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## NOTES

A DISCUSSION OF CONDITIONS AND COVENANTS.—As a lead to the introduction of a discussion of the effect and interpretation of conditions and covenants with regard to real property we pose the following problem and discuss the problem as to conditions or covenants imposed: — Problem; "In 1850, G conveyed Whiteacre to a city in Indiana, 'to have and to hold in fee simple on the express condition that the property be used as a city hall'." The city so uses the property for 50 years, then abandons the location and sells the property to X. G's heirs seek to eject X and reclaim. Will they succeed?

The courts construe strictly the terms of a condition subsequent. In the case of *Perkins v. Fourniquet* [1] the court held as follows: "Conditions which go to defeat an estate or destroy an act are strictly construed; while those which go to vest an estate are liberally construed." In the case of *Woodruff v. Woodruff*,[2] the court held: "Conditions subsequent are not favored in law but are always strictly construed be-

1 Perkins v. Fourniquet, 15 How. U. S. 323 14 L. Ed. 435 (1852).
2 Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380 (1888).

cause they tend to destroy estates, and where it is doubtful whether a clause in a deed be a covenant or a condition, this court will incline against the latter construction."

In the case of *Leach v. Leach,*[3] the Indiana court held that a court of equity, in case of a condition subsequent, will interfere where there was even a partial performance, or where there is only a delay of performance.

The right of entry for breach of a condition subsequent is created when a fee simple (or lesser estate) is conveyed with a right reserved to enter and terminate it upon breach of a certain condition, which is usually with relative explicitness described as such. To create the right of re-entry for a breach of a condition subsequent no express words to the effect that the property shall revert to the grantor on forfeiture are necessary. However, such expressed words make the right of re-entry more certain and the intention clearer that a condition subsequent was created.[4]

Thus, in a condition subsequent, the words, "on condition" or others of equal import are used to create the condition but they are not absolutely necessary as long as the intention of the grantor is clear. However, generally it can be said that the courts do not favor such conditions. It is a general principle as before stated that the law frowns on forfeitures. Wherever the court has the opportunity it will construe the wording in a deed as a covenant or a trust rather than condition subsequent. If, however, the grantor clearly expresses his intention to create such an estate, the courts will give it effect. It can be seen that rules of construction govern a great deal in determining whether the words of a deed create a condition subsequent rather than a covenant.

In the Indiana case of *Cross v. Carson,*[5] the court held that if land be conveyed in fee simple on a condition subsequent and the condition be not performed, the estate may be defeated by the entry of the grantor or his heirs, but until such entry, the grantees and his heirs will hold the land. This case illustrates the necessity of the grantor to institute an action for re-entry. If not, the grantee continues to hold the estate until the grantor does re-enter, regardless of the time of the breach.

Further examples of courts' construction follow. In the case of *Hawley v. Kafitz,*[6] the deed provided that, "it was upon the express agreement" that the grantee build a house for not less than $1,500, the agreement being understood to be part of the consideration for the conveyance. The court held that such a provision was a mere personal

3 Leach v. Leach, 4 Ind. 628, 58 Amer. Dec. 642 (1853).

4 National Law Library, Volume 5, Property.

5 Cross v. Carson, 8 Blackford 138 (1846).

6 Hawley v. Kafitz, 148 Cal. 393, 83 Pac. 248 (1905).

covenant on the part of the grantee and not a condition subsequent authorizing a forfeiture.

In the case of *Greene v. O'Connor,*[7] the clause in the deed stated, "On condition that it shall be forever kept open as a public highway and for no other purpose"; court held this to be a mere declaration of the purpose for which the land was conveyed to the city by the grantor, and even though it is in the form of a condition subsequent, it cannot be treated as such so as to allow the grantor, fourteen years after the grant, to re-enter the land because of the city's failure to use the land as a highway. This only could be construed as a condition subsequent if the express right to re-enter for nonuse was expressed in the deed.

An example of the type language needed to enforce the condition subsequent is to be observed in the case of *Skipper v. Davis.*[8] Here the deed to church trustees was made in consideration of a specified sum and the premises were to be used for church purposes only. A re-entry provision for the abandonment of the property in the grantor was included. The court held that a sufficient intention was expressed to create a condition subsequent.

In the case of *Fitzgerald v. Modoc County,*[9] the deed conveyed land "to be used as and for a county high school ground and premises." The court held that a condition subsequent was not created, but that it was a mere declaration of the purpose for which the grantor expected the land to be used. The court said that language will be construed against a condition subsequent whenever possible unless the language itself expressly creates the condition.

An Illinois case[10] held that in determining whether a clause is a condition subsequent or a covenant, the presence or absence of a re-entry clause giving the right to the grantor or his heirs, is a forfeiture of the estate for a breach of condition is always important to determine the intention of the parties.

It can be seen, after a review of the cases, that if the court determines a clause to be a condition subsequent, there must be a forfeiture of the estate upon the proper action of the grantor for a breach of the condition. This the court hesitates to do. However, if a construction is found deciding in favor of a covenant, the remedy to the grantor is for money damages without a forfeiture. Here it can be seen why the courts will, whenever possible, find a construction for a covenant rather than for a condition subsequent.

In our particular problem we find that provisions were made that the property be used for a city hall with the "express provision" inserted. This factor in itself might induce the courts to consider the

7 Greene v. O'Conner, 18 R. I. 156, 25 Atl. 692 (1892).
8 Skipper v. Davis, 59 S. W. (2d) 454 (1932).
9 Fitzgerald v. Modoc County, 164 Cal. 493, 129 Pac. 794 (1913).
10 Dunn v. Minson, 312 Ill. 333, 143 N. E. 842 (1924).

clause to create a condition subsequent. However, in our case, the deed does not go on and recite that the grantor has the right to re-enter and reclaim the property if the city stops using the land for a city hall. This in many of the cases above noted would be fatal to the condition subsequent construction. The court would construe this omission to be a covenant rather than a condition. The intention of the grantor would not be clear as to whether a condition or something else was intended, and the court would require a clear intent for a condition subsequent, in order that it be enforced. The court, in our case, would, in view of above noted authorities, have ample justification to declare this clause and provision to be no more than a covenant.

Another important provision in the facts to consider is the fact that the city held the land for fifty years before abandoning and selling the property. In the Indiana case of *Leach v. Leach,*[11] cited previously, the court held that in the case of a condition subsequent, the equity court will interfere where there was a partial performance. Certainly in this case there was not only partial performance but substantial performance.

Other Indiana cases support this view. The case of *Higbee v. Rodeman* [12] is important. There land was conveyed to a township for common school purposes. The deed stated: "lot was donated for school purposes so long as it shall be used for such purposes." The township held the land for thirty years and then sold it. The court held that the language of the deed did not create a condition subsequent; but that if the conveyance were upon a condition subsequent, the use of the property for thirty years for school purpose would be a substantial compliance with the condition.

In the case of *Jeffersonville R. R. Co. v. Barbour,*[13] the deed was made "for and in consideration of the sum of $5," and provided that a failure to erect buildings and occupy the ground "for the use and purpose above mentioned, then and in that case the above specified ground shall revert back to the donors." The court held that the erection of the buildings and their use for depot purposes was a substantial compliance with the condition.

It seems clear that in view of the authorities cited that the courts will consider that the clause in this deed is to be construed as a covenant and not a condition subsequent. Coupled with the fact the city used the land for fifty years as a city hall, and made substantial compliance and substantial performance of the provisions in the deed, and the courts reluctance to enforce forfeitures, the court will declare the city has the free right to sell the land to X.

*Robert A. Oberfell.*

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11 Leach v. Leach, 4 Ind. 628, 58 Amer. Dec. 642 (1853).

12 Higbee v. Rodeman, 129 Ind. 244 (1891).

13 Jeffersonville R. R. Co. v. Barbour, 89 Ind 375 (1883).

FEDERAL AND STATE TAXATION OF EACH OTHER'S PROPERTY.—An interesting problem arises when the Federal Government endeavors to levy a tax on state property. The same problem also comes about when the state tries to place a tax on the Federal Government's property or instrumentalities. There is a conflict of authorities concerned in these situations. This controversy arises because of the concept of dual government which we have in the United States.

In the first place the Federal government made up of delegated powers from the state as set forth in the Constitution, is supreme in its own sphere of activity. The national government is a sovereign power which cannot be encroached upon or limited in its constitutional jurisdiction by the states. On the other hand the state governments are supreme in their spheres of activity. The reserved powers which the states kept for themselves after delegating certain enumerated ones to the federal government give the states ample powers within which they are supreme. The states thus have a sphere of influence within which they are sovereign. Under our system of government we have two sovereign governments exercising their powers over the same area. Difficulties arise as to whether one of these sovereign bodies is encroaching or interfering with the jurisdiction of the other.

One of these particular conflicts of the laws of the two governments occurs when revenues by taxation are sought by each of the two governments. It is well known that one of the essential powers of any government is taxation. Thus any government needs to exercise this function in order to obtain revenues to carry on its activities. However, in the United States under our dual system, if one of these sovereign powers endeavors to exercise its function of taxation a conflict arises since in the use of this power it must not hinder or limit the jurisdiction of the other sovereignty in its powers or activities.

Thus when the federal government seeks to secure revenues by taxation, it cannot encroach on the states' sovereignty of jurisdiction because if it did so the state would not longer be supreme in its sphere of activity. The same problem arises when the state seeks to exercise its taxing powers.

This conflict of taxation arises in various ways. However, in order to better examine the situation the problem will be divided into two fields: (1) The taxation of the property of the sovereignty; and (2) the taxation of the agencies or instrumentalities of the other sovereign government.

Thus let us first consider taxation by the state of federal property. In the case of *Royal Van Brocklin et al v. Anderson,*[1] the Supreme Court held that the property of the United States was not subject to state taxation. Then in the case of *United States Housing Corporation*

1 117 U. S. 151, 29 L. Ed. 845 (1885).

*v. City of Watertown et al* [2] the court of New York held that the Secretary of Labor organized a corporation for housing workers vital to essential industries and acquired land for the purposes of quarters. The city levied a tax on this land. The court held that the tax was unlawful as a tax on federal property and granted an injunction against the collector of the levy.[3] In the case of *People ex rel McCrea, Collector v. United States* [4] the Illinois court held that property while the title to it is in the United States, no matter for what purpose it is acquired or held, is exempt from state taxation.

The Supreme Court, on the question of public lands, held in *McGoon v. Scales* [5] that public lands belonging to the United States are not taxable by the state or any of its political subdivisions. However, this exemption rule can be waived by Congress. In other words, if Congress so deems it necessary or practicable, it can expressly provide that certain public lands can be taxed by the state or its subdivisions. For example in the case of *Central Pacific Railroad Company v. State of Nevada* [6] Congress authorized the state to tax unsurveyed lands held under a railroad grant, and the court held that no federal question was involved since Congress had expressly authorized the state to tax these lands. The only question involved was the construction of the state statute of taxation as to the levy.

Another situation arises when the state cedes land to the Federal Government and then tries to levy taxes on the land. In the case of *Fort Leavenworth Railroad Company v. Lowe* [7] the court held that where the United States acquires land within a state in any other way than by purchase, with its consent, and forts, arsenals or other public buildings are erected thereon, for the use of the General Government as instrumentalities for the execution of its powers, the land will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purpose designed. But when the land is not used for the purpose designed the legislative power of the state over the places acquired will be as full and complete as over any other places within its limits. Thus the state in ceding land from under its jurisdiction to the United States can reserve the right to maintain tax levies against the land.

On the other hand if the title of the United States to any part of its public domain is sold or a grant is made to an individual or to a railroad company, the land becomes subject to state taxation as soon as the purchaser or grantee becomes vested with the legal or equitable

2 186 N. Y. S. 309 (1920).

3 See also Irwin v. Wright, 258 U. S. 219, 66 L. Ed. 573 (1922).

4 93 Ill. 30 (1879).

5 9 Wall. (U. S.) 23, 19 L. Ed. 545 (1870).

6 21 N. W. 247, 30 P. 686, affirmed in 162 U. S. 512, 40 L. Ed. 1057 (1896).

7 114 U. S. 525, 29 L. Ed. 264 (1885).

title. For example in *Johnson v. Crook County* [8] the Oregon court held that when payment of the full consideration for public land has been made, and the receiver of the local land office issues a final report, it operates to transfer such an equitable estate in the premises as immediately to render them liable to taxation though the United States holds the legal title until a patent is executed. In *Northern Pacific Railroad Co. v. Myers* [9] the Supreme Court held that lands included in the grant to the Northern Pacific Railroad Company by the Act of Congress of July, 1864, are subject to state taxation for their value as agricultural lands although they have not been patented to the railroad and their mineral or non-mineral character is under investigation under the provisions of the Act of Congress of 1895. However, it is necessary in order to make property taxable by the state, that the United States be divested of its equitable title.[10]

In Nebraska in the case of *State ex rel Sioux County v. Tucker et al* [11] the court held that school lands sold by the state, but to which the equitable title of the purchaser had not been completed by full payment of the purchase price, are subject to taxation to the extent of the purchaser's interest therein; such interest to be determined by the amount paid and invested in improvements on such land. Thus the exemption from taxation does not apply to improvements made on public lands made by the occupants. It has been also held that the exemption does not apply to possessory interests held in public lands for mining, agriculture, and other like purposes.[12] In the case of *Elder v. Woods* [13] the Supreme Court held a mining interest in public lands subject to state taxation.

Let us now turn to the second situation; namely, can the states tax federal agencies and instrumentalities? Generally it can be said that the states cannot by implication tax the federal agencies and instrumentalities. The reason behind this rule is that the states if they became dissatisfied with the Federal Government or sought to end national activity, they could destroy or hamper the activities by taxation. In the famous case of *McCulloch v. Maryland* [14] the state endeavored to levy

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8 53 Ore. 329, 100 P. 294 (1909). See also Newby v. Brownlee, 23 F. 320 (1885) also as to transfer to individuals, see Wilson Cypress Co. v. Enrique, Del Pozo Y Marcos, et al, 236 U. S. 635, 59 L. Ed. 758 (1915).

9 172 U. S. 589, 43 L. Ed. 564 (1899), see also Elting v. Gould, 26 Mo. 585, 9 S. W. 922 (1888).

10 Price v. Dennis, et al, 159 Ala. 625, 49 S. 248 (1909).

11 36 Neb. 56, 56 N. W. 718 (1893).

12 In re Delinquent List of Perna County, 4 Ariz. 186, 37 P. 370 (1894); 39 P. 328 (1894).

13 208 U. S. 226, 52 L. Ed. 464 (1908), see also Baltimore Shipbuilding & Dry Dock Co. v. Baltimore, 195 U. S. 375, 49 L. Ed. 242 (1904).

14 4 Wheat (U. S.) 316, 4 L. Ed. 597; see also State v. Gaston, 32 Ind. 1 (1869); 2 Am. Rept. 315.

a tax on national banks within its boundaries. The Supreme Court held that the states are prohibited from taxing the instrumentalities by which the United States powers are carried into execution. The court held that if the tax were allowed by the state, the powers delegated to the federal government would be impaired and hindered until the federal agencies could not carry out their legal functions. Then in the case of *Buffington v. Day* [15] the court said that this policy was not based on an expressed limitation of the federal constitution but on the grounds of self-preservation for the federal government.

In the case of *Fidelity & Deposit Company of Maryland v. Pennsylvania* [16] the court held that a surety company did not by becoming (conformably to the Act of Congress of 1894) surety on bonds required by the United States, act as a federal instrumentality so as to be exempted from a state tax on the premises received, exacted from foreign corporations doing business within the state. Thus by implication it can be said that the prohibition against state taxes would apply to a privilege tax upon the federal instrumentality for the privilege of performing its function.

Congress, however, can by express enactment waive the exemption which runs in favor of the federal government. Thus Congress can allow its agencies to be taxed by the states. Limitation as to the extent of the tax can be prescribed by Congress when it waives the exemption. For example in the case of *Talbott v. SilverBow Company,*[17] Congress authorized taxing by the state of shares of stock in National Banks. The territorial legislature of Montana taxes the shares of stock in the National Bank pursuant to this authorization. The court held that this levy was just as valid for the territory as for any state. Congress has also provided that the states can also tax moneyed corporations, agencies of the federal government, which are within the area of the state.

It must be said that there is an important limitation on the above rule. In *Thompson v. Union Pacific Railroad Company* [18] the court held that the exemption lies to the federal government only insofar as the state taxation would interfere or impair the efficiency or carrying out of the functions by the agencies of the federal powers. The court said, "Taxation of the agency is taxation of the means; taxation of the property of the agency is not always or generally, taxation of the means."

Along the same line, in the case of *Union Pacific Railroad Company v. Penisten* [19] the court held that the state might tax the property of

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15 11 Wall. (U. S.) 113, 127, 20 L. Ed. 122 (1871).

16 240 U. S. 319, 60 L. Ed. 664 (1915).

17 139 U. S. 439, 35 L. Ed. 210. See also Van Slyke v. Wisconsin, 154 U. S. 581, 20 L. Ed. 240 (1871).

18 9 Wall. (U. S.) 579, 19 L. Ed. 792 (1870).

19 18 Wall. (U. S.) 5, 21 L. Ed. 787 (1873).

federal agencies with other property in the state, and as other property is taxed when no law of Congress forbids and where the effect is not to defeat or hinder the operation of the federal government. The reason is that if the exemption was applied in blanket form, every corporation engaged in performing or aiding in the performance of functions for the federal government would be exempt. Thus the state would be left in an embarrassing situation since most of the sources of its revenue would be exempt from taxation. Thus benefit would result to the individual rather than to the nation. The court adds, "the test is whether the tax deprives the persons or corporations taxed, in truth, of power to serve the government as they were intended to serve it or hinder the efficient exercise of their power. Thus just because property is held by a federal agency, it is not for this reason exempt from state taxes.

In passing it is interesting to note the problem of whether a state can tax the salaries of federal officers. In the case of *Dobbins v. Commissioner of Erie County* [20] the court held that a state cannot tax a federal office nor the salary of a federal officer. Then in the case of *Fenly v. Philadelphia* [21] the court ruled that this exemption applied to an income tax insofar as it pertained to salaries of officers. But the court held that the exemption did not extend to or include other property of federal officers.

These above cases were modified by the case of *Dyer v. City of Melrose* [22] wherein the court said "when the salary has been paid by the government to one of its officers and has come into his possession it loses its identity as salary and becomes money, effects or credits, liable to taxation."

The case of *Graves v. New York* [23] modified and changed the exemption a great deal. The court held that the imposition by a state of a non-discriminatory income tax, in respect of the salary of any employee of a corporate instrumentality of the Federal Government does not place an unconstitutional burden on the Federal Government where Congress has not conferred on the salaries of employees of such instrumentality an immunity from state taxation. Further the court held that in respect to the question of whether the taxation of income which is compensation for services rendered to a state or the Federal Government lays an unconstitutional burden on such government, it is immaterial whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employee or an officer of either a state or the National Government or of its instrumentalities. Thus from this case it can be seen that unless Congress and in the case of state officers and employees, the state legislature, expressly claim and

20 · 16 Pet. (U. S.) 435, 10 L. Ed. 1022 (1842).

21 32 Pa. St. 381.

22 197 Mass. 99, 83 N. E. 6, affirmed in 215 U. S. 594, 54 L. Ed. 341 (1910).

23 306 U. S. 486, 83 L. Ed. 927 (1939).

provide the exemption by statute, a rule of comity is thus reached. The dual government and the State in order to secure to itself the most sources of revenue will not exempt the compensation of its agents unless it is absolutely necessary. For when one of the sovereign powers takes advantage of the exemption, the other sovereign power acts to exempt some of its officers and employees.

*Taxation of State Agencies and Property.*

Now let us consider the same two situations we did for the Federal Government with regard to its property and agencies for the state government and their agencies and property. The general rule in this regard was established in *United States v. Baltimore and Ohio Railroad Co.*[24] The court held that the federal government was without power to tax the property or the agencies of a state or the means essential to the exercise of its governmental functions. The states are entitled to the same exemption from federal taxation in this respect as the federal government is from state taxation. This same principle is supported in Indiana in *State v. Garton*;[25] in Michigan in *Fifield v. Close*[26] and in Wisconsin in *Sayles v. David.*[27]

It must be added also that the same limitation applies to this rule for the states as for the federal government case. The exemption applies only insofar as the tax would hinder or interfere with the agency or instrumentality of the state from efficiently carrying out its function for the state in the exercise of its governmental power.

The case of *United States v. Baltimore and Ohio Railroad Company* (*supra*) also answered this question with regard to municipal corporations. The court held since a municipal corporation is really only a portion of the states' sovereign power since it is established for the convenient and necessary execution of state government, it is as much exempt from taxation by the federal government in all its revenues and property as the state itself.

In the case of *Mercantile National Bank of the City of New York v. Mayor, Alderman and Commalty of City of New York*[28] the Supreme Court held that the federal government could not levy a tax on bonds issued by a state. Then in *Pollock v. Farmer's Loan and Trust Company*[29] the same court held that the federal government could not tax bonds issued by a municipality in a state. The reason for this court's holding was that such a tax would be an obstruction on the instrumentality of the state in the exercise of its governmental powers. How-

24 17 Wall. (U. S.) 322, 327, 21 L. Ed. 597 (1873); see also Ward v. Maryland, 12 Wall. (U. S.) 418, 20 L. Ed. 449 (1871).

25 32 Ind. 7 (1869).

26 15 Mich. 505.

27 22 Wis. 217 (1867).

28 121 U. S. 138, 30 L. Ed. 895 (1886).

29 157 U. S. 429, 459, 39 L. Ed. 759 (1895).

ever, in the case of *Veazie Bank v. Fenno* [30] the court held that the federal government could tax a franchise granted by a state if the franchise so granted was not one for the purpose of carrying into execution any of the governmental powers of the state. Thus it would appear that proprietary or non-governmental functions of a state or a municipality are subject to federal taxation. The case of *South Carolina v. United States* [31] supports this view. Here the court held that where the federal government had levied an internal revenue tax on the state agents engaged in selling liquor under state authority, the tax was valid. The court reasoned that the exemption of the state from federal taxation applies only and is limited only where the state is engaged in a strictly governmental function. This exemption does not extend to those functions of the state when it is engaged in business of a private character. Then in the case of *Flint v. Stone Tracy Company* [32] the court held that the exemption from federal taxation does not extend to public service corporations. Thus these public service corporations are subject to federal taxes.

Finally with regard to federal taxation of state officers and employees on their salaries or compensation, we have seen that *Graves v. New York* [33] (*supra*) has held that the compensation of state officers or employees is not exempt from federal taxation unless the state legislature expressly claims the exemption for them on their salaries. The rule of comity between the federal government and the states limits the use of this exemption. Further authority for this view is found in *Helvering v. Gerhardt* [34] where the court held that the imposition of a federal income tax on salaries received by employees of a corporation created as a state agency to construct and operate transportation and terminal facilities in a certain district does not place an unconstitutional burden on the states served by the corporation.

Thus the conflict between the two sovereign governments in the United States, the federal government and the states, has been worked out with regard to taxation of each others' property and agencies. This problem being successfully dealt with gives added significance and importance to the blending and integrity of our idea of theory of government. It shows that our system of dual government can be harmonized and blended into a workable form of jurisdictional powers. Thus with this successful solution of a complicated problem of the conflict of laws, a path is blazed which shows the way for the solution of other conflicts of laws.

*Charles M. Boynton.*

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30 8 Wall. (U. S.) 533, 19 L. Ed. 482 (1869).

31 199 U. S. 437, 50 L. Ed. 261 (1905); see also Salt Lake City v. Hollister, 118 U. S. 256, 30 L. Ed. 176 (1885).

32 220 U. S. 107, 55 L. Ed. 389 (1911).

33 306 U. S. 486, 83 L. Ed. 927 (1939).

34 304 U. S. 405, 82 L. Ed. 1427 (1938).

MAY THE FEDERAL OR STATE GOVERNMENT THROUGH ITS HOUSING ADMINISTRATIONS CONDEMN PROPERTY UNDER THE RIGHT OF EMINENT DOMAIN?—With the passing of the Federal Housing Act in 1934, many problems arose as to the legality of the government or the state to condemn property for use in the housing program. One of the first cases to arise was *The United States v. Certain Lands in City of Louisville, Jefferson County, Kentucky.*[1] In this case, the United States of America attempted to condemn certain property in the city of Louisville, Kentucky, for the purpose of securing fee-simple title thereto in order to erect thereon a Low-Cost Housing and Slum Clearance Project. Prior to the filing of the action, the plaintiff asked the court to appoint a commissioner to assess the damages of the respective owners of the property described in the petition. The defendants immediately demurred to the petition. This demurrer was based upon the contention of the defendant that the United States was without power to exercise the right of eminent domain for the purpose of acquiring property for Low Cost Housing Projects. The court sustained the demurrer of the defendants and went on to explain that the power of eminent domain is inherent in sovereignty and is possessed by the national government within the field described by the constitution. That is to say the government may condemn property for ordinary governmental purposes such as for post offices, forts, arsenals, locks and dams on navigable streams, courthouses, light houses and the like and for any other legitimate function of the government. It is also equally well settled that the national government may condemn property for the establishment of national memorials, commemorating the valor of its sailors and soldiers, which are open to the enjoyment of and will serve as an object lesson to, all the people. However the court drew the line on the condemnation of property for the housing program. It is not for public use the court concluded, in that only a few persons would benefit. Also such condemnation proceedings is part of the police power of the state and may not be exercised by the national government within the state. Therefore such an act must be considered unconstitutional. The case, *The United States v. Certain Lands in the City of Detroit* [2] the court reaffirmed the decision of the court in the previous case. But the facts are somewhat different. The Detroit Housing Commission was appointed by the Governor of the State of Michigan to investigate housing conditions in the city of Detroit. The commission found conditions deplorable in a certain section of Detroit and immediately asked the Federal Housing Administration to step in and have the property condemned and erect sanitary houses. The national administration immediately instituted condemnation proceedings. But again the court found for the defendants and refused

1 9 Fed. Supp. 137 (1935).

2 12 Fed. Supp. 345 (1935).

to allow the government to seize any property for non-public use. The court further stated in part that private property may not be taken, either by the United States or by any state agency, except for public use. There was a statute in Michigan at this time which declared condemnation of lands for purposes of government of United States in its housing projects was permissible but the court added that the fundamental law of both the United States and the state of Michigan prohibits the taking of private property except for public use and this was not for public use the court concluded.

The case, *Franklin TP in Somerset County, New Jersey v. Tugwell* [3] proves to be similar to the cases discussed. The township of Franklin was a municipal corporation, organized and existing under the laws of New Jersey. The major portion of its revenues were received from taxes on real estate. The Resettlement Administration, a branch of the Housing program attempted to create within the corporate limits of Franklin the so-called "model community," and to purchase a large area of the township and move seven hundred and fifty families from a congested area into the township. Unless the government was restrained from doing so the township would lose immediately three-fifths of the value of its taxable real estate and the township will be separated into two parts. The township's ability to discharge its municipal duties would thus be impaired. The board of education would also lose a large portion of the source of its revenue for discharge of its duties. The plaintiffs, further contended that this was an illegal transfer of legislative powers to this resettlement commission. The court held for the plaintiff and said in part that Congress cannot delegate the law making power with which it is vested by the constitution, although it may lay down policies and establish standards leaving to selected instrumentalities the making of subordinate rules within prescribed limits. The court concluded by stating in part that this act left the President of the Unied States with practically unfettered authority to decide where, when and how appropriations was to be expended for housingg.

As early as 1928, state courts have defined housing programs as for public welfare. This was to be seen in the case of *Willmon v. Powell.*[4] The elimination of overcrowded tenements, unhealthy slums for which the municipal housing commission was established by the Los Angeles charter, is a public and charitable purpose and not a purely commercial or industrial enterprise, the court concluded. Again in 1931 the question of housing arose in the New Jersey courts in the case of *Simon v. O'Toole* [5] where an ordinance authorizing a contract between municipality and insurance company for the reconstruction of certain blocks

[3] 85 Fed. (2d) 208 (1936).

[4] 91 Cal. App. 1-266 P. 1029 (1928).

[5] 108 N. J. L. 32, 155 A. 449 (1931).

with modern housing facilities and parks was held to be a valid contract in that the primary purpose of the contract was for the betterment of public welfare.

The first case contra to the cases, *The United States v. Certain Lands in the City of Louisville* [6] and *The United States v. Certain Lands in Detroit* [7] is *New York Housing Authority v. Muller*.[8] The petitioner, a public corporation organized under the Municipal Housing Authority Law sought to condemn certain premises in the city of New York owned by the defendant Andrew Muller. The defendant refused to sell his property and held that the law establishing a housing authority was unconstitutional in that it violated article one, section six of the New York State Constitution and also the fourteenth amendment of the federal constitution. The court held to the contrary, however, and decided that the menace of slums must be safeguarded for public welfare. The argument was also presented in this case that the public would not benefit from this legislation. The court answered this by saying that the designated class to whom incidental benefits will come are persons with an income under twenty-five hundred dollars a year and it consists of two-thirds of the city's population. This was not the essential purpose of the legislation, that class or any class rather the main purpose as has been previously stated is to protect and safeguard the entire public from the menace of the slums.

In 1937, the case *Spahn v. Stewart* [9] again held for the power of housing authorities to condemn property. The plaintiff here, a property owner attempted to obtain a permanent injunction against the city from seizing his land for housing purpose, his main argument was that it was an unlawful delegation of legislative powers to a municipality. The court held for the city and quoted the case *Craig v. O'Rear* [10] which stated: "When we say that the legislature may not delegate its powers, we mean it may not delegate the exercise of discretion as to what a law shall be, but not that it may not confer discretion in the administration of the law itself."

The property acquired was to be used for public use and therefore it is within the powers of the legislature to transfer the power of condemnation to the municipality.

Although the case *Marvin v. Housing Authority of Jacksonville* [11] affirmed the decision of the courts in prior cases yet a new problem arose to be ruled upon. The Housing Authority of Jacksonville pursuant to acts of 1937, organized the Housing Authority of Jackson-

6 9 Fed. Supp. 137 (1935).
7 12 Fed. Supp. 345 (1935).
8 270 N. Y. Rep. 333, 1 N. E. (2d) 153 (1936).
9 268 Ky. Rep. 97, 103 S. W. (2d) 651 (1937).
10 199 Ky. Rep. 553, 251 S. W. 828 (1923).
11 133 Fla. Rep. 590, 183 So. 145 (1938).

ville, to do away with slums et al. The housing authority then entered into a contract with the United States Housing Authority. The federal administration advanced eight thousand dollars to the municipality for the purpose of paying preliminary expenses. The Municipal Housing Authority then proposed to issue bonds for the payment of the balance of the project and to do so without obtaining the approval of qualified fee holders of the city of Jacksonville. Marvin, a property owner in this city, brought this action to attempt to prevent the city from issuing the bonds and continuing on with the housing program. The court found for the housing authorities and stated in part that it was well within the power of the Mayor of Jacksonville to appoint the members of the Housing Board and that all the debts the housing administration contracted for were the debts of the housing program and not the city's obligations. They were not bonds within the meaning of the constitution providing that counties, districts or municipalities shall have the power to issue bonds only after approval by a majority of the voters. Furthermore the property would be exempt from taxation under the constitutional provision exempting from taxation property for municipal, educational, literary, scientific, religious or charitable purposes in that it was a non-profit governmental function within the state of Florida.

The plaintiff in the case *Humphrey v. City of Phoenix* [12] claimed the municipality was acting *ultra vires* that is to say beyond its powers in condemning property for use in a housing project and dealing with the national government's housing program. Again as has been seen before the court declined to agree with such statements and stated that the city of Phoenix was not precluded from constructing and operating housing projects as authorized by the municipal housing law. Municipal housing law is intended to enable cities and towns of the state in which unsafe and unsanitary housing conditions exist to remove such conditions and substitute therefor safe and sanitary dwellings for persons of low income.

In the case *Knoxville Housing Authority v. City of Knoxville,*[13] the court states, the city has control and supervision of the housing commission and that the property belongs to the city and compares such supervision to that of the State and the State University. The state owns all the property of the University yet the University is a separate corporation with certain delegated powers, the case, the *University of Tennessee v. People's Bank* [14] adds credence to this statement. The court concludes in the Knoxville Housing case that the slum areas may be condemned and taken over by the authority.

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12 55 Ariz. Rep. 374, 102 P. (2d) 82 (1940).

13 174 Tenn. Rep. 76, 123 S. W. (2d) 1085 (1939).

14 157 Tenn. Rep. 87, 6 S. W. (2d) 328 (1928).

Thus it is to be seen that housing projects are now considered for public welfare. The following cases conclude the required proof. In *Edwards v. Housing Authority of the City of Muncie* [15] the court held the state legislature has the power to seize land for public welfare through housing projects, *Housing Authority of City of Dallas v. Higginbotham* [16] the court held the housing authority may condemn land in that it did not grant special privileges to any certain group. Another case is *Oklahoma City v. Sanders* [17] where the court said that the taking of property for low cost housing projects pursuant to congressional acts is such "public use" as will authorize the exercise of eminent domain. *McNulty v. Owens* [18] court decreed that the city Housing Authority is for a public municipal purpose within the meaning of the constitution. Finally the case *United States v. Boyle, County Treasurer* [19] where the court concluded that a use does not fail to be a "public use" for which property may be condemned by the federal government merely because immediate enjoyment of it is limited to a small group or even to a single person.

*Theodore M. Ryan.*

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QUASI CONTRACTS—RECOVERY OF VOLUNTARY PAYMENTS MADE UNDER A MISTAKE OF FACT.—As a general rule, a payment made under a mistake of fact, and which the payor was under no legal obligation to make, may be recovered [1] even though it was made during the pendency of a suit on a demand.[2] The right of recovery under such circumstances is bottomed upon the equitable doctrine that an action will lie for the recovery of money received by one to whom it does not in good conscience belong; the law presuming a promise to repay.[3]

The right to recover a payment made under mistake of fact is not taken away by the existence of a mistake of law co-existing in the same transaction. However, owing to the fact that the rule permitting back payments to be recovered when made because of mistake of fact is founded upon considerations of equity and good conscience, there can be no recovery when the payor has received a substantial benefit.[4]

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15 215 Ind. Rep. 330, 19 N. E. (2d) 741 (1939).
16 135 Tex. Rep. 289, 143 S. W. (2d) 79 (1940).
17 94 Fed. (2d) 323 (1938).
18 188 So. Car. Rep. 327, 199 S. E. 425 (1938).
19 52 Fed. Supp. 906 (1943).

1 Meyer v. Richards, 163 U. S. 385, 16 S. Ct. 1148, 41 L. Ed. 199 (1896); Peo v. Foster, 133 Ill. 496, 23 N. E. 615 (1890).
2 Hinds v. Wiles, 12 Ala. App. 596, 68 So. 556 (1915).
3 Citizens Bank v. Reidisile, 4 Ga. App. 37, 60 S. E. 818 (1908); Chrysler Light Co. v. Belifield, 58 N. D. 33, 224 N. W. 871 (1929).
4 Traweek v. Hagler, 199 Ala. App. 664, 75 So. 152 (1915).

The next problem to be determined is what constitutes a mistake of fact. Corpus Juris [5] defines a mistake of fact, within the meaning of the rule allowing recovery of payments as follows, ". . . one of such error or want of knowledge as to a fact, or such belief in the past or present existence as a fact of that which never existed, or such real or honest forgetfulness of a fact once known, as that a true recollection or knowledge of the fact, or of its existence or non-existence would have caused the payor to refrain from making the payment."

The mistake must also be one of a material fact [6] which influenced the plaintiff at the time he made the payment.[7] It is not essential to the right of recovery that the mistake be caused by any wrongful act of the payee.[8] Failure to foresee a future event is not mistake of fact.

It is held in some states that to authorize recovery of money paid under mistake of fact it is not essential that the mistake be mutual.[9] From *Gibbons v. Perkins*:[10] "It is well settled that if one party to a contract seeks to set it aside for mistake of fact he must show one of two things: (1) Either that the mistake was a mutual mistake of fact, or (2) such mistake on the part of the party seeking to set aside the contract, and conduct on the part of the other party amounting to fraud in taking advantage of a mistake which he knows is being made by the one with whom he is dealing. In regard to payments of money on a contract, a party seeking to set aside the payment is not compelled to prove so much. It is sufficient if he prove that he alone made a mistake (even though negligently) in paying the money, unless it would be unfair and inequitable to compel the party receiving the payment to return it."

In general, where the payee has changed his position to his own harm and cannot be placed in *status quo*, the money cannot be recovered although paid under mistake of fact.[11] There is an exception to this rule, however, when the payor's negligence was induced on the part of the payee.[12]

The rule that money voluntarily paid cannot be recovered has many conditions, qualifications and exceptions. Among the conditions is

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5 Vol. 48, p. 762.

6 Boylston Nat. Bank v. Richardson, 101 Mass. 287.

7 Meene Mutual Home Protective Fire Ins. Co. v. Lorfeld, 194 Wis. 322 (1927).

8 Hinds v. Wiles, 12 Ala. App. 596, 68 So. 556 (1915); Montgomery Door Co. v. Atlantic Lumber Co., 206 Mass. 144, 92 N. E. 71 (1910).

9 Stotsenburg v. Fordice, 142 Ind. 490, 41 N. E. 313 (1895).

10 Gibbons v. Perkins, 230 N. Y. S. 273 (1928).

11 Espy v. Cincinnati First National Bank, 21 L. Ed. 947 (1874); Traweek v. Hagler, 199 Ala. App. 664, 75 So. 152 (1917).

12 New York Life Ins. Co. v. Talley, 72 Fed. (2d) 715 (1934).

one that the payor must have had full knowledge of all the facts. One of the qualifications is that compulsory payments are not within the rule, and what constitutes compulsion depends upon the peculiar facts and circumstances of each case. This is not within the scope of this report, but the rule in regard to voluntary payments was stated in the case of *Raddick v. Hutchins*,[13] in which the court said: "To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary . . . there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving the payment over the person or property of another, from which the latter has no other means of immediate relief than by making payment."

A court of equity will only give aid when there is a mistake as to an intrinsic fact concerning the contract. Here are a few illustrations of mistakes as to intrinsic facts essential to contracts, against which courts of equity will grant relief: A buys an estate of B to which the latter is supposed to have a fee simple title. It turns out upon investigation of the facts that B has no such title; in such a case equity might either cancel the release or restrain its application as intended. On the other hand if the vendor was in possession of the facts which will materially enhance the price of the commodity and of which he knows the vendor to be ignorant he is not bound to communicate these facts to the vendor and hence there is no ground for equitable interference. In such a case the facts unknown to the vendor are extrinsic to the contract and are not of its substance.

Judge Earl in *Dambman v. Schulting*[15] said: "There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon, or defrauded, he must be held to his contracts. In such cases equity will not stretch out its arm to protect those who suffer from want of diligence.

*William O'Connell.*

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13 95 U. S. 210, 24 L. Ed. 409 (1877).

14 Bengham v. Bengham, 1 Vessey 26.

15 75 N. Y. 55 (1878).

RESTATEMENT OF CONFLICT OF LAWS SEC. 94: A CRITIQUE.—With all deference to the difficult undertaking of the American Law Institute's Committee on Conflict of Laws,[1] it must be admitted that here, as in other attempts at over simplification, a compendium of general rules of law, without reference to any factual context, is apt to be misleading. Experienced lawyers recognize the fact that every case is distinguishable on the facts from every case. Questions presented are often so ramified that they cannot be answered by the perfunctory application of "rules," tacitly based, we take it, on a great subsisting body of statutes and case law refinements not alluded to in the body of the Restatement.

Section 94 of the Restatement provides as follows: "A state can exercise jurisdiction through its courts to make a decree directing a party subject to the jurisdiction of the court to do an act in another state, provided such act is not contrary to the law of the state in which it is to be performed."

The rule as it stands doubtless contemplates the recognized power of equity to decree the specific performance of a contract for the conveyance of land situated in a foreign state or country, by way of mandatory injunction, provided that the litigants are before the court. This proposition is exhaustively annotated in the comparatively recent Indiana Appellate decision of *Light v. Doolittle* et al.[2] From the syllabus: "There is no inconsistency on the part of the courts in assuming jurisdiction of suits for specific performance of contracts in respect to real property beyond the territorial jurisdiction of the state, if the parties are personally subject to their jurisdiction, upon the theory that such suits are *in personam,* and not *in rem,* and at the same time assuming jurisdiction of such suits in respect to land within the territorial jurisdiction upon the constructive service against nonresidents, upon the theory that such suits have, by virtue of a statute (Burns' Ind. Stat. Anno., 1933, Title 2, Sec. 907 et seq.) become, for the time being or for the occasion, a suit in rem or quasi in rem."

But the language of Section 94 of the Restatement does not expressly confine itself to the specific performance of contracts for the sale of lands beyond the territorial jurisdiction. By its broad language, it purports to govern all instances of positive acts to be done beyond the territorial jurisdiction, as decreed by equity courts acting in personam.

As early as 1877, the Supreme Court of Georgia recognized that the jurisdiction of a court of equity to issue orders compelling the performance of an act in another state might or might not be entertained, depending upon the particular facts involved and the nature of the decree sought.[3] There a bill was sought by a nonresident, praying that

1 Restatement of the Law of Conflict of Laws, St. Paul (1934).
2 77 Ind. App. 187, 133 N. E. 413 (1921).
3 Port Royal Ry. Co. v. Hammond, 58 Ga. 523 (1877).

the defendant railroad company (a Georgia corporation) be decreed to specifically execute construction contracts, e.g., the cutting of drainage ditches and stock gaps, in South Carolina, alleged to have been made with the plaintiff, a resident of South Carolina. The Court said: "Although a court of equity will act upon the person of a defendant within its jurisdiction and compel specific performance of a contract in relation to lands in a foreign state . . . still we are not aware that the court has ever gone to the extent of compelling a defendant by its decree to go into a foreign state and specifically execute a contract there, even in the case of a natural person; and, more especially, where the defendant is an artificial person, having no legal existence beyond the territorial limits of the state which created it. . . ." The Court declined to entertain jurisdiction.

The recent Massachusetts case of *Thomas Gunter et al v. Arlington Mills* [4] prima facie is inconsistent with the rule laid down in Section 94 of the Restatement. That was an appeal by plaintiffs from a decree of the trial court sustaining a demurrer to and dismissing a bill filed to restrain the diversion of water from a certain lake, for the restoration of a dam to its former height, and to desist from interfering with plaintiffs' rights in the lake. The decree was affirmed. The Court said: "Want of jurisdiction in equity such as is here alleged properly is raised by demurrer. . . . Ordinarily our courts decline to take jurisdiction where performance of a positive act is to be carried out in another state. (Cases cited.) To protect adequately and fully the rights of the plaintiff, positive acts must be done by the defendant in the State of New Hampshire. These rights can be fully protected in the courts of New Hampshire which have jurisdiction of the land and the water rights involved. . . ." From the foregoing excerpt of the opinion, the Court's inclination to decline jurisdiction to order performance of positive acts in another state is readily apparent.

The doctrine of the court in *Gunter v. Arlington Mills, supra,* however, that the jurisdiction will not be exercised to compel the performance of positive acts in another state, is sustained by the authorities, at least where such acts are not necessary to the protection of property at the forum. The distinction between requiring the performance in another state of acts affecting real property therein, and requiring the performance at the forum of an act affecting real property in another state, is well brought out in *Port Royal Ry. v. Hammond, supra.*

In *Delaware, L. & W. R. Co. v. New York, S. & W. Ry.,*[5] where it was sought, by injunction, to compel a railroad to deliver coal in Pennsylvania, it was said that any attempt to interfere with the business of railroad transportation in that state would undoubtedly be viewed by the courts of that state as an impertinent interference with

[4] 271 Mass. 314, 171 N. E. 486 (1930).
[5] 33 N. Y. S. 1081 (1895).

its domestic affairs and the due administration of the local concerns of an independent sovereignty. Hence it was concluded that "as a matter of comity between the states, we are bound by every consideration of policy, expediency, and propriety to abstain from taking jurisdiction of a controversy of this character."

The principle that a court of equity will not require the performance of a positive act in another state appears, in most cases bearing on the point, to be subject to an exception or limitation where the performance of such an act is necessary to the protection of real property within the territorial jurisdiction.

Thus, in the celebrated Salton Sea Cases,[6] it was held that, while the rule that a court of equity can never compel a defendant to do anything which is not capable of being physically done within the territorial jurisdiction of the court "undoubtedly obtains where the property injured is itself outside the jurisdiction of the court," that rule is inapplicable where property within the court's jurisdiction is injured, in which case jurisdiction is not impaired simply because the party on whom the court must act may find it necessary to do things outside the court's jurisdiction in order to comply with its order. The injunction which was affirmed in that case in effect abated a nuisance caused by the construction of intakes in Mexico, by ordering that the diversion of water onto the complaintant's lands should be so controlled as not to flow thereon.

From an analysis of the above authorities, it is apparent that Section 94 of the Restatement is not, strictly speaking, a correct statement of the law with reference to the jurisdiction of a court of equity to order performance of positive acts in foreign states. There is indeed a formidable division of authority on the question.[7]

*David S. Landis.*

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RIPARIAN RIGHTS IN COLORADO.—The body of laws pertaining to streams and watercourses and the accompanying rights of riparian proprietors are unique in Colorado and other western jurisdictions. Because of the naturally arid condition of the soil and other physical characteristics of the western land many rights that a riparian owner found inherent in his possession of land at common law have been

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6 172 Fed. 792 (1909); certiorari denied in 215 U. S. 603 (1909).

7 Cases at variance with Sec. 94 of the Restatement: Gunter, et al v. Arlington Mills, 271 Mass. 314, 171 N. E. 486 (1930); Smith v. Mutual Life Ins., 14 Allen 336; Kansas & Eastern Ry. v. Topeka & Western, 135 Mass. 34; Richards v. Security Mutual Life Ins., 230 Mass. 320, 119 N. E. 744 (1918); Arizona Comm. Mining v. Iron Cap Co., 233 Mass. 522, 124 N. E. 281 (1918); Wimer v. Wimer, 82 Va. 890, 5 S. E. 536 (1888); Dyke v. Colorado C. R. Co., 42 Fed. 638 (1880).

abrogated. In this paper we shall examine the remedies of a lower riparian against the pollution of a stream by an upper riparian. The doctrine of riparian rights, well established in most American jurisdictions, has been largely extinguished in Colorado by the state constitution itself. This is true of the common law doctrine of the right of continuous flow which was abolished by section 5 of the constitution when it declared: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." [1]

This was given judicial recognition in *Sternberger v. Seaton Mining Co.*[2] and has long been the law in Colorado. It is clear then that insofar as the right to continuous flow is concerned the riparian rights in that respect have been entirely superseded by the doctrine of prior appropriation which gives the prior appropriator the right to use all the water necessary for any beneficial activity he may choose.

It seems apparent that few, if any, prior appropriators could make beneficial use of the entire flow of any river. What of that portion that he does not appropriate and that flows to the lower riparian? It is with this portion of the unappropriated water that we are concerned. Admitting the abrogation of the right of continuous flow, then the question presents itself: Did the right to have the unappropriated water come to lower riparian unpolluted and uncontaminated fall with the right of continuous flow? If it did then any remedies available to the lower riparian would necessarily be statutory. The constitution of the state is silent on this point but there is a leading case that lays down the general rule. In *Suffolk Gold Mining & Milling Co. v. San Miguel Consolidated Mining & Milling Co.* the court said: "* * * with respect to prior and subsequent appropriators, we see no reason why some of the principles which have been thoroughly settled in many jurisdictions respecting the riparian rights may not be applied to the determination of the relative rights of appropriators along the line of streams in Colorado." [3]

Continuing the court said: "Under these circumstances, we are quite of the opinion that the title and rights of the prior appropriating company were not absolute, but conditional and they were obligated to so use the water that subsequent locators might, like lower riparian owners, receive the balance of the stream unpolluted, and fit for the uses to which they might desire to put it." [4]

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1 § 5, State Constitution of Colorado.

2 45 Colo. 401, 102 Pac. 168 (1909).

3 9 Colo. App. 407, 48 Pac. 828 (1897).

4 Ibid.

That this is the rule in other western jurisdictions that also hold the doctrine of prior appropriation is shown by a Montana court in *Adler Gulch Consolidated Mining Co. v. Hayes* [5] in which the court stated that the prior appropriator must permit the water to flow on for the use of the lower proprietors, subject only to the reasonable deterioration in quality and dimunition in quantity made necessary by the use of it by him for the purpose for which he appropriated it.

Applying the rules as laid down by these courts we may formulate a general rule that any portion of a stream that a prior appropriator does not put to beneficial use must come to the lower riparian unpolluted and so here we see portions of the doctrine of riparian rights and prior appropriation existing concurrently. This being true, the subsequent appropriator in case of pollution may look, much as an ordinary riparian proprietor does, to the common law remedy of damages for an injury to his estate. The leading case on this point is *Humphrey's Tunnel & Mining Co. v. Frank,* in which the court awarded damages of $1,000 for pollution of a stream. Without considering whether the pollution was a violation of an anti-pollution mining statute the court said: "Whether it applies to the present case we need not say. Upon general principles of law it is so entirely clear that defendant is liable in damages for this pollution of the stream which has injured plaintiff, that we do not cite authorities or deem it necessary to argue such a self-evident proposition." [6]

The court then further substantiated the view laid down in *Suffolk v. San Miguel* of the right of the lower riparian to have the unappropriated water flow unpolluted. In addition to assessing damages for the pollution the court issued a permanent injunction prohibiting further pollution by the defendants. Here we see another remedy open to a lower riparian in case of violation of his right. He may avail himself of an injunction as well as secure damages for any injury caused by the pollution of the unappropriated waters. Injunctive relief has often been granted to plaintiffs in this jurisdiction to enjoin such pollution that would ultimately result in irreparable damage. The right to pollute a stream of the water not appropriated does not run to mining operations even in a state such as Colorado where mining is a principal industry. A. L. R. states the general rule: "A mine operator has ordinarily no right to pollute the water of a stream by his operations in such manner as to injure either the land of an adjacent or lower riparian proprietor, or the water as it flows past such land, and if he does so he is liable in damages, and in a proper case is subject to injunction." [7]

Such injunctive relief has been granted numerous times in this state against mining operations following a rule laid down in a case decided

5 6 Mont. 31, 9 Pac. 581 (1886).
6 46 Colo. 524, 105 Pac. 1093 (1909).
7 39 A. L. R. 891.

even prior to *Suffolk v. San Miguel.*[8] Injunctive relief was given in the Suffolk case and in 1935 the Supreme Court of Colorado affirmed a decision granting a permanent injunction against defendant mining companies notwithstanding the fact that the expenditure necessary to satisfactorily dispose of the mill tailings and slimes was in excess of the defendant's profits.[9] The court even refused to apply the balance of convenience doctrine in granting the permanent injunction. A violation of a statute was involved in this case and was heavily relied upon by the plaintiffs. The right of a lower riparian in Colorado to have what water does flow through his land come to him uncontaminated even at the expense of a necessary industry was further reasserted when the court sustained a demurrer to defenses set up by the mining companies of the extreme cost of installing, of custom and acquiescence and of estoppel by laches. It would appear conclusively then that although many portions of the doctrine of riparian rights have been abolished in Colorado, a lower riparian proprietor has the right to have what water is not appropriated by the prior appropriator come to him unpolluted. That this right may be maintained against a municipality by an individual as well as against an important industry was decided in *Mack v. Town of Craig* where a municipality sought to condemn the plaintiff's property and pollute a public stream with its sewage. In adjudicating the court said: "In consideration of the question as to whether municipalities have a right to pollute state public streams it is to be noted that section 1817 R. S. 1908 expressly makes the pollution of such public waters by discharging sewage or any other obnoxious substance therein a criminal offense. There is nothing inherent in a municipality which gives it any greater right so to do than that which a natural person has." [10]

It would follow then that a municipality, in committing wrongs in which it possesses no greater right to commit than an individual, would be vulnerable to the same remedies that an injured riparian would be in a position to apply against a person or an industry that caused the nuisance.

The remedies mentioned, damages and injunctions, both arise out of common law rights. What of the statutory remedies available to an injured lower riparian in Colorado? Looking at the books we find two pertinent statutes which have often been exercised in asserting rights of lower riparians. Section 258 of chapter 48 declares: "If any person or persons shall hereafter throw or discharge into any stream of running water, or into any ditch or flume in this state, any obnoxious substance, such as refuse matter from slaughter house or privy, or

8 Fuller v. Swan River Placer Mining Co., 12 Colo. 12, 19 Pac. 836 (1888).

9 Wilmore, et al. v. Chain O' Mines, Inc., 96 Colo. 319, 44 Pac. (2d) 1024 (1934-35).

10 68 Colo. 337, 191 Pac. 101 (1922).

slops from eating houses or saloons, or any other fleshy or vegetable matter which is subject to decay in the water, such person or persons shall, upon conviction thereof, be punished by a fine of not less than one hundred dollars nor more than five hundred dollars for each and every offense so committed." [11]

This statute was declared constitutional as being within the police power of the state in *People v. Hupp* [12] in which the court reversed a lower tribunal that had refused to apply the penal statute because the act complained of was a mere technical violation. It is to be noted that the statute is a section of the criminal code and affords the injured riparian no relief save possibly the conviction and imposition of heavy fines on the party guilty of such pollution. This would obviously be an inadequate remedy for an injured proprietor and he would be in a more favorable position were he to fall back on his common law remedies which, of course, he would do.

The anti-pollution mining statute that has long been a source of much difficulty to mining operations in Colorado also is worthy of our attention. It reads: "In no case shall any person or persons be allowed to flood the property of another person with water, or wash down the tailings of his or their sluice upon the claim or property of other persons, but it shall be the duty of every miner to take care of his own tailings upon his own property, or *become responsible for all his damage.*" [13] (Italics mine.)

It was the violation of this statute that played a paramount role in the determination and awarding relief in the Fuller, Humphreys, and Wilmore cases. That the pollution was occasioned by a corporation engaged in a vital industry would be no defense under this statute which provides for damages for any contamination caused by the concern. This section, declaring the extent of a mining company's liability for stream pollution to be absolute, seems to be declaratory of common law rights.

It would appear that in Colorado, notwithstanding the inapplicability of the doctrine of ordinary riparian rights, the unappropriated water of a stream must flow unpolluted from the prior appropriator to the subsequent appropriator and if the water is polluted by the prior appropriator he will be forced to respond in damages and be subject to an injunction much in the fashion of jurisdictions where full riparian rights are judicially guaranteed.

*Francis J. Paulson.*

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11 Chap. 48, § 258, Colo. Stat. Ann. (1935).
12 53 Colo. 80, 123 Pac. 651 (1910).
13 Chap. 110, § 186, Colo. Stat. Ann. (1935).

THE LAW OF IMPUTED NEGLIGENCE IN THE OPERATION OF AUTOMOBILES.—It may be stated as a general rule in the law of automobile operation, that conceding the negligence of the operator of an automobile, the owner thereof, when not riding in the car, is not liable for injuries arising from such negligence, merely because he is the owner of the vehicle. The above general rule is supported by the Indiana cases of *Premier Motor Mfg. Co. v. Tilford,*[1] and *Decker v. Hall.*[2] In the latter case the court held: "A complaint alleging that defendant allowed another to operate his automobile, brought into collision with plaintiff's car, states no cause of action, where there is no allegation that the driver was a servant or agent, or that he was on any business or errand of defendant."

This general rule of no liability is supported in the majority of states; for example: The case of *Mosby v. Kimball,* an Illinois case [3] held: "Owner is not liable for negligence of another whom he permits to operate automobile unless operator, in operating automobile, is owner's servant or agent." A Massachusetts case [4] holds: "Owner of automobile, merely by virtue of his ownership, is not liable for injuries inflicted by the car when driven by another person, not his servant." It is clear that under the general rules of agency as applied to automobiles the owner is not responsible for the negligent acts of a third person, other than a servant or agent, even though the automobile is being driven with the owner's consent, express or implied.

In several jurisdictions, an automobile owner is liable by statute for the negligent use or operation of his car by other persons for their own purposes with the permission or consent of the owner. The intent of such statutes is to secure greater protection to the public from the operation of motor vehicles when negligently driven, and to prevent an owner, who had given permission for the use of his car, from escaping liability by saying that it was not being used in his business.[5] Such statutes enlarge the legal liability of the owner who intrusts his car to another by making such person the agent of the owner, although there is no agency in fact. There is an important constitutional law problem involved in the interpretation of such statutes. For example, in Michigan [6] the Legislature attemped to charge the owner with liability for all injuries occasioned by the negligence of the driver of the machine, except in case it was stolen. But this statute was held to be unconstitutional so far as it attempted to impose liability where a trespasser obtained possession thereof without the consent of the owner

1 Premier Motor Mfg. Co. v. Tilford, 61 Ind. App. 164, 111 N. E. 645 (1916)
2 Decker v. Hall, 72 Ind. App. 139, 125 N. E. 786 (1920).
3 Mosby v. Kimball, 178 N. E. 66; 345 Ill. 420 (1931).
4 Phillips v. Gookin, 120 N. E. 691, 231 Mass. 250 (1918).
5 "Cyclopedia of Automobile Law." Huddy Ninth Edition. Volume 7-8. Chap ter H. Section 141.
6 Johnson v. Sergeant, 134 N. W. 468; 168 Mich. 444 (1912).

and without his fault. A subsequent statute [7] cured the defect in the former law by providing that the owner would not be liable when the machine was driven without the consent or knowledge of the owner. The New York courts have included such liability statutes as being within the police power of the state. In the case of *Feitelberg v. Matuson* [8] the court held, "I fail to perceive how the constitutionality of this act can be questioned. It is based upon the police power which is inherent in every state for the protection of its citizens and others within our borders." The case of *Stapleton v. Independent Brewing Co.*,[9] a Michigan case, the court held, "The present statute, while safeguarding the rights of persons having occasion to use the streets, does not unreasonably infringe upon the rights of those able to own automobiles. The owner of an automobile is supposed to know, and should know, about the qualifications of the persons he allows to use his car, to drive his automobile, and if he has doubts of the competency or carefulness of the driver he should refuse to give his consent to the use by him of the machine. The statute is within the police power of the state."

It is interesting to note that the law makers of Canada have not been hindered with constitutional limitations, and have imposed liability on the owner of the machine for the negligence of the driver.[10]

There are only seven states that have enacted strict liability statutes:[11] They are, California, Iowa, Michigan, New York, Rhode Island, Virginia, and Wisconsin. Also the District of Columbia has enacted a very strict statute as the case of *Ross v. Hartman* [12] will illustrate. In that case the court held: "Where truck owner's agent violated traffic ordinance by leaving truck unattended, in a public alley, with ignition unlocked and key in switch and an unknown person drove the truck away and negligently ran over plaintiff, the violation of the ordinance requiring motor vehicles to be locked, was negligence and constituted the 'proximate causes' of the injury rendering owner liable therefor." The court reasoned that the purpose of the ordinance requiring motor vehicles to be locked is not to prevent theft for the sake of the owners or the police, but to promote the safety of the public in the streets.

The foundation of this statutory liability of the owner is the consent or permission, express or implied, given to another to use an instrumentality which, if improperly used, is a danger and a menace to the public. If the car is driven without the owner's consent, or contrary to his express orders, no liability attaches to him unless the statute

7 Daugherty v. Thomas, 140 N. W. 615; 174 Mich. 371 (1913).
8 Feitelberg v. Matuson, 208 N. Y. S. 786 (1925).
9 Stapleton v. Independent Brewing Co., 164 N. W. 520; 198 Mich. 170 (1917).
10 McFee v. Joss, 56 O. L. R. 578, 2 D. L. R. 1059 (C. A.) 1925.
11 112 A. L. R. 416.
12 Ross v. Hartman, 139 Fed. Rep. 2nd 14 (1943).

expressly so provides. Knowledge is prerequisite to consent, and permission cannot be implied from mere user without proof of knowledge thereof. Such a statute does not require that the particular driver be known and his driving consented to by the owner.

To make the owner liable, his permittee, at the time of the negligent act, must be acting within the scope and limits of the permission. The court held [13] the following to be the test of the owner's liability under the statute: "Was the automobile being operated at the time and place of the accident, by one who had the owner's permission, and was it so operated within the scope and limits of the owner's permission?"

Generally the entire case is decided upon the jury's interpretation of the extent of the owner's consent. It is question of fact from which the jury may find consent, and if so, in those jurisdicitions following the strict statutory liability, the owner is liable as the principal in an agency relation, although there was no agency in fact.

*Robert A. Oberfell.*

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VALIDITY OF A CITY ORDINANCE AGAINST PICKETING.—Ever since the use of the labor injunction has been curtailed by the *Norris-La Guardia Act*,[1] there has been an increasing resort to the sanctions of the criminal law in labor disputes. The most important phase of this development has been the enactment of city ordinances against picketing by municipalities.[2]

Peaceful picketing is a lawful means of labor union activity because in it there is an entire absence of fraud, violence, or anything of an intimidating nature.[3] It is characterized by peaceful persuasion for the promotion of a lawful purpose.

In *People v. Rebenovich* [4] the court said that the right to picket in front of a place of business on a city walk during a labor dispute could not be made dependent upon obtaining a permit from the park commissioner because the right to picket peacefully is a fundamental human right.

A city ordinance which prohibited all peaceful picketing off the employer's premises, or the approach thereto, even though without fraud or violence, was held invalid in *Local Union N. B. O. P. v. Ko-*

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13 Kelly v. Niagara Falls, 229 N. Y. S. 328 (1928).

1 Title 29 U. S. C. A., § 101 to 115.

2 Ex Parte Harder, 9 Cal. App. (2d) 153, 49 P. (2d) 304 (1935).

3 City of Reno v. Second Judicial District Court, 59 Nev. 416, 95 Pac. (2d) 994 (1939).

4 171 Misc. 569, 13 N. Y. S. (2d) 135 (1939).

*komo*,[5] one section being in direct conflict with a state statute and other provisions being irreconcilable and inconsistent.

In *Diemer v. Weiss* [6] the court held a city ordinance to be invalid by reason of its vagueness, indefiniteness and uncertainty, where one section provided that it should be unlawful to interfere with the operation of a business or with a working agreement between an employer and an employee by what is commonly known as picketing, this section being in conflict with another.

Formerly all courts were inclined to disapprove collective bargaining, striking and picketing, upon the part of employees. However, the past few years have witnessed a decided change in public opinion. Recently courts have been holding anti-picketing ordinances unconstitutional as interfering with freedom of speech. Courts have said that this right and that of freedom of the press may be regulated under the police power of the state.

However, the court in *City of Reno v. Second Judicial District Court* (*supra*) stated that neither freedom of the press or that of speech could be suppressed under the guise of regulation; that the city may, in the exercise of its police power, regulate the methods of publicity as well as the use of the streets is conceded.[7] But it cannot under the cloak of regulation, prohibit such means or such use.

The theory on which it is sometimes based that the government, either by the legislature or a municipality, can enact valid legislation against picketing, is that this means of publicity, however, it may be confined to peaceful persuasion, tends to provoke disorder and impedes traffic. On this account it is declared the exercise of the police power is justified to suppress it. I cannot agree with this idea that peaceful persuasion in the form of picketing has any such tendency. The doctrine that it does connote such evil consequences as disorder or street obstruction, as previously pointed out has long since been discarded. I believe that dangers to the public peace can easily be avoided by an effective police administration.

In the case of *Lovell v. the City of Griffin* [8] the Supreme Court of the United States with Chief Justice Hughes delivering the opinion, denied the authority of a municipality to limit freedom of the press and speech by restricting the right to distribute leaflets without first obtaining the consent of the city manager. The distribution of leaflets and picketing might impede traffic yet they cannot be outlawed by ordinance.

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5 5 N. E. (2d) 624 (1936).

6 122 S. W. (2d) 922 (1938).

7 Senn v. Tile Layers Protective Union, 301 U. S. 468, 57 Sec. 857, 81 L. Ed. 1229 (1937).

8 58 Supreme Court Rep. 666, 82 L. Ed. 949 (1938).

Of course, free speech may be curtailed when its exercise invokes activities harmful in themselves and so subject to prohibition under the police power.[9] There can be no argument as to the power of municipalities to declare picketing illegal when accompanied by intimidation, coercion, physical assault or indecent language and when actually tending to create violence.[10]

An ordinance making picketing prima facie evidence of a conspiracy to injure the business of a person picketed is invalid since the acts in question have no direct logical tendency to prove such a conspiracy.[11]

In summation, originally laws forbidding picketing, even including peaceful picketing, were generally regarded by state courts as constitutional.[12] The later cases undoubtedly as a result of the more modern concept of the rights and problems involved in labor disputes, take the position that as applied to peaceful picketing such a law cannot be held consistent with the constitutional rights of the parties, upon the grounds both that it constitutes a denial of due process and that it is an infringement of the constitutional right of freedom of speech.[13]

Any difference of opinion on this point among the state courts would seem to be no longer of any consequence, since the question was passed upon by the Supreme Court of the United States, which in decisions binding upon all courts so far as rights under the Federal Constitution are concerned, holds in favor of the view that a statute or ordinance forbidding peaceful picketing or all picketing without regard to whether it is accompanied by threats or acts of violence, is an unconstitutional invasion of the right of freedom of speech.

Laws forbidding picketing may also by so indefinite or ambiguous as to render them invalid, but an ordinance invoking only a reasonable regulation rather than an absolute prohibition of peaceful picketing is not unconstitutional but the regulation must not suppress picketing of this type. There is authority to the effect that the performance by strikers of picket duty on a public street is not an act which the municipal authorities can prevent so long as it is confined to peaceful persuasion of laborers not to take the place of strikers.

*William J. O'Connell.*

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9 Abrams v. United States, 250 U. S. 616 (1919); Schench v. United States, 249 U. S. 47 (1919).

10 10 North Carolina Law Review 158 (1931).

11 Hall v. Johnson (1917), 87 Ore. 21, 169 P. 515 (1917).

12 Thomas v. Indianapolis, 195 Ind. 440, 145 N. E. 550 (1924).

13 People v. Harris, 104 Colo. 386, 91 Pac. (2d) 989, 122 A. L. R. 1034 (1939); State ex rel Meridith v. Borman, 138 Fla. 149, 189 So. 669 (1939).

14 St. Louis v. Glover, 210 Mo. 502, 109 S. W. 30 (1908).

VALIDITY OF PARKING METER ORDINANCES.—A number of the larger cities of the several states in the last decade have attempted to regulate parking on their more congested thoroughfares through the use of the parking meter ordinance. The ordinances require a small sum to be placed in the meter which is stationed at the curb, the sum usually being five cents for a half-hour of parking.

Probably the most forceful objection to these ordinances have come from the abutting property owners who claim their right of egress and ingress to their own property is taken away without due process of law. On this point the Supreme Court of Indiana in the case of *Andrews v. City of Marion* [1] held that the property owner's right of egress and ingress did not include the storing of his car in front of his property. The right includes the right to stop vehicles in front of his property for the purpose of loading and unloading passengers and merchandise and that the ordinance did not prohibit this. The court held that when the owner of property parks his car in front of his property on the street he does so as a member of the general public and in so doing is subject to reasonable traffic and parking regulations.

In the case of the *City of Birmingham v. Hood-McPherson Realty Co.*[2] the Supreme Court of Alabama held directly contra to the Indiana court. The Alabama court holding the owner of the premises has the right to have his family, guests, or customers come and go within reasonable limitations and without the exaction of a fee or compensation. The court said: "The right of ingress and egress is necessarily burdened with the right within reasonable limitations of parking a vehicle or car. The owner has the right to come and go, park his vehicle alongside of his property (within reasonable limitations), and without the exaction or payment of a tax or fee to the municipality, or to have his property defaced by superimposed obstructions, barriers, or parking meters placed alongside." [3]

The objection that parking meter ordinances are an unreasonable exercise of the police power on the part of the municipality has been answered by the courts. It is held that the state has the right to regulate traffic on the streets and highways of the state and that this power may be legally delegated to the city within the limits of the city and when the facts warrant it the restrictions on time in parking and the payment of a fee to cover expenses and policing are valid exercise of the power of the city to regulate traffic within its limits.[4]

The presumption of constitutionality is applied to the parking meter ordinances and the Supreme Court of Oklahoma in *Ex Parte Duncan* [5]

1 47 N. E. (2d) 968, 221 Ind. 422 (1943).

2 172 So. 114, 233 Ala. 352, 108 A. L. R. 1140 (1937).

3 108 A. L. R. 1152.

4 Andrews v. City of Marion, 47 N. E. (2d) 968, 221 Ind. 422 (1943); State v. McCarthy (Fla.) 171 So. 314, 126 Fla. 433 (1936).

5 65 Pac. (2d) 1015, 47 Okla. Stat. Ann. § 12 (1937).

held that the parking meter ordinances are valid where they appear to be bona fide police regulations on their face, and there is no showing that they have been installed on streets where traffic is not sufficiently heavy to justify any parking regulation, or that the city is making unjustified profits and is resorting to their use for the purpose of raising revenue and not regulation.

The courts hold that they will not go into extensive accounting of the profits exacted from parking meter ordinances to determine whether it is actually a measure for raising revenue for the city and not one of regulation but that they would promptly arrest any clear abuse.[6] A reasonable fee is allowed for the privilege of parking on city streets where the amount collected does not substantially exceed cost of acquiring, installing and maintaining meters and other expenses incidental to enforcement of the ordinance.[7]

The ordinance under consideration in *Andrews v. City of Marion*[8] provided for a fee to be paid for "parking" and the court construued this word to mean storage and not stopping to load and unload passengers and merchandise so that the ordinance did not interfere with the abutting property owner's rights of egress and ingress. However in the case of *City of Birmingham v. Hood-McPherson Realty Co.*[9] the court seemed to construe the word "parking" to include stopping to load and unload passengers and merchandise and therefore it did interfere with the property owner's right of ingress and egress. However in that case the court went further and said the property owner had a greater right than mere loading and unloading passengers and merchandise in front of his property; that he had the right to park his vehicle, subject to reasonable limitations, in front of his property, and that parking meters exacting a fee was an unreasonable limitation on his rights. These two cases are squarely conflicting and on no grounds can they be reconciled. It seems that the Indiana case is supported by the weight of authority in the few states in which the question has been decided,[10] however there is weight to both sides and it seems now to come to a matter of expediency in the regulation of traffic. As the Oklahoma court put it in the case of *Ex Parte Duncan*:[11] "Courts should refrain from interference with a municipal regulation of automobile traffic unless there is some real, direct and material infraction of rights."

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6 Ibid.

7 Andrews v. City of Marion, 47 N. E. (2d) 968, 221 Ind. 422 (1943).

8 Ibid.

9 172 So. 114, 233 Ala. 352, 108 A. L. R. 1140 (1937).

10 See annotation in 108 A. L. R. 1152.

11 65 P. (2d) 1015, 47 Okla. Stat. Ann. 12 (1937).