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NOTES

CONSTITUTIONAL LAW

LEGAL DIFFERENCE BETWEEN THE ARTICLES OF CONFEDERATION AND THE CONSTITUTION OF THE UNITED STATES.—In this work I will show the three fundamental differences between the Articles of Confederation, adopted November 15, 1777, and the United States Constitution, adopted at Philadelphia in 1787.

On June 12, 1776 Congress appointed a committee to draw up "Articles of Confederation," which were ratified March 1, 1781. These Articles became the first Constitution of the United States of America. Although these articles were sufficient, and very superior to anything up to this time, they contained fundamental defects which were not remedied until the adoption of the present Constitution in 1787.

"Generally speaking, the Articles of Confederation were designed to continue the government of the Continental Congress in Constitutional form. This of course, was much less than was actually needed by a proper government for the United States, but the individual states were jealous of one another, and their experience with England had prejudiced them against a strong central government. From the Articles of Confederation comes the name, United States of America." [1]

"The national government under the Articles of Confederation, had no direct power over the citizens of any of the states. Congress, under

[1] Lessons in Liberty, Manion p. 98.

the Articles acted upon the states, and not upon individuals. Since states and not individuals, were responsible for obedience to Congress, there were no practical methods available to Congress for enforcing observance of its laws. "Sovereign states" could not be put into jail or tried for law violation. This was the killing weakness of the Articles of Confederation. Congress could negotiate treaties, but had no power, to enforce them either at home or abroad." [2]

In short the three fundamental differences between the Articles of Confederation and the Constitution of the United States of America were these: the Articles of Confederation, (1) Left too much power to the states, and left Congress entirely dependent upon them for money and the enforcement of its decrees. (2) It did not operate on individuals, nor prevent the violation of treaty obligations, nor command respect abroad, nor insure tranquility at home. (3) The Articles could not be amended except by the consent of every state.

In 1784, Washington wrote of the Congress; "I predict the worst consequences for a half starved limping government, always moving on crutches and tottering at every step." [3] In 1786 a meeting was held by Washington at Annapolis, and a motion was passed calling for a convention to meet in Philadelphia in 1787, "to revise the Articles of Confederation." The motion was sent to the Continental Congress and they approved a convention for the second Monday in May 1787. So began the work, to form a more perfect union.

In discussing the proceedings of the 1787 constitutional convention, at Philadelphia, as it bears upon the three fundamental differences between the later formed Constitution, and the Articles of Confederation, the three fundamental differences having been previously set out, we shall see how they remedied them.

I.—National Tax Favored Over State Quota Plan.

The Constitutional Convention, in its fourth month, completed a busy week by voting down a plan to retain, in the government in the making, the method of taxation existing under the Articles of Confederation, namely, the levying of quotas on the states instead of direct levies on individuals and collection by the officials of the national Government.

On the roll call, only New Jersey voted for continuing the old system, which had been much criticised as providing insufficient and uncertain revenue. Eight states voted to place the responsibility for taxation for national needs on Congress. The Maryland delegation, in which Luther Martin and Dr. James McHenry sponsored the state quota plan, was evenly divided.

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2 Lessons in Liberty, Manion p 99.
3 Lessons in Liberty, Manion p. 101.

The action was a victory by the nationalists over those who wanted to give the states the upper hand in the new government. It reflected the belief that a union of the states would be no stronger than its authority to raise money to maintain itself and harmonize with the work of the convention.

The delegates also completed a list of powers proposed for Congress by providing that all laws deemed "necessary and proper" [4] to carry out the powers enumerated shall also be within the authority of the national legislature. This addition, first proposed by the Committee of Detail, was approved without a dissent, notwithstanding its sweeping character.

A proposal was rejected which was to give Congress the power to pass laws regulating the eating and drinking habits of the people. George Mason, 62 year old lawyer and planter of Virginia, who introduced the idea, argued for it as necessary to maintain standards of life consonant with the government itself. He said the purpose of sumptuary discipline was not to eliminate the desire for distinction but to give that desire "proper direction."

Oliver Ellsworth of Connecticut said the power of Congress to tax was all the power needed over eating and drinking habits. Elbridge Gerry of Massachusetts said: "The law of necessity is the best sumptuary law."

Gouvernour Morris of Pennsylvania, who was a member of a family of prominent landowners, argued against sumptuary legislation because such laws, he said, "tend to continue great landed estates in the same families." "Unless men had temptations to dispose of their money, they would not sell their estates."

II.—Delegates Limit Powers of National Legislature.

The Constitutional Convention adopted a proposed draft of a new system of government which was reported to the delegates by the Committee of Detail.

A series of important changes were found to have been incorporated in the report which John Rutledge of South Carolina, chairman of the Committee of Detail, presented. Notwithstanding these changes from the recommendations of the Committee of the Whole and the convention proper, the delegates began at once to approve the report, section by section.

The most important change made by the Committee of Detail was the authority of the national legislative body. The resolution of the convention covering this point gave members of the national legislature power "to legislate in all cases for the interests of the Union, and also in those to which the states are separately incompetent, or in which

[4] Constitution, Article I, Section VIII, United States.

the harmony of the United States may be interrupted by the exercise of individual legislation."

Sidetracking this broad grant approved by the delegates, members of the Committee of Detail substituted a set of enumerated powers, which specifically limit the authority of Congress. They are: "The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;" [5]

"*To* borrow money on the credit of the United States; *To* regulate commerce with foreign nations and among the several States, and with the Indian tribes; *To* establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States; *To* coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; *To* provide for the punshment of counterfeiting the securities and current coin of the United States; *To* establish post-offices and post-roads; *To* promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries; *To* constitute tribunals inferior to the Supreme Court; *To* define and punish piracies and felonies committed on the high seas and offenses against the law of nations; *To* declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; *To* raise and support armies, but no appropriations of money to that use shall be for a longer term than two years; *To* provide and maintain a navy; *To* makes rules for the government and regulation of the land and naval forces; *To* provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; *To* provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress; *To* exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten mile square) as may, by session of particular States and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and *To* make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." [6]

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[5] Constitution, Article I, Section VIII, United States.
[6] Constitution, Article I, Section VIII, United States.

The report also proposed certain things which the national lawmakers may not do.

"*The* migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person. *The* privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it. *No* bill of attainder or expost facto law shall be passed. *No* Capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken. *No* tax or duty shall be laid on articles exported from any State. *No* preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another. *No* money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time. *No* title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress accept any present, emolument, office, or title, of any kind whatever, from any king, prince or foreign state." [7]

Much interest centered in the designation of names for officers and agencies of the Government. The chief executive was called "the President," after the style of the chief officer of government in Pennsylvania, Delaware, New Jersey and New Hampshire. The title "Legislature of the United States" disappeared and in its place was "the Congress." The first and second branches were designated as "the House of Representatives" and "the Senate."

III.—Formal Bill of Civil Rights Rejected as Unnecessary.

There was no bill of rights to guarantee the civil liberties of citizens in the Constitution for the United States Government. This fact, which was much lamented by many delegates, was established when the Constitutional Convention rejected by a vote of 10 state delegations, the motion of Elbridge Gerry of Massachusetts to create a committee for drafting a list of such rights.

Agitation for a guarantee of civil liberities was launched as soon as the Committee of Style reported out the draft of the Constitution, which, save for minor changes, was the document which was submitted to the states. Col. George Mason of Virginia at once called attention to the failure to include a guarantee of jury trials in civil as well as

[7] Constitution, Article I, Section IX, United States.

criminal cases. Mr. Gerry took up the plea to "give quiet to the people" by a bill of rights, but the convention took the view that a formal guarantee of that sort was unnecessary.

The draft which was reported back to the convention by the Committee of Style presented a much more detailed preamble. The preamble which was received from the Committee of Detail merely said that the people of the convenanting states "do ordain, declare and establish the following constitution for the Government of ourselves and posterity." The new preamble stated that the purpose of the action was "to form a more perfect union, to establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity." [8]

The National Legislature became known as Congress. The Reverend Dr. Hugh Williamson, delegate from North Carolina, who was the successful sponsor of the motion to require a three-fourths vote in each chamber to override a presidential veto, surprised the convention by calling for a return of the original two-thirds majority. He explained that although he had favored the three-fourths majority at one time he had decided that would make it too difficult for Congress to overcome an unpopular veto. By a close vote the convention followed the Rev. Dr. Williamson back to the two-thirds proportion.

The procedure for amending the Constitution was agreed upon. As redrafted by James Madison of Virginia, the amending clause provided that whenever two-thirds of both houses of Congress deemed it necessary or upon application by two-thirds of the state Legislatures, amendments should be submitted for ratification. The second phase is completed when the submitted amendment is approved by the Legislatures of three-fourths of the states or by conventions in the same proportion of states.

Gov. Edmund Randolph of Virginia, one of the leading delegates and proposer of the original resolutions on which the convention went to work, virtually disowned the entire result of the summer's work. He announced a long list of reasons for opposing the document, including the need, for a more definite boundary between the powers of Congress and the states.

"On September 17, 1787, the convention met for the last time. The final approved draft of the constitution was then signed by thirty-nine delegates. Of the fifty-five delegates who had attended the sessions at one time or another, only forty-two remained. Three of these refused to put their names to the new document. The signers of the constitution knew that their new plan for national government would be greeted with a storm of disapproval. Each of them had serious ob-

[8] Constitution, Preamble, United States.

jections to many of the things included therein, but all were convinced that it was the best that could possibly be obtained under the circumstances. Having completed their work, they were now faced with the task of persuading the people back home to approve it and order it to be ratified." [9]

In summing up we find the new Constitution differed from the Articles of Confederation, in that it dealt directly with individuals, that it invested the Federal Government with coercive powers, that it provided an efficient executive, and that it was susceptible of amendment by easier means than unanimous consent. It has been developed by amendments, by interpretation and by custom. The Bill of Rights is contained not in the body of the Constitution but in the first ten original amendments put in force on December 15, 1791.

Robert J. Callahan, Jr.

THE ARTICLES OF CONFEDERATION AND THE CONSTITUTION.—The relative practical effectiveness of the two forms of government embodied in these documents has been demonstrated historically. Their basic cleavage in theory is connoted by the words "confederation" and "federation." The results which, from past human experience, we may expect of a confederacy as distinguished from a federation assume new importance today. All the civilized world looks with lofty hopes but crossed fingers at the United Nations Organization, an attempt at world union based upon a confederacy theory. The nations participating in this attempt appear less prepared to delegate a portion of their sovereignty sufficient to form a true federation than were the original reluctant thirteen states of this country.

And to this observer, it appears that even should a George Washington of world stature "raise a standard to which the wise and the just can repare," the wise are too few and the just too impotent to affect a more perfect union of nations on a world wide scale. None the less, many sages of political science look to the growth of a World Constitution as the refuge of civilization from the ravages of recurrent war which has plagued western civilization since the fall of Rome.

Leaving the broader implications to be derived from this introductory theme to a thesis of larger scope, let us examine the differences between these two documented frameworks of government. Upon analysis it becomes more and more apparent that the disparities between them are not enumerative and separate but fundamental and reducible. And we can divide this cleft in the two theories into *tres*

[9] Lessons in Liberty, Manion p. 109.

partes like *omnia Gallia.* The FIRST is their difference in *purpose*: the one, a "firm league of friendship between the states"; the other, "a more perfect union" of the people of the several states. The SECOND is their difference in *form*: the one, composed of a body of delegates with committees to handle executive power; and the other, a balanced, if somewhat sprawling, governing machine with executive, legislative, and judicial departments. The THIRD is a difference in the *object upon which the machinery operates*: the one reaching the sovereign states; the other touching the individual citizen within the state, albeit rather lightly at first.

A demonstration of the validity of these differences becomes apparent from a mere descriptive summary of the provisions contained and the mention of a mere outline of their working effect historically.

The Articles of Confederation grew out of the efforts of the Continental Congress to draft a feasible framework of "perpetual union" to guide the colonies through the War for Independence. One year after the Declaration of Independence the first draft was prepared and submitted to the states for ratification by the Second Continental Congress.

By its terms, Congress was to be continued and was to consist of delegates annually appointed by the legislature of each state. No attempt was made to create an executive for the confederacy, though authority was given Congress to appoint a council of states which should manage general affairs especially during recesses of Congress. The Congress had various powers: 1. To decide on peace and war and superintend the progress of same and to build a navy. 2. To control diplomatic relations. 3. To coin money and emit bills of credit. 4. To establish post offices. 5. To regulate Indian trade. 6. To adjust boundary disputes between the states. 7. To borrow money and determine expenditures; *but not to tax*!

To get supplies and funds the central government had to beg from the states enough requisitions to keep going. The same thing was necessary to equip the revolutionary troops. Congress could not make its laws effective in any matter of importance. Control of trade was left to the states. The predominance of the states was further ensured by the provision that no votes, except those for daily adjournment, could be carried without the consent of a majority of the states, and no important measure without the consent of nine states. A common citizenship was declared to exist and Congress received authority to establish a court of appeal which might pass finally on all disputes between the states.

The United States staggered through the war under the Articles and survived the difficult post-war readjustment from civil conflict. But thinking men in all the colonies were appalled at the trade wars, the

national debt, inflation, and the general impotency of the central government. And hence, when in 1787 it was decided to hold an assembly "to revise the Articles of Confederation," the delegates, after a considerable delay, proceeded in secret sessions to draft an entirely new constitution. It was submitted for consideration to the legislatures of the states the same year and ratified by the requisite nine states nine months later. Ten amendments called "the bill of rights" were added in 1792 and eleven more have since been added.

This Constitution provides for a legislature composed of two houses, the members of which shall be elected directly by the voters within the states. They shall be apportioned in the lower house according to population, and in the upper house by states. The congress or legislature is empowered to: lay and collect taxes, duties, imposts and excises; regulate interstate commerce; legislate on naturalization and bankruptcy; coin money; establish postoffices and post roads; regulate copyrights and patents; provide for organization of federal courts; punish felonies on high seas and under international law; declare war; raise and support armies and a navy; call out the state militia; and exclusively control its *situm* ten miles square. Eight limitations on these powers are also cited prohibiting *ex post facto* laws, suspension of habeas corpus, capitation taxes, and titles of nobility. As a corollary, the states are denied these powers more specifically in three paragraphs of the first article which contains all of the above.

It further provides that a president shall be indirectly elected by apportioned electors. He is paid by the federal government as are all of its officers. The president is empowered to command the armed forces, grant pardons, make appointments, make treaties with the consent of two-thirds of the Senate, and appoint judges to the federal courts. He is charged with the duty of executing laws, commissioning officers and making recommendations to congress. He may veto legislations of congress subject to their power to override the veto by joint resolution or two-thirds majority in the senate. He may be impeached for high crimes and misdemeanors.

The federal court consists of a supreme court and inferior courts directed by congress. Its judges' salaries may not be diminished and their tenure is for life. The courts jurisdiction extends to all cases in law and equity arising under the constitution as well as controversies between the states, and between citizens of the several states.

Privileges are guaranteed the citizens. New states and territories may be admitted to the Union. The federal government guarantees every state a republican form of government and insures them against domestic violence on application of its legislature and sometimes its governor. Amendments are normally proposed by both houses of congress and require ratification by three-fourths of all the states.

But in the powers denied the states, we find the most obvious demonstration of the diversity in effect between the two documents. No state could thereafter impair the freedom of contract. "The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states." "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state." No state could interfere with immigration, tariff, foreign commerce, foreign relations or national defense. These and similar provisions had the effect of obliterating the boundary lines between the states and of pooling the population and economy of the whole union.

And thus it is, that we have seen more than a century and a half of stable government under the latter as compared with a generation or less of limping impotence under the former. Despite the centripetal forces of a national economy based on steam, steel and electricity; despite eight generations of expansion and of assault from within and without, the Constitution has stood as the bulwark of stability and freedom supported from below by the common law and from above by the Creator to the astonishment and awe of its enemies and friends alike.

John Kelly.

A PENNSYLVANIA BILL OF RIGHTS, WHY?—"Over the class of unalienable rights the supreme power hath no control, and they ought to be clearly defined and ascertained in a BILL OF RIGHTS, previous to the ratification of any constitution. The bill of rights should also contain the equivalent every man receives, as a consideration for the rights he has surrendered." Thus spoke the Essex Result, a product of the convention of Essex county in showing the literalness with which the men of 1778 took the theories of the origin of government in compact and the original possession of power by the people.

Before proceeding into my analysis of the parallelisms contained within the federal bill of rights and my own state declaration of rights I feel that it is necessary to explain the existence of such declarations and also to account for the necessary existence of both a state and a federal declaration of rights.

We must first realize that our first state constitutions antedated our federal constitution by thirteen years and that the idea for such a provision of rights came from these early state constitutions and not from our federal constitution. The purpose of such bills would logically be the next question which would come to the reader's mind. This question is easily answered when we realize that the purpose of es-

tablishing them was to secure and protect the unalienable rights of the individual citizens. Because of their lack of experience they were uncertain about the powers the new government should have for this purpose but they were certain that these powers should not violate individual rights. Consequently the states incorporated a series of limitations in every state constitution that they made.

When the time came for the formation of the federal constitution the devotedness of the people for the bill of rights was evident in the clamor for the inclusion of such a bill in the new constitution. It was only by promising several of the states that the constitution would be amended to include such limitations that the necessary votes for ratification were obtained. Pennsylvania was one of the few states that did not insist on such amendments. The Federalists objected strongly to the inclusion of any such bill in the "Federalist" when they stated, "we go further, and affirm that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary, in the proposed constitution, but would even be dangerous.—They would contain various exceptions to powers not granted; and on this very account, would afford a colourable pretext to claim more than were granted." Thus the federal bill of rights operates as a restriction on all branches of the federal government while the state bill of rights restricts the governments of the individual states. Events which have passed since the early days of our constitution have proven unquestionably the truth of Jefferson's words, "a Bill of Rights is what the people are entitled to against every government on earth."

The constitution of the Commonwealth of Pennsylvania was framed in Philadelphia in 1776 and went immediately into effect without submission to the people for ratification. A bill of sixteen unalienable rights was included in the body of the constitution itself. When the constitution was revised in 1873 the declaration was supplanted by a new bill which included twenty-six rights and limitations upon the government of the commonwealth.

The first two sections of the declaration are taken from the purpose of the government as set forth in the Declaration of Independence.

SECTION 1.

All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

SECTION 2.

All power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and

happiness. For the advancement of these ends, they have at all times an inalienable and indefeasible right to alter, reform, or abolish their government in such manner as they may think proper.

The federal bill of rights contains no such mention of the source of their power but their source (proximate) are the several states while as a result of such a provision in state constitutions the people remain the ultimate source of all governmental power.

The right of religious freedom for which so many of the original settlers had come to this country to seek is guaranteed in the third and fourth sections of the declaration.

SECTION 3.

All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; no human authority can, in any case whatever, control or interfere with the rights of conscience, and no preference shall be given by law to any religious establishments or modes of worship.

SECTION 4.

No person who acknowledges the being of a God and a future state of rewards and punishments shall, on account of his religious sentiments, be disqualified to hold any office or place of trust or profit under this commonwealth.

The first amendment to our federal constitution also provides for freedom of religion and by forbidding the "prohibiting of the free exercise thereof" it covers the office holding discrimination clause mentioned in Section 4.

Suffrage is covered by the Fifth Section of the bill and this freedom is unique to the state constitution because the federal constitution makes voting strictly a power of the states and thus there is no need for any limitation of a power which the government does not possess.

SECTION 5.

Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Since judicial power is vested both in the state and the federal government it is easily understood that both federal and state declarations of rights limit the judiciary in its powers. Due process of the law is guaranteed by both bills before a person may be deprived of life, liberty, or property. The right to a trial by jury is upheld both

in Article 5 of the federal bill and in Section 6 of the state declaration. Freedom from being twice put in jeopardy for the same crime is guaranteed by both, as is also the right to be compensated for property applied to public use. The right to a speedy trial by an impartial jury of the vicinage, freedom from the compulsion of acting as a witness against yourself, the right to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him and to have the benefit of counsel to defend him are all rights and limitations on the judiciary provided by both the state and the federal bills of rights.

The state bill places express limitations on certain powers, but the federal bill fails to specifically place such limitation, on powers of its legislature.

SECTION 12.

No power of suspending laws shall be exercised unless by the legislature or its authority.

SECTION 24.

The legislature shall not grant any title of nobility or hereditary distinction, nor create any office the appointment to which shall be for a longer term than during good behavior.

Both the state and federal bills distinctly set out the rights which the people thought to be inherently theirs and which the British government had often during the days leading up to the Revolution taken away from them. The right to freedom of the press, of speech, of peaceful assemblage, and to petition the government for a redress of grievances are expressly set out in both bills and are rights which are absolutely indispensable to a republican form of government such as ours. The state bill as in most of its declarations is more explicit in setting forth these rights but the federal bill leaves little to be contested as to their meaning or extent.

The framers of both bills are very careful to deprive their respective governments of the power to pass any of the laws which were to the colonists obnoxious and which were flagrantly passed by parliament prior to the Declaration of Independence. The most obnoxious being the laws which made it necessary for the colonists to quarter the king's soldiers, prohibited the people to bear arms, the law giving to the troops the right of seizure of private property unreasonably and the right of search without reason without the issuance of a warrant on probable cause, supported by oath or affirmation, and particularly describing the place to be searched. The state expression of these limitations seems to me to be more clear and definite.

SECTION 8.

The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation, subscribed to by the affiant.

SECTION 21.

The right of the people to bear arms in defense of themselves and the state shall not be questioned.

SECTION 23.

No soldier shall in time of peace be quartered in any house without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

Both the federal bill and the state bill include certain rights and limitations which are peculiar to each. The reason for such provisions are obvious. Those which are covered only by the state are either included in the body of the constitution of the federal government or are included in the general list covered by the Tenth Amendment and those peculiar to the federal government are those powers to be retained by the individual states and as the state exercise these as a right from the people it is unnecessary to include them in the state bill.

Those which are peculiar only to the state bill are as follows:

SECTION 16.

The person of a debtor, where there is not strong presumption of fraud, shall not be continued in prison after delivering up his estate for the benefit of his creditors, in such manner as prescribed by law.

SECTION 17.

No ex post facto law, nor any law impairing the obligations of contract, or making irrevocable any grant or immunities, shall be passed.

SECTION 18.

No person shall be attained of treason or felony by the legislature.

SECTION 19.

No attainer shall work corruption of blood, nor, except during the life of the offender, forfeiture of the estate to the commonwealth. The estate of such persons as shall destroy their own lives shall descend or vest as in cases of natural death, and if any person shall be killed by casualty there shall be no forfeiture by reason thereof.

SECTION 22.

No standing army shall, in time of peace, be kept up without the consent of the legislature, and the military shall in all cases and at all times be in strict subordination to the civil power.

SECTION 25.

Emigration from the state shall not be prohibited.

The only statement I find in the federal bill which is omitted in the state bill is one which I think could have been a fatal omission for the people of the state if there had never been a union.

ARTICLE IX.

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

The state bill seems to disparage all other rights than the ones mentioned by the inclusion of the 26th section.

SECTION 26.

To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate.

The states conclusively and most rigidly limited the federal government in the last article of the federal bill of rights and made it plain that the source of its power came from the states who obtained it from the people themselves.

ARTICLE X.

The powers not granted to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people.

As we finish our comparison of the federal bill and a state declaration of rights we are struck by the strong influence which the state bill had on the federal bill and we are extremely sensitive to how strongly the state pointed out and made evident to the federal government that the power of the people was given to the state and the federal government received this power only indirectly from the individual states. This latter fact is one which is often overlooked but today no one fact exists to disclaim the validity of the states' claim.

William A. Meehan.

COGNOVIT NOTES IN INDIANA.—A cognovit note is a note containing a provision which authorizes a confession of judgment if the instrument is not paid at maturity.[1] The provision contained in the note involved in a recently decided case is a typical one and is as follows: [2] *In Consideration Whereof,* and to secure the payment of said amount, the undersigned and each of them does hereby authorize, irrevocably, any attorney of any court of record, to appear for the undersigned, or any of them, in such court, in term time or vacation, at any time hereafter, and confess a judgment without process in favor of the holder of this note against such undersigned for such amount as may appear to be unpaid thereon. . . .

From this example it can be seen that the type of confession of judgment meant is one without process. Such an authority to confess judgment without process can be given in a separate instrument. At common law, this separate instrument was called a warrant of attorney, and was distinguished from a cognovit provision, which was part of the note itself.

The inclusion of this provision in a note or in other writings obligatory was in ancient times regarded as a legitimate transaction of commerce, if the amount due the obligee was a sum certain, such as specified installments of rent due under a written lease. It is still so regarded in many jurisdictions, either through court decisions or express statutes. The Supreme Court of Illinois in an opinion [3] interpreting an Illinois statute said, "A warrant of attorney to confess judgment, is a familiar common law security. The entry of judgment by cognovit thereunder, is a proceeding according to the course of the common law, which courts have ever entertained, in the ordinary exercise of their authority as courts of general jurisdiction."

This excerpt also illustrates the modern tendency to use the terms "cognovit" and "warrant of attorney" more interchangeably than they were originally at common law. The line of authority represented by this case has been upheld repeatedly, as in a recent Massachusetts case,[4] in which a petition to vacate a judgment so obtained, on the ground that such a provision in a note was invalid, was denied. However, such an authority to confess judgment without process is invalid in tort actions,[5] or in contract actions where the amount due is not a sum certain.[6] It has been held that where a lease contract authorized a confession of judgment without process at any time for any unpaid installments of rent specified in the lease plus "all amounts paid

1 N. I. L. Section 5.
2 Appellant's Brief, Barber v. Hughes, 63 N. E. (2d) 417.
3 Bush v. Hanson, 70 Ill. 480 (1873).
4 Ferranti v. Lewis, 271 Mass. 186 (1930).
5 French v. Willer, 126 Ill. 611 (1888).
6 Little v. Dyer, 138 Ill. 272 (1891).

for the lessor for water-rates and gas-bills," such authorization was void, because the amount to which judgment was to be confessed could not be calculated from the instrument.[7]

A right to confess judgment after a cause of action has accrued, either in tort or in contract, is well known and is expressly provided for by Statute in Indiana since 1852: "Any person indebted. or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and, with the consent of the creditor or person having such cause of action, confess judgment therefor; whereupon judgment shall be entered accordingly." [8]

The early cases usually involved confession of judgment by warrant of attorney, after the cause of action had accrued. It was held that a written confession addressed to the Court was insufficient to obtain jurisdiction over the debtor,[9] and that neither the clerk of the court [10] nor the creditor himself [11] is competent to exercise this power. A further statute was designed to give other creditors of the party confessing protection against fraudulent use of the power. "Whenever a confession of judgment is made by power of attorney or otherwise, the party confessing shall, at the time he executes such power of attorney or confesses judgment, make affidavit that the debt is just and owing, and that such confession is not made for the purpose of defrauding his creditors. The affidavit shall be filed with the court." [12]

The Supreme Court at first ruled that unless the warrant was accompanied by the affidavit executed according to the exact requirements of the statute judgment upon the warrant would be erroneous.[13] This ruling was modified later so that judgment by confession is good between the parties thereto even without affidavit, but not good against other creditors of the party confessing.[14]

Now we can come to the consideration of notes containing a cognovit provision. The early statutes were silent concerning them. At the very least, the cognovit note would have had to be accompanied by an affidavit executed according to the statutory requirements. It was not until 1914 that there was a court decision directly on the validity of a cognovit provision in a note.

The Irose case [15] involved the judgment obtained in Illinois on a note by exercise of the power specified in the cognovit provision

7 6 supra.
8 R. S. 1852 Vol. II, Sec. 383 — Burns 2-2901.
9 Ferrand v. McClease, 1 Ind. 87 (1848).
10 Craig v. Glass, 1 Ind. 89 (1848).
11 Coonley v. Tracy, 4 Ind. 137 (1853).
12 R. S. 1852 Vol. II, Sec. 385 — Burns 2-2903.
13 McPheeters v. Campbell, 5 Ind. 107 (1854).
14 Kennard v. Carter, 64 Ind. 31 (1878).
15 Irose v. Bella, 181 Ind. 491 (1913).

therein. The note had been executed in Indiana and was payable "at Gary, Indiana or elsewhere." The Court ruled "elsewhere" to mean "elsewhere in Indiana" and that the note was an Indiana note and must be enforced in accordance with the laws of Indiana. The Court held "While the question has not been expressly decided, it is the acknowledged public policy of this State, not to recognize powers of confession in promissory notes. . . ." and therefore since the note was an Indiana note, the courts in Indiana do not have to enforce a judgment obtained by a remedy not permitted by them even under the "full faith and credit" clause of the Federal Constitution.

The Court cited the statute requiring an affidavit as supporting its decision: "and that seems to be the public policy as declared by the statute in respect to confessions of judgment. . . . requiring that in order to be a valid execution of such power, there must at the time of its execution, be an affidavit made, and this by necessary implication excludes the method employed in the case at bar," but whether this is a correct interpretation of the statute at least for the reason given is open to question. One cannot resist the thought that it might have been better to have ruled that the statute prescribing who could confess judgment was exclusive, that is, that no one could confess judgment, either by warrant of attorney or otherwise, until a cause of action had accrued, and so confession of judgment by exercising the cognovit provision in a note would have been excluded.

Be that as it may, in 1922 the Appellate Court ruled on the validity of a judgment obtained by cognovit in Illinois on a note whose maker was a resident of Indiana.[16] The Court held the judgment was erroneous because it was entered in vacation time, and entry at this time was beyond the authority given in the cognovit provision. Presumably if the entry had been made in term time, the Court would have upheld the validity of the judgment.

In 1924 the Supreme Court did uphold the validity of such a judgment, ruling that judgment confessed under a cognovit provision of a note payable in another state is enforceable in Indiana, even though the note was executed in Indiana, because the execution of such a note was not illegal by statute in this state.[17] The implication is, as noted in the most recent decision involving cognovit notes,[18] that if there had been such a statute, the Court's decision might have been otherwise.

In 1927 a statute was passed which concerns the question we are discussing. One section concerns contracts to pay money and made unlawful all contracts and stipulations for the confession of judgments

16 Wieler v. Diver, 78 Ind. App. 26 (1921).
17 Egly v. T. B. Bennett and Co., 196 Ind. 50 (1924).
18 Barber v. Hughes, 63 N. E. (2d) 417 (1945).

under powers of attorney given before a cause of action to enforce payment of money due accrues, or for the release of errors, or for giving consent to the issue of execution under any powers of attorney.[19] Another section defined a cognovit note and fixed a penalty for the execution and procurement of one.[20]

Let us now see how the courts have dealt with cognovit notes from the passing of this statute to the present day. In 1928 the court held in *Jordon v. Kittle,*[21] that, as a general rule, if an illegal covenant can be eliminated from a contract without destroying its symmetry as a whole, the court will do so and enforce the remainder; but if the good and bad covenants are so written that they cannot be separated without destroying the meaning and purpose of the contract, the whole contract must be set aside. Thus we see an early tendency for the court to hold only the cognovit provisions of a contract void rather than declaring the entire contract to be invalid.

Three years later in *Phend v. Midwest Engineering and Equipment Co.,*[22] the court ruled that although a vendee executed cognovit notes on the installation of a refrigerating machine which was sold under a conditional sales contract which did not stipulate for cognovit notes, the contract could be enforced, since the execution of the cognovit notes, even though illegal, was a separate transaction.

The court here said: "It was not necessary, in order that appellee be able to recover, that it rely upon the alleged illegal cognovit notes. All the provisions of the original contract could have been performed in a legal manner. The several provisions of the original contract being valid, they will not be declared void because some of them were partly performed in an illegal manner." The court went on to say: "If we take the position that the cognovit notes were illegal and void and made so by the provisions of law, nevertheless the execution of the several cognovit notes was a distinct transaction, and can be separated from the valid acts of the parties. The original contracts can therefore be enforced against appellant."

We see from the above two cases that the court in both found some ground upon which to hold the defendant liable, although admitting that the cognovit provisions themselves were void.

In the case of *Fodor v. Popp,*[23] also decided in 1931, the court ruled directly that the statute made cognovit notes void. The court said: "Courts will not lend their aid to enforce a contract which contravenes the provisions of a statute. A cognovit note executed in this

19 Burns Statute Section 2-2904.
20 Burns Statute Section 2-2906.
21 88 Ind. App. 275, 150 N. E. 817 (1928).
22 93 Ind. App. 165, 177 N. E. 879 (1931).
23 93 Ind. App. 429, 178 N. E. 695 (1931).

state, growing out of a contract made in this state since the acts of 1927 became effective is void." In the same case the court made it clear, however, that where the notes were executed on a printed form of cognovit note, but such blanks as to the parties were not filled on the part relating to confession of judgment, and there being no showing of intent to include them, the court will not add words to make the contract void.

In 1936 the Supreme Court of Indiana made it plain that the 1927 statutes applied only to cognovit notes executed in Indiana and that said statutes had no extra-territorial effect. In *American Furniture Mart Bldg. Corp. v. W. C. Redman, Sons & Co.*[24] the court said: "We have found no authority in this or any other state which prevents recovery upon a contract, which contains cognovit features and valid where made, if the cognovit features are not relied upon in the action to recover. The act does not pretend to make it a crime or misdemeanor to bring an action upon such a contract when there is a proper issuance and service of process when the cognovit features are abandoned."

In 1937 the highest court in Indiana maintained that the purpose of the cognovit statute was to protect the citizens of Indiana from the evils of having judgment confessed against them on the authority of prematurely executed powers of confession, and without having an opportunity to appear and defend themselves.[25] They went on to say that the act was purely a penal statute and should not be extended in order to permit a wrong. The court said: "Section 2-2906 Burns, penalizes any person who shall procure others to execute, indorse, or sign a cognovit note or who shall accept and retain such instrument. Under that section, the instrument bearing the cognovit features are not declared void by express terms. The statute defines a misdemeanor and prescribes a penalty to be assessed against the offender." In this case the court ruled that a note and mortgage which is complete within itself in that it recites the amount of the loan, security given, and the promise to pay are separate instruments, although executed at the same time and concerning the same matters, and the note is not a necessary part of the mortgage.

In *Hatfield v. Schloss Bros.*[26] the court held that a note requiring the payment of money and the deposit of certain collateral as security for its payment, outlining the procedure to be followed in disposing of the collateral and the application of the proceeds derived from the sale thereof, in event it became necessary to resort to collateral, was

24 Amer. Furniture Mart Bldg. Corp. v. W. C. Redmon, 210 Ind. 112, 1 N. E. (2d) 606 (1936).

25 Peoples Nat. Bank & Trust Co. v. Pora, 212 Ind. 468, 9 N. E. (2d) 83, 111 A. L. R. 1402 (1937).

26 103 Ind. App. 429, 8 N. E. (2d) 389 (1937).

not invalid as a cognovit note within the statute prohibiting the execution and procurement of such notes.

In 1939 the courts again affirmed the fact that a note valid at the time and place of execution was valid in a suit on it brought in Indiana.[27]

Three years later the Supreme Court of Indiana held that after the execution of a note with a cognovit provision, the cognovit paragraph may be stricken out by the payee without destroying his right to judgment on the note in an action in Indiana brought by summons.[28] Thus we see a continuing tendency to uphold the note itself as long as the suit is not based on the cognovit provision.

In *Simpson v. Fuller*[29] the court said that the statute designating as cognovit notes all written contracts to pay money containing agreements authorizing confession of judgment by an attorney for the maker or indorser is not intended to void entire contracts containing cognovit clauses, but is only intended to void contract provisions giving a power of attorney with authority to confess a judgment on such instrument for a sum to be ascertained in a manner other than by action of a court upon a hearing after a notice to the debtor. Referring to Burns, Section 2-2906 the court said that the statute prohibiting execution and procurement of a cognovit note is "penal" and must be construed strictly.

We come now to the recent case of *Barber Co. v. Hughes*[30] decided on November 9, 1945. In this case recovery was sought on an Illinois judgment taken pursuant to a cognovit contained in a promissory note. In ruling for the plaintiffs the Supreme Court of Indiana first held that the cognovit provision did not destroy the note's negotiability. The court went on to say: "It is clear also that under Illinois law the judgment there taken was valid and accordingly must be given full faith and credit in Indiana." At this point the court cited the well known case of *Fauntleroy v. Lum.*[31]

The case of *Barber v. Hughes, supra,* does a good job of summarizing the cases on cognovit notes in Indiana and once more affirms the view that cognovit provisions may be stricken out and an action brought on the remaining note.

Thus we see that the passing of the 1927 statute did not stop cognovit notes in Indiana. It did, however, provide us with an op-

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27 Phrommer v. Alhers, 106 Ind. App. 548, 21 N. E. (2d) 72 (1939).

28 Paulausky v. Polish Roman Catholic Union of America, 219 Ind. 441, 39 N. E. (2d) 440 (1942).

29 114 Ind. App. 583, 51 N. E. (2d) 870 (1943).

30 Barber v. Hughes, 63 N. E. (2d) 417 (1945).

31 Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 64, 52 L. Ed. 1039.

portunity to study the interpretation of a statute by the courts. We saw that the courts would not allow a suit on the cognovit provisions themselves, but would permit the striking out of such clauses and a suit on the remaining note. We also saw the willingness of the court to hold cognovit provisions a separate transaction, when possible, and allow a suit on the contract. As to valid cognovit notes made in states where they are legal we saw that Indiana courts will hear a suit not based on the cognovit provisions. We further saw that a cognovit provision did not destroy the negotiability of a note. Finally in regard to Burns Section 2-2906 we found that it was construed as "penal" and not subject to extension by the courts.

Joseph R. Rudd and Arthur M. Diamond.

CRIMINAL LIABILITY OF INSANE PERSONS IN INDIANA: PROOF AND TESTS.—Because of the unquestioned fact that an insane person is not responsible for his acts, he cannot be criminally prosecuted for the commission of what would otherwise be crime. Allowing a criminal action to be brought against him would be a deprivation of his fundamental right to a trial by jury, for it cannot be presumed that an insane person is capable of preparing an adequate defense. The question of whether he is insane at the time of the indictment or at any time subsequently is a matter of fact and left to the determination of a jury impaneled for that purpose; in Indiana this has been provided for by the statute.[1] However, not so simple is the determination of whether or not the accused was insane at the time the crime was committed. Various rules to aid in the determination have grown up in different jurisdictions. The rules accepted in Indiana will be given later.

The injustice of bringing a criminal action against an insane person was recognized in common law. Blackstone summarizes the common law on the point as follows: Though a man be compos when he commits a capital crime, yet if he became non compos after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution; for . . . the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings.[2] As mentioned above, Indiana provides for this by statute, but does not empower the court to appoint such an examination after judgment. Then only the Governor may stay the execution of the judgment in order to determine the man's sanity.[3]

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1 Burns Ann. Stat. (1942 Repl.) Sect. 9-1706.
2 4 Blackstone's Commentaries 396.
3 Diamond v. State, 195 Ind. 285 (1924).

Since it is always presumed in the law that every man is sane, the State need not prove that the defendant was sane at the time he allegedly committed the crime. But once some evidence has been introduced, either by the defendant or by the State, which is upon the issue of the defendant's sanity and which the jury is to consider in order to decide his guilt or innocence, then the burden of proof has shifted to the State and never reverts thereafter to the defendant. The State now must establish beyond a reasonable doubt that the accused was sane at the moment of the crime. If the State is unable to do this, it follows that it has not been proved beyond a reasonable doubt that the defendant is guilty, and therefore he must be acquitted.[4]

Before considering the tests of insanity, it might be well to dispose of those peculiarities of the mind and of conduct which Indiana does not regard as sufficient proof of insanity to absolve a man from liability for the consequences of his acts. First of all, neither a lack of motive nor the monstrousness or peculiarity of the crime proves that its perpetrator was of unsound mind.[5] Mental weakness is not insanity, and is no defense.[6] A purely physical defect such as an "imbalance of the sex hormones" has been held to be no defense in itself, even if evidence could be offered that such an abnormality would render its victim unconscious of his acts.[7] Nor may one plead "partial insanity" as a mitigating factor; either one is fully sane and culpable or insane and not responsible in the law for his acts.[8] Perversion of the affections was declared to be a valid proof of insanity in *Bradley v. State;*[9] based upon the asserted fact that this is in the law of wills sufficient proof of insanity to invalidate a will made by one whose affections are perverted, it was in that case declared to be an equally legitimate test in criminal cases. But that was dictum, which has been specifically repudiated,[10] and has never been followed in another Indiana case. "Moral" or "emotional insanity," which might be defined as a perversion of the will, is much closer to the borderline that separates the invalid from the recognized tests of insanity. Dipsomania has been named by the court as a type of moral insanity,[11] yet the dictionary defines it as "A disease produced by drunkenness, and, indeed, other causes, which overmasters the will of its victim, and irresistibly impels

4 Walters v. State, 183 Ind. 178 (1915); Bradley v. State, 31 Ind. 492 (1870); Brattain v. State, ... Ind. ....., 61 N. E. (2d) 462 (1945); Fritz v. State, 178 Ind. 463 (1912); McHargue v. State, 193 Ind. 204 (1923); Noelke v. State, 214 Ind. 427 (1938); Plummer v. State, 135 Ind. 308 (1893).

5 Goodwin v. State, 96 Ind. 551 (1884).

6 Wartena v. State, 105 Ind. 445 (1886); Warner v. State, 114 Ind. 137 (1888); Conway v. State, 118 Ind. 482 (1889).

7 Foster v. State, 222 Ind. 133 (1944).

8 Sage v. State, 91 Ind. 141 (1883); Warner v. State, supra.

9 Supra.

10 Goodwin v. State, supra.

11 Ibid.

him to drink to intoxication." But the whole problem of intoxication in relation to criminal liability must be treated separately. The entire catalogue of other "manias" which the psychologists consider as mental abnormalities, if not diseases, are included under the designation "moral insanity," and none of them in the law can support a plea of insanity. The courts are unanimously afraid that if such a defense were permitted, all criminals would use it as a shield.

In regard to intoxication as a defense or mitigation in a criminal case the following general rules may be laid down. Voluntary intoxication is never an excuse for crime. But insanity, usually delirium tremens, may be a result of excessive and long continued drinking; and such insanity is as much a defense as any other.[12] It has been stated that there is no middle ground between sanity and insanity, and that "partial insanity" is not recognized as a mitigating factor. However, in certain cases voluntary drunkenness may act in mitigation. If the nature of the crime, such as murder in the first degree, demands a specific intent, and if the accused formed no such intent before he became intoxicated, and if he is so intoxicated at the time of the commission of the act that he is unable to form a specific intent, then the charge against him may be reduced to a lower degree.[13]

We finally come to a consideration of the tests for insanity that actually are recognized as valid in Indiana. They are simple, and there has been little question or variation in the state court's acceptance and application of them. They may be labeled as the "right and wrong," the "irresistible impulse," and the "monomania" tests. If the accused at the time of the act both knows the difference between right and wrong and realizes that this act is wrong, if no mental disease has robbed him of the power to choose the right and avoid the wrong, and if he is suffering from no hallucinations or delusions that impel him to commit the act, then in the eyes of the law he is sane and fully responsible for his act.[14]

The tests in Indiana have best been summarized in *Sawyer v. State* (1871),[15] where it was held that the law was stated correctly by the following instruction, in which the lower court charged the jury that they must find the defendant not guilty if he was so far insane as not to be able to distinguish between right and wrong with respect to the act in question; or if you shall find from the evidence that he was

12 Bailey v. State, 26 Ind. 422 (1866); Sanders v. State, 94 Ind. 147 (1884); Goodwin v. State, supra; Aszman v. State, 123 Ind. 347 (1890).

13 Booher v. State, 156 Ind. 435 (1901); Aszman v. State, supra; Brattain v. State, supra.

14 Stevens v. State, 31 Ind. 485 (1869); Bradley v. State, supra; Sawyer v. State, 35 Ind. 80 (1871); Goodwin v. State, supra; Grubb v. State, 117 Ind. 277 (1889); Conway v. State, supra; Plake v. State, 121 Ind. 433 (1890); Morgan v. State, 190 Ind. 411 (1921); Swain v. State, 215 Ind. 259 (1939).

15 Supra.

urged to the commission of the act by an insane impulse so powerful that he was unable to resist it, even though he might know and feel that the act he was committing was wrong and a violation of law, no matter whether such insane impulse arose from mental or physical causes, or both, provided they were not voluntarily induced by himself; or if you should find from the evidence, that the prisoner was insane on any subject, no matter upon what, provided you find the insane impulse to do the act charged in the indictment arose from such insanity.

John J. Doyle.

DAMAGES FOR EMOTIONAL DISTURBANCE.—As a basis for a cause of action, emotional shock, mental suffering, nervous strain, and even neurasthenia have been regarded by the courts generally as insufficient grounds for recovery. But this can only be considered as a general statement and not as a rule of law because it is subject to so much qualification as to render it entirely misleading.

The Supreme Court of Minnesota had this to say in regard to such statements: "There has been a great deal of misconception and confusion as to when, if ever, mental suffering, as distinct element of damage is a subject for compensation. This has frequently resulted from courts giving a wrong reason for a correct conclusion that in a given case no recovery can be had for mental suffering, as a distinct element of damage, and that it is never a proper subject of compensation; when the correct ground was that the act complained of was not infraction of any legal right, and hence not an actionable wrong at all, or else that the mental suffering was not the direct and proximate cause of the wrongful act."

And on this reasoning the court states: "that no action for damages will lie for an act which, though wrongful, infringed no legal right of the plaintiff, although it may have caused him mental suffering. But where the wrongful act constitutes an infringement on a legal right, mental suffering may be recovered for, if it is the direct, proximate and natural result of the wrongful act." [1]

There is a large class of cases where emotional derangement has always been an element of damage regardless of physical injury. The following are examples: assault and battery, indecent assault, false imprisonment, malicious prosecution, libel and slander if actionable *per se,* seduction and criminal conversation, and abduction of children. Nervous shock or similar mental anguish in this class of cases

[1] Larson v. Chase, 47 Minn. 307, 50 N. W. 238 (1891).

is, according to the reasoning of the courts, recoverable on the theory that such recovery is a proper method of punishing the wrongdoer and serves as standard by which to estimate the enormity of the outrage wilfully committed.

One example in the above class should suffice. As in Indiana, for instance, it was held that "humiliation, loss of reputation and social standing were properly considered affecting damages, though not pleaded, and though the amount of damages is not shown by the evidence." [2] Breach of promise to marry, though arising out of contract is properly included in this category. But we shall consider such damages arising from breaches of contract in general in the immediately succeeding paragraphs below.

Very few cases involving mental suffering as an element of damages arise out of contract actions unless they also involve breach of a quasi-public duty. The mere disappointment occasioned by property loss is not recoverable. But, if the mental anguish resulting from the breach of a contract is foreseeable; that is, if the parties to the contract, as reasonably prudent persons, may be said to have had such consequences in mind at the time the contract was made, especially where this element is the only damage contemplated, then the courts are inclined to permit recovery.

This is true of contracts for burial arrangements breached by undertakers. Notice the following cases: where the undertaker, in violation of the contract, gives undue publicity or notoriety to the transportation of the corpse; [3] where corpse was jammed into an undersized pine box without burial robe; [4] where child was buried in rough coffin without a box, and within six inches of the ground surface on top of the grave of another child.[5] In all of these cases the breach was apparently wilful and recovery was allowed.

But some courts make a distinction between wilful and negligent breach of contract as the following case: where the ashes of a cremated infant were misplaced by a cremation society. No recovery was allowed here because the wrong was not wilful and there was no "physical invasion of the plaintiff's rights." [6] And likewise, where the defendant so negligently prepared the body of the plaintiff's husband for shipment that it arrived in a decomposed condition, the court held that no recovery was allowed because the wrong was not wilful and the defendant was not in a public calling.[7]

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2 See Hale on the Law of Damages (1896) pp. 96-100 for numerous citations.

3 Fitzsimmons v. Olinger Mortuary Association, 91 Colo. 544, 17 P. (2d) 535 (1932).

4 J. E. Dunn & Co. v. Smith, Tex. Civ. App. 1903, 74 S. W. 576 (1903).

5 Wright v. Beardsley, 46 Wash. 16, 89 P. 172 (1907).

6 Kneass, et ux v. Cremation Society of Washington, 103 Wash. 521, 175 P. 172, 10 A. L. R. 442 (1918).

7 Hall v. Jackson, 24 Colo. App. 225, 134 P. 151 (1913).

For breach of contract to transmit a telegram announcing death or serious illness, recovery has been allowed [8] in several jurisdictions such as Indiana, Alabama, Iowa, and Texas. However, Indiana has squarely overruled the case cited in footnote eight herein, and now holds that "where, through the defendant's failure to deliver a telegram announcing the death of the plaintiff's grandmother, plaintiff was deprived of the opportunity of attending the funeral but he suffered neither pecuniary nor bodily loss, he cannot recover for the mental anguish occasioned by the defendant's negligence.[9] Usually however, courts deny flatly that a plaintiff may recover, for simple breach of contract, any compensation for injured feelings. And they point to the necessity for physical injury, wilful or wanton breach of public duty (as in cases against carriers) or special actions like breach of contract to marry, in order to sustain recovery.

In tort, on the other hand, if the injury to the feelings of the plaintiff is not too remote, compensation may be awarded even where the wrong is essentially against the property rights of the plaintiff. Thus, in Massachusetts, in an action of trespass *quare clausum fregit,* damages were awarded for injured feelings of plaintiff because defendant trespassed on burial lot and disturbed the remains of the plaintiff's child. The court here held that the trespass was sufficient wilful tort to sustain the action. And further explained that the "damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by wantonness." [10] The application of the above rule is rather limited as in the case of contract breaches, since mere sorrow or disappointment at the loss of property is not recoverable.

Where there is a wilful, malicious, or wanton, tortious act which results in physical harm to the plaintiff, it is everywhere held that the plaintiff may recover for mental pain and suffering accompanying the physical harm. This includes humiliation resulting from deformity or disfigurement, and even future pain and mental anguish which result directly from the defendant's wrongful act. Apparently the only difference in allowable recovery between actions for wilful or wanton torts and merely negligent torts is the greater length to which the courts will extend the rules of causation in the former, provided, of course, the physical injury accompanies the mental anguish.

Moreover, in the case of mere negligence resulting in physical harm to the plaintiff, it appears that recovery is not restricted to physical pain arising out of the injury, even by the narrower scope of the foreseeability rule in negligence cases in most states. Thus it has been

8 Reese v. Western Union Telegraph Co., 123 Ind. 294, 24 N. E. 163, 7 L. R. A. 583 (1890).

9 Western Union Telegraph Co. v. Ferguson, 64 Ind. 157, 60 N. E. 674 (1901).

10 Meagher v. Driscoll, 99 Mass. 281 (1868).

held in Oklahoma that "where a personal injury caused the loss of sight of an eye, and it was removed, one of the elements of damages was the inconvenience of living with one eye and such anguish as the plaintiff had had and would suffer from the mutilation, and the fact that he might become an object of ridicule and curiosity among his fellows." [11]

Missouri is likewise in accord: "Where in an action for injuries from being run over by a street car and plaintiff's left arm and both feet were partially amputated and mutilated, an instruction that plaintiff could recover for mental anguish suffered and likely to be suffered as a direct result of such injuries was not error; mental anguish being distinguishable from mere pain, and the condition for its production remaining through life." [12]

There appears to be an exaggerated importance attached to physical impact, physical harm, or bodily injury as the *sine qua non* of compensation for emotional disturbance to the neglect of all consideration for the quality of the defendant's act or the seriousness of the mental harm done to the plaintiff. This has come to be known as the "impact theory." An illustration of the result is this holding in Massachusetts: in an action arising out of negligent operation of a street railway causing a rear end collision, there can be no recovery for fright, terror, alarm, anxiety or distress of mind if these are unaccompanied by some physical injury, damages are assessed with reference to results immediately arising therefrom, and from those attributable to the mental shock or disturbance.[13]

Where there is no physical harm but wanton or wilful acts which cause emotional disturbance, such acts can be compensated for if they threaten the safety of the plaintiff's person in all cases. Thus where a married man entered stealthily at night into the bedroom of the plaintiff, a blind girl who taught music in his family, sat upon her bed, leaned over her and solicited sexual intercourse, which she refused; it was held that damages might be recovered for injury to the girl's health because of the fright and shock to her feelings. [14] But if the act be wilful or wanton and does not threaten the plaintiff or do him bodily harm such act must be directed against some right of the plaintiff nearly as sacred to the law as right to safety of person to be recoverable as far as damages for emotional disturbance are concerned. And I believe that it is on this theory that burial cases cited above should be reasoned, rather than on the mental gymnastics indulged in by the courts.

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11 Muskogee Electric Traction Co. v. Wimmer, 80 Okla. 11, 194 P. 107 (1920).

12 Hill v. Kansas City Rys. Co., 289 Mo. 193, 233 S. W. 205 (1921).

13 Kisiel v. Holyoke Street Ry. Co., 240 Mass. 29, 132 N. E. 622 (1921).

14 Newell v. Whitcher, 53 Vt. 589, 38 Am. Rep. 703 (1880).

The holdings on torts involving mere negligence with no bodily injury, are in conflict as regards recovery for this element of damage. For example where the defendant railroad company shoved its cars off the end of a switch track and into the dwelling of the plaintiff, who, being in the house at the time, "suffered a severe nervous shock that shattered her nervous system and caused her great bodily pain and mental anguish and permanent injury to her person and health," it was held that in the absence of any claim that the defendants acted wantonly or that the plaintiff suffered bodily injury there could be no recovery.[15]

An authoritative restatement considers it well settled that mere fright or nervous shock without any physical injury resulting therefrom cannot form the basis of a cause of action when such emotional disturbance is the result of mere negligence.[16] But notice what happened in North Carolina where the defendant caused a rock to crash through the plaintiff's residence frightening the female plaintiff, greatly shocking her nervous system and almost causing a miscarriage and the court held there could be a recovery for the nervous shock. And the court here relied on "general principles of the law of torts" as the justification for its ruling.[17]

The next question to be considered is the case where the physical injury results from the emotional disturbance. The authorities are split on the question and an examination of their reasoning reveals the following reasons advanced for denying recovery: (1) Since there can be no recovery for fright alone, it follows logically that there can be none where the injury flows from the fright; (2) The injury to the body resulting from fright is not the proximate result of the negligence; (3) The danger of opening the door to fictitious suits and the difficulty of estimating damages.

It seems to me that the chain of causation between the negligence and the physical harm done the plaintiff is not interrupted by the fright of the plaintiff, since the only reason his fright is unrecompensed in the first place is because of reason number three. And the third reason is expedient rather than sound because judges should be able to deal with fictitious suits aside from the enforcement of so unreasonable a rule.

In many cases the injustice of the rule denying recovery is so blatant that the courts seize upon any circumstance showing impact on the body of the plaintiff to sustain his right to recover.[18]

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15 Miller v. Baltimore and O. S. W. R. Co., 78 Oh. St. 309, 85 N. E. 499, 18 L. R. A. (NS) 949 (1908)

16 Subject note, 3 L. R. A. (NS) 49.

17 Kimberly v. Howland, 143 N. C. 398, 55 S. E. 778 (1906).

18 Warren v. Boston M. R. Co., 163 Mass. 484, 40 N. E. 895 (1895).

There is no right of action growing out of fright or nervous apprehension for the safety of another. And the fact that the offense against the third person is wilful as against such third person does not make the injury to the mentally disturbed party any less remote. Only if the wrong against the third person is also a wrong against the plaintiff, is recovery permitted.[19]

John Kelly.

DAMAGES FOR THE CONVERSION OF MINERALS.—When coal, oil, or other minerals are appropriated, the innocent taker pays the value of the mineral in the ground, usually measured by the value when brought to the surface less the cost of mining, but sometimes measured by the "royalty" value. "The wilful appropriator is liable in an action for the conversion for value at the surface, without any deductions, and is sometimes held in an equitable accounting for the proceeds of the sale of the minerals with no credit for the cost of mining." [1] The true measure of damages depends upon circumstances of aggravation, ranging from the profits of working to the gross value of the ore after breaking from the stope, or even down to its value in place before breaking.[2]

Thus, at the outset, it must be noted that, depending on whether the taking was a wilful or an innocent one, the convertor is in all cases liable for the goods so detached from the realty. While generally, there are but two general rules — the one as regards innocent trespassers, and the other in cases of wilful trespass. Nevertheless, the means by which different states arrive at the measure of the damage to be so assessed vary, both in common law jurisdictions, and where statutes have been enacted, declaratory of, or in abrogation of the common law rules.

Where the trespass is excusable, i.e., where a person encroaching upon the land of another takes inadvertently,[3] or under claim of title,[4] or a bona fide belief of title,[5] he is liable either for the value in place,[6] the value of the mineral extracted less the costs incident thereto,[7] or a reasonable royalty value,[8] depending upon the facts of

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19 Fleming v. Lobel, N. J. L., 59 A. 29 (1904) and also Mahoney v. Donkert, 108 Iowa 321, 79 N. W. 134 (1899).

1 McCormick on Damages, page 481 (1935).

2 Morrison's Mining Rights, page 456 (1936).

3 Coleman's Appeal, 62 Pa. 252 (1869).

4 Dougherty v. Chesnutt, 86 Tenn. 1, 5 S. W. 444 (1887).

5 U. S. v. Homestake Mining Co., 54 C. C. A., 117 Fed. 481 (1902).

6 Dougherty v. Chesnutt, note 4 supra.

7 Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Pac. 777, Ann. Cases 1913C (1911); Fitzgerald v. Clark, 17 Mont. 100, 42 Pac. 273, 30 L. R. A. 803 (1895).

the case, the jurisdiction where decided, and the type of minerals in issue. A Missouri court [9] recognized the difficulty in computing the value of coal in place, and in estimating such cost established the standard as one wherein the market value was determined and then deducting the costs of bringing the product to market, provided however, both parties to the action were engaged in mining operations. Otherwise the measure would be on the basis of the usual royalty paid a landowner. It would seem that the measure thus adopted and that applied by the court in *Keys v. Pittsburg & W. Coal Co.*[10] are in accord. But in the latter case the court went on further to state that it is a distinction without a difference to speak of the value of coal in place and of the value of coal when severed less the cost of severance. Actually, each case is but an attempt by the respective court to arrive at a measure of damages that conform to justice and reason when taken in conjunction with the facts at issue. The difficulty was recognized in an early Pennsylvania case [11] wherein the jury were instructed, "The measure of damages is the fair value of the coal at the place there. If there is a market price in place, in the pit or mine, that would be the value you would put upon it, and if there is evidence from which you can find what it was worth before it was touched, it is your duty to do so. If there is no evidence to fix the value in place, what it would be worth at the pit mouth, then you may find what it was worth at a distant market, deducting what it was worth to take it there, even if you had to go to Europe to sell it." [12]

The rules of value in place or of marketability less cost of marketing have been applied in some jurisdictions to all types of minerals, whether coal,[13] oil,[14] or precious minerals.[15] However, some states, notably Pennsylvania and Kentucky have interjected a third measure of damages into the realms of consideration as regards coal. This is the so called "royalty theory." But it is not a true measure in all cases as regards coal — only where the accessibility of the mine to transportation facilities enhances the price of the coal over that of similiar deposits in place. "If the injured party owns a tract of coal land which has a present market value for operation as a going mine, and it has a market value for operating purposes at a price per ton, — that is what is known as a royalty, — he should not be deprived of the advantages which the situation of his property gives him, and in such a case it is proper to allow recovery on the basis of royalty

8 Stark v. Pennsylvania Coal Co., 241 Pa. 481, 88 Atl. 770 (1895).
9 Lyons v. Central Coal & Coke Co., 239 Mo. 626, 114 S. W. 503 (1911).
10 58 Oh. St. 246, 51 N. E. 911, 41 L. R. A. 681, 65 Am. St. Rep. 754 (1898).
11 Oak Ridge Coal Co. v. Rogers, 108 Pa. 147 (1884).
12 Note 11 supra at page —.
13 Coal Creek Mining & Mfg. Co., 54 Am. Rep. 415 (1885).
14 Bryson v. Crown Oil Co., 185 Ind. 156, 112 N. E. 1 (1916).
15 Chamberlain v. Collinson, 45 Iowa 429 (1887).

value." [16] Kentucky, however, adopts a slightly different formula in assessing the damage as either the value of the coal in place or the usual reasonable royalty paid for the right of mining.[17]

Oil, on the other hand, seems to be in a classification of its own in all jurisdictions in that the measure of damages is always said to be the value after being severed less the cost of drilling, pumping, storage, etc.[18] As enunciated by the Indiana court,[19] "The general rule is that if the wrongful act is committed unintentionally, or by mistake, or in the honest belief that the party is acting within his legal rights, in estimating the damages the recovery must be limited to the value of the product taken, less what it costs to produce it." And one court [20] has even gone so far as to say that despite a trespass and the conversion of oil, the defendant in an action thereon should still be entitled to a royalty on same despite his trespass, for "it does not appear * * * that the plaintiff would have been able, by any means within his power, to produce the whole, or and definite or certain portion, of the oil, at the sites to which he was restricted." [20a] One recent case [21] has gone even further where a person extracting oil and gas under a lease which is subsequently declared invalid, nevertheless continues his operations, the law has been enunciated that though the taking thereupon becomes wilful, the offender should none the less be treated as an innocent converter when assessing the damages. "In our judgment what would amount to a wilful taking of property applicable to persons in possession of land producing mineral ores therefrom, or cutting timber on the land is not applicable to a person in possession of land producing oil and gas therefrom. The reason for the rule is very apparent. If a person in possession under a mining lease is producing mineral ores therefrom, and has notice that the landlord considers the lease invalid, or that a third party claims a superior lease upon the land, the party might cease mining the ore, or from cutting the timber, until the title to the ore or timber is determined, without irreparable injury to the landlord or to the lessee; but in

16 Kingston v. Lehigh Valley Coal Co., 241 Pa. 469, 88 Atl. 763, 49 L. R. A. (NS) 557 (1913).

17 Sandy River Channel Coal Co. v. Whitehouse, Channel Coal Co., 125 Ky. 278, 101 S. W. 319, 102 S. W. 320 (1920).

18 Two outstanding exceptions: Dyke v. Natural Transit Co., 22 App. Div. 360, 49 N. Y. S. 180 (1897), and Turner v. Seep, 167 Fed. 646 (1909), are exceptions. In the former case the court held the true measure of damages to be the value of the oil as it lay in the earth.

19 Kahle v. Crown Oil Co., 180 Ind. 131, 100 N. E. 681 (1913).

20 Duffield v. Rosenweig, 41 Pa. 357 (1861).

20a This in effect gives the trespasser credit for the expenses incurred as well as the profit ordinarily made by the lessee of such mineral land. To the same effect are the rules in Pennsylvania and Kentucky as regards coal. See notes 16 and 17 supra.

21 Barnes v. Winona Oil Co., 83 Okla. 253, 200 Pac. 985, 23 A. L. R. 189 (1921).

case of a person in possession of land producing oil and gas therefrom a different condition exists. If the party in possession shuts in the wells, the oil and gas are liable to be drained by adjacent landowners, or has the risk of salt water ruining the wells, and in many other ways the wells may be ruined by failure to operate or to produce the oil or gas therefrom, thereby causing irreparable damage to the property. It is essential to produce the oil and gas to protect the interests of all the parties." [22] But where one enters under such a lease knowing the same to be invalid, he is classed as a wilful trespasser and so unable to deduct from the value after produced, the expenditures in producing and marketing such oil.[23] Prior knowledge, then, is the criterion in determining a trespasser's status.

Turning now to the consideration of cases wherein the trespass is wilful, intentional, or without claim of right or title, we are again confronted with two main topics: those jurisdictions wherein the common law doctrine of liability for value in the enhanced state without allowances or deductions for expenses incurred, is applicable; and those few jurisdictions wherein double or treble damages are collectible in the way of exemplary or punitive damages pursuant to specific statutory provisions. In the absence of statutory provisions to the contrary, the rule generally prevailing in the United States is that the trespasser is liable for the enhanced value of the mineral at the time it is finally converted to his own use and no deductions for expenditures or for any value added to the mineral by his own labor are allowable. The use of the word trespasser, however, must be qualified to the extent that he is a person who removes the minerals intentionally or recklessly with full knowledge of his wrong, or without claim of right or title. And the above rule applies whether the mineral converted be sand,[24] stone,[25] coal,[26] ore,[27] or oil.[28] By reason of this rule, declaratory of all cases wherein there was an intentional or wilful trespass, there is no problem as to the measure of damages which confronted us in the previous considerations where the trespasser was an innocent party and unintentionally committed the wrong.

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22 Id. 200 Pac. at page 987.

23 Pittsburg & W. Va. Gas Co. v. Prentiss Gas Co., 84 W. Va. 449, 100 S. E. 296, 7 A. L. R. 901 (1909).

24 American Sand & Gravel Co. v. Spencer, 55 Ind. App. 523, 103 N. E. 426 (1913).

25 Baker v. Hart, 52 Hun. 363, 5 N. Y. S. 345 (1889); Cheney v. Nebraska & C. Stone Co., 41 Fed. 740 (1890).

26 Central Coal & C. Co. v. Penny, 97 C. C. A. 600, 173 Fed. 340 (1909); Sunnyside Coal & C. Co. v. Reitz, 14 Ind. App. 478, 39 N. E. 541 (1895).

27 Lightner Mining Co. v. Lane, note 7 supra; Durant Mining Co. v. Percy Consol. Mining Co., 35 C. C. A. 252, 93 Fed. 166 (1899); Benson Mining and Smelting Co. v. Alta Mining & Smelting Co., 145 U. S. 428, 36 L. Ed. 362, 12 Sup Ct. Rep. 877 (1892).

28 Bryson v. Crown Oil Co., note 14 supra.

The policy of holding an intentional trespasser for the total enhanced value and allowing no deductions is founded on the policy of deterring any repetition of such acts and as notice to all others that the wrong-doer will not only be distrained from profiting by his wrong, but that he will in effect be punished therefor.[29] This is also the principle underlying the practice of awarding exemplary damages for wilful wrongs. And in those states having statutes allowing double or treble damages for wilful, wrongful removal of minerals, such is also the case. Thus it has been held that a plaintiff may recover damages exclusive of those for coal wrongfully converted, for injury done to his property in imparing its worth and making the mining of the coal that is left more difficult or impossible on account of unworkmanlike, destructive, or wasteful modes of mining.[30] A test for such an award was enunciated by the Oklahoma court: [31] "To entitle a plaintiff to recover exemplary damages in an action sounding in tort, the proof must show some elements of fraud, malice, or oppression. The act which constitutes the cause of action must be actuated by or accompanied with some evil intent or must be the result of such gross negligence — such disregard of another's rights — as is deemed equivalent to such intent." [32] And as to the reason for the rule, an Illinois court has said: [33] "The rule which we have adopted will have a wholesome effect upon all persons operating coal mines. It will have a tendency to prevent wilful trespasses on other's personal rights."

Statutes in some states have been enacted providing for exemplary damages for the wilful conversion of minerals. Among these are Michigan,[34] Missouri,[35] and Pennsylvania.[36]

CONCLUSION

From the foregoing analysis of the problem it will be seen that the measure of damages for the conversion of minerals is a relatively simple one. Where the trespass is not wilful, the value in place, the market value less the expenditures necessary for the production thereof, or the "royalty" value, have been accepted at one time or another to fit the circumstances of the particular case in determining how much the party wronged may recover. However, this observation should be made in passing. Where recovery is limited to the reasonable royalty value of the property converted, the wrong-doer, though innocent, is actually profiting by his wrong in that he not only deducts the ex-

29 McCormick on Damages, page 499 (1935).
30 Barton Coal Co. v. Cox, 39 Md. 1, 17 Am. Rep. 525 (1873).
31 Haskell Nat'l Bank v. Stewart, 76 Okla. 58, 184 Pac. 463 (1919).
32 As cited in Barnes v. Winona Oil Co., note 21 supra.
33 Ill. & St. Louis R. & C. Co. v. Ogle, 92 Ill. 353, 365 (1879).
34 Mich. Con. Laws, Sec. 15124 (1929).
35 Mo. Rev. St., Sec. 3291 (1929).
36 Pa. St., Secs. 11239, 15605 (1920).

penses of production but has sufficient allowances remaining to realize a profit therefrom. This is a violation of all established legal principles and the arguments of the courts in sustaining such a legal monstrosity seem founded on reasons of expediency rather than principles of justice.

Where the initial trespass has been wilful the problem is less acute. The convertor is in all cases liable for the enhanced value. And he is allowed to make no deductions for the costs of production. In practical effect, this amounts to an award of exemplary damages but the courts look to the policy of deterring future wrong-doers and preventing a wrong-doer from profiting by his tortious act, as the foundations upon which such a sound rule, both in reason and in law, has been established. But as has been noted, some states go even further, either by way of statute or decision, in allowing actual exemplary damages. In such jurisdictions, notably in the coal states, the necessity of preventing an intentional theft of underground mineral rights, and the possibility that the conversion might go undiscovered for a long period and a consequent inability to recover therefor, has culminated in the added penalties.

Robert E. Sullivan.

DAMAGES—PUNITIVE DAMAGES AND DOUBLE JEOPARDY.—The substance of this article is a discussion of the various views taken on the application of punitive damages upon a defendant who has been, or is going to be, criminally prosecuted. The majority of the decisions tend to hold that both can be applied. Perhaps the outstanding of the contrary decisions come from Indiana where punitive damages cannot be imposed if the defendant has been criminally prosecuted.

In a brief and concise statement of the matter, McCormick, in his book on Damages,[1] makes the following statement: "Under the rule obtaining in nearly all of the states, the fact that the defendant is liable to criminal punishment for the same act is no defense against the allowance of exemplary damages. Even though he has already been actually criminally punished, it is no defense, and in most states this fact is not even provable in mitigation of damages." This is, of course, a broad discussion of the prevailing lines of thought on the matter. More detail will be required as a means of explanation.

As aforesaid, a few decisions hold that exemplary damages cannot be assessed against one who is to be criminally prosecuted. In *Borkenstein v. Schrack*,[2] the court held: "In some of the instructions to the

1 McCormick on Damages, P. 292.

2 Borkenstein v. Schrack, 31 Ind. App. 220, 67 N. E. 547 (1903).

jury they were told that they might award punitive damages. These instructions were erroneous. It is a well settled rule that for a wrong, the commission of which subjects the wrongdoer to both criminal prosecution and a civil action, punitive damages cannot be assessed." Decisions such as this are in the minority and are undoubtedly an outgrowth of the theory of double jeopardy. However, most states hold that the punitive damages are given for an aggravated offense in a civil action, while the criminal action punishes the defendant for his wrong against society.

There are other instances where the court has allowed the defendant to show that he has been criminally prosecuted in an effort to mitigate the punitive damages which might be assessed. This, it seems, is justifiable on the grounds that if such evidence is not admissible, excessive damages may be assessed without realization or admission in evidence of the criminal jeopardy, a punishment in itself. It appears that if this were not allowed, all factors for a fair trial would not be present. In *Saunders v. Gilbert*,[3] the court made this statement: "It would be exceedingly strange if a civil injury, which is also a crime, does not entitle the injured party to vindictive damages, and yet it is said that the reason why the law should be so is the very fact that the defendant will be punished in the criminal indictment, if convicted. But he may not be either indicted or adequately punished. Whatever may be the law elsewhere, this court has held, according to the rule, which we think is general, that when the defendant has been indicted and punished for the crime the pecuniary punishment can be considered by the jury in reduction of punitive damages."

The plaintiff in such a cause of action does not have the privilege of inflicting punishment by means of punitive damages merely for reasons of punishment. He must have a justifiable cause, even though for nominal damages, before he will be allowed to claim exemplary damages. The essence of the matter seems to be actual infliction of damages against P and not merely the infliction of a criminal wrong. Furthermore, it has been considered proper for a judge to take into consideration the criminal liability in assessing the punitive damages.[4]

While the defendant may have been guilty of both criminal and civil offenses, it would seem unconscionable to inflict criminal damages to the statutory extent, and then inflict civil damages, in punitive ways, to an extent that would persist if he were not punished criminally. It is undoubtedly true that he is guilty of two offenses, but actually, it seems that the defendant would be paying excessively if both punishments were used to any excessive extent. A sense of reasonableness should be used by the court.

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[3] Saunders v. Gilbert, 156 N. C. 463, 72 S. E. 610, 38 L. R. A. (N. S.) 404 (1911).

[4] Cook v. Ellis, 6 Hill N. Y. 466, 41 Am. Dec. 757 (1844).

A stronger view against the defendant is expressed by most courts. This seems to be contrary to reason, but, nevertheless, the rule exists in many jurisdictions. These courts reason that the knowledge of such impending or existent criminal prosecution should not be allowed in evidence in the civil suit. To this effect, a New Jersey court said: "That a defendant in a civil case for assault had been punished criminally for the same assault is not material upon the question of exemplary damages or the amount thereof, and, if it can be made so by reference to the defendant's present resources, there must at least be an offer of what the defendant expects to show regarding his financial resources." [5] An Iowa court said: " * * * the defendant was prosecuted criminally for the assault. He was fined and he paid the fine. The defendant asked the court to instruct the jury that the fine paid might be considered in mitigation of damages, and in another instruction asked that the jury be directed to consider the same in determining the amount of exemplary damages. Both these instructions were refused." [6]

The North Carolina court gave a different opinion in *Warren v. Cohaere*: [7] " * * * yet the plaintiff * * * in order to recover punitive or exemplary damages must show malice, fraud, wanton or wilful disregard of his rights, or other circumstances of recklessness or aggravation, unless the crime producing the injury requires proof of one of these elements to constitute the offense."

It appears, thruout, that the majority of the states allow exemplary damages. This is undoubtedly justifiable on the easily ascertainable basis that damages, punitively, might be effectuated upon the plaintiff and therefore, justifiably applicable. However, it appears that the defendant is not given adequate opportunity to present evidence in an effort to mitigate the exemplary damages. The fact that he has been found guilty of crime should be considered a fair means for the defendant to show that he has already been punished once, i.e. criminally, for purposes of mitigation.

Roger Gustafson.

DISTINCTION BETWEEN "COVENANTS" AND "CONDITIONS SUBSEQUENT" AS RESTRAINTS AGAINST ALIENATION.—An interesting question as regards the creation of future interests in property is posed by the attempt on the part of a grantor or a testator to direct how, by whom, and under what circumstances, a parcel of land which he transfers in

5 Dubois v. Roby, 84 N. J. 465, 80 A. 150 (1911).
6 Reddin v. Gates, 52 Iowa 210, 2 N. W. 1079 (1879).
7 Warren v. Cohaere, 154 N. C. 34, 69 S. E. 685 (1910).

fee simple, or otherwise, shall be utilized, enjoyed, and possibly retransferred. It is a subject replete with tenuous distinctions and one upon which courts, even in the same jurisdiction, are not always in agreement. A part of the difficulty arises from the inability to distinguish between terms so closely allied that the distinction is not apparent until the law is applied. Thus a court in speaking of a particular conveyance as a violation of the rule against perpetuities when it means an invalid restraint upon alienation, finds the result so divergent from that originally intended, that frequently the reasoning given to sustain the decision is a mere play upon words and contributes nothing to the body of law in this field save increased uncertainty and doubt. Coupled with this situation, is the attempt on the part of some states to codify the whole subject and so interject statutory provisions designed to replace and supplement the common law rules but which frequently, either expressly or impliedly, are interpreted so as to be in abrogation thereof. The purpose of this cursory survey of the subject will be to examine in detail a typical restriction in a grant of real property with an eye to determining just where this uncertainty on the part of the courts and the legislatures arise, and to inquire into the status of such provisions in grants or devises with particular reference to the law of Ohio. Such annotations will be supplemented, however, with references to decisions in other jurisdictions whenever there are no Ohio cases directly in point.

Where a person owning a large tract of land, creates a subdivision thereof for the purpose of establishing a residential district, it is a common practice to impose upon all parcels of the tract certain restrictions, either to protect his investment or to assure a definite and continued character to the district over the years. Such a grant contains a clause, however worded, but having the same force and effect, providing that upon failure to observe certain restrictions in the use of the property or in an attempt to transfer the same, the instrument of transfer — the deed — between the original grantor and grantee shall be forfeited and the original grantor shall have the right to re-enter and claim the property. Popular misconception has it that such a provision is legally acceptable, although such may not always be the case even in those jurisdictions wherein an attempt is made to give full force and effect to the provisions of a deed or devise at the expense of the grantee or devisee, notwithstanding the fact that the burden must be borne by the latter. Consequently, before determining what principles of law shall apply, it is necessary to determine just what a clause of this nature is — a condition subsequent or a covenant running with the land.

It is generally held [1] that only real covenants run with the land and in defining the latter, Blackstone [2] says it is one "the allegation

[1] See 15 Corpus Juris, Covenants Sec. 17, and annotations thereto.

of which is so connected with the realty that he who has the latter is either entitled to the benefit of or liable to perform the other." Under Ohio law [3] where the covenant benefits both the lessor and lessee, and sustains the estate, the covenant runs with the land, *if so intended.*[4] In the cited case, there was no express stipulation to the effect that the covenant should run with the land, but the parties so conducted themselves with relation thereto that it was a fair inference that such was their intention. This was also the situation in a very recent case [5] where although the original deed contained a provision that in case of a violation of a property line "the property shall revert to the said grantors," the fact that that there had been no objection to the violation for thirty-five years by adjacent owners precluded the heirs of the grantor from enforcing the forfeiture because the provision was manifestly intended as a restrictive covenant and not a condition subsequent. Intention of the parties, whether manifest or to be gathered from the manner in which they conduct themselves relevant thereto, then, is the determining factor. However as we shall see in our query as to what constitutes a condition subsequent, the courts have sometimes adopted a policy favoring covenants over conditions subsequent apparently as a rule of thumb in choosing the lesser of two evils.

Conditions subsequent have been variously defined. One authority [6] opines they "are those whose effect is not produced until after the vesting of the estate or bequest or the commencement of the obligation." The Restatement of Property [7] elaborates somewhat in declaring that "The term 'condition subsequent' denotes that part of the language of a conveyance, by virtue of which upon the occurrence of a stated event, the conveyor, or his successor in interest, has the power to terminate the interest which has been created subject to the condition subsequent, but which will continue until this power is exercised." And again, "a condition subsequent is that kind of a condition which operates upon estates already created and which may defeat or cause a forfeiture of such estate." [8] "Among the words which imply a condition in a grant are the following 'on condition' 'providing always,' 'if it shall so happen,' or 'so that he the grantee pay.' " "It is also said that to make a condition there must be added a conclusion with a clause of re-entry, or, if without such a clause, they shall declare the estate shall cease or

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2 2 Blackstone 304, Coleridge's Note.

3 Mass. Mutual Life Ins. Co. v. Jeckell, 124 Fed. (2d) 339, 343 (1941) (Ohio).

4 Italics those of this writer.

5 Second Church of Christ Scientist of Akron v. Le Prevost, 67 Oh. App. 101, 35 N. E. (2d) 1015 (1941).

6 Bouvier's Law Dictionary, Rawle's Third Revision.

7 Sec. 24.

8 Mahoning County Comm. v. Young, 8 C. C. A. 27, 59 Fed. 96, 103 (1893) (Ohio).

be void." [9] Thus where a father executed a deed to his son "subject to the conditions and reservations" that he should support him for the remainder of his life, it was held to be a condition subsequent.[10] But where there was an express condition but no words providing for forfeiture or re-entry, the conditions were held to be mere covenants running with the land.[11] The reason underlying such a principle seems to be the rule of thumb heretofore mentioned based on the policy that "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." [12] This for the reason that conditions subsequent are not favored in law, and are looked upon with disfavor in equity because they tend to destroy estates.[13] Thus where it is doubtful whether a clause in a deed be a covenant or a condition, the courts will incline against the latter construction.[14] And Blackstone says, "if a condition subsequent was void at its creation, or becomes impossible, unlawful, or in any way void, the estate or obligation remains intact and absolute." [15] Therefore, it may be propounded as a general conclusion that "conditions subsequent, especially when relied upon to work a forfeiture, must be created by express terms or clear implication, and are construed strictly." [16]

But even though courts are inclined to construe conditions as covenants whenever and wherever possible, wherein can they be distinguished? "A condition subsequent and a convenant are distinguished chiefly in the remedy applicable in the event of a breach which, in the case of a 'Condition Subsequent' subjects the estate to forfeiture and, in the case of a 'Covenant' is merely ground for the recovery of damages." [17] Thus from the standpoint of ascertaining what law to apply it is important first to discover what type of restriction is imposed. And ordinarily this is not too simple a task because it has been held that mere words are not deemed to be the controlling element. It must appear that the attempt to impose a condition subsequent with the consequent forfeiture of the estate, was the distinct intent of the grantor and so understood by the parties to the instrument.[18] Inasmuch as our problem is chiefly concerned with conditions subsequent,

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9 Id.

10 Ford v. Ford, 71 Oh. App. 396, 43 N. E. (2d) 756 (1942).

11 Incorporated Village of Ashland v. Grenier, 58 Oh. St. 67, 50 N. E. 99 (1898); Petition of Capps Chapel M. E. Church, 120 Oh. St. 309, 166 N. E. 218 (1929).

12 Perkins v. Fourniquet, 15 How (U. S.) 323, 14 L. Ed. 435 (1852).

13 Note 5 supra; Annotation 5 Am. St. Rep. 680.

14 Taylor v. Benford, 37 Oh. St. 262 (1881).

15 2 Blackstone Commentaries 157; Annotation 60 Am. Dec. 682.

16 2 Washburn on Real Property 7 (5th Ed.) (1887).

17 Globe American Corp. v. Miller Hatcheries, 110 S. W. (2d) 393, 396 (1937) (Mo.).

18 Note 5 supra.

we shall presume that the clause containing the restrictive elements and the provision for forfeiture are legally sufficient, and thereupon pass to the consideration of what law applies where such a condition exists, to what extent such restrictions are valid, and by whom they may be enforced.

Inasmuch as the measurement of the period during which such restrictions imposed by a condition subsequent were valid, has in numerous jurisdictions been interpreted to be the same as that embodied in the so-called "rule against perpetuities," there has been a tendency on the part of some courts to use the two terms "restraint upon alienation" and "rule against perpetuities" interchangeably. This situation was aided and abetted in no small measure by legislatures passing bills extending the common law rule against perpetuities and directing that this period should also be the measurement of the validity of any restraints on alienation. "In more recent cases, however, the pure doctrine has been recognized; and it seems now firmly established that remoteness in vesting and not suspension of alienation, is the sole test for a perpetuity." [19] Thus, "the rule against perpetuities as distinguished from that making estates indefinitely inalienable, concerns itself only with the vesting or assignment of estates and not with their termination." [20] But what is this so-called restraint upon alienation, where did the concept arise, for what purpose is it designed, and how does it operate? In view of the understandable difficulties of the courts to distinguish and describe the term some explanation appears mandatory.

"Restraints upon alienation of lands held in fee simple were of feudal origin. A feoffment in fee did not originally pass an estate in the sense in which we now understand it. The purchaser took only an usufructary interest, without the power of alienation in prejudice of the heir or of the lord. In default of heirs, the tenure became extinct and the land reverted to the lord. The heir took by purchase and independent of the ancestor, who could not alien, nor could the lord alien the seignory without the consent of the tenant. This restraint on alienation was a violent and unnatural state of things, contrary to the nature and value of property, and the indirect and universal love of independence. It arose partly from favor to heir, and partly from favor to the lord, and the genius of the feudal system was originally so strong in favor of restraint upon alienation, that by a general ordinance mentioned in the book of Fiefs, the hand of him who wrote a deed of alienation was directed to be struck off." [21] But ever since the passage of the statute *Quia Emptores,* there has been

19 Speitz on Conditional and Future Interests in Property, page 192 (1931).

20 Brooks v. City of Belfast, 90 Maine 318, 38 A. 222 (1897).

21 De Peyster v. Michael, 6 N. Y. (2 Selden) 467, 57 Am. Dec. 470, 478 (1852).

an inclination to disregard all such restraints and thus promote the free and unencumbered alienation of property. The general policy has been thus enunciated: "All such attempted restraints upon alienation as are invalid in law will be disregarded and the limitation be given the same effect as if the testator had not, by any means manifested his unlawful purpose." [22] But let us consider a specific aspect of these restrictions and one increasingly in evidence today — the restraints as applied to the transfer and lease of real property.

"A provision operating to prevent alienation to any except particular named individuals, or except to a certain class of individuals, is, by weight of authority, invalid, as is, perhaps, a requirement that the property shall not be sold without first having been offered to a person named, *as well as a requirement of the consent of a particular party to the alienation.*" [23] "The restraint is designed to preserve the homogeneity of the group residing in a particular area either by excluding transfers to a different race, or by subjecting prospective purchasers to the veto of a supervising person." [24] There is a sharp conflict as to which of the above restraints are valid [25] but aside from those that are held to be "repugnant" and "against public policy" there is a definite period within which such a restraint must operate so as to be valid. Ohio is one of the states which have no specific statutory provisions in regard thereto, although that section of the code [26] dealing with the time within which "interests in real and personal property" [27] shall vest, after extending the time to "not later than 21 years after a life of loves in being at the creation of the interest," [28] further provides that "It is the intention by the adoption of this section to make effective in Ohio what is generally known as the common law rule against perpertuities." [29] Conceivably then, what the statutes have failed to provide for expressly, has been done by implication and the measurement of a valid vesting of estates is the same period within which a termination by way of restriction on alienation may be had, in order to be valid.

Turning now to those situations wherein the termination conceivably falls within the statutory period, but which nevertheless fails because of public policy or as being repugnant to the estate we find some interesting Ohio law on the subject. Thus where there was a devise in fee with a condition that the devisees should not be allowed to sell,

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22 The Rule Against Perpetuities, 49 Am. St. Rep. 117, 126.

23 5 Tiffany on Real Property 192 (1931) Italics those of this writer.

24 Powell, Cases on Future Interests 988 (1937).

25 Thus Ohio and Indiana do not recognize as valid restraints on the transfer of property to Negroes, while Illinois holds them to be acceptable.

26 10512-8, Throckmorton's Ohio Code (1936).

27 Id.

28 Id.

29 Id.

dispose of, or encumber the land devised to them for ten years after the testator's youngest son should arrive at full age, the restriction was held to be void.[30] Citing the fact that the power of alienation is an inseparable incident of the estate and therefore such a general condition was unquestionably void, the court said: "By the policy of our law it is the very essence of an estate in fee simple absolute, that the owner who is not under any personal disability imposed by law, may alien it or subject it to the payment of his debts at any and all times, and any attempt to evade or eliminate this element from a fee simple estate either by deed or by will, must be declared void and of no force." [31] "Of course, we do not deny that the owner of an absolute estate in fee simple may by deed or by will transfer an estate therein less than the whole, or transfer the whole upon conditions, the breach of which will terminate the estate granted. * * * "The attempt here was to fasten upon the estate devised a limitation repugnant to the estate, which limitation and not the devise, must for that reason be declared void." [32] To the same effect was the case [33] wherein a warranty deed, regular in all respects except for the addition of a clause, immediately following a description of the land conveyed and preceding the habendum clause, providing that the "grantee, her heirs and assigns, shall not sell or dispose of the premises herein conveyed without the consent of the said grantor." Inasmuch as there was no express reference to a trust, the court said the disposition of the estate would be controlled by the rule in Shelly's case and so vest a fee simple.

"The power of alienation is one of the most valuable rights of ownership, and any attempt to cut off this right from the highest estate known to the law must obviously be unavailing. To say that we shall have an estate in fee simple in land, and yet that he shall not alienate it, is to say that he shall have such an estate, and at the same time that he shall not have it, for an inalienable estate in fee is an absurd impossibility. It is true that the ancient fees of the feudal system were inalienable, because the owner was in fact as well as in name a mere tenant to a superior owner, who had a possibility of reversion in the land, and because it was contrary to the fundamental principles of that system for a tenant owing fealty to his lord to substitute another person in his place without the lord's consent. But even before the statute *Quia Emptores,* a right of alienation began gradually to be engrafted upon estates in fee and ever since that statute and similar statutes in this country, there has been a steadily increasing tendency in the courts to favor the free alienation of property, and to discountenance every contrivance intended to restrain it." [34] But sup-

30 Anderson v. Cary, 36 Oh. St. 506 (1881).
31 Citing Hobbs v. Smith, 15 Oh. St. 419 (1864).
32 Note 30 supra at page 515.
33 Alford v. Mackey, 32 O. D. (N. P.) 25 (Ohio).
34 Annotation 57 Am. Dec. 489, 490.

posing that a condition is interpreted to be a valid restriction upon alienation, then who has the power to enforce it?

"A breach of a condition subsequent and the attendant right of re-entry for condition broken can only be taken advantage of by the creator of the estate and his heirs, who are his 'successors in interest.' Such right of re-entry at common law, and in practically all jurisdictions at the present time in which the rule has not been changed by statute, is inalienable either before or after breach and cannot be taken advantage of by a third person. In most jurisdictions such a right is, moreover, not devisable. The rule has grown up and has been followed in all cases in which the question has arisen that in the absence of a statute changing the rule not only is the right of re-entry not transferable, but an attempt to transfer it to a third person has in addition the effect to destroy the right totally, even as far as the grantor and his heirs are concerned." [35] The Ohio court has gone so far as to say that where the grantor and his heirs conveyed all property owned by them in the subdivision upon which the restriction was imposed, and for 35 years failed to assert the same, they ceased to have any financial interest in the district and therefore could not assert the provision for forfeiture.[36] But where there was a violation of a condition in a deed providing for reverter should the property cease to be used for church purposes, the enforcement of the condition was in the grantor alone.[37] With the exception of the aforementioned cases, Ohio law in re this point is nugatory. A reference to those jurisdictions to which Ohio turns for authority under such circumstances, however, discloses an abundance of cases.

In Massachusetts, for instance, it is held that the unexercised possibility or right of re-entry on condition broken could pass from the original grantors by descent or devise.[38] And Indiana holds that such a possibility of reverter is unassignable and the right of re-entry after breach cannot be exercised by any one other than the grantor or his heirs, and a creditor or stranger to the deed cannot take advantage of the breach.[39] And an early New York case summarized the situation in declaring that the right to take advantage of such a breach of a condition subsequent is not an estate or an interest in land, nor an assignable chose in action, but a right to re-enter and insist upon a forfeiture was reserved only for the benefit of the grantor and his heirs.[40]

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35 19 Am. Jur., Estates Sec. 83.

36 Note 5 supra.

37 Branch v. Wesleyan Cemetery Assn. 11 Oh. C. C. 185, 5 Oh. C. D. 326.

38 Dyer v. Siano, 298 Mass. 537, 11 N. E. (2d) 451 (1937).

39 Federal Loan Bank of Louisville v. Luckenbill, 213 Ind. 616, 13 N. E. (2d) 531 (1938).

40 Fowler v. Coates, 201 N. Y. 257, 84 N. E. 997 (1911).

CONCLUSION

Forfeitures, then, are not favored in the law. And conditions subsequent, whose effect if enforced is the forfeiture of estates are construed strictly and enforced only when expressed in clear unambiguous terms and the right of re-entry is specifically reserved. Implication of such a right is unavailing. But even when the deed or other instrument of transfer is sufficient to that extent, the conditions still may not be enforced because it constitutes "an invalid restraint upon the power of alienation." Whether the reason supporting such a conclusion is based on grounds of public policy, repugnancy in the terms of the instrument itself, or other judicial attempt to avoid the creation and enforcement of such an interest, it is evident that such practices are not favored at the law and will be given full force and effect only when there is no other course open to the court. This in itself is an anomalous situation because courts have repeatedly declared that a restriction may be placed upon property either to protect the interests of the person conveying, or those of adjacent landowners. It would seem that in so speaking, the judges were contemplating only those restraints which constitute covenants running with the land, for the breach of which, a remedy can be had in an action for damages by the party injured. And where possible courts will construe conditions subsequent as covenants, so that the intent of the transferor is disregarded in favor of the policy of preserving estates. Keeping these decisions in mind, then, as a reflection of judicial demeanor, it is incumbent upon the party attempting to reserve a right of re-entry to determine first of all — Has a condition subsequent been expressly created, and is that fact so understood by both parties to the transaction; has the forfeiture of the estate because of a condition broken been adequately and specifically expressed; and has there been any indication by courts of record, through their decisions, in that jurisdicition that notwithstanding the attempt to create such an interest, it will not be enforced by the court? Once ascertained, the answers to these questions may not resolve all of the difficulties, because in determining the disposition of such problems, the courts look to the facts of each individual case as the criterion for assessing the justice of the cause, and as has been seen, it is an outstanding situation wherein the courts have decided that damages for breach of a covenant running with the land is not an adequate remedy.

Robert E. Sullivan.

JURISDICTION OVER PROMISSORY NOTES, REGISTERED BONDS, AND STOCK CERTIFICATES AS A BASIS OF PROCEEDINGS IN REM.—While it is a well defined rule that jurisdiction over land lies with the court presiding over the state in which the land lies; whether bonds, notes or shares of stock may be regarded as a res for proceedings in rem due to the physical presence of the paper itself has given rise to great difficulties in the courts. The decisions have been varied; on the one hand holding to the theory that the bond or note is a tangible right,[1] and on the other hand that the bond or note does not alter the intangible character of the debt. The court said: "the mere physical presence within the Southern District of New York of certain promissory notes secured by deeds of trust on land in Mississippi does not make them personal property of that localized character lawfully within the district, which under the judicial code Section 57, would justify foreign service of process, upon a nonresident and bring him to local jurisdiction to contest title to the notes." [2]

The main reason for these varied decisions has been the question of determining whether or not the situs of the debt has constituted a "property" as a foundation for jurisdiction. The controlling issue in cases similar to the Doepke case *supra* is that the documents are looked upon from a business point of view, as instruments of value and consequently regarded as "property" rather than mere evidence of contractual relationship.

The Federal court has said, "I am of the opinion that stock certificates * * * when properly endorsed and delivered to a resident trustee with power of sale in case of default in the trust agreement are properly within the definition of Section 57 of the Judicial Code conferring jurisdiction upon the court." [3]

These decisions are in accord with the Restatement of Conflicts of Law which sets forth the general doctrine in Section 52, "where a right is, by the law that created it, embodied in a document, the right is subject to the jurisdiction of the state which has jurisdiction of the document." Or, as in the case of a negotiable instrument that the state having jurisdiction over the instrument itself, also has jurisdiction over the right embodied in the same document.

The Supreme Court of Minnesota has adopted the "Business Value" attitude in applying a strict interpretation of the Restatement. In a down-to-earth approach, an analogy is made concerning the ordinary person being able to understand that he has no property in the vault

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1 Doepke v. Christy Box Car Loader Co., 26 Ohio Dec. 583 (1913).

2 Crichton v. Wingfield, 66 L. Ed. 467 (1921).

3 Blake et. al. v. Foreman Bros. Banking Co., et. al., 218 Fed. 264. See also Manning v. Berdan, 132 Fed. 382 (1904).

where his bonds are kept, that his property obligations were not vested in the bond certificates themselves.[4]

These decisions for the stability of the intangible character of the note have come into favor for a period in the Supreme Court of the United States, as set out in *Baldwin v. Missouri* [5] where no distinction is made between simple contract debts and debts evidenced by a bond or promissory note. In regard to the application of the principle the court said: "It is not defeated by the mere presence of the bonds or note or other evidence of debt within the state other than the domicile of the owner." The Supreme Court in handling these cases, had for the basis of their decisions, for the most part, a line of tax cases which favor the view of the situs of the debt being at the domicile of the creditor.[6]

While *Baldwin v. Missouri, supra,* is controlling in its decision, the trend of today seems to lie in favor of the dissent of Justice Holmes in that case.

In his dissent to *Tax Comm. v. Aldrich,*[7] Justice Jackson predicts the future trend: "Certain it is that while only corporate stock is expressly mentioned in the opinion or involved in the opinion today, the fiction of benefits and protection is capable of as ready adaptability to other intangible property. Our tomorrow will witness an extension of taxing power of the chartering or issuing states to corporate bonds and bonds of states and municipalities (by overruling *Farmers' Loan and Trust Co. v. Minnesota,* 280 U. S. 204); to bank credits for cash deposited (by overruling *Baldwin v. Missouri,* 281 U. S. 586); and to choses in action (by overruling *Beidler v. South Carolina,* 282 U. S. 1). To attain these aims in *Buchman v. Smith,*[8] the fault is laid with the incompleteness of the Restatement in that it does not attempt to specify in what various situations property interests are embodied in documents. In general, this rule is applied to negotiable instruments, or papers having a large degree of negotiability, such as bills of lading, stock certificates and bearer bonds.[9]

This measure, grounded on the negotiability of the instrument, as a basis for determining the degree of right vested in the document itself, seems to be the sound doctrine for the future.

William F. Martin.

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4 First Trust Co. of St. Paul v. Matheson et. al., 187 Minn. 468, 246 N. W. 1 (1932).

5 281 U. S. 586 (1930).

6 Cleveland R. R. Co. v. Penna., 21 L. Ed. 179 (1873).

7 316 U. S. 174, 200 (1942).

8 136 N. J. Eq. 246, 41 A. (2d) 262 (1945).

9 First Trust Co. of St. Paul v. Matheson, supra.

NECESSITY OF CONSIDERATION ON A SEALED INSTRUMENT.—Under the earliest law a sealed instrument was the only basis of contract liability. Most parties could not write and in order to contract would legally bind themselves by affixing a seal to a written instrument. At this time the law developed before the so-called simple contracts came into existence with the result that the law of consideration never applied to this type of obligation.[1]

The seal was introduced into England by the Normans[2] and at common law was a substitute for consideration. Often the cases would speak of a seal as "importing a consideration." In a deed under seal the court held that the seal imported sufficient consideration, namely, "the will of the party that made the deed." [3]

It was indisputable at common law that a contract under seal was not invalid for lack of consideration either at law,[4] or in equity,[5] but may have been questioned if fraud were present.[6]

Massachusetts still holds to the common law rule as does England. In a Massachusetts case Justice Holmes stated that in the absence of fraud, oppression, or unconscionableness, consideration would not be enquired into on a sealed instrument.[7] Most all states in the middle of the 19th Century held that a seal to an instrument *per se* imported a consideration. Since then most jurisdictions have passed statutes altering the common law rule and other changes have been brought about by judicial modification. The majority of states have abolished the distinction between sealed and unsealed written contracts,[8] but most of these states have established a rebuttable presumption that a sealed instrument has been made for a valid and sufficient consideration. Michigan and Wisconsin maintain a presumptive evidence theory of consideration on sealed instruments.[9]

The early laws in Michigan followed the common law rule of the seal importing *per se* a consideration.[10] The reason for such a rule was aptly stated, in a leading case on the point, in *Storm v. U. S.*[11]

The seal imports a consideration, or renders proof of consideration unnecessary; because the instrument binds the parties by force

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1 Blackstone's Commentaries on The Law, p. 493, Gavit.
2 5 The Archeological Journal 1 (1850).
3 Bromley v. Strotton, King's Bench, 1 Plowden 298 (1565).
4 Dye v. Mann, 10 Mich. 291 (1862).
5 2 Delaware Chancery 386.
6 Smith v. Smith, 36 Ga. 184, 91 Am. Dec. 761 (1867).
7 Krell v. Codman, 154 Mass. 454, 28 N. E. 578 (1891).
8 Williston on Contracts, Sec. 218.
9 Mich. Stat. Annot., (1936), Henderson, Sec. 27.895. Wis. Statutes, Sec. 328.27 (1935).
10 Sec. 90 of R. S. 1846, ch. 102 being C. L. 1857, Sec. 4327.
11 Storm v. U. S., 94 U. S. 76, 24 L. Ed. 42 (1877).

of the natural presumption that an instrument executed with so much deliberation and solemnity is founded upon some sufficient cause.

The validity of an instrument under seal derived its efficacy from the solemnity of its execution. Such a solemn act must be obligatory. The rule of law laid down in an early case in Michigan [12] made it neither necessary to aver or prove the consideration of an agreement under seal, as the seal itself imported the consideration. In 1873 in *Green v. Langdon*,[13] the first case under the new statute,[14] the seal is held to be no more than *prima facie* evidence of a consideration. The want of consideration could therefore be shown.

The validity of the instrument could be attacked for fraud, mistake, surprise, duress, or total want of consideration. The rule by statute that sealed instruments might be impeached [15] for want of consideration applied with equal force to all sealed instruments between party and party. The statute expressly provided that defense of want of consideration should not be made unless the defendant gave his notice thereof with his plea to the general issue.[16] A rebuttal was made and want of consideration proven in the Wabash Railway case of 1895.[17] Thus we see the early development of the "Presumptive Evidence Rule" in Michigan.

At the turn of the century, in *Hollenback v. Breakey* [18] no notice of the defense (lack of consideration) was given so the seal was held to have imported the necessary consideration. Other cases may be cited laying down the principles as provided by the statute.[19]

Thus the seal as being only presumptive evidence of consideration has evolved by statute and today is expressed in the Michigan Statutes as follows:

In any action upon a sealed instrument, and where a set-off is founded on any sealed instrument, the seal thereof shall only be presumptive evidence of a sufficient consideration, which may be rebutted in the same manner, and to the same extent, as if such instrument were not sealed.[20]

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12 Dye v. Mann, 10 Mich. 291 (1862).

13 28 Mich. 221 (1873).

14 2 Comp. L., 1871, Sec. 5947; How 7520.

15 Hobbs v. Brush, 75 Mich. 550, 42 N. W. 965 (1889).

16 Boyer v. Sowles, 109 Mich. 485, 67 N. W. 530 (1896).

17 Wabash Western R. Co. v. Brow, 65 F. 941, 164 U. S. 271, 41 L. Ed. 431 (1895).

18 127 Mich. 555, 86 N. W. 1055 (1901).

19 Axe v. Tolbert, 179 Mich. 556, 146 N. W. 418 (1914); Danby v. Bebee, 147 Mich. 312, 110 N. W. 1006 (1907); In re McLaughlin's Est., 182 Mich. 707, 151 N. W. 745 (1915).

20 Mich. Stat. Annot., Sec. 27, 895, Henderson (1936).

The great trend throughout the country has been to discard the common law rule. The effect of a seal upon a written instrument is not received as conclusive nor as presumptive evidence of a sufficient consideration under the Civil Practice Act. In many cases it would be highly desirable to have a binding contract without actual consideration. To this end it has been strongly advocated by the Commissioners on Uniform Laws to adopt the Uniform Written Obligations Act which validates certain written transactions without consideration. Section I of the Uniform Written Obligations Act provides that:

No written release or promise hereafter made and signed by the person releasing or promising shall be invalid or unenforceable for lack of consideration, if the writing also contains an express statement, in any form of language, that the signer intends to be legally bound.[21]

Although only two states have adopted the act [22] it is, nevertheless, a sure and simple way to make gratuitous promises binding without actual consideration being present.

Robert A. Macdonell.

REMEDIES OF A CHATTEL MORTGAGEE.—Except for a few states in the Eastern part of this country, the courts of the United States have rejected the old common law belief that title to mortgaged realty passes to the mortgagee upon execution of the mortgage, and have adopted the reasoning that title remains in the mortgagor, leaving the mortgagee with but a "lien" upon the premises.[1] It is somewhat surprising, then, to find that the courts almost universally cling to the common law or "title" theory in the realm of chattel mortgages, allowing title to pass to the chattel mortgagee as soon as the mortgage is executed.[2]

Adherence to this old world idea of mortgages in personal property and rejection of it in real property is caused by the peculiar nature of chattel mortgages. Actually, the lien theory can not be applied to chattel mortgages because they are similar to pledges and conditional sales. By definition, a chattel mortgage is in the nature of a pledge and conditional sale, title becoming absolute in the mortgagee, without redemption, upon condition broken.[3] One of its predominant features, therefore, is the ease with which the chattel mortgagee can have satis-

21 Uniform Law Annotated, Vol. 9, (1932).

22 Penn., P. L. 985 (1927); Utah Laws, Chap. 62 (1929).

1 Walsh on Mortgages, Sec. 5; McMillan v. Richards, 9 Cal. 365 (1857).

2 Bowers Ed. of Jones on Chattel Mortgages and Conditional Sales, Vol. 2, Sec. 699; see also Holtzhausen v. Parkhill, 85 Wis. 446, 55 N. W. 892 (1893); Randall v. Persons, 42 Neb. 608, 60 N. W. 898 (1893).

3 Callaghan's Cyclopedic Law Dictionary, 3rd Ed.

faction for the money he loans to the mortgagor, and for that reason title must pass to the mortgagee so that he may preserve his "pledge." The single difference between the chattel mortgage and the pledge is that title to the property, rather than possession, is the security.[4]

Minority View. Some of the courts, having adopted the lien theory of realty mortgages, were reluctant to see any special pledge-like character in chattel mortgages. In an early Indiana case, *Blackmore v. Taber's Exr.*, 22 Ind. 466, the court said, "our statutes place chattel mortgages upon the footing of mortgages upon real estate, in this, that (they) recognize the legal title, the equity of redemption, as remaining in the mortgagor, and the mortgagee as having but a lien." However, the Indiana court later reversed this opinion in *Broadhead v. McKay*, 46 Ind. 595, saying, "the mortgagee of personalty, the mortgage being silent as to possession, is immediately upon the execution of the mortgage entitled to the possession of the mortgaged property."

Arizona, California, Florida, Georgia, Iowa, Montana, Oklahoma, and South Dakota have abrogated the common law theory of chattel mortgages by statutes and the law in these states now is that the mortgage of a chattel creates a mere lien as security for the debt, and the mortgagor can be divested of his title only by foreclosure and sale.[5] In a few other states, the common law rule has been modified to the extent of requiring that title of particular chattels, such as household goods, remains in the mortgagor and can be taken away from him only by foreclosure and judicial sale.[6] So we see that in a few states the chattel mortgagee is restricted to the remedy of foreclosure and judicial sale, which is in effect a statutory application of the lien theory to personal property.

Foreclosure and Sale. When the chattel mortgagor defaults, the title which the mortgagee has acquired by execution of the mortgage ceases to be defeasible and becomes absolute in the majority of states.[7] However, the mortgagor still retains an equity of redemption which must be barred or forever closed. Therefore, a foreclosure and judicial sale, although not the only remedy in most states, is a proper remedy in all jurisdictions.[8]

Most of the courts and text-writers favor a suit for foreclosure and judicial sale as the safer and more adequate remedy of the chattel mortgagee.[9] The Supreme Court of the United States, in the case of

4 Ibid. See also Restatement of Security, Sec. 5.

5 Bowers, supra, Sec. 701. See also Mathew v. Mathew, 138 Cal. 334 (1903).

6 Ibid, Sec. 701.

7 Lathrop v. Cheney, 29 Neb. 454, 45 N. W. 617; Allen v. Ranson, 44 Mo. 263, (1869); Carroll v. Ballance, 26 Ill. 9 (1861).

8 Lembeck & Betz v. Saxton, 77 N. E. 38 (1906); Lee v. Fox, 113 Ind. 98, 14 N. E. 889 (1888); Brown v. Russell, 105 Ind. 46, 4 N. E. 428 (1886).

9 Broom v. Armstrong, 137 U. S. 266 (1890); Wilson v. Brannon, 27 Cal. 258 (1865).

Broom v. Armstrong, 137 U. S. 266, 267, points out that "a judicial sale of the property and application of the proceeds as directed by the decree, make a record which will protect the mortgagee from the embarassment and charges of unfairness in the conduct of the sale which attend the actual taking possession and sale of the property by the mortgagee without a decree of the court."

When the chattel mortgagor defaults, the chattel mortgagee may sell the property, with the consent of the mortgagor.[10] This is considered the equivalent of a formal foreclosure, but is frowned upon by the courts for the reasons suggested above. However, it has the advantage of eliminating the advertising of the sale as required in judicial sales and sales under power of sale agreements.

Power of Sale. Judicial foreclosure and sale is not depended upon today as it once was, having withdrawn somewhat in favor of a more popular method of foreclosure called the "power of sale." It has become customary to include in the chattel mortgage a provision that, upon default of payment by the mortgagor, the mortgagee shall have the right to seize the mortgaged chattels and sell them.[11] Most statutes requiring foreclosure and judicial sale exclude foreclosure under a power of sale agreement, but unless so made expressly exclusive, the power of sale provisions in chattel mortgages are not excluded, as long as the stipulations agreed upon by the parties are reasonable.[12] Conversely, the right to foreclose is not destroyed by a power of sale provision in a chattel mortgage.[13] It is an established rule that the pledgee of chattels has the right to come into equity for a decree of sale of the pledge, altho a valid sale may be made without a judicial decree. By oblique reasoning, the same rule should apply to a mortgagee of chattels.[14]

The sale of chattels under the power given without resort to judicial proceedings is hailed as the more "speedy and effectual" remedy of the chattel mortgagee, and "based on sound reasoning." "Why," asks Justice Brewer in *Denny v. Van Dusen,* 27 Kan. 437, "should not the owner of personal property, who may sell absolutely or conditionally, and impose such conditions as the parties agree upon, or give it away providing it be not done in fraud of creditors, — why should not such owner be permitted to mortgage his property upon such conditions as he sees fit?"

Legal Remedies. The chattel mortgagee ordinarily has three legal remedies which he may pursue in addition to his equitable remedy of foreclosure: debt, replevin, and trover.

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10 Bowers, supra, Sec. 707.
11 Denny v. Van Dusen, 27 Kan. 437 (1888).
12 Ibid. See also Glaspie v. Williams, 51 P. (2d) 254 (1935).
13 Briggs v. Oliver, 68 N. Y. 336.
14 Ibid.

An action of debt may be maintained by the chattel mortgagee to recover the sum of money secured by the mortgage, provided the instrument contains an express agreement to pay the sum (which most mortgages as a practical matter do contain), or a distinct acknowledgment that such a debt exists.[15] Some courts go slightly further and require that the mortgage show on its face an undertaking (1) to pay a sum certain, (2) to a specified person, (3) at a time certain.[16] The third requirement hardly seems necessary, since it might be presumed that the debt becomes due when the mortgage becomes due. An action of debt may also be maintained when expressed in a note for which a chattel mortgage is security.[17]

The chattel mortgagee is entitled to the remedies of replevin and trover only after he has a right to immediate possession of the property mortgaged,[18] that is, after execution. He may maintain an action of replevin against anyone who has wrongfully taken the property from the mortgagor, or against a creditor who has levied upon it.[19] If the property is sold by the creditor he may bring an action of trover for conversion.[20]

Concurrent Remedies. Ordinarily, when there are two inconsistent remedies, the selection of one precludes the right to pursue the other.[21] However, the remedies of a chattel mortgagee are not considered to be inconsistent, so he may pursue all of them concurrently — an action to recover the debt, an action to recover the mortgaged property, or a foreclosure of the mortgage.[22]

Conclusions. Generally speaking, the chattel mortgagee seems to have little cause for complaint. Because of his close relation to the pledgee and conditional vendee, he obtains more control over his "security" than his big brother, the real estate mortgagee. He has several remedies, and he may use all of them at the same time. In short, he has plenty of assurance when he loans money to the mortgagor that he will get his money back, one way or another.

But I wonder if the courts are not creating, or rather perpetuating, unnecessary confusion by safeguarding this peculiar pledge-like character of the chattel mortgage. A chattel mortgage is really no different

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15 Larmon v. Carpenter, 70 Ill. App. 549 (1896); Culver v. Sisson, 3 N. Y. 264 (1808); but see Bray v. McKenzie, 39 Ga. App. 397 (1896); 147 S. E. 406 (1929).

16 Larmon v. Carpenter, supra.

17 Schwary v. Schwary, 138 Ore. 690, 7 P. (2d) 986 (1932); Fisher v. Jones, 114 Ga. 648 (1902).

18 Lathrop v. Cheney, supra; Holthauzen v. Parkhill, supra.

19 Jones on Chattel Mortgages, 4th Ed. Sec. 706; Crouch v. Fahl, 63 Ind. App. 257 (1916); Malcolm v. O'Reilly, 89 N. Y. 156 (1882).

20 Lathrop v. Cheney, supra.

21 Barchard v. Kohn, 157 Ill. 579, 41 N. E. 902 (1895).

22 88 A. L. R. 915.

than a pledge. True, the pledgee's security is possession while the chattel mortgagee's security is the title, but the chattel mortgagee, except in those states having statutes to the contrary, can obtain possession anytime he pleases on the ground that he has title, thereby making his security synonymous with that of the pledgee — possession. Actually, then, a chattel mortgage is a legal fiction.

Why not call a spade a spade? For the sake of clearness, the courts should call a pledge a pledge and a mortgage a mortgage; if it is desirable to have a special kind of pledge, I should think it would be more proper to invent a new kind of pledge to take care of this need.

Calling this special pledge a "chattel mortgage" would cause little damage if it were not for the conflicting "lien" and "title" theories of mortgages, and would still result in little damage if the predominating theory of realty mortgages, the lien theory, were applied to chattel mortgages. However, the fact that the "lien" theory is universally followed in real property law and the opposite view is followed in chattel mortgages, is bound to cause misunderstandings. Suppose a farmer mortgages his premises and is guaranteed the right to retain possession until foreclosure under the lien theory. Is it not natural for him to expect the same right if he mortgages his car, his tractor, or his corn-picker? If it is mostly a pledge, then we should call it a pledge and apply the law of pledges, instead of calling it a mortgage and applying the minority view of mortgages to it, merely to satisfy the requirements of a pledge.

Robert E. Million.

THE EFFECT AND OPERATION OF A PLEDGE OF THE RENTS AND PROFITS OF THE REAL ESTATE MORTGAGED AS FURTHER SECURITY.—Upon the effect and operation of the pledging of rents and profits, there is a great difference of opinion. Although there are instances in which the courts have refused to give effect to a pledge of rents and profits of real estate in a mortgage thereof, the general rule is that in the absence of a prohibitory statute, the mortgagor may make such a pledge, by stipulation, of the rents and profits in a mortgage of real estate. In the case of the *First National Bank of Joliet v. Illinois Steel Co.*,[1] the court construed the effect of a provision pledging the rents and profits of the real property mortgaged. In his opinion, Justice Craig said, "Under this clause in the mortgage a lien is given, by express words, upon the rents and profits, and such an equitable lien a Court of Equity will enforce." The mortgagee has no lien upon the rents and profits of the real estate which is the subject of the mortgage

[1] First Bank of Joliet v. Illinois Steel Co., 174 Ill. 140, 51 N. E. 200 (1898).

unless there exists in the mortgage a provision pledging the rents and profits.[2] The main purpose for the insertion of such a provision is to add to, or further secure the real estate so pledged. The pledging of the rents and profits, may be inserted in the mortgage at the time it is drawn or executed, or at any time after the execution of the mortgage.[3] Before proceeding further, it should be pointed out that there is a marked difference between an assignment and a pledge of rents and profits. This is very well explained by Vice Chancellor Berry in his opinion on the case of *Paramount Building and Loan Association of the City of Newark v. Sacks et al.*[4] In his opinion, Vice Chancellor Berry says: "An examination of the cases cited as authority for the statement that the mortgagor is not entitled to the rents until he takes possession, or until a receiver is appointed, convinces me that the word pledged, there used, is distinguishable from the word assigned. Ordinarily, a pledge is considered as a bailment, and delivery of possession, actual or constructive, is essential, but the transfer of title is not. On the other hand, by assignment, title is transferred, although possession need not be. There may, of course, be pledges accompanied by an assignment where both possession and title are transferred to the pledgee; and there may also be a qualified assignment where neither possession or complete title passes. The word pledged as used in the cases in its ordinary sense is plain from the fact that possession, actual and constructive, must follow to make it effective." In summary thereof, it need not be necessary for the mortgagee to be in possession to collect the rents and profits assigned, but where the rents and profits are merely pledged possession of the mortgagee is necessary.

As appears from the foregoing discussion, the mortgagor may create a lien upon the rents and profits in favor of the mortgagee, in the absence of some prohibitory statute. The provision by which the mortgagor may have pledged the rents and profits, has various forms. These various forms may be divided roughly into three classes: (1) Provisions giving a lien on the rents and profits of the real estate. (2) Provisions giving a lien and also authorizing the mortgagee to take possession either directly or by a receiver. (3) Provisions authorizing the mortgagee to take possession of the rents and profits in case of default. The great weight of authority, as regards all of these various forms of pledges, is to the effect that the mortgagee does not thereby acquire a lien on the rents and profits. Such a provision is held not to vest such rents and profits in the mortgagee without acquiring possession, either constructive or actual. One of the leading cases, setting forth the above mentioned rule, is the case of *Hall v. Golds-*

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[2] Hubell v. Anenue Investment Co., 97 Iowa 135, 66 N. W. 85 (1896).

[3] Central Trust Co. v. Wolf, 255 Mich. 8, 247 N. W. 159 (1933).

[4] Paramount Bldg. & Loan Assn. of the City of Newark v. Sacks et al., 107 N. J. Equity Reports 328, 152 A. 457 (1930).

worthy et al.[5] In this case in his opinion, Justice Sloan said, "Reason and authority lead us to the conclusion that the mortgagee is not entitled to the benefits of the contract (pledge of the rents and profits of the land) until he has taken the possession and control of such rents and profits by appropriate proceedings in court." It can safely be said, with assurance, that the great weight of authority is that the mortgagee, under a mortgage containing the pledging of the rents and profits, does not become entitled to the rents and profits until he has taken possession of the rents and profits pledged.

As we have seen, the mortgagee is not entitled to the rents and profits so pledged until they have been reduced to the possession of the mortgagee. In the states that follow the title theory of mortgages, the mortgagee has the right to the possession on the assertion of his legal right.[6] The problem arises in those states which adhere to the lien theory of mortgages.[7]

In the cases where the mortgage has contained a stipulation for the pledging of the rents and profits, the mortgagee may apply to a Court of Equity to have a receiver appointed to impound the rents and profits. While this is not the only way of reducing rents and profits to possession, it is by far the most usual. Therefore, this discussion will be limited to the ability of the mortgagee to have a receiver appointed under a provision in the mortgage pledging the rents and profits. The appointment of a receiver is within the discretion of the court. The courts in the use of such discretion have shown a reluctance towards the appointment of a receiver. The majority rule is that the court will not appoint a receiver for the rents and profits unless there exists some equitable reasons, other than the provision contained in the mortgage pledging the rents and profits. The rule is well set out and explained in the case of *Aetna Life Insurance Co. v. Broeker.*[8] In his opinion of the case, Justice Gillett said; "The appointment of a receiver is a remedy; it is a part of the procedure of the Courts of Chancery to conserve and enforce equitable rights. Such provisions (which pledge rents and profits) may be entitled to some weight upon application, but a Court of Equity will not enforce them where it would be inequitable or unconscionable to do so. For the Court of Equity to enforce such a provision, there must be some existing fact that would subject the mortgagee to the chance of loss." Since it is entirely within the discretion of the Court of Equity, assuming there are

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[5] Hall v. Goldsworthy et al., 136 Kan. 247, 14 P. (2d) 659 (1932).

[6] Under the title theory of mortgages, which the common law rule follows the mortgagee was vested with the legal title of the real estate mortgaged and was therefore entitled to possession under his legal title. Am. Jur. Vol. 36 p. 823.

[7] Under the lien theory of mortgages the mortgagee was given a lien and not a conveyance of the legal title; therefore the mortgagee did not have the right of possession. Am. Jur. Vol. 36 p. 823.

[8] Aetna Life Insurance Co. v. Bracker, 166 Ind. 576, 77 N. E. 1092 (1906).

not statutes regulating the appointment of receivers, there may be different judicial opinions of what "certain facts" have to be alleged to enable the Court of Equity to appoint a receiver for the rents and profits. It was held in the case of *Davenport v. Thompson*,[9] that to have the court appoint a receiver there must be proven that the mortgagor is insolvent and the security is inadequate. These two facts are necessary in the majority of the states to show that the mortgagee is in danger of running the chance of loss to have the court appoint a receiver. This fact was also put forward in the *Strauss v. Georgian Bldg. Corp.*[10] in which the court said that when the property was ample security and the mortgagor solvent then a receiver should not be appointed. In summation, the general rule is that the Court of Equity will not appoint a receiver under a provision pledging the rents and profits unless it is proven that the security of the mortgage is inadequate and the mortgagor is insolvent.

There are other ways the Court of Equity may protect the mortgagee, where the proper allegations have been made and proven. In some cases, where the proof sustains the appointment of a receiver, the court may take a bond executed by the mortgagor to secure the rents and profits and thus deny the appointment of a receiver

A great number, if not the majority, of the pledges of the rents and profits are accompanied by a provision that the mortgagee shall have the right to the appointment of a rent receiver. These provisions are not controlling but they do furnish evidence for the appointment of a receiver by the Court of Equity.

In conclusion, the general rule regarding the pledging of rents and profits, is: (1) Such a provision is valid. (2) Mortgagee is not entitled to the rents and profits pledged, unless he takes possession actual or constructive of such rents and profits. (3) Outside of the title theory states, the usual way the mortgagee secures possession of the rents and profits is by the appointment of a receiver. (4) The Court of Equity will appoint a receiver if it is shown that the security is inadequate or that the mortgagor is insolvent or both are required.

Arthur A. May.

THE EFFECT OF THE DELIVERY OF UNINDORSED ORDER PAPER.—At the beginning of this paper it is profitable to first distinguish between a note payable to bearer and a note payable to the party or his order, for in the first instance title passes by delivering, so that a holder in due course, that is, one who takes a note complete and

9 Davenport v. Thompson, 221 N. W. 347, 206 Iowa 746 (1928).
10 Strauss v. Georgian Bldg. Corp., 261 Ill. App. 284 (1931).

regular on its face, in good faith and for value before it is overdue and without notice of any infirmity in the instrument, defect in the title, or that it has been dishonored,[1] may collect on the note though it had been lost and found by the party who sold to him.[2] While in the latter, the note in order to be collectible must contain the genuine indorsement of the payee plus delivery to be negotiable.[3]

The various types of indorsements as set out in the Negotiable Instruments Law are: (a) an indorsement in blank,[4] (b) a special indorsement,[5] (c) a restrictive indorsement,[6] (d) a qualified indorsement,[7] (e) and a conditional indorsement and by proceeding a little further that "an instrument negotiable in its origin will continue to be negotiable under the above indorsements with the exception of a restrictive indorsement and provided the note has not been discharged by payment.[8]

However, in the instant case we are concerned with the problem of the effect of the delivery of an unindorsed note payable to order on the rights of the respective parties or those taking under them.

The Negotiable Instruments Law was proposed for adoption to the various states by the National Conference of Commissioners on Uniform State Laws in 1896 and on the point in question read as follows: "Where the holder of an instrument payable to his order transfers it for value without indorsing it, the transfer vests in the transferee such title as the transferor had therein, and the transferee acquires in addition, the right to have the indorsement of the transferor. But for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the indorsement is actually made.[9] As for the State of Illinois the legislature on March 18th, 1874 passed an act in relation to promissory notes, bonds, due bills, and other instruments in writing,[10] and on the fifth day of June, 1907, adopted the Uniform Negotiable Instruments Act quoted above.[11]

There appears to be a conflict of opinion on the matter as to whether title to a negotiable instrument can be transferred without an indorsement when the transfer is not for value. In a Georgia case[12] where

1 N. I. L. Art. IV Sec. 52.
2 Miller v. Rate, 1758 K. B., 1 Burrows 452.
3 Art. III Sec. 30 N. I. L.
4 N. I. L. Art. III Sec. 34.
5 Ibid.
6 Ibid. Sec. 36.
7 Ibid. Sec. 38.
8 Ibid. Sec. 47.
9 Ibid. Sec. 49.
10 Ill. Rev. Stat. Chap. 98 Sec. 1-18.
11 Ill. Rev. Stat. Chap. 98 Sec. 21-218.
12 Moore v. Moore, 35 Ga. App. 39, 131 S. E. 922 (1926).

the only consideration was love and affection, the court held an indorsement essential to the transfer of title, but New York, Oregon and Illinois hold that the delivery of an unindorsed negotiable instrument to the donee, with the intent of effecting a gift is sufficient to effectuate a transfer of title.[13] Many courts have held that the effect of a transfer of a negotiable instrument payable to order without an indorsement is to destroy the negotiability of the note and relegate it to a mere chose in action, but this broad statement can be modified to read that the courts deem said note to lose its negotiability only insofar as a subsequent transferee cannot be considered as a holder in due course, but rather that he will be subject to defenses on the note which would be inadmissible were he a holder in due course. Courts of Oregon,[14] and Illinois [15] maintain the note is reduced to a chose in action and compels the transferee or assignee to proceed under a real party in interest statute for non-negotiable choses in action in the name of the assignor, as against all but the assignor himself. The holding that the delivery of said unindorsed note payable to order loses its negotiability so as to admit inquiry into prior equities is upheld in New York,[16] Missouri,[17] Montana,[18] and Nebraska.[19]

Continuing further a question arises as to whether we consider the transferee of such an unindorsed negotiable note payable to order is vested with a legal or an equitable title. The decisions of the courts of North Carolina and Wyoming are to the effect that an equitable title alone passed to the transferee, subject to all the defenses available against the payee,[20] but courts of Oregon [21] seem content with the view that by reason of a statute that the transfer "vests in the transferee such title as the transferer had therein," and hence by the force of the statute itself, the transferee is vested not only with the equitable but also with the legal title, although the transferee cannot until indorsement, be treated as a holder in due course. Still more confusion reigns when the jurisdiction follows the rule that the holder of the equitable title to a chose in action must sue in the name of his assignor. Minnesota,[22] Missouri,[23] and Oklahoma [24] allow the transferee to bring

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13 In Re Nitze 200 N. Y. S. 81 (1923); Baker v. Moran, 67 Ore. 386, 136 Pac. 30 (1913); Rinard v. Lasley, 143 Ill. App. 450 (1908).

14 Columbia Hotel Co. v. Rosenbury, 122 Ore. 675, 260 Pac. 235 (1927).

15 Blanke v. Hammel, 256 Ia. 251 (1930).

16 Newer v. Phenix Nat'l Bk., 86 N. Y. S. 701 (1904).

17 Newton Co. Bk. v. Holdeman, 223 Mo. App. 164, 95 S. W. (2d) 852 (1928).

18 Price v. Skylstead, 69 Mont. 453, 222 Pac. 1059 (1924).

19 Jackson State Bk. v. Laurel, 111 Neb. 744, 197 N. W. 389 (1924).

20 Critcher v. Ballard, 180 N. C. 111, 104 S. E. 134 (1920); Capitol Hill State Bk. v. Rawlins Nat'l Bk., 24 Wyo. 423, 160 Pac. 1171 (1916).

21 Simpson v. First Nat'l Bk., 94 Ore. 147, 185 P. 913 (1919).

22 Peterson v. Swanson, 176 Minn. 246, 223 N. W. 287 (1929).

23 Proctor v. Home Trust Co., 221 Mo. App. 577, 284 S. W. 156 (1926).

24 Bennett v. Stewart, 131 Okla. 235, 268 Pac. 286 (1928).

suit in his own name. As for the Illinois decisions on this matter we can do no more than cite the contrary views expressed by the Appellate Court in 1930. The first case of *Pfeil v. Loeb* [25] was one in which the note had been assigned and transferred by the payee to the plaintiff for a valuable consideration and the court held that title to the note was by virtue of Sec. 49 of the Illinois N. I. L. cited above vested in the plaintiff because of the expressed provision that when a note is transferred without the payee indorsing it "the transferor vests in the transferee such title as the transferor had, and that the statute requiring the transferee to bring such action in the name of the transferor applied only to non-negotiable choses in action, hence the note in question retained its original negotiability which would seem to be in accordance with Sec. 47 of the same act which states that "an instrument negotiable in its origin continues to be negotiable until it has been restrictively indorsed, or discharged by payment or otherwise." This would seem to be justifiable on the theory that though the note remains negotiable, the transferee would be subject to all defenses available against the transferor since he would not be considered as a holder in due course as the note is not complete or regular on its face.

Nevertheless in *Blanke v. Hemmel* [26] the court held contrary to the preceding case when it said that an originally negotiable instrument in the hands of a transferee from the payee without an indorsement is no longer a negotiable instrument, but rather a chose in action and must be enforced in the name of the assignor in view of the statute pertaining to non-negotiable choses in action.

Prefering the first decision rather than the second, it should be once again pointed out that even though the assignee brought suit in his own name, he acquires only the rights, which his assignor possessed. He is not a holder in due course,[27] and takes title subject to all defenses and prior equities which would be available had the notes remained in the hands of the assignor,[28] hence, to my mind, the necessity of suing in the name of the assignor appears to be a fiction of the mind which only entails more labor and impedes justice. With regard to the transferee's right to compel the indorsement of the transferor, it has generally been held that in the absence of an argument to the contrary, that the transferee has not only a right to the indorsement of his transferor, and that he may compel such indorsement by legal process, but he has a right to an unqualified indorsement,[29] and that the transferee's rights as a bona fide holder as of the date of the actual indorsement

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25 255 Ill. App. 484 (1930).

26 256 Ill. App. 251 (1930).

27 Wolf v. Brookfield, 248 Ill. App. 428 (1928).

28 Pierik v. Muller, 201 Ill. App. 108 (1915).

29 Reese v. Schenck, 106 Fla. 742, 144 So. 313 (1933); Lowish v. First Nat'l Bank, 31 Fed. (2d) 408 (1929).

when he may become a holder in due course.[30] But he will not be protected against those equities and defenses arising prior to the time of the actual indorsement.[31]

In closing it might be advisable to add, that though the note is unindorsed that even so every person negotiating an instrument by a delivery impliedly warrants that the instrument is genuine and in all respects that what it purports to be; that he has good title to it; that all prior parties had capacity to contract and that he has no knowledge of any fact which would impair the liability of the instrument or render it valueless, but said implied warranties extend in favor of no holder [32] and as a result the transferor remains personally liable to the transferee if the note is a forgery,[33] or a fraud. A transferor without endorsement can be held liable only on the implied warrants arising from such transfer,[34] and can never be held liable as an indorser.[35]

John F. Power.

THE LIABILITY OF AN ATTORNEY FOR THE EXAMINATION OF A CLIENT.—The purpose of this paper is to set out the liability of the attorney for the negligent examination of a client's title. The relationship between the attorney and his client is founded upon confidence and trust in the attorney by his client. This is true because of the type of the relationship that binds together the attorney and his client. When a client engages an attorney to examine a title for him, the client is not in a position to know when the attorney is fulfilling his job and thus serving the client's best interests. The courts have recognized the above fact and have generally held that the attorney holds a duty towards his client to use a reasonable amount of skill and diligence in the work he performs for his client. This duty the attorney owes his client is set out in the case of the *National Savings Bank of District of Columbia v. Ward.*[1] In this case, the plaintiff bank employed the defendant, who was an attorney, to examine the title of the possessor. The attorney assured the bank that the possessor had the title to the land. Upon this assurance by the attorney, the bank loaned to the possessor the sum of $3,500. It afterwards appeared that the possessor of the real estate was not possessed with the title. The plaintiff then

30 Island Pond Nat'l Bank v. LaCroix, 103 Vt. 282, 158 Atl. 684 (1932).
31 Folk v. Felder, 168 S. C. 103, 167 S. E. 27 (1933).
32 Lippman v. New Ga. Nat'l Bank, 249 N. Y. 307, 164 N. E. 108 (1928).
33 Hunt v. Sanders, 288 Mo. 337, 232 S. W. 456 (1921).
34 Moses v. Woodward, 103 Fla. 1256, 140 So. 651 (1932).
35 Prewitt v. Lloyd, Tex. Civ. App., 240 S. W. 1039 (1922).

1 National Savings Bank of District of Columbia v. Ward, 100 U. S. 195, 25 L. Ed. 621 (1879).

brought this action for damages. In the opinion of this case, Justice Clifford said: "When a person adopts the legal profession and assumes to exercise its duties in behalf of another for hire, he must be understood to promise to employ a reasonable degree of care and skill in the performance of such duties. If injury results to the client from want of such degree of care and skill the attorney may be held to respond in damages for the injury sustained by the client." The court in this instance followed the general rule that the attorney must exercise on behalf of his client a reasonable amount of care and skill in performance of the examination of the title put forth by the client. The aforementioned case is supported by the case of *Watson v. Calvert Building & Loan Association.*[2] This case followed the general rule that the attorney is held liable for the exercise of a reasonable amount of care and skill in the examination of the client's title. In the opinion of the court, a very interesting reason was set out for the holding of an attorney liable for such skill and diligence. The reason given was because of the high standing the legal profession has attained in the estimation of the public in general.

In the case of the *Citizens Loan Fund & Savings Association of Bloomington v. Friedly et. al.*[3] an interesting comparision was made between the legal and medical profession. The court in this instance held the attorney to the same rule of liability for the want of professional skill and diligence in practice as the doctors or those who follow the medical profession are held to. The court also forwarded the idea that the study of the practice of law is not merely an art but a science which can be achieved by constant study and research. This is a very interesting view; a view with which not many people regard the practice of law. In my estimation, this view is very correct. As in the medical profession, the study of law advances every day and unless the practicing attorney devotes himself to constant study and research, he will never be able to use the reasonable degree of skill and diligence that is required of him in his dealings with his client.

The next question that arises is in what amount of damages the attorney will be liable for such a negligent use of care and skill. The case of *Fabry et al. v. Jay*[4] is one of the most interesting ones on this point. In this action the attorney advised a client that the land contract, in which the client was contemplating taking an assignment, was a valid land contract and that the assignor had a valid title. Relying on this advice, the client accepted the assignment of the land contract and made a down payment of the purchase price to the extent of $1,500. After the assignment was completed a third party set up

2 Watson v. Calvert Building & Loan Ass'n, 91 Md. 25, 45 Atl. 879 (1900).

3 Citizens Loan Fund and Savings Ass'n of Bloomington v. Friedley, 123 Ind. 143, 23 N. E. 1075 (1890).

4 Fabry et al. v. Jay, 141 A. 780, 104 N. J. L. 617 (1928).

a valid title to the property which was the subject of the assignment. The client, the assignee of the land contract, sued the attorney for damages. The court held that the measure of damages would be the amount of the consideration paid for such an assignment. The leading case, which sets out the general rule for the measure of damages for which the attorney will be held liable, is the recent case of *Hill v. Cloud.*[5] In this case, a client consulted the attorney on the advisibility of taking up a lien upon a certain piece of real estate. In the examination of the title of this property, the attorney negligently overlooked an outstanding lien upon the real estate. This lien had been duly recorded so as to constitute a first lien. In reliance of the attorney's advice that the client's lien would have priority, the client took up the lien upon the property believing that his lien would have priority. The prior lien foreclosed upon the property and the property was sold to satisfy same. The client then brought this action against the attorney for negligently overlooking the recorded prior lien. The court held the measure of damages to be the value of the property lost to the plaintiff by the foreclosure of the first lien. In the case, the lien was for the value of the property, but the court made it clear that if the lien was for less than the amount the property was valued at, the measure of damages would be the loss of the lien. In other words, the measure of damages would be the amount of the lien. Judge Stephens, in his opinion on the case, said: "An attorney at law employed to examine the title of real estate, who negligently fails to report an existing outstanding lien upon the property is liable to his client for the actual damages sustained." This opinion raises the question as to whether the proof that the attorney was negligent in the exercise of the duty owed towards the client would be sufficient for the recovery of nominal damages. The courts are in conflict upon this point but the weight of authority is that the allegation will not be sufficient for the recovery on nominal damages.[6] The weight of authority is to the effect that in order to hold the attorney liable for damages the plaintiff must show actual damages. The mere allegation that the attorney was negligent will not be sufficient for the recovery of damages. The plaintiff must show that he has suffered actual damages.

Arthur A. May.

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5 Hill v. Cloud, 48 Ga. App. 506, 173 S. E. 198 (1934).

6 National Hollow Brake Beam Co. v. Blakewell et al., 227 Mo. 203, 123 S. W. 561 (1909).