Mulvey Mfg. Co., 157 Ill. App. 339 (1910).

10 Foster v. Rudis, 196 Ill. App. 174 (1915).

11 Watson v. Smith, 180 Ill. App. 289 (1913); Vintaloro v. Pappas, 310 Ill. 115, 141 N.E. 377 (1923).

12 Watson v. Smith, 180 Ill. App. 289 (1913); Palmer v. Ford, 70 Ill. 370 (1873).

13 Cedrom Coal Co. v. Moss, 230 Ala. 32, 159 So. 225 (1935).

14 Cesar v. Virgin, 207 Ala. 148, 92 So. 406 (1922): "It may be conceded that, in general, equity will relieve against the forfeiture of a lease for the nonpayment of rent, the theory being that the covenant for forfeiture on nonpayment is intended as a mere security, and a forfeiture on that account will be relieved against on payment of the rent due and damages which the lessor may have sustained."

15 Charles Mulvey Mfg. Co. v. McKinney, 184 Ill. App. 476 (1914), in which the lessee had to pay: (1) a note plus interest thereon to the landlord; (2) costs of landlord in his forcible detainer action; (3) costs of the landlord in a suit on the note; (4) costs of the landlord in suits instituted by him for nonpayment of rent for several months prior to the forfeiture; (5) costs in the action for a bill to enjoin.

16 Sunday Lake Mining Co. v. Wakefield, 72 Wis. 204, 39 N.W. 136 (1888); Cesar v. Virgin, 207 Ala. 148, 92 So. 406 (1922).

17 Illinois Merchants Trust Co. v. Harvey, 335 Ill. 284, 167 N.E. 69 (1929). See also Rooney v. Crary, 8 Ill. App. 329 (1880).

an "equity of redemption" from the forfeiture of a leasehold estate for breach of the obligation to pay rent has been afforded.

An examination of the instant case in the light of these rules establishes its soundness. The failure to protest the several late payments was not a waiver of the landlord's right to receive future rent in advance. Such inaction was insufficient to amount to an assurance that late payment would be permissible. The giving of the five day notice of termination would seem insufficient to constitute a waiver of the breach of the lease contract in view of the provision that such notice should not be deemed a waiver. And the retention of the tenant's check for the September rent was not a waiver of the failure to pay that installment on time in view of the provision in the lease contract that "the acceptance of rent . . . after knowledge of any breach . . . by Lessee shall not be considered as a waiver of . . . any . . . right . . . given Lessor." It must be remembered, however, that the case was presented to a court of equity, and it is submitted that the above provision was ineffective to bar the lessee's "equity of redemption" from the forfeiture, any more than a mortgagor's agreement could cut off his equity of redemption[18] and for similar reasons of policy. W. L. SCHLEGEL

LANDLORD AND TENANT — INJURIES DUE TO DEFECTIVE CONDITION OF PREMISES—WHETHER EXCULPATORY CLAUSE WILL RELIEVE LANDLORD OF LIABILITY FOR CONCEALMENT OF DEFECT IN DEMISED PREMISES.—In the recent case of *Myron W. McIntyre, Limited* v. *Chanler Holding Corporation,*[1] the Supreme Court in New York County was faced with an old landlord and tenant principle complicated by an unusual factual situation. The premises in question were a suite of rooms in a commercial building. Prior to the plaintiff's tenancy, the landlord concealed a door leading to an adjoining suite by the simple process of papering it over so that, to all outward appearances, no door had ever existed there. Its existence thus was unknown to the plaintiff. The negligence alleged is the renting of the adjoining space without proper investigation of the tenant, who gained admittance to the plaintiff's suite through the papered entrance and removed a quantity of the plaintiff's merchandise.

Plaintiff's lease contained an exculpatory clause, immunizing the landlord from liability for negligence. The court held that this clause did not have such effect in the instant case. At the time of the making of this lease, exculpatory clauses were, in New York as in virtually all jurisdictions, consistent with public policy,[2] although shortly before this action was instituted, a New York statute declared such clauses contrary to policy and void.[3] However, it had already been decided in New

[18] Bearss v. Ford, 108 Ill. 16 (1883).

[1] 16 N.Y.S. (2d) 642 (1939).

[2] Kirschenbaum v. General Outdoor Advertising Co., 258 N.Y. 489, 180 N.E. 245, 84 A.L.R. 645 (1932); Taylor v. Bailey, 74 Ill. 178 (1874); Hopkins v. Sobra, 152 Ill. App. 273 (1908), and cases therein cited.

[3] Cahill's Consolidated Laws of N. Y. (1937 Supp.), Ch. 51, §234.

York that such statute was not to have a retroactive effect.[4] Thus the issue resolves itself as to whether an exculpatory clause will relieve this landlord of liability for the negligence and concealment practiced in the instant case.

Regarding the general effect of exculpatory clauses, the decisions differ more in verbiage than in result. Some hold that active negligence on the part of the landlord is not within the protection of the clause;[5] other holdings indicate that passive as well as affirmative negligence on the part of the lessor may render inoperative such a lease provision;[6] and it is said that patent defects are, and latent defects are not, within the purview of such clauses.[7] But the general effect may be summed up in the words of Justice Lehman in deciding the case of *Drescher-Rothberg Co.* v. *Landeker*,[8] wherein he states: "It seems to me that this [exculpatory] clause . . . means simply that the landlord is not to be liable for damages caused by wear and tear, or inherent defects, or the action of the elements, although by the exercise of active diligence he might have prevented such damages; but it does not exempt him from his liability to repair actual defects, when called to his attention, or from acts of affirmative negligence." Illinois, it may be said, has followed this general line of reasoning in the numerous cases which have arisen in this jurisdiction on the same matter.[9]

With regard to the landlord's duty to reveal defects in the premises to the prospective lessee, the courts seem to be equally in accord. There is no duty to disclose defects which are patent and discernible upon reasonable investigation by the prospective lessee. But the landlord is liable for a failure to disclose defects which are latent and unknown to the lessee, as where he had not an opportunity of knowing equal to that possessed by the landlord; the same result obtains where the defect is latent and the landlord has been guilty of fraud and deceit in the letting.[10]

Upon this state of the law, and of the facts in the instant case, it seems clear that the court could not have reached any result other than that which it did. For if the exculpatory clause will not protect the landlord from liability for acts of affirmative negligence, it will certainly not protect him from liability for fraud or concealment practiced by him on the propective lessee.

M. J. SCHRAM

4 Bernard Katz, Inc. v. East Thirtieth Street Corporation, 16 N.Y.S. 640 (1939).

5 Dickey v. Wells, 203 Ill. App. 305 (1917); Drescher Rothberg Co. v. Landeker, 140 N.Y.S. 1025 (1913); 84 A.L.R. 645 at 659 and cases cited therein.

6 Arling v. Zeitz, 269 Ill. App. 562 (1933).

7 King v. Smith, 47 Ga. App. 360, 170 S.E. 546 (1933); F. H. Vahlsing, Inc. v. Hartford Fire Insurance Co., 108 S.W. (2d) 947 (Tex. Civ. App. 1937); Holzhauer v. Sheeny, 127 Ky. 28, 104 S.W. 1034 (1907); May v. Di Censo, 277 Ill. App. 248 (1934); Sunasack v. Morey, 196 Ill. 569, 63 N.E. 1039 (1902).

8 140 N.Y.S. 1025 at 1026 (1913).

9 Arling v. Zeitz, 269 Ill. App. 562 (1933); Dickey v. Wells, 203 Ill. App. 305 (1917); Chapman & Smith Co. v. Crown Novelty Co., 175 Ill. App. 397 (1912).

10 Long v. Joseph Schlitz Brewing Co., 214 Ill. App. 517 (1919); see also cases cited in footnote 7 supra.

STATUTES—TIME FOR ACTION BY EXECUTIVE—WHETHER TIME FOR APPROVAL OR DISAPPROVAL RUNS FROM DAY OF PRESENTMENT OR FROM DAY OF ADJOURNMENT OF THE LEGISLATURE.—Does the Governor's ten-day period, within which to approve or disapprove a bill, start to run on the day of presentment of the bill to him or on the day of adjournment by the General Assembly? This question was raised in the cases of *People ex. rel. Petersen v. Hughes* and *People ex rel. Adelman Heating Corporation v. Hughes*.[1] Both of the bills in issue were passed on June 30, and on the same day the General Assembly adjourned sine die. One was presented to the Governor on July 17 and the veto was filed on July 26. The other was presented on July 11 and the veto was filed on July 20. The Supreme Court of the State of Illinois decided that the ten-day period started to run on the day of presentment to the Governor.

Section 16 of Article 5 of the Constitution of the State of Illinois provides for the veto power of the Governor and the manner in which it is to be exercised. Among the provisions of this section are the following: "Every bill passed by the General Assembly shall, before it becomes a law, be presented to the Governor," and "any bill which shall not be returned by the Governor within ten days (Sundays excepted) after it shall have been presented to him shall become a law in like manner as if he had signed it, unless the General Assembly shall, by their adjournment prevent its return, in which case it shall be filed with his objections, in the office of the Secretary of State, within ten days after such adjournment, or become a law."[2]

The court in the instant case divided bills passed by the General Assembly into four classes; first, those presented more than ten days before adjournment; second, those presented on the day of adjournment; third, those presented less than ten days before adjournment; and, fourth, those presented after adjournment. The first class, those presented more than ten days before adjournment, and the second class, those presented on the day of adjournment, present no problem.

The third class, those presented less than ten days before adjournment, raises the question as to the effect of adjournment. Does adjournment start the period running anew from the day of adjournment or does it continue to run from the day of presentment? If the period starts anew from the day of adjournment, adjournment would operate to give the Governor more than ten days after presentment in which to approve or disapprove a bill. The court states that adjournment does not have this effect. The ten-day period starts to run on the day of presentment, and adjournment does not operate to lengthen the period. The court in arriving at this conclusion relies in part upon custom, that is, the custom of executives in the past to treat the day of presentment as the day on which the period starts to run.[3]

1 25 N.E. (2d) 75 (Ill., 1940). 2 Ill. Const. 1870, Art. 5, §16.

3 People v. Barrett, 370 Ill. 464, 19 N.E. (2d) 340 (1939); Neiberger v. McCullough, 253 Ill. 312, 97 N.E. 660 (1912); The Pocket Veto Case, 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929).

The fourth class, those presented after adjournment, such as the bills in issue in the instant case, raise the greatest problem in light of the constitutional provisions. The constitutional provision requiring presentation to the Governor of every bill passed by the General Assembly before it becomes a law is mandatory.[4] The court holds that the General Assembly can make a presentment after a sine die adjournment.[5] In support of this the court states there is no constitutional prohibition against making a presentment after adjournment. The General Assembly has the power to fix the date on which a bill shall be effective, subject to constitutional limitations,[6] and this power includes the power to fix the date of presentment. The court also takes cognizance of the manner in which the General Assembly functions. The General Assembly, from a practical point of view, could not make a presentment of all the bills passed on the day of adjournment.[7] Out of a total of 474 bills passed by the Sixty-First General Assembly, 232 were passed on the last day of the session. The custom of the General Assembly to make presentment after adjournment is accorded considerable weight.[8]

Holding that the General Assembly can make a presentment after adjournment brings into conflict the constitutional provisions, "within ten days (Sundays excepted) after it shall have been presented to him . . . " or "within ten days after such adjournment, . . ."[9] If the period starts to run on the day of adjournment, the General Assembly could by delaying the presentment shorten or do away entirely with the period within which the Governor is to act. The legislature has no power to impair the time within which the Governor is to act.[10] Therefore the ten day period within which the Governor is to act starts to run on the day of presentment to him.

The result in the instant case is a practical one. If the legislature was allowed to impair or do away with the veto check upon legislative power, the safeguard intended by the framers of the constitution to prevent hasty and ill-advised legislation would be nullified.[11]

R. F. Rose

4 People v. Lueders, 283 Ill. 287, 119 N.E. 339 (1918); Neiberger v. McCullough, 253 Ill. 312, 97 N.E. 660 (1912); 25 R.C.L. 888; Hamilton v. State, 61 Md. 14 (1883); Preveslin v. Derby & Ansonia Developing Co., 112 Conn. 129, 151 A. 518, 70 A.L.R. 1426 (1930); State ex rel. Corbett v. South Norwalk, 77 Conn. 257, 58 A. 759, 54 A.L.R. 339 (1904).

5 See generally, Lankford v. Somerset County, 73 Md. 105, 20 A. 1017, 22 A 412, 11 L.R.A. 491 (1890); Johnson v. Luers, 129 Md. 521, 99 A. 710 (1916); Hartness v. Black, 95 Vt. 190, 114 A. 44 (1921). Cf. Amos v. Gunn, 84 Fla. 285, 94 So. 615 (1922).

6 Ill. Const. 1870, Art. 4, §13.

7 Johnson v. Luers, 129 Md. 521, 99 A. 710 (1916).

8 See note 3, supra. 9 Ill. Const. 1870, Art. 5, §16.

10 People v. Hatch, 33 Ill. 9 (1863). Cf. In re Opinions of the Justices, 196 N.E. 260 (1935); The Pocket Veto Case, 279 U.S. 655, 49 S. Ct. 463, 73 L. Ed. 894, 64 A.L.R. 1434 (1929); Edwards v. United States, 286 U.S. 482, 52 S. Ct. 627, 76 L. Ed. 1239 (1932).

11 "As the best means of accomplishing this, and of preventing the adoption of injurious measures, they [the framers of the constitution] gave to the governor

TRADE MARKS AND TRADE NAMES AND UNFAIR COMPETITION—JUDICIAL REVIEW OF FEDERAL TRADE COMMISSION ORDERS—BASIS FOR EQUITABLE MODIFICATION OF CEASE AND DESIST ORDERS.—In *H. N. Heusner & Son* v. *Federal Trade Commission*,[1] the Circuit Court of Appeals of the third circuit modified an order of the Commission requiring the petitioners to cease and desist from using the word "Havana" in the advertising and labeling of its cigars, which were actually made of tobacco grown in the United States. Petitioner asked the court to modify the order so as to allow use of the word "Havana" in conjunction with appropriate qualifications, e.g., "Notice.°These cigars are made in the United States and only of United States tobacco." While rejecting this prayer on the ground that the two statements were contradictory the court did modify the order to the extent of allowing the petitioner two years in which to eliminate the offensive word from its advertising. In stating the reasons for its decision the court pointed out that the cigars had been labeled "Havana Smokers" since 1902 and that this called two mitigating factors into play, first, that "the sudden elimination of the word 'Havana' might cause confusion or even consternation among the devotees of petitioner's cigars, as well as substantial loss to the petitioner" and second, that "it is possible, although the point is not reflected in the findings of the commission, that the long misuse of the word 'Havana' has lent that term a species of secondary meaning in connection with petitioner's cigars." In its conclusion the court stated, "We feel that these considerations, though without bearing on the propriety of the Commission's order, may well influence the method whereby it is to be enforced. . . . "

The granting by the court of an extension of time in which to comply with a F.T.C. order is a comparatively new development in the review of such orders.[2] Since the lawmaking of the Federal Trade Commission flows from adjudication rather than from legislation, its orders have been subjected to a broader scope of judicial review than have the orders of legislative tribunals.[3] It has been held that what constitutes unfair competition is for the determination of the court, and not for the Commission,[4] although even this legal question is properly

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ten days, exclusive of Sundays, in which to bestow that careful examination and consideration, so essentially necessary to determine the effects and consequences likely to flow from the adoption of a new measure. This is the duty imposed, and it is one that must be performed. And the time allowed for the purpose cannot be abridged, or the provision thwarted, by either accident or design. The use of the whole time given to the governor must be allowed." People v. Hatch, 33 Ill. 9 at 136 (1863).

1 106 F. (2d) 596 (1939).

2 Cited by the court as authority for this action is Masland Duraleather Co. v. Federal Trade Commission, 34 F. (2d) 733 (1929), in which the court modified an order forbidding the use of the term "Duraleather—the durable leather substitute" for imitation leather products by granting a six month's period in which this slogan could be stamped on the product in conjunction with some new inoffensive trade name.

3 James M. Landis, "Administrative Policies and the Courts," 47 Yale L. J. 519 at 534.

4 15 U.S.C.A. §41 et seq.; American Tobacco Co. v. Federal Trade Commission,

determined by the Commission in the first instance.[5] On the other hand, it is universally held that the determination of questions of fact is for the Commission and that its findings are conclusive if supported by substantial evidence.[6] The Supreme Court has expressly stated that the reviewing court cannot appraise testimony and choose among uncertain and conflicting inferences.[7]

In practice, however, the courts have expanded the field of judicial investigation on review. This has been accomplished partly through an interpretation of the powers of the Commission. For example, the Supreme Court has held that the F.T.C. should determine whether unfair competition can be prevented without suppressing long-used trade names by requiring proper qualifying rules.[8] It has also been accomplished by the decision that the circuit court has the power to search the whole record for facts not reported by the Commission and to remand to the Commission for additional findings, or, if justice requires a quick decision, to render its decision without remanding.[9] The courts have also expanded their field through their function of construction to determine what questions are those of fact and what are of law or mixed questions of fact and law.

The growth of the practice by the courts of inquiring into the expediency of administrative orders on review, as well as the growth of administrative action generally, has been accompanied by widespread criticism and comment.[10] These discussions stem from a consideration of the emphasis in government to be afforded administrative action, as that of a government of men, as contrasted with a stricter adherence to the tri-partite system of constitutional government, as a government of laws. Criticism of present-day administrative tribunals ranges from the loss of constitutional safeguards in the merging of the three branches

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9 F. (2d) 570 (1925), affirmed 274 U.S. 543, 47 S. Ct. 663, 71 L. Ed. 1193 (1927); Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S. Ct. 587, 75 L. Ed. 1324 (1931).

5 Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 42 S. Ct. 150, 66 L. Ed. 307, 1 A.L.R. 882 (1922).

6 15 U.S.C.A. §41 et seq. and cases cited.

7 Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 54 S. Ct. 315, 78 L. Ed. 655 (1934), reversing 64 F. (2d) 618 (1933).

8 Federal Trade Commission v. Royal Milling Co., 288 U.S. 1212, 53 S. Ct. 335, 77 L. Ed. 706 (1933); Indian Quartered Oak Co. v. Federal Trade Commission, 58 F. (2d) 182 (1932), modifying 26 F. (2d) 340 (1928), where the Commission's order requiring petitioner to desist from designating wood not of mahogany family as "mahogany" or "Philippine Mahogany" was modified to allow use of the second term, on a showing of widespread use of the term by the trade establishing a secondary meaning. See also Federal Trade Commission v. Maisel Trading Post, 79 F. (2d) 127 (1935), modifying 77 F. (2d) 246 (1935); Federal Trade Commission v. Hires Turner Glass Co., 81 F. (2d) 362 (1935).

9 Federal Trade Commission v. Curtis Publishing Co., 260 U.S. 568, 43 S. Ct. 210, 67 L. Ed. 408 (1928).

10 For a review of the subject as a whole, see James M. Landis, "Administrative Policies and the Courts," 47 Yale L. J. 519; Marvin B. Rosenberry, "Law and Discretion in Government," 15 Tenn. L. Rev. 514; Robert M. Cooper, "Administrative Justice and the Role of Discretion, 47 Yale L. J. 577.

of government, through the fact that action by such tribunals as the F.T.C. is remedial rather than preventive to the lack of procedural standards. Many suggestions have been made for remedying these alleged defects, to the end that the functions of the administrative tribunals and the courts may be more clearly differentiated and that constitutional safeguards be more securely established. It has been suggested, for example, that the discretion of the tribunal should be made more limited by making standards for administrative action more definite. Thus it is proposed that opinions and decisions be published and that these precedents be built up into a system of administrative law circumscribing their own discretionary powers.[11] Examining F.T.C. practice in this light, it is interesting to note that ordinarily the F.T.C. does not give written opinions—only the findings of fact and the order are issued.[12] It was early established[13] that the Commission's power to prevent "unfair methods of competition" was not restricted to acts which would have been unlawful prior to the act at common law, the court saying that the words were not void for indefiniteness, since the trader would still have his day in court, on application for enforcement of the order, where the principles and tests of the common law were still applied.[14] The need for definite substandards of vague statutory standards has been widely recognized.[15] It has been suggested by several writers that more attention should be paid to the drafting of delegation of power statutes, and many suggestions have been made for supervision of reviewing administrative tribunals.

The problem of so forming our administrative agencies so as to do away with the need for judicial interference in the administrative function has been aptly epitomized by Professor James Hart,[16] in the statement, "An ounce of administrative prevention is worth a pound of

11 E. Blythe Stason, "Administrative Tribunals—Organization and Reorganization," 36 Mich. L. Rev. 533.

12 See the report of The Attorney General's Committee on Administrative Procedure, "The Federal Trade Commission," at Page 63: "The development of law through the deciding of individual cases is a process both of inclusion and of exclusion. That is, it is important to understand what is permitted by law, as well as to know what is forbidden. Not only, therefore, should the Commission seek to develop a body of precedent based on its holdings that conduct has been improper, but also it should formulate, for their precedent value, those decisions which are 'adverse to the complaint.' . . . A narrative statement of the circumstances in which a cease and desist order will not be issued would not be inappropriate."

13 Sears Roebuck and Co. v. Federal Trade Commission, 258 F. 307, 6 A.L.R. 358 (C.C.A., 1919).

14 The court intimated, however, in Gratz v. Federal Trade Commission, that the words "unfair methods of competition" are "inapplicable to practices not heretofore regarded as opposed to good morals because characterized by deception, oppression, bad faith and fraud or as against public policy because of their dangerous tendency unduly to hinder competition or create a monopoly.

15 Louis G. Caldwell, "Comments on the Procedure of Federal Administrative Tribunals, with Particular Reference to the Federal Communication Commission," 7 George Wash. L. Rev. 740.

16 James Hart, "Some Aspects of Delegated Rule Making," 25 Va. L. Rev. 810.

judicial cure." Certainly the businessman today in planning his advertising statements or trade names has no standards more definite than the maze of F.T.C. orders, signed stipulations, and court decrees, upon which to determine whether his statements will be free from criticism, and he may place no reliance in *stare decisis* when he does find favorable authority.[17] Neither can he secure an advisory opinion on his problem.[18] Certainly he is protected from abuse of discretion by the Commission by his right to apply to the court for injunctive relief, but unless he wishes to incur the cost of expensive litigation, he will be required to sign cease and desist stipulations which are based not on establishment by the Commission of the unfair practice alleged but on information and belief only, since no finding is required before the issuance of a complaint. In contrast it is interesting to note that under the anti-trust provisions of the Clayton act, wherein the acts condemned are specified, the government must establish the existence of the combination before issuing the order. In addition, the required public admission by the businessman that he has been guilty of unfair methods of competition, which is a necessary consequence of signing the stipulation, is a live grievance, especially in these days of growing Consumer Buying groups.

Looking again to the instant case, in light of the foregoing, it is difficult to criticize the court for relieving the petitioner to the extent of allowing two years in which to find a more suitable trade name than "Havana Smokers" for his cigars where for 30 years he has labored to build his business around this name, even though it might be said that the exercise of this type of discretion is more properly within the sphere of the Commission than the Court. D. C. MACDONALD

WILLS—WORDS NECESSARY OR SUFFICIENT TO CREATE TRUST—CONSTRUCTION OF GRANT DIRECTLY TO CHARITABLE CORPORATION WITH RESTRICTIONS.—The New York Court of Appeals has decided that a charitable corporation cannot apply the principal of an endowment fund to the payment of a mortgage where the donor-testator specifies that the income be used for ordinary expense of maintenance.[1]

The will disposed of the remainder of decedent's estate to the complainant hospital in common with eight other charitable corporations,

[17] Recognizing the hardship thus worked on businessmen the Commission has started the practice of issuing Trade Practice Rules, based upon Trade Practice Conferences with members of the trade concerned, for certain key industries such as furs, silks, rayons and some others. These rules are divided into two groups. Infractions of the first group constitute violations of fair trade practice per se. Infractions of the second, the Commission states, may or may not lead to the issuance of a complaint.

[18] The attorney general has declined to give advisory opinions on matters regarding the Federal Trade Commission since that Commission alone has power to enforce the act, 33 Op. Attny. Gen. 225; and the Commission itself has never given advisory opinions.

[1] St. Joseph's Hospital v. Bennett, 281 N.Y. 115, 22 N.E. (2d) 305 (1939), reversing 256 App. Div. 120, 8 N.Y.S. (2d) 922 (1939).

using the language "one-ninth to each to be held as an endowment fund and the income used for maintenance." Complainant's share amounted to almost $148,000 and its mortgage to $175,000; and, in a proceeding for a declatory judgment, it claimed the privilege of applying the principal in part payment of the mortgage indebtedness. The attorney-general as defendant was opposing this action on the ground that any such use of the principal would be in disregard of the testator's expressed intention. The hospital claimed that the will created not a trust but a gift.

Directions for the application of funds in words similar to those here used have not been given uniform treatment by the courts. Some courts have said that such language creates a gift in trust.[2] Other courts have found that such words import an absolute gift, and that the directions bind only the conscience, and not the conduct, of the donee.[3] Finally, it has been suggested that such words create a charitable gift upon condition, performance of the terms of which can be required by the proper public official.[4]

It has been said that the first theory is untenable since a sole trustee cannot be sole beneficiary. This objection is unsound, however, in cases

[2] Such a case was Hobbs v. Board of Education of Northern Baptist Convention, 126 Neb. 416, 253 N.W. 627 (1934), where a college became insolvent and an attempt was made to foreclose liens. Said the court, "While it is said in general terms that to create a trust requires the existence of a donor, a trustee, and a cestui que trust, there are many cases where charitable trusts have been declared and enforced, notwithstanding the fact that the trustee and cestui may be the same entity. . . ."

[3] In jurisdictions whose statute law opposes perpetual holdings by charities, courts will frequently construe the words as creating an absolute gift. Thus the bequest, "I give . . . to be used by said church or its trustees in aiding the cause of home and foreign missions equally," was found to be a gift. Lane v. Eaton, 69 Minn. 141, 71 N.W. 1031 (1897). And in Maryland, whose law permitted no holdings in perpetuity, the court construed these words, "I further direct that said body shall hold said fund in trust," as creating a gift. The court indicated, however, that the beneficiary must keep the fund intact. Charles T. Brandt Inc. v. Young Women's Christian Association, 169 Md. 607, 182 A. 452 (1936). "Such a gift, though the corporation may be instructed to maintain the principal intact and use the income only for a specific purpose, does not create a trust." In re Donchian's Estate, 120 Misc. 535, 199 N.Y.S. 107 (1923).

[4] Thus a bequest, "Moneys . . . be held in trust by the Board of Managers for the following purposes . . ." was held to be a gift on condition. Woman's Foreign Missionary Soc. M.E. Church v. Mitchell, 93 Md. 199, 48 A. 737 (1901). Says one court, "Ordinarily it is of little consequence whether a gift to a charitable corporation for one or more of its corporate purposes be in form a gift outright or a gift in trust. In either case the corporation holds it upon a trust which may be enforced through the visitorial power of the state." Dwyer v. Leonard, 100 Conn. 513, 124 A. 28 (1924). Illinois states the converse of the proposition, "The gift or grant of an estate upon condition or charged with some burden . . . does not create a trust. . . ." Department of Public Works and Buildings v. Porter, 327 Ill. 28, 158 N.E. 366 (1927). Another court states the rule categorically: "Where the property is conveyed directly to a corporation to hold for use in the purpose for which the corporation was created, no trust for the benefit of others arises. . . ." Clark v. Sisters of Society of the Holy Child Jesus, 82 Neb. 85, 117 N.W. 107 (1908).

where ordinary charitable trust principles are applied.[5] New York courts have said that "gifts to a charitable corporation, though subject to enforceable restrictions, do not create a trust in the legal sense."[6] The suggestion of an absolute gift in the present case is refuted because of the intent gathered from the use of the word, "endowment." Says the court, "The term 'endowment' has been defined as the bestowment of money as a permanent fund, the income of which is to be used in the administration of a proposed work."[7] The court concludes that the use of this term reflected testator's intention that the principal should be kept intact.

It has been suggested that such bequests could be considered as gifts upon condition subsequent, analogous to determinable fees, and that failure to follow the terms thereof will cause forfeiture. But a gift to a charitable corporation ordinarily will not lapse and revest in the settlor or his heirs,[8] for the purpose of the gift may be enforced on behalf of the public.[9] The court here seems to conclude that testator intended a gift on condition, the condition being an ordinary usage of the income.

The dissenting judges contended that the language following the words of absolute gift is merely precatory;[10] but in so doing they ignored the force of the word, "endowment." That testator has given complainant a wide discretion in the use of the income does not support the contention that he intended an equal latitude in the disposition of the principal.

The decision is reasonable. The testator's intent is manifested by

5 Scott on Trusts, §364.

6 St. Joseph's Hospital v. Bennett, 281 N.Y. 115, 22 N.E. (2d) 305 at 308 (1939). See also In re Griffin's Will, 167 N.Y. 71, 60 N.E. 284 (1901).

7 St. Joseph's Hospital v. Bennett, 281 N.Y. 115, 22 N.E. (2d) 305 at 306 (1939).

8 People ex rel. Seeman v. Greer College, 302 Ill. 538, 135 N.E. 80 (1922).

9 People ex rel. Smith v. Braucher, 258 Ill. 604, 101 N.E. 944 (1913). See also note, 62 A.L.R. 881.

10 As may be inferred from any study of the cases, there is practical unanimity in the result reached or recommended. There is, however, some cleavage in the interpretation of the words as to whether a trust or gift is created. Two authorities on trusts appear to disagree somewhat in the importance to be attached to the interpretation. "Occasionally it becomes important to learn whether the donor intended to make an absolute gift to a charitable corporation to be used by it for one or more of its corporate purposes, or desired to make the charitable corporation trustee of a charitable trust. It is clear that there is a distinction in these two intents and the legal result of their expression. In the first case the gift is outright and absolute. In the second instance the charitable corporation takes the bare legal interest. . . ." Bogert, Trusts and Trustees, II, §324, 1031. "The testator may manifest an intention not to impose a legal obligation upon the legatee, but to leave him free to apply the legacy to the designated purpose or to keep it for his own benefit. In such case the legatee takes the legacy beneficially and the expression of the testator's wish has no legal effect except to promote litigation." Scott, Trusts, III, 351. Ordinarily discussions on the subject will be academic, as courts usually favor donations to charity. However, as it may be seen in the instant case, sometimes the interpretation of the words is very significant. See also T. E. Blackwell, "The Charitable Corporation and the Charitable Trust," 24 Washington U. L. Q. 1; A. Lincoln, "A Question on Gifts to Charitable Corporations," 25 Virginia L. Rev. 764.

the words, "income" and "endowment." Nowhere does it appear that the mortgage is impairing the efficient operation of the institution. If such a situation were made to appear a contrary conclusion might be justified.[11]

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[11] Such a course has been pursued in similar situations where deviation was deemed advisable. Stanley v. Colt, 5 Wall. 119, 18 L. Ed. 502 (1866); Morville v. Fowle, 144 Mass. 109, 10 N.E. 766 (1887); Trustees of Sailors' Snug Harbor v. Carmody, 211 N.Y. 286, 105 N.E. 543 (1914); Buchanan v. McLyman, 51 R.I. 177, 153 A. 304 (1931).