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NOTES

CONTRACTS

ACCEPTANCE BY SILENCE.—Ordinarily speaking, an offeree need make no reply to offers and his silence and inaction cannot be interpreted as an assent to the offer, but relations between the parties or other circumstances may have been such as to have justified the offeror in expecting a reply, and therefore in assuming that silence is assent to his proposal. In *Hendrickson v. International Harvest Company* [1] the court said: "* * * defendant's salesman received an order from the plaintiff with the provision that it was subject to the defendant's approval. The order was forwarded to the defendant, and the latter retained it for some time without notifying the plaintiff of its approval or rejection. The plaintiff sued to recover damages for breach of contract. There was no evidence of previous dealings. The court charged the jury that the fact that the defendant kept the order without approving it or notifying the plaintiff of its disapproval would amount to an acceptance."

Court held charge correct. Not infrequently the existence of previous dealings is held to give rise to a duty on the part of the offeree to seasonably repudiate orders subject to his approval taken by his salesman, so as to prevent an acceptance by silence. This is on the ground that the conduct of the offeree in previous dealings justifies the offeror in understanding silence as assent, and if he so understands, a contract results. But the principal case presents what appears to be an original offer to one with whom there had been no previous relations, and consequently there are no circumstances which afford a basis for inferring assent to the offer from mere silence of the offeree.[2] In *Gould v. Cates Chair Company* [3] it was held that where the salesman

1 135 Atl. 702, 100 Vt. 161 (1927).
2 Metzler v. Harry Kaufman Co., 32 App. D. C. 439 (1909).
3 147 Ala. 629, 41 S. 675 (1906).

had taken an order subject to principal's silence for over a month did not amount to acceptance or estop the principal from urging non-acceptance even though he had accepted and filled a previous order.

Silence may be so deceptive that it may become necessary for one who receives beneficial services to speak in order to escape the consequence of a promise to pay for them. An illustration of this is: If A gives several lessons on the violin to B's child, intending to give the child a course of twenty lessons, and to charge B the price, and B, without having requested A to give this instruction, silently allows the lessons to be continued to their end, having good reason to know A's intention, B is bound to pay the price of the course. It is unimportant in this connection whether services are requested and the silence relates merely to an undertaking to pay for them, or whether the services are rendered without an introductory request but with the knowledge on the part of the person receiving them that they are rendered with the expectation of payment. The common implication in either case is that the services are to be paid for at their fair or equitable value, or at the offered price, if that is known to the offeree before he accepts them.[4]

Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction and the offeree in remaining silent and inactive intends to accept the offer, the offeree's silence and inaction operate as an acceptance.[5] Even where the offeror is not justified in comprehending the offeree's silence as an acceptance, a line of argument may be advanced to indicate that mere silence, though unaccompanied by any act, may amount to an acceptance if the offeror requested that means of indicating assent, and assent was intended by the offeree. When an offer is made to one who remains silent, there may be a variety of causes to which the silence is due. It is evident that, whatever may have been the offeree's state of mind, no contract can be made unless the offer stated that offeror would assume assent in case offeree made no reply. But if the offeror does so state, the offeree's silence is ambiguous, and may doubtless be shown not to have been assent.[6] Offeree certainly may with immunity remain silent if he chooses without becoming charged with a contract. An illustration of this is: If A offers to sell his boat to B which is already in B's possession for the sum of $500 saying to him, "I am sure that you will accept; you need not trouble to write me," and B makes no reply, but does not intend to accept, there is no contract. But it could be possible that he intended assent, and if this was the case, there is good reason for urging that a contract has been made.

[4] Aurenger v. Cochran, 225 Mass. 273, 114 N. E. 355 (1916); Tyson v. Thompson, 195 Ala. 230, 70 So. 649 (1916).

[5] Restatement of Contracts — Section 72 (1B).

[6] Peralta v. Escobar, 207 App. D. C. 611, 202 N. Y. S. 114 (1924).

Another rule, where offeree's silence and inaction operates as an acceptance, is where because of previous dealings or otherwise, the offeree has given the offeror reason to understand that the silence or inaction is intended by the offeree as a manifestation of assent, and the offeror does so understand.[7] Offeree may authorize the offeror to regard silence as an acceptance of his offer. Such authorization is not likely to be given in express terms, but the conduct of the offeree in previous dealings or in earlier states of the existing negotiation may have justified the offeror in comprehending silence as assent. If he does so understand, there is a contract. In *Hobbs v. Massasoit,*[8] the court said: "Goods had been sent four or five times before the occasion in question and had been accepted and paid for by the buyer. The testimony warranted the conclusion that there was a standing offer to the seller for all goods of a certain description which the seller should ship. The court held that a duty was imposed on the buyer to act in regard to goods sent by the seller, and that the buyer's silence coupled with the retention of the goods for more than a reasonable time might be found by the jury to warrant the seller in assuming that they were accepted."

It is for this reason that the silent retention of a statement of account between the parties may often indicate or show assent to the correctness of the statement and furnish the basis for an account stated.[9] Evidence of usage in a particular trade has been held admissible with other circumstances to prove assent a justifiable inference from silence.[10] A further extension of this principal is developing in the cases that, where an offeree solicits the offer, this, in the light of the relations of the parties or other surrounding circumstances may justify the offeror as a reasonable man in interpreting the offeree's silence after receiving the offer as acceptance.

In *Laredo National Bank v. Gordon*[11] the court said: "Where the offeree or his agent solicits and receives an offer and does not reject it within a reasonable time, his inaction may be treated as indicia of acceptance."

Our final rule is where the offeree exercises dominion over things which are offered to him, such exercise of dominion in the absence of other circumstances showing a contrary intention is an acceptance. If circumstances indicate that the exercise of dominion is tortious the offeror may at his option treat it as an acceptance, though the offeree manifests an intention not to accept.[12] Where the offeree takes or

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7 Restatement of Contracts — Section 72 (1B).

8 Hobbs v. Massasoit Whip Co., 158 Mass. 194, 33 N. E. 495 (1893).

9 Griffith v. Hicks, 150 Ark. 197, 233 S. W. 1086 (1921).

10 Rose Inn Corp. v. Nat. Union Fire Ins. Co., 258 N. Y. 51, 179 N. E. 256 (1930).

11 61 F. (2d) 906 (1932).

12 Restatement of Contracts — Section 72 (2).

retains possession of property which has been offered to him, such taking or retention may constitute an acceptance in the absence of other controlling circumstances. Thus, the offeree may come under a duty to return money or property in his possession belonging to the offeror, unless he accepts an offer for its acquisition.[13] In such a case, silence and failure to return the property amount to an assent to buy it. The most common illustration of this is in contracts or offer to, on approval. proval. The approval of the buyer is in terms made a condition precedent to transfer of the title. But, if the buyer retains the goods beyond a reasonable time, this of itself operates as an assent to take title.[14] Similarly, when property is sent to another though not ordered, but under such circumstances that the latter knows that payment is expected, the exercise of dominion over the property as the owner is in effect an assent to the offer of sale implied by sending of the property.[15] A frequent illustration of this principle is where newspapers or periodicals are sent to one who has not a subscription or one that has ceased.

In *Austin v. Burge*[16] the court said that one who received papers or periodicals was liable therefor, but it is necessary for the plaintiffs to prove that periodical was actually received by defendant. An earlier case[17] decided by an Iowa court held that proof of proper mailing, is however, evidence that it was received.

Where the offeree's exercise of dominion is also tortious, the offeror may treat it as an acceptance in spite of the offeree's manifestation of intention not to accept.[18] A common illustration of this principle is this situation: where A sends B a one-volume edition of Shakespeare with a letter saying "if you wish to buy this book, send me $6.50 within one week after receipt hereof, otherwise notify me and I will forward postage for its return." B examines the book and uses it or gives it to his wife, writing A at the same time that he has taken the book, but that it is worth only $5.00 and that he will pay no more. A may at his option treat B as a tort feasor or as contracting to pay $6.50. It should be noted that to come within the operation of this general principle the taking or exercise of dominion must be something more than mere temporary taking or handling for the purpose of inspection or to determine whether to accept.[19]

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13 Starbuck v. Fletcher Savings and Trust Co., 91 Ind. App. 695, 170 N. E. 863 (1930).

14 Wolf v. Monarch Refrigerating Co., 252 Ill. 491, 96 N. W. 1063 (1911); Turner v. Muskegon Machine Co., 97 Mich. 166, 56 N. W. 356 (1893).

15 Haris v. Amoskeog Lum. Co., 97 Ga. 465, 25 S. E. 519 (1895); Forst v. Harris, 177 Mass. 72, 58 N. E. 174 (1900).

16 156 Mo. App. 286, 137 S. W. 618 (1918).

17 103 Iowa 681, 72 N. W. 776 (1897).

18 Restatement of Contracts — Section 72 (2).

19 Williston on Contracts, Vol. 1.

A CHAPTER IN THE DEVELOPMENT OF THE TREE OF LIBERTY.—The American tree of liberty, sown in the soil of God's creative purpose and rooted therein by the Declaration of Independence [1] has flourished through the centuries, against the ravages of time and man, against fair wind and foul and stands today, straight and symmetrical offering shade and shelter beneath its friendly boughs to all who love freedom.

The history of the growth of this forest giant is full of romance and red blooded adventure. One chapter of particular interest was written very early in the history of its growth. At that time the seed of freedom had been sown, the roots had sprouted and formed and the trunks had emerged into God's sunlight and vertical growth began. By the year 1781 this sapling showed signs of being weak and puny, it leaned with the winds that blew against it. By the year 1789 it became apparent that the tree in order to be preserved would have to be bolstered up and nursed along by the efforts of man. Some men of foresight saw the great tree we enjoy today, others could see only the difficulties of straightening out a crooked young tree and thought it not worth their efforts and commended it to die. It is of this chapter, the story of the near death of a tree that I treat in what follows:

The joyous peals of the Liberty Bell, which had been heard for the first time, were still ringing in men's ears when many of the various states formed their constitutions. The difficult task that faced the fathers of our nation was to unite these constitutions into one. The problem was a tremendous one. The populace was drunk with the new taste of liberty and the enemy stood by ever wary and ever threatening. The job was made even more difficult due to the fact that the yoke of British domination had just been lifted from the shoulders of the states and they were of no mind to put another in its stead. It seemed a hopeless situation when unity depended upon the states conceding some of their new found liberty to a central government when the bad taste of an oppressor was still in their mouths. Yet if the break from England in 1776 was to mean anything at all unity had somehow to be realized. A committee led by three great men of courage and foresight, Jefferson, Adams and Franklin rose masters to the occasion. Through the efforts of these men, union of a kind was effected in 1781 by the framing of the *"Articles of Confederation and Perpetual Union Between the States."*

The Confederation was the sapling that was growing so crooked, weak and puny in the early history of the Tree of Liberty. It was the trunk that men had to straighten out and nourish to develop the tree we know today.

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[1] Clarence E. Manion, Lessons in Liberty.

The critics of the Confederation are as myriad as the faults embodied in its preamble through its thirteen articles. But in spite of its multitude of faults the Articles of Confederation deserve a high place in the annals of American history, if for no other reason than that it first spoke out those magical words, "The United States of America." The Articles played a far greater role, however, for they united the states when unity was essential to existence and, even though the union could not be maintained, it did form the all-important stepping stone to a "more perfect union."

At the very outset it should be pointed out that the state governments were much better organized and more efficient than the national government under the Articles of Confederation. This was not the result of an accident or of blundering; rather, it was the result of deliberate purpose. The simple truth of the matter was that the men who drew up the Articles of Confederation did not wish to establish a strong national government. All they sought to accomplish was to create a constitutional government to act as the agent of the states in carrying out certain common purposes. The states, deriving their authority directly from the people, were to remain supreme.[2]

The very intention of the framers of the Articles of Confederation doomed it then to an early death. The fact that the states were to remain supreme or sovereign was the false premise on which the Confederation was based. Articles two and three declared that each state was to retain "its sovereignty, freedom and independence" as well as "every power, jurisdiction and right" not "expressly delegated" to the Congress of the United States. The word "sovereignty" means or implies independence, self-sufficiency and non-subordination. A "sovereign" state by its very nature takes orders from nobody but its own constituency.[3] The league of friendship was thus formed, and it was to take a period of near chaos—what John Fiske called "The Critical Period" to force the country to accept the idea of a strong central government.[4]

The form of government provided for by the Articles of Confederation was extremely simple. Each state was to send one to seven delegates to make up the one branch government. The delegates were to be elected annually in such manner as the legislature of each state directed. The interesting thing is that these delegates were to be maintained by the states they represented. This was a great stumbling block for the success of a strong national government. Manifestly a delegate dependent upon his state for salary would be much more

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2 American Constitutional History — Eriksson & Rowe, p. 157. W. W. Norton & Co., 1933.

3 Clarence E. Manion — Notre Dame Lawyer, vol. 20, 1-10.

4 Eriksson & Rowe — American Constitutional History, p. 157.

state minded in the central government than he would be if paid by the national government.

This deficiency points out another and even greater shortcoming. The national government could not pay the salaries of delegates for, under the authority of the Confederation, the Congress had no power to tax. It was provided that the required money be obtained by making requisitions on the states "in proportion to the value of all land within each state, granted to or surveyed for any person." Each state was to raise its proportion of the national expenses through taxes levied by its own legislature. While all this sounded well, in practice it failed miserably. The Congress had not the power to enforce the Articles and, as a result, the states paid only what they wanted and often that was nothing at all.

The thirteenth article was formally stated that "every state abide by the determinations of the United States in Congress assembled on all questions which by this Confederation are submitted to them" and further that "the articles of this Confederation shall be inviolably observed by every state." The article was pregnant with meaning and force and good intention, but again in actual practice it was sterile. The individual states paid little or no attention to Congress or the Articles.

The make-up of the Confederation was such that foreign and commercial treaties were most difficult if not impossible. Even the tact and diplomacy of such men as Thomas Jefferson and John Adams was not enough to overcome the handicaps the Articles of Confederation heaped upon them. In 1784 Jefferson was a minister to France and succeeded in negotiating some trade agreements with that country. Between 1785 and 1788 John Adams made successive but futile attempts to make commercial agreements with England. The objection Great Britain made was, needless to say, louder than most of the other countries, but, nevertheless, it typified the feeling of all foreign countries. Great Britain very logically pointed out that it would be useless to make a commercial treaty with the United States as long as the thirteen states had the power to impose trade restrictions as they saw fit. Such was the actual case; the power was in the "sovereign" states to impose taxes and duties as they saw fit. No such power was forfeited by the states and vested in the central government. Despite this, it was the duty of the central government in the interests of "the general welfare" to promote export and import trade.

Disputes arose between the individual states, and the Confederate government was unable to cope with them. Article nine of the Articles of Confederation expressly stipulated that "The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever." Authoritative though this article sounded, it carried

little or no effect for the reason before stated, that the national or central government did not have the power or authority to enforce it. The states, instead of cooperating with each other, were inclined to treat their neighbors like foreign countries. It was a common occurrence for states to impose tariffs and tonnage duties on the commerce of other states. This only further serves to illustrate the sovereign power of the states relative to the very limited powers of the Congress.

The state of the nation under the Confederation can well be illustrated by reference to Shay's Rebellion. The financial condition of the central government was bad, but the situation in the individual states was worse. The states coined their own money, inflation was in full swing, the financial arrangement was most precarious. In Massachusetts in 1786 the debtor class, under the leadership of Daniel Shay rose up against the paper money advocates. The debtor class won out, but the outcome of the Shay Rebellion was unimportant. The real significance of the affair lay in the spirit it so violently displayed. The most hesitating Conservatives saw the handwriting on the wall, the inadequacy of the Confederation and the need for a quick change in government. "There are combustibles in every State," wrote Washington in 1786, "which a spark might set fire to." [5]

All clear-thinking men of that year saw the problem and challenge loom large before them. The trouble and confusion was manifestly caused by the failure of the states to abide by their obligations. The problem was to find a method, if union was to subsist at all, for overcoming the difficulty, to find, therefore, some arrangement, some scheme or plan of organization wherein there would be reasonable assurance that the states would fulfill their obligations and play their part under established articles of union. Certain powers had to be granted Congress from the pool of powers held by the states. Clear heads and minds were not wanting in the year of gloom, and late in the year the Annapolis convention agreed "to meet at Philadelphia on the second Monday in May next to take into consideration the situation of the United States to devise such further provisions as shall appear to them necessary to render the constitution of the federal government adequate to the exigencies of the Union." [6]

The convention in May, 1787 was a most memorable one. Under the able leadership of George Washington the convention got under way. The system of debate was used and many plans were discussed for a national government. All reports of the convention prominently report the names of Benjamin Franklin of Pennsylvania, James Madison of Virginia, Alexander Hamilton of New York, John Dickinson of Delaware, to name but a few. The convention went through stages

[5] The Confederation and The Constitution — A. C. McLaughlin, Harper Brothers, p. 166.

[6] A Constitutional History of the U. S., A. C. McLaughlin, p. 147.

of debate, deadlock, and compromise. These great leaders were all anxious to represent and protect the interests of their own respective states. Many concessions had to be made before an adequately powerful national government could be formed. Finally, however, a compromise was reached, and on September 8th a committee of five was appointed to draft the new Constitution. The five were William Samuel Johnson, Rufus King, James Madison, Alexander Hamilton and Governeur Morris. The last named is credited with the final wording of the Constitution.[7]

Monday, September 16, 1787, the convention delegates signed the Constitution. On September 28, 1787, the Congress of the Confederation "lit its own funeral pyre" [8] by unanimously adopting the Constitution.

The first three words in the Preamble of the Constitution, "We the people," cured, in one sweep, many of the faults of the Articles of Confederation. Here was a constitution of individuals, not a confederation of sovereign states. No "league of friendship" was the Constitution. Here was the reason why the Constitution succeeded where the confederation failed.

The Constitution as finally adopted consisted of a preamble and seven articles. The very first article labelled "Legislature Department" cured one ill of the confederation. Congress was to be of two branches rather than one. The delegates now would be paid by the national government, and their interest would be national and not merely for their state. Section VIII of Article I outlined the powers of Congress. Notable among the powers was the power "to lay and collect taxes." The states ceded many of their powers, these powers left the state forever to become powers in the hands of the Congress. The states lost their sovereignty. The framers of the Constitution had well in mind the shortcomings of the Confederation, and in a very brilliant fashion they found and drew up the panacea.

This then is the story behind one of the early chapters in the growth of the Tree of Liberty; the story of how men who loved liberty reshaped the trunk of the young tree that was crippled under the infirmities of the Articles of Confederation; the story of men who, with loving care, patience and diligence worked tirelessly on the trunk until, under their guidance, it became well and strong as the Constitution of the United States. These men, of whom Franklin and Madison were but two, straightened the tree on its roots and started its growth upward and outward. The fruits of their labors we today enjoy.

William C. Malone.

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7 Eriksson and Rowe, at 205.

8 A Constitutional History of the U. S. — A. C. McLaughlin, p. 198, Appleton-Century Company.

AN EXCEPTION TO THE GENERAL RULE OF AVOIDABLE CONSEQUENCES.—The general rule of avoidable consequences is that one who has been injured so as to have an action in tort or for breach of contract must use reasonable efforts to keep the loss down. Unless the injured party does use such reasonable efforts he is said to be under a legal disability to recover for the enhanced damages that he might have prevented, and the defendant has immunity against liability for them. This rule should be distinguished from the general rule of contributory negligence in tort cases, which is a bar to the recovery of any damages at all.[1]

The rule of avoidable consequences applies (a) to breach of contract; (b) to injury to property; and (c) to injury to persons. Thus in the event of a breach of contract by a school board the wronged teacher must take a similar position in the vicinity if there is an opening or be held under a legal disability to recover for the damages she could have avoided by so doing.[2] A Massachusetts court ruled that injury to a fence must be repaired to avoid loss of livestock,[3] and this is the case even if the tort is intentional. Finally, "It is uniformly held to be the duty of one who has suffered a personal injury by the negligence of another to exercise due care to mitigate the damages by having his injury treated by a physician or surgeon, if the injury is such as reasonably to require medical treatment or a surgical operation."[4] But a discharged employee does not have to take a more menial position to lessen the damage,[5] nor does a buyer have to pay cash for goods which he contracted for on credit to do the same.[6] That would be unreasonable.

The question of avoidable consequences arises in the relation of landlord and tenant when the tenant abandons the leased premises before the end of the term of the lease and declines to pay further rent. The question is, must the landlord reenter the abandoned property and try to rent it to another tenant and so avoid as far as he can the consequences of the tenant's breach of the agreement? There are three Indiana cases on this subject, which will be examined in order.

In the first case,[7] the City of Evansville leased a wharf along the Ohio river to a coal company for a term of one year. The rent was payable monthly. The company abandoned the wharf after using it for about four months and paying three months' rent. For three short periods during the unexpired term the city allowed barges to use the

1 25 C. J. S. 499.
2 Abrams v. Jackson County, 230 Ky. 151 (1929).
3 Loker v. Damon, 17 Pick. (Mass.) 284 (1835).
4 Lane v. Southern Ry., 192 N. C. 287 (1926).
5 Hussey v. Holloway et al., 217 Mass. 100 (1914).
6 Coppola v. Marden, Orth and Hasting Co., 282 Ill. 281 (1917).
7 Aberdeen Coal Co. v. City of Evansville, 14 Ind. App. 621 (1896).

wharf temporarily and collected wharf charges. The court held that these acts did not confer any immunity on the tenant from the liability to pay rent, though the amount received by the city as wharf charges did entitle the tenant to a credit for the amount so received by the city.

In the second case,[8] the tenant abandoned the premises, and the landlady sued for the rent. The defendants asked the trial court to instruct the jury that it was the duty of the plaintiff to take possession, and make the premises as remunerative as possible in order to mitigate the loss accruing from the defendants' breach. The trial court refused the instruction and was upheld on appeal. The appellate court said: "It cannot be said that it was any part of her duty to take possession, try to rent it, and make something out of it after the appellant had abandoned it."

In the third case,[9] there was an abandonment of the leased premises by an assignee of the original tenant when the lease had two more years to run. Two months later the building was leased to another tenant at an increased rental, partly due to the fact that repairs made by the original tenant greatly improved the building and enhanced its value. The tenant was held liable for the rent of the building during the two months it was vacant as well as for the damage caused by certain structural changes made to the building by the assignee.

Therefore the law of damages in Indiana does not require a landlord to do anything to avoid the consequences of a tenant's wrongful abandonment of the leased premises. But if part of the consequences are avoided, the tenant is entitled to credit for at least that part. Whether he is liable for damages accruing after a reletting of the premises for a definite term at a smaller rental cannot be gathered from the three decisions.

A Connecticut court in 1909 ruled directly on whether a landlord could reenter and relet without waiving any rights accruing under the abandoned lease.[10] ". . . it is true that he might so relet them without prejudice to his claim that there had been no surrender of the premises, yet he is not bound to so relet them. . . . He could treat the tenant as still occupying under the lease and look to him for the rent."

In the case of *Abraham v. Gehrens*[11] the tenant had a lease for a year, and held over for four months paying an increased rental. By statute in Kentucky, if a tenant holds over for more than three months, the term is extended for an additional year, both the landlord and the tenant being bound. The tenant abandoned the premises at the end

8 Patterson et al. v. Emerich, 21 Ind. App. 614 (1899).

9 Trick v. Eckhouse, 82 Ind. App. 196 (1924).

10 Boardman Realty v. Carlin, 82 Conn. 413 (1909).

11 Abraham v. Gehrens, 205 Ky. 289 (1924).

of the four months, and at the end of the term the landlord brought suit for the eight months' rent unpaid since abandonment. From a peremptory instruction of a verdict for the landlord the tenant appealed. In denying the appeal, the Kentucky Court of Appeals said: "Appellant contends that after he vacated the premises appellee should have used diligence to procure another tenant, and that his amended answer pleading appellee's failure so to do, offered at the close of testimony, was wrongfully refused by the court. To this we cannot agree. . . . no legal duty devolved upon appellee to supply a tenant for the premises vacated by appellant."

In other words, this question and ruling was exactly the same as in the second Indiana case considered. These cases show that the law of damages as to avoidable consequences after the tenant abandons the premises and refuses to pay rent is an exception to the general rule that the party injured must use reasonable efforts to keep the loss down.

It was not until 1923 that a court in Iowa ruled that a landlord had the duty to let the property at the best obtainable rent.[12] A small minority of the cases since then have tended to follow this new rule, partly perhaps to cut down claims against insolvent tenants during the depression following 1929.[13] But where a landlord does reenter after abandonment, it is the general rule that it is his duty to rent if possible to a suitable tenant,[14] and if he acts in good faith, he is the sole judge of who is a proper tenant.[15]

Joseph F. Rudd.

AUCTION SALE—WITHOUT RESERVE.—One of the interesting questions concerning auction sales from a legal standpoint is the lack of previous legal and judicial support given to the general statutory requirements in the various states that a person selling goods at an auction sale "without reserve" may not withdraw the goods after announcing such terms, nor shall the seller or agent for the seller bid on his own goods.

The typical case under the statute is where "A" advertises a sale of his household furniture without reserve. An article is put up for sale at the auction and "B" is the highest bona fide bidder; but "A," dissatisfied with the bidding either accepts a higher fictitious bid from an agent employed for the purpose or openly withdraws the article from sale. In either case "A" is bound by law to "B" to sell to "B" the

12 Roberts v. Watson, 196 Iowa 816 (1923).
13 Patton v. Milwaukee Commercial Bank, 222 Wis. 167 (1936).
14 Re: Mulling Clothing Co., 252 Fed. 667 (1918).
15 Edmunds v. Rust and R. Drug Co., 191 Mass. 123 (1906).

article on which he was the highest bona fide bidder. The last statement of conclusion has been given force by statute in Indiana and several states.

The cases involving the above set of facts fall into three categories. First, is the English case which gives support to the theory that a collateral contract is impliedly formed with the highest bona fide bidder by the seller. Secondly, are cases that support the theory of direct sale between the bidder and the seller, with the seller making the offer and the bidder by bidding gives an acceptance. Thirdly, are the cases which ignore the implied contract theory, and in their decisions, by reasoning, deny the direct sale theory on the basis that the bidder is the person making the offer and the acceptance is made by the seller.

In the following discussion I will limit myself to the case where goods are withdrawn before sale because the cases and statutes today are in accord as to the effect that the seller can not bid at his own auction nor have an agent to do so for him. The old English courts of equity, however, used to let the seller protect his interest by using one agent or puffer, even in a case where it was announcd that the auction sale was to be without reserve.[1]

The Indiana Statute which follows the Uniform Sales Act, Para. 21 is not certain on what the relationship and obligations are between seller and bidder in an auction sale without reserve. The pertinent Statute is quoted: [2] "A sale by auction is complete when auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made, any bidder may retract his bid; and the auctioneer may withdraw the goods from sale unless the auction has been announced to be without reserve." The right of action is arbitrarily given to the bidder if the seller withdraws the goods. The theory behind the law would seem to be that a direct sale had been made. Full emphasis is not given to this doctrine in view of the fact that the bidder is permitted to revoke his bid up to the time that the hammer falls. This would preclude the mutuality which is necessary in a contractual retationship.

There are several questions which it might be well to keep in mind as we check through the cases on the subject to understand the strain put on the legal conception of a contract by the statute.

What is the nature of the proceedings in an auction sale from a legal viewpoint? Why do most of the courts hold that there is not a contract between the bidder and seller before the hammer falls, thus permitting the seller to withdraw his goods from sale? What is the basis on which some courts find that a contract does exist? If a contract is formed, when is such contract complete so as to make it legally

1 Thornett v. Haines, 15 Mees. & W. 367 (1846).
2 Burns Ind. Statutes 58-205 (1933).

binding on both the parties? Finally, if a contract is formed, why is there necessity of statutory regulation?

On analyzing the above questions first it is well to remember that the seller of the goods at the auction sale is the individual who sought the sale and the disposition of his goods in this manner for what ever benefit or loss that may accrue as a result of his choice, and secondly economic conditions of the country, social philosophy, and the development and stability of the morals of the people are influences on the courts and the resulting law in their decisions.

An auction sale is a competitive sale by public outcry. Publicity and competition between bidders are essential elements. Supposedly, one of the results of an auction sale is a higher price for the goods sold. The announcement that a public auction is to be held is merely a declaration to hold an auction at which bids will be received.[3] The controversy as to the existence of a contract is centered in the proposition: Is the bid of the bidder an offer to be accepted by the seller, or is the bid of the bidder an acceptance of the offer of the seller to sell without reserve?

The leading case on the theory that an implied contract arose between the seller and the highest bidder is *Warlow v. Harrison*,[4] where the court in its decision said, "It seems to us that the highest bona fide bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think the auctioneer who puts the property up for sale upon such a condition pledges himself that the sale shall be without reserve; or in other words, contracts that it shall be so; and that this contract is made with the highest bona fide bidder and, in case of a breach of it, that the bidder has a right of action against the auctioneer." It is important to note that while the above dicta was included in the opinion of the court in giving its decision, it was not the determinate factor in the case. In otherwords, where a sale is announced without reserve a collateral unilateral contract not within the statute of frauds is formed by making the highest bid, such bid being what was bargained for. It seems questionable whether the seller gets anything extra from the highest bidder in return for the lack of any reservation on the seller's part. There may be an element of a higher selling price on the article, but it would be very difficult and probably unascertainable as to how much this is due to the stipulation of without reserve. Competition among the bidders sets the price. Williston comments—"such bid being what was sought, a collateral contract is somewhat artificially created by the court in order to work a just result." [5]

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3 Goshen v. Kern, 63 Ind. 468 (1875).

4 Warlow v. Harrison, 1 El. and El. 309 (1859).

5 Williston, (2d) sec. p. 297.

The court in the *Warlow v. Harrison* case speculated with the idea that there might have been a direct sale. Thus the bid of the bidder was actually an acceptance of the offer of the seller to sell without reserve. The bidder at once became a conditional purchaser, subject to no one bidding higher. Langdell says that the correct view is, "That the seller makes the offer when the article is put up,—namely, to sell it to the highest bidder, and that when a bid is made there is an actual sale, if no one else shall bid higher." [6] The outstanding case in this country which lends support to the theory laid down in *Warlow v. Harrison* [7] is *Anderson v. Wisconsin Central R. R. Co.*[8] Reduced to its lowest terms this decision said that the offer to sell is made in the advertisement of intention to sell at auction, and that the contract is completed by the acceptance of that offer by the bidder. With regard to the advertisement the majority of the cases support *Harris v. Nickerson*,[9] "The nature of the advertisement was considered, and it was held that it should be construed as a mere declaration of intention, which did not amount to a contract with any one who might act upon it, or constitute a warranty that the articles advertised would be offered for sale."

In *Payne v. Cabe* [10] the court said, "that a bidding at an auction, instead of being a conditional purchase, is a mere offer, that the auctioneer is the agent of the vendor, that the assent of both parties is necessary to the contract, that this assent is signified by knocking down the hammer, and that till then either party may retract.[11] This is quite inconsistent with the notion of a conditional purchase by a bidding, and with the notion of there being any personal promise by the auctioneer to the bidder that the bidding of an intending purchaser shall absolutely be accepted by the vendor. The vendor himself and the bidder are respectively free till the hammer knocks down the goods. Mutuality is an essential element of a contract. One party thereto cannot be bound and the other remain free. If the announcement of an auction is an offer to sell to the highest good-faith bidder, and the contract is closed when the bid is made, both the vendor and the vendee must be bound thereby. But it is conceded by all the authorities that the bidder may withdraw his bid at any time before the hammer falls, and this means necessarily that the bid is a mere offer which is not binding until accepted.[11] Thus an announcement that a person will

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6 Summary of the Law of Contracts, p. 24.

7 Warlow v. Harrison, 1 El. and El. 309 (1859).

8 107 Minn. 296, 120 N. W. 39 (1909).

9 Harris v. Nickerson, 8 Q. B. 286 (1876).

10 Payne v. Cave, 3 T. R. 148 (1789).

11 Grotenkemper v. Achtermeyer, 74 Ky. (11 Bush.) 222 (1875); Hibernia Sav. & Loan Soc. v. Behnke, 121 Cal. 339, 53 Pac. 812 (1898); Fisher v. Seltzer, 23 Pa. 308, 62 Am. Dec. 335 (1854); Dunham v. Hartman, 153 Mo. 625, 77 Am. St. Rep. 741, 55 S. W. 233 (1900).

sell his property at public auction to the highest bidder is a mere declaration of intention to hold an auction at which bids will be received; that a bid is an offer which is accepted when the hammer falls; and until the acceptance of the bid is signified in some manner neither party assumes any legal obligation to the other. At any time before the highest bid is accepted, the bidder may withdraw his offer to purchase, or the auctioneer his offer to sell goods.

In *McPherson Bros. Co. v. Okanogan County*,[12] a county advertised property for sale at public auction to the highest and best bidder. The complaint alleged that the plaintiff was the highest and best bidder, and that the defendant refused to knock down the property to it, and demanded that the defendant be required to convey the property to it. A demurrer to the complaint was sustained. On the appeal the appellant contended that, since its bid for the property when it was offered for sale was the highest and best bid, it was the duty of the auctioneer to strike off the property to it, and that the failure so to do, could not affect its right to have the sale completed. The court said, "Measured by the test thought sufficient in these cases, the offer to sell the property, and a bid therefor by the appellant, did not create a contract of sale between the county and the appellant before the hammer fell. There is no contract capable of being specifically performed." It was also held that the officer making sale was clothed with a certain discretion as to refusing a bid, when in his judgement it was not made in good faith, or was made in such a sum as would amount to a virtual sacrifice of the property. To the same effect is *Warehime v. Graf*[13] which held that the contract was not complete until the property was knocked down to the highest bidder.

The application to the above case of the principle laid down in the *Payne v. Cave*[14] case is to apply a principle to a case which is not altogether the same as to the facts. The most important difference is that in the *Payne v. Cave* case the goods were not put up in the auction sale on the terms "without reserve." The announcement by the seller that he was going to sell "without reserve" would indicate that he intended to sell under different conditions than if he had not made such an announcement and intended to let the goods be sold at an auction in the normal way with regular rules applying. While the advertisement of an auction without specific stipulations and the announcements at an auction by the auctioneer without specific stipulations would leave the bids at an auction as mere offers, I feel that the limitations attached by the seller himself have changed his announcements from being more than mere invitations to that of being offers. The determination of whether an act is an offer largely depends upon

12 45 Wash. 285, 88 Pac. 199 (1907).
13 83 Md. 98, 34 Atl. 364 (1896).
14 Payne v. Cave, 3 T. R. 148 (1789).

the viewpoint of the person to whom the act is addressed, acting reasonably. Certainly, the obvious meaning of the words "without reserve" would seem to be that if a person was the highest bidder that he would therefore be entitled to the goods. The fact that the cases have held that the contract does not become complete until the hammer falls where there have been no specific terms made in the announcement does not necessarily mean that such should be the case when such terms as "without reserve" are made a condition in the auction sale. While it is pointed out that under such interpretation, the amount of consideration in the highest bid is small. The fact that there is some is sufficient. In these cases the seller gets all that is asked for. Because of the uncertainty in the statute and the Uniform Sales Act, Section 21, the rule that the fall of the hammer controls in the making of the contract has been applied to both types of auction sales. Thus we have the unique situation of the seller being bound but not the bidder in an auction sale "without reserve."

I am of the opinion that a seller could withdraw the goods if no bids had been made on the particular article withdrawn. The goods are not up for sale until the bidding on the particular article has begun. Each article at a sale constitutes a separate sale, unless specified otherwise. Technically, the withholding of an article is not an actual withdrawal because the article had not been put up.

The statute as it is today does accomplish one desirable result in that it forcefully binds the seller to his own terms. The legislature may have thought it sound that persons dealing with the general public should be held to their own terms in view of the fact that there is, at least, the opportunity for them to make a greater profit in this type of sale.

I think the same desirable good for the public could be accomplished and ambiguous statutes could be avoided if the statutes were re-drafted to read, "At an auction, the auctioneer merely invites offers from successive bidders unless by announcing that the sale is 'without reserve' or by other means, he indicates that he is making an offer to sell at any price bid by the highest bidder."

Leonard D. Bodkin.

CONTRACTUAL RIGHTS OF THIRD PARTY BENEFICIARIES AS FOUND IN MONTANA LAW.—An examination of the law in any particular state or even in the federal government or the United States as a whole demands that an understanding of the Common Law rules on the point in question be known. This is true because the legal system in this country is but a continuation of that parent body—the common law system of early England.

To understand the rulings in the state of Montana on the contractual rights of third party beneficiaries, a knowledge of the common law on this point must be had. The courts that rely on the common law alone have decided in numerous decisions that a beneficiary to a contract has no legal rights arising from that contract.[1] Following from this general rule, it is apparent that third parties to a contract are not entitled to bring suit for a breach of that contract. To avoid definite injustices to be wrought, the common law rule was often twisted to serve the third party by the use of a fictitious identification of a child with the parent [2] in order that the child might recover on a contract made for its benefit, or by the fiction of a trust.[3] Irrespective of these circuitous approaches to the problem, the established rule is that only the parties to the contract will be permitted to bring an action arising from an alleged breach of that contract by the other party.

An examination of the Montana statutes and court decisions with respect to the rights of a third party beneficiary to a contract will be the aim of this work. The treatment will, of necessity, cover the three specific classes of beneficiaries namely: the creditor beneficiary, the donee beneficiary, and the incidental beneficiary. The legal rights of each one arising from a contract to which the beneficiary is not one of the principals will be examined.

Before a detailed discussion can be undertaken, a definition of the terms "third persons" or "third parties" must be known. As used in the Montana codes the words "include all who are not parties to the obligation or transaction concerning which the phrase is used." [4] Person or party ordinarily refers to a living human being—a natural person, but the definition includes corporations as well as natural persons.[5] These third persons in a case revolving upon a contract will be a creditor, one to whom some gift, advantage, or benefit is to be tendered, or one who is aided by a contract although such aid is but incidental and not a part or a concern of the contract itself.

In the field of incidental beneficiaries, it is held that to entitle a person to recover when not a party to the contract under which suit is brought, the contract must have been made expressly for his benefit. The fact that it might incidentally benefit him is insufficient to bring it within the terms of the law.[6] The statute referred to as being the governing law in all cases concerning the rights of a beneficiary is to the effect that: "a contract, made expressly for the benefit of a

1 Tweedle v. Atkinson, 1 B & S 393, 121 Eng. Reprint 762 (1861).
2 Dutton v. Poole, 2 Lev. 210, 83 Eng. Reprint 523 (1677).
3 Tomlinson v. Gill, 1 Ambl. 330, 27 Eng. Reprint 221 (1756).
4 Revised Codes of Montana, Vol. 1 Sec. 16 (1935).
5 In re Beck's Estate, 44 Mont. 561, 121 Pac. 784 (1912).
6 Martin v. American Surety Co., et al., 74 Mont. 43, 238 Pac. 877 (1925).

third person, may be enforced by him at any time before the parties thereto rescind it." [7] Having eliminated the class of those who are but incidentally affected, the contractual rights of the donee and the creditor beneficiaries will next be examined.

With regard to the creditor beneficiary, it has been held that such a person may enforce his rights as provided by the statute just cited. The contract must, however, be made expressly for the benefit of this third person and be such that the promisor undertakes to pay or to discharge some debt or duty which the promisee owes to the third person.[8] The contract to be enforceable must itself be a valid one and cannot construe the statute to include executory contracts that are to be carried out without consideration being passed.[9] The question of consideration also arises when a surety is requested to make payment and has been sufficiently answered to the effect that a bond to be enforceable must make express mention of persons to be benefited.[10]

Donees and creditor beneficiaries have been placed in the same class and have been governed by the same express rules under Montana law. Just as the statute makes no concrete distinction between them, so do the courts apply the statutes to each in the same manner and form. Either one, to enter a complaint must show that the contract which was made between two other parties was expressly made for the donee's or for the creditor's benefit or for the benefit of the class of persons to which he belongs.[11] No one can be considered a beneficiary nor have any legal rights as such in the event that a party to the contract dies and suit is brought to force his successors to pay since the contract can be binding upon no one but the contracting parties.[12]

Similarly third party beneficiaries could not be liable to a breach of contract by one of the principals or both of them even though he does have the right to sue for enforcement of the contract when breached. The important question in the interpretation and the application of the law as regards the rights of a third party to a contract is to determine if that party indeed be in the class of a donee or a creditor beneficiary.[13]

Strangers to the contract, and these can very easily include a third party beneficiary, may not interfere with the performance of the con-

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7 Conley v. United States Fidelity, Etc. Co., 98 Mont. 31, 37 Pac. (2d) 565 (1934); Revised Codes of Montana, Vol. 3, Sec. 7472 (1935).

8 Tatem v. Eglanol Mining Co., 45 Mont. 367, 123 Pac. 28 (1912).

9 McDonald v. American Nat. Bank, 25 Mont. 456, 65 Pac. 896 (1901).

10 Gary Hay and Grain Co., Inc. v. Carlson, 79 Mont. 111, 255 Pac. 722 (1927).

11 McKeever, et al. v. Oregon Mtg. Co., Ltd., 60 Mont. 270, 198 Pac. 752 (1921).

12 Thompson v. Lincoln Nat. Life Ins. Co., 114 Mont. 421, 138 Pac. (2d) 951 (1943).

13 Cedar Creek Oil and Gas Co. v. Archer, 112 Mont. 477, 117 Pac. (2d) 265 (1941).

tract; but no liability can be imposed upon these strangers by the parties to the contract.[14] If for any reason, a third party beneficiary or any other party not a principal to the contract induces one of the principals to break his contract by any means whatsoever, that party can be held responsible for the damages to the other principal.[15]

From this examination of the statutory provisions and the court decisions that elucidate these statutes, it can be seen that a third party beneficiary, be he donee or creditor, can enforce his contractual rights at anytime before such contract is rescinded by the main parties to it. On the other hand, it has been found that such beneficiary incurs no legal obligation under the contract from which he is to benefit. That is the law as it operates for all persons within the jurisdiction of the Montana courts and under Montana law.

James D. Sullivan.

INSANITY IN CRIMINAL ACTIONS.—"Insanity is a form of mental incapacity which may be urged as a defense, as existing at the time of arraignment or trial, to prevent going to trial; which may be urged, as existing at the time the alleged crime was committed, in order to prevent a finding of criminal liability therefor; which may be urged, as existing at the time of sentencing, in order to prevent the imposition of sentence." [1]

"Various tests of insanity have been devised by medical doctors. Of these the so-called 'right and wrong' test and the 'irresistible impulse' test have been most generally adopted. In some states the issue of insanity is submitted to the jury without a definition. A number of tests have been used and later abandoned, and a number have been proposed and rejected." [2] Some of older tests were the "Wild Beast" tests, the "counting twenty-pence test," as great understanding, as ordinarily a child of fourteen years hath"; the disability of distinguishing between "good and evil," and finally the "right and wrong" test laid down in McNaughten's case, decided in England in 1843.

In *People v. Schmidt*,[3] Justice Cardozo stated that, "The real point of the inquiry was whether a defendant who knew that the act was wrong was excused because he had an insane belief that either personal or public good would be promoted by the deed. There was no thought of any conflict between the commands of law and morals."

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14 Burden v. Elling State Bank, 76 Mont. 24, 245 Pac. 958 (1926).

15 Simonsen v. Barth, et al., 64 Mont. 95, 208 Pac. 938 (1922).

1 Miller on Criminal Law, p. 122, Sec. 35.

2 Miller on Criminal Law, p. 125, Sec. 37.

3 People v. Schmidt, 216 N. Y. 324, 110 N. E. 945 (1915).

The theory of the irresistible impulse test is that a person acts under an insane, irresistible impulse when from the disease of the mind he is incapable of restraining himself, though he may know that he is doing wrong. Missouri refuses to recognize this rule,[4] the leading case stating, "It will be a sad day for this state when uncontrollable impulse shall dictate a rule of action to our courts." The test of insanity as a defense is knowledge of the right and wrong of the particular act charged; and the "irresistible impulse" doctrine does not apply, though the defense be kleptomania.[5]

Moral insanity is a term applied to a perverted condition of the moral nature which impels a man naturally towards crime. Although his mind may be sound, and he may know right from wrong, his passions may have become so strong that he has virtually lost control of them. Moral insanity does not exempt a person from criminal responsibility as the mind is not diseased, as in insanity.

Whatever the proper interpretation of the statement in *McNaughten's Case*[6] may be, it has caused the writing into the law of a doctrine of partial delusion or partial insanity, which has been followed generally both in England and in the United States.

"The law presumes every person to be sane. It also presumes every accused person to be innocent. The burden is upon the state to prove every element of the crime charged. The defendant who relies upon insanity as a defense must introduce some evidence of insanity. The rule varies in the different states as to the extent of this burden."[7]

In discussing the question of insanity, in criminal actions in the state of Missouri, it was necessary on the part of the writer to conduct what is known as legal research of the law governing the question. This has been done along four distinct and defined lines which I will set forth and discuss separately.

Insanity at the Time of the Act

"When a person, tried upon indictment for any crime or misdemeanor, shall be acquitted on the sole ground that he was insane at the time of the commission of the offense charged, the fact shall be found by the jury in their verdict, and by their verdict the jury shall further find whether such person has or has not entirely and permanently recovered from such insanity; and in case the jury shall find in their verdict that such person has so recovered from such insanity, he shall be discharged from custody; but in case the jury shall

4 State v. Pagels, 92 Mo. 300, 4 S. W. 931 (1887).

5 State v. Riddle, 245 Mo. 451, 150 S. W. 1044 (1912).

6 McNaughten's Case, 10 Clark and F. 200, 1 Car. & K. (1843).

7 Miller on Criminal Law, p. 135, Sec. 41.

find such person has not entirely and permanently recovered from such insanity, the prisoner shall be dealt with . . . ." [8]

In *State v. Crane,*[9] it was held that the right of a trial on the question of insanity of a defendant, in advance of the trial of the charge on which he is indicted, only applies when such person becomes insane after his indictment. But where his plea is that he was insane when the crime was committed the court should not direct an independent investigation into his sanity, but leave him to make that defense on the trial.

In a Missouri case decided in 1914,[10] it was stated that where a person tried on an indictment shall be acquitted, on the ground that he was insane at the time of the offense, the fact shall be found by the jury, which shall find whether he has entirely and permanently recovered, and in case he has so recovered he shall be discharged from custody; otherwise he shall be dealt with in the manner provided, applies only where the accused is found to have been insane when he committed the offense, and not readjudged insane by the probate court and afterwards indicted for a felony.

In *State v. Murphy,*[11] the defendant was the owner of a lumberyard, a garage and a hardware store. A feeling of dispute had arisen between the defendant and his brother Paul, over a hardware store in another town, which Paul had been forced to turn back to the defendant. Armed and in a drunken rage Paul entered the defendant's store and requested a settlement of $10,000, but was refused, after which he threatened to kill his brother. For three nights and three days Paul stood watch before the defendant's store and living quarters, in a very threatening manner, which threw the defendant into extreme nervous agitation. On the morning of the killing it was shown that the defendant arose about four a. m., saying that he was going fishing, but proceeded to the home of his Mother, where Paul was staying, and shot him in the back six times while he slept. Witnesses were produced with the intent of proving insanity, on the ground that his father and other relatives before him were insane, and at the time the murder was committed he was insane. Three doctors and eight lay witnesses testified as to his insanity, and he was therefore acquitted.

In murder prosecution, defendant has burden to prove his insanity by preponderance of evidence, or at least like an affirmative defense. If insanity is proven at time of act defendant may not be guilty of murder. *In murder prosecution defendant must prove insanity.*[12]

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8 R. S. Mo., Sec. 9348 (1939).

9 State v. Crane, 202 Mo. 54, 100 S. W. 422 (1907).

10 Ex parte McWilliams, 254 Mo. 512, 164 S. W. 221 (1914).

11 State v. Murphy, 338 Mo. 291, 90 S. W. (2d) 103 (1936).

12 State v. Murphy, 338 Mo. 291, 90 S. W. (2d), 103 (1936).

Time of Trial

The Missouri law does not state a statute construing the law at the time of trial, but only between indictment and trial. Three sections state the said rule:

"If any person indicted for any crime in this state shall, after his indictment and before his trial on such charge, become insane, and the circuit or criminal court wherein such person stands charged shall have reason to believe that such person has so become insane, it shall be the duty of such court to suspend all further proceedings against such person under said charge, and to order a jury to be summoned to try and decide the question of the insanity of such person, and said judge shall notify the prosecuting attorney of the pendency of such inquiry. The alleged insane person shall be notified of such proceeding, unless the court order such person to be brought before it." [13]

In a case decided in Missouri in 1906,[14] an adopted son of twenty-two, under the influence of intoxicants, slit the throats of his foster parents while they slept. The statement that he had drunk a "lot" of blackberry wine, but not saying how much or what effect it had on him, was too indefinite and unsatisfactory to authorize an instruction on the effect of drunkeness. It was also decided that it was not error to refuse motion for new trial where evidence on the claim of insanity would probably not produce a different result. If a defendant becomes insane after indictment, and the court has reason to believe that he has so become insane, a jury shall be summoned to try the question of sanity, the court may refuse to summon the jury after hearing evidence convincing it that defendant was not insane.[15]

In *State v. Morris* [16] where the accused relies on insanity, his mental condition at the time of the offense is the material matter to be proved, and not the cause of his insanity or the time when he became insane.

"If upon such inquiry the said jury shall become satisfied that such person has so become insane, they shall so declare in their verdict, and the court shall, by proper warrant to the sheriff, marshal or jailer, order such person to be conveyed to the hospital for the care and treatment of the insane and there kept until restored to reason. And such person shall be thereupon disposed of, and the costs and expenses of conveying him to said hospital and of his support and maintenance at said hospital shall be taxed, paid and collected as now or hereafter provided by law in cases of the insane poor. Provided, if such person shall be adjudged to be insane and shall have property, the costs shall be paid out of his property by his guardian." [17]

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13 R. S. Mo., Sec. 4046 (1939).
14 State v. Church, 199 Mo. 605, 98 S. W. 16 (1906).
15 State v. Church, 199 Mo. 605, 98 S. W. 16 (1906).
16 State v. Morris, 263 Mo. 339, 172 S. W. 603 (1915).
17 R. S. Mo., Sec. 4047 (1939).

"When such person shall be restored to reason, he shall be returned to the county whence he came, and the proceedings against him shall be continued and be prosecuted, and his trial had as though no such inquiry and proceedings thereon, as herein provided, had been made, and if upon such inquiry it shall be determined that said person has not so become insane as aforesaid, the criminal proceedings against him shall be continued and prosecuted, and his trial had in the same manner as though no such inquiry had been made and had." [18]

State v. Rose [19] defendant convicted of forgery when he came to the store of the Allen Grocery Company, and in the absence of the manager and owner signed the owner's name to a blank check, on the desk of the owner, cashed said check, subsequently fled to California, was brought back, and then pleaded insanity. The jury shall try a supposedly insane person subsequent to his indictment to decide the question of insanity. The test to determine defendant's sanity is whether he knew that he was doing wrong at the time he committed the offense. There is a presumption of sanity which always sustains in the absence of countervailing proof.

After Conviction and Before Sentence

"If any person, after being convicted of any crime or misdemeanor, and before the execution, in whole or in part, of the sentence of the court, become insane, it shall be the duty of the governor of the state to inquire into the facts; and he may pardon such lunatic, or commute or suspend, for the time being, the execution in such manner and for such period as he may think proper, and may, by his warrant to the sheriff of the proper county or warden of the state penitentiary, order such lunatic to be conveyed to a state hospital and there kept until restored to reason. If the sentence of such lunatic is suspended by the governor, the sentence of the court shall be executed upon him after such period of suspension has expired, unless otherwise directed by the governor.[20]

The governor of the state has no power to have the sheriff convey an incorrigible person to colony for feeble-minded without an adjudication finding her to be feeble minded.[21] Counties are liable for the support of insane criminals who resided and were convicted therein, and whose sentences have been suspended by the governor for their transfer to the state hospital.[22] There is no appeal from the governor's con-

18 R. S. Mo., Sec. 4048 (1939).

19 State v. Rose, 271 Mo. 17, 195 S. W. 1013 (1917).

20 R. S. Mo., Sec. 9352 (1939).

21 Ex parte Griggs, 214 Mo. A 304, 248 S. W. 609 St. Ct. (1923).

22 Walton v. Christian County, 235 Mo. 385, 138 S. W. 537 (1911).

clusion.[23] A finding by the governor that the prisoner is insane is conclusive against a county, and where a reprieve *ex necessitate legis* is granted due to insanity of a prisoner, a finding by the governor that the prisoner is insane is against a county.[24]

After Sentence While in Penitentiary

"Whenever a convict in the penitentiary, having served two-thirds of the sentence of the court convicting him and having become insane and sent to a state hospital, shall have recovered his sanity, and the same shall be certified to the governor of the state of Missouri, by the superintendent of the hospital where said person is confined, it shall be the duty of the governor of the state of Missouri, on receipt of such certificate, to grant a complete discharge from the sentence of the court convicting such person, to the end that such person be not required to return to the penitentiary after his reason is restored for the purpose of filling out the unexpired term of sentence." [25]

"If, after any convict be sentenced to the punishment of death, the sheriff or warden having in charge his person shall have cause to believe that such convict has become insane he may summon a jury of twelve competent jurors to inquire into such insanity, giving notice thereof to the prosecuting attorney of the county where such criminal proceedings originated, or to the circuit attorney of the city of St. Louis, if such proceeding originated in the city of St. Louis." [26]

"The prosecuting attorney, or the circuit attorney, as the case may be, shall attend such inquiry and may produce witnesses before the jury, and may cause subpoenaes to be issued by a justice of the peace or notary public for that purpose, and disobedience thereto may be punished by the court in the same manner as in other like cases." [27]

"The inquisition of the jury shall be signed by them and by the officer in charge of said convict. If it be found that such convict is insane, the execution of the sentence shall be suspended until the officer in charge of such convict receives a warrant from the governor, or from the supreme or other court as hereinafter authorized, directing the execution of such convict." [28]

"The officer in charge of such convict shall immediately transmit such inquisition to the governor, who may, as soon as he shall be convinced of the sanity of the convict, issue a warrant appointing the

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23 Shields v. Johnson County, 144 Mo. 76, 47 S. W. 107 (1898).

24 Lime v. Blagg, 131 S. W. (2d) 583, 345 Mo. 1 (1939).

25 R. S. Mo., Sec. 9353, Rept. Ct. (1939).

26 R. S. Mo., Sec. 4192, Rept. Ct. (1939).

27 R. S. Mo., Sec. 4193, Rept. Ct. (1939).

28 R. S. Mo., Sec. 4194, Rept. Ct. (1939).

time of execution, pursuant to his sentence; or, he may, in his discretion, commute the punishment to imprisoment in the penitentiary for life." [29]

No Missouri cases construing the statute were found.

Robert J. Callahan, Jr.

MORAL OBLIGATION AS CONSIDERATION.—This article will trace in brief the doctrine known as "Moral obligation as consideration" as far back in the history of law as it directly concerns our law of contracts today. The theory has been argued pro and con in the courts of our country and is still accepted whole heartedly by some states and reluctantly by others.

Moral obligation as consideration was first acknowledged about the middle of the 18th century. At its inception [1] it was deemed to be a type of past consideration which gave validity to a subsequent promise to fulfill the original obligation. The theory seems to have been the result of the influence of Lord Mansfield, Mansfield introduced his doctrine of moral obligation into general assumpsit cases where there had been precedent debts or what were regarded as precedent debts. The cases to which the theory was applied include the following:

1. Promises to pay a debt barred by the Statute of Limitations.
2. Promises barred by a debt discharged in bankruptcy.
3. A promise to pay a voidable debt.
4. A promise by a discharged surety to waive a discharged liability.
5. A promise by a woman to fulfill a promise made during coverture.
6. A promise to rectify a previous mistake or illegality.

This theory found a great deal of use in the time of Lord Mansfield and shortly thereafter. Gradually however, it was greatly abused and was largely restricted about the beginning of the 19th century.[2] Several cases [3] brought statements from the judges concerning the limits of the theory. Scarcely fifty years after its inception, the minds of the judicial officers had begun to realize that this theory might well get

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29 R. S. Mo., Sec. 4195, Rept. Ct. (1939).

1 Williston on Contracts, Chapter 7, Section 147.

2 Williston on Contracts, Chapter 7, Section 147.

3 Littlefield v. Shea, 2 B & AD 811 (1831); Meyer v. Howarth, 8 A & E 467 (1838).

completely out of hand if allowed to cover all promises, or even a great portion of them.

In 1840, the Queen's Bench [4] also dissented. The court held that if promises of this sort were enforced, it would result in mischievous consequences to society and that one of the consequences would be the frequent preferences of voluntary undertakings for just debts. At the same time, the Queen's Bench [5] adopted as an accurate statement of the law as regards moral obligation as consideration the following: "An express promise can only revive a good consideration which was precedent, and which might have been enforced at law through the medium of an implied promise, had it not been suspended by some positive rule of law; but can give no original right of action if the obligation on which it was based never could have been enforced at law, though not barred by any legal maxim or statute provision."

Today the doctrine of moral obligation as consideration has been discredited wholly in England, though in England, as in many of our own states, certain exceptional cases such as the ratification of an infant's obligation, a promise to pay a debt barred by the Statute of Limitations, and a promise to pay a debt discharged by bankruptcy still impose liability.[6]

In every jurisdiction however, there are many promises that are enforceable without present consideration, whether or not the jurisdiction professes to accept the doctrine of moral consideration, however difficult it may be to explain the reason for their enforcement. The test of moral consideration must vary with every individual's opinion. Since there is a moral obligation to perform every promise, it would seem if morality is to be the guide, every promise would be enforceable and if the existence of a past moral obligation is to be the test, every promise which repeats or restates a prior promise that is gratuitous, would be binding. This could not be allowed to happen if the laws of contracts are to endure.

In order to show the difference of opinion that exists today as to the limits of this doctrine, we have chosen the views taken by the courts of Pennsylvania and Indiana.

The Supreme Court of Pennsylvania [7] defines moral obligation in law as "An obligation which is binding on the party who incurs it in conscience and according to justice, although it cannot be enforced by action." The effect of such a rule was clearly set out in Pennsylvania in a case decided in 1918,[8] in which the court claimed that it was not

4 Eastwood v. Kenyon, 11 A & E, 438-450 (1840).
5 Eastwood v. Kenyon, 11 A & E, 438-450 (1840).
6 Williston on Contracts, Chapter 7, Section 147.
7 Longstreth v. Philadelphia, 245 Penn. 233, 91 Atlantic 667 (1914).
8 Zumbro v. Zumbro, Pennsylvania Superior Court, 600 (1918).

necessary that there should be a pre-existing legal obligation to give effect to a moral obligation. In contrast to this, the Appellate Court of Indiana [9] in 1944 stated that past consideration imposing no legal obligation at the time it was furnished would support no promise whatever.

With regard to a promise to pay or fulfill a promise made while in coverture, we are not too much concerned today, since the legal status of women has been so highly elevated. However, as a matter of record, we find that Pennsylvania [10] cases are consistent, holding that where the wife promised to pay her husband's debt during his lifetime, although this promise could not be binding during her coverture, it could however become binding if upon his death she renewed her promise to pay. The reason seems to be that she had the right to claim the exemption but if she decided to promise to repay again, she waived the exemption and she bound herself to pay, the moral obligation of the contract being the consideration for the subsequent promise to pay.

Indiana has held directly opposite. In 1891,[11] the Supreme Court held that the promise of a woman to do an act which she had previously promised while in coverture, was void.

Indiana holds with Pennsylvania that promises to pay debts discharged by bankruptcy,[12] or the Statute of Limitations [13] may be enforced with moral obligation as the consideration. In addition, Pennsylvania upholds a parent's promise to compensate her children for services rendered while in her home, giving moral obligation as the basis for the decision, even though such promise could never have been enforced otherwise at law.[14]

To further illustrate the extent of the doctrine in Pennsylvania, we cite the case of *Stebbins v. County of Crawford.*[15] Stebbins was County Treasurer for the year 1874 and at the end of the year settled accounts which became a judgment, no appeal being made. Afterwards a mistake was found of approximately $1700 which Stebbins acknowledged and agreed to pay. The court said, "A moral obligation is sufficient to support an assumption to pay a debt barred by a report of county auditors which was properly filed and from which no appeal had been taken."

Charitable subscriptions in Indiana are supported by the promises of the subscribers as the consideration for each other. In Penn-

9 Brown v. Addington, 144 Ind. App. 404, 52 N. E. (2d) 640 (1944).

10 Holden v. Bane, 140 Pa. 63, 21 Atl. 239 (1891); Hemphill v. McClimons, 24 Pa. 367 (1847).

11 Austin v. Davis, 128 Ind. 472, 28 N. E. 890 (1891).

12 Wiggins v. Keiser, 6 Ind. 252 (1855); Hackett v. Jones, 70 Ind. 227 (1880).

13 Lovett v. Lovett, 87 Ind. App. 42, 155 N. E. 528 (1927).

14 In re Sutch's Estate, 201 Pa. 305, 50 Atl. 943 (1902).

15 Stebbins v. County of Crawford, 92 Pa. 289, 36 Am. Rep. 687 (1879).

sylvania,[16] the Supreme Court states that the consideration for a promise to pay a sum for the erection of a church was supported by a consideration that was strictly a moral obligation, and was enforceable by Pennsylvania law.

The last class of cases on our list of originals includes those promises made by a discharged surety. The high courts of both states [17] have decided that if a surety, after he has been discharged by an extension of time for the payment of a note, with knowledge of the facts, although no new consideration is given, acknowledges liability, he is liable therefor.

Thus as we finish our analysis of the judicial views of the two states, we find that today in our country the breach between a mere moral obligation and a legal consideration as defined in law is not so great as the definition would indicate. The summary of exemplary cases from both states indicates that the doctrine of Lord Mansfield is not dead in the law of contracts. Pennsylvania has indeed, stretched the theory to its limits, but the majority of the states limit it as we have indicated.

William Meehan and *Alphonse Spahn.*

MORTGAGES—PRIORITY OF LIENS UNDER THE TORRENS SYSTEM OF LAND REGISTRATION.—"The general purpose of the registration law seems to be variously stated by different authorities. Mr. Torrens, who is said to have been the originator of the modern registration of land titles, says its purposes are 'to quicken, simplify, and cheapen the transfer of real estate and to render titles safe and indefeasible.' Some courts hold that its purpose is 'for simplifying the title to and the dealings with estates in land.' Others hold that its purpose is 'To create an indefeasible title in the person adjudged to be the owner,' and that 'The basic principle of the system is the registration of the title to land instead of registering only the evidence of such title.' " [1]

This article will have for its scope, a brief resume of the essential features of the Torrens system for the Registration of Titles to Land, a somewhat detailed treatment of the application of this system in a particular jurisdiction as regards the priority of liens, and a cursory review of the status of liens and their priority in those jurisdictions wherein the Torrens System has been adopted. Although the specific

16 Caul v. Gibson, 3 Pa. 416 (1846).

17 Young's Estate, 243 Pa. 287, 83 Atl. 201 (1912); Matchett v. Winona Assembly Assn., 185 Ind. 128, 113 N. E. (1916).

1 Ward v. Home Savings and Loan, 39 Oh. App. 393, 177 N. E. 845, 849 (1931).

statutory provisions vary with the jurisdiction, there is more than a tinge of similarity among the acts—in fact the discrepancies may be dismissed as minor ones. The purpose of this means of ascertaining title to land is, as one authority on the subject summarizes: "the establishment of a method by which the title to a particular piece of land will always be ascertainable by reference to a register maintained by a government official, made by law conclusive in this regard." [2] Thus, "the scheme of the general Torrens system is that the state, through the functions of a registrar, vests and certifies to an indefeasible title to an interest or an estate in land * * *." "Under other systems (of registration) the efficacy of a deed depends on the validity of the title of the grantor, but under the Torrens system, titles are vested by the state, by the act of registration, and a transfer of land does not depend in the least on the validity of the title of the transferor." [3] In effect, then, the end is to "Bind the land and to quiet title to it." [4] And because the original or first certificate of title is made conclusive evidence as to all encumbrances on the land, the court must pass on the validity of all such encumbrances before issuing the certificate.[4a] An application to register title to land, then, has a twofold result: quieting the title, and a registration of the title.

The procedure to be followed in registering a title to land is entirely statutory,[5] and once complied with, the certificate of title issued is "made conclusive evidence of title and of priority of liens * * * except as to statutory burdens not covered by registration." [6] However, an estate less than a fee may not be registered unless the title in fee simple has first been registered.[7] "All existing liens, equitable or statutory, except those excepted in the statute, are noted upon the certificate of title, when issued upon the registration of the land, and *those subsequently created upon the land are also required to be noted on the certificate,* generally upon the filing with the registrar of a copy of the proceedings or instrument upon which the lien is based." [8] Disregarding for a time the exceptions hereinafter noted, the certificate of title issued by the registrar is absolute and conclusive evidence of title and cannot be controverted where the provisions of the statute as regards initial and subsequent registration have been complied with.[9] But to be of an legal effect except as between the parties, the evidence of all such transactions must be filed and registered. Otherwise they have no force and effect against subsequent innocent transferees and

2 5 Tiffany on Real Property (3rd ed.) 109 (1939).
3 Niblack, Analysis of the Torrens System, p. 6 (1912).
4 Malaguti v. Rosen, 262 Mass. 555, 160 N. E. 532 (1928).
4a First National Bank v. City, 192 Mass. 220, 78 N. E. 307 (1906).
5 Tiffany, p. 114.
6 Niblack, p. 105.
7 Niblack, p. 26 and annotation thereto.
8 Tiffany, p. 120.
9 McWhinney v. Gage, 183 Minn. 141, 235 N. W. 676 ((1931).

are a mere nullity. As one authority on the subject has pointed out, "Documents and their delivery for the transfer of rights under the Torrens system merely represent authority to the registrar for the registration of the transferee in place of the transferor, and thus *derive their legal transferring force, except as between the parties, from such registration;* but upon such registration being made its effect then relates back to the moment to filing the instrument registered." [10] The general result of a successful application to register title to land, we may conclude, is that "any existing liens and encumbrances are noted upon the record and the certificate, and generally speaking the holder acquires an indefeasible title to the property, free from all claims and encumbrances except those so noted * * *." "Subsequent encumbrances are to be noted upon the certificate and record, and where a conveyance is made a new certificate is issued to the party acquiring title." [11]

All authorities recognize and cite the difference in the statutory enactments that are the Torrens system of Land Registration in the various jurisdictions of the United States. "But the fundamental principle and purpose of all of them are to establish and certify to the ownership of an absolute and indefeasible title to real property, *without requiring any judicial proceedings for that purpose,* and to simplify and expedite the transfer of such property." [12] This fact was recognized by the Ohio judiciary in a case [13] wherein the purpose of the Torrens System as exemplified by the statutes of that state was commented upon by the court: "It would seem, from a careful reading of the Registration of Land Law as adopted in Ohio, that its purpose and scope include not only all of the above-mentioned purposes,[14] but that it is also no doubt intended for the information and benefit of persons dealing with the owner of a registered title, such a person who may desire to know his financial responsibility or to purchase such real estate, or to obtain a lien upon it, either voluntarily or involuntarily on the part of the owner." "Indeed the provisions of some of the sections of the registration law indicate that they are intended, more especially, if not entirely, for the information or benefit of purchasers or lien holders or persons dealing with the owner, rather than for the benefit of the owner himself." But inasmuch as our problem is the relative priority of liens under specific statutory provisions, we will concern ourselves with those few sections and the cases decided thereunder in the state of Ohio, rather than inquire into the whole scope and

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10 Beers, "The Torrens System of Realty Titles" Sec. 72.

11 34 C. Y. C. 605.

12 Reeves "Progress in Land Title Transfers", 8 Columbia Law Review 438, 444 (1931).

13 Ward v. Home Savings and Loan, 39 Oh. App. 393, 177 N. E. 845, 849 (1931).

14 Ward v. Home Savings and Loan, 39 Oh. App. 393, 177 N. E. 845, 849 (1931).

purpose of the act, especially so inasmuch as that part of the subject has already been somewhat sketchily treated.

As to the priority to be given leins, "it has been held that, under the Torrens system of Registering Land Titles, one whose conveyance or mortgage is first registered acquires a lien prior to any instrument not registered, even though the latter is first in point of execution." [15] In Ohio, as elsewhere, the express provisions of the statutes relating to land registration serve to take such land out of the realm of the general common or statutory law relevant thereto. But if such is not the case the statute succinctly declares, "Registered land is subject to the same burdens and incidents as unregistered land." [16] Notwithstanding the general statement as to priority of liens under the Torrens system when the statutory provisions have been complied with, there are certain exceptions: fraud, for instance, in procuring of the original registration is grounds to have the same set aside.[17] And there are five general types of liens that attach and are given priority irrespective of their lack or registration: Liens or claims arising under the constitution or laws of the United States, taxes within six years after becoming due and payable, highways, public or private ways, leases coupled with possession thereunder up to three years, and easements.[18] An additional exception was added in 1937 when special assessments on property for the improvement of the same were included.[19] Prior to this date, all assessments had to be registered in the usual manner before a lien could be said to arise in favor of the municipality against the property so assessed.[20] Where the statutory provisions were so complied with, these assessments had the same priority as general taxes.[21] But the estate was liable only for those installments and payments that came due after compliance with the statute.[22] And if the required registration had not been made, and the statute subsequently repealed, a subsequent bona fide purchaser would be liable only for the installments due and owing after the repeal of the statute.[23]

Inasmuch as the provisions of the statute are mandatory [24] and not merely directory and inasmuch as the statute cites the time when a lien shall attach in most instances, there have been few cases in Ohio dealing particularly with priority between various types of liens. Thus

15 41 C. J. 552.
16 Ohio General Code Sec. 8572-81 (1926).
17 Id. Sec. 8572-22.
18 Id. Sec. 8572-25.
19 Id. Sec. 8572-56 (Repealed).
20 Id. Sec. 8572-56.
21 Ward v. Savings and Loan, 28 N. P. (N. S.) 95.
22 Id.
23 Shaker Corlett Land Co. v. City of Cleveland, 139 Oh. St. 536, 41 N. E. (2d) 243 (1942).
24 Curry v. Lybarger, 133 Oh. St. 55, 11 N. E. (2d) 873 (1937).

whether it is a decree of order of a court,[25] a certificate of levy and seizure when the proceedings are in execution or attachment,[26] a certified copy of the writ and return when the property levied on is in one county and the writ issues in another county,[27] or a certificate of the pendency of a suit when a *lis pendens* proceeding,[28] the lien is said to attach when the document is filed and a record made thereof by the registrar on the last registered certificate of title of the land to be affected. Where an assignment of a part only of an encumbrance upon registered land is made, it must specify whether the part transferred is to rank equally, be deferred, or given priority over the remaining part.[29] And if the rights of dower and homestead do not appear on the last registered certificate, such claims are unavailing against a person acquiring the land in good faith and for a valuable consideration.[30]

However, in the case of a material man's, a mechanic's, or a Laborer's lien, there has been some controversy due to the provisions of the code[31] stating at what time such liens shall attach and the confliction provision of the part of the code referred to as the Torrens system of registration wherein it is directed that such liens may be obtained only by filing an attested account of the amount claimed and a subsequent notation thereof on the certificate of title by the registrar.[32] Thus where a purchase money mortgage was entered upon the certificate of registration prior to a mechanic's lien but subsequent to the actual improvement of the property in question, the mortgage was given priority [33] because of the further provision [34] providing that—any person desiring to assert a lien when the act has no provision for registering it, should file an affidavit setting forth the character of the lien and how acquired, and it will thereupon be entered by the registrar in the usual manner. The fact that the affidavit of intention to file the lien was not made precluded the provision of sec. 8321 of the Ohio code from operating to allow the lien to refer back to the time the first improvements were made. As further definitive of the act, it is provided that "No statutory or other lien of whatever kind or nature except judgments in the United States courts and taxes shall affect the title to registered land, until after the same is noted upon the registered certificate of title." [35] Thus the whole act has been interpreted to be an exception to and restriction on the mechanic's lien law as to the method of secur-

25 Ohio General Code, Sec. 8572-52 (1926).
26 Id. Sec. 8572-52.
27 Id. Sec. 8572-53.
28 Id. Sec. 8572-55.
29 Id. Sec. 8572-48.
30 Id. Sec. 8572-66.
31 Id. Sec. 8321.
32 Id. Sec. 8572-54.
33 Gough Lumber Co. v. Crawford, 125 Oh. St. 46, 176 N. E. 677 (1931).
34 Ohio General Code, Sec. 8572-68 (1926).
35 Id. Sec. 8572-89.

ing the lien.[36] But this pertains only as between such a lien and some other type of encumbrance such as taxes, mortgages, etc. For it has been decided that where mechanic lien claimants on the the same job perfect their respective liens on registered land, they do not have priority as between themselves because there is no express provision in the statute relating to land registration which differs from or conflicts with the code provisions relating to relative priority of similar lien holders.[37]

Thus we see the operation and effect of the Torrens system in one particular jurisdiction as regards the relative priority to be given liens. Inasmuch as the statute is mandatory and expressly provides how and when liens shall operate as encumbrances against registered land, there seems to be little doubt as to the preference one document is to be given over another. And the attitude of the courts, in interpreting these statutes vary strictly, enhances rather than detracts from the law in this instance, because not only are they disinclined to modify the provisions to meet new situations outside the purview of the code, neither are they prone to interpret them and so arouse confusion and uncertainty where there now exists certainty and determinability. A strict interpretation in this instance leads to a clear definition of the law and lack of ambiguity. So much for the law of Ohio.

Our attention is now diverted to the case law, scarce as it is, revolving around the question of priority under this system of land registration in those jurisdictions that have adopted the Torrens System. The comparative dearth of cases in all of these states is in itself informative inasmuch as from the time the Torrens system was introduced into the United States just before the turn of this past century, it has been adopted by an increasingly large number of states.[38] It may be inferred that the trend has been much the same as took place in Ohio where the clarity of the statutory provisions and the strict interpretation thereof by the court has resulted in a definite and well established body of law.

The difference in the cases found in other jurisdictions are attributable to the lack of uniformity in the statutes embodying the features of the Torrens system. Thus in Illinois, a mechanic's lien must be registered before a preference can be had [39] because of a statutory provision [40] similiar to that in effect in Ohio. This is the rule prevailing

36 Mizner v. Paul, 29 O. C. A. 33, 30 O. C. D. 484.

37 Crawford v. Liston, 38 Oh. App. 294, 176 N. E. 598 (1930).

38 By 1917 the following states had adopted the Torrens Act or something comparable thereto: California, Colorado, Illinois, Massachusetts, Minnesota, Mississippi, Nebraska, New York, North Carolina, Ohio, South Carolina, Oregon, Virginia, and Washington.

39 In re Application of Bickel, 301 Ill. 484, 134 N. E. 76 (1922).

40 Smith-Hurd Ill. Rev. Statutes 1935 c. 30 sec. 127.

in California also.[41] Whereas in Minnesota a mechanic's lien when filed with the registrar of titles attaches to land as of the commencement of the improvement, as would be the case if filed in the office of the registrar of deeds for improvement on unregistered land, and is prior to an intervening mortgage which was executed after the improvement had been commenced.[42] The court in the instant case stated: [43] "It is apprehended that if there had been any intention to change or disturb the well settled law as to the rights of the different mechanic's lien claimants for work and materials on the the one improvement, the Torrens Act would have so provided in express terms. "Thus the requirement of an affidavit of intention to file a mechanic's lien on the one hand, and its absence on the other, result in two conflicting rules of law.

In conclusion, it may be noted that the statutes are the controling feature in all controversies under the Torrens system of land registration, and where applicable the express provisions prevail. But in all cases they are interpreted strictly and no loose interpretations given that might in one case foster the cause of justice but ultimately lead to utter confusion and a deterioration of the whole system—one which was originally designed to simplify and expedite, and to protect the owner incidentally but particularly the persons dealing with the registered owner of lands.

Robert E. Sullivan.

RESTRAINTS ON ALIENATION AND A CONDITION SUBSEQUENT IN DEEDS.—The problem confronting us may be stated thus: the South Shore Corporation, owners of the South Shore Subdivision, puts a clause in one of its deeds as follows: ". . . Provided, however, that should the grantee, his heirs, successors or assigns ever transfer to, or permit the prescribed property to be occupied by, as tenant or otherwise, any person not previously approved in writing by the trustees of this Corporation, then the deed shall be forfeited and the grantor shall have the right to reenter and reclaim the property." Subsequently X, the grantee of one of the above conveyances, leases his property to J for ten years without the consent of the trustees. The questions then presenting themselves are numerous.

First of all what can K, another grantee, who lives next door to J's property, do about it, if anything? Secondly, is such a provision a valid restraint on alienation? Thirdly, does the provision amount to

41 Hammond Lumber Co. v. Moore, 104 Cal. App. 528, 286 Pac. 504 (1930).
42 Armstrong v. Lally, 209 Minn. 373, 296 N. W. 405 (1941).
43 Id. Page 406.

a condition subsequent which will permit a forfeiture, or is it merely a covenant? And lastly, does the remedy for the violation of such a provision rest in the corporation or in the surrounding grantees who have title to their land through a similar deed from the corporation?

The first distinction to be made is the prime difference between a covenant and a condition subsequent, for if the above provision could be construed as a covenant running with the land as well as a reasonable restraint, then the provisions in the various deeds could be enforced by the grantee K in the form of an injunction. Thus we find the distinction between these two clauses in the remedies available to each, as the important consideration in a condition subsequent is the presence of a clause providing for re-entry by the grantor or his heirs, or for the forfeiture of the estate by the grantee in case of breach, while the breach of a covenant is merely a ground for the recovery of damages or an injunction. Whether a clause in a deed shall be construed as a condition subsequent or a covenant depends chiefly on the contract, the circumstances surrounding the contract, and the intention of the parties creating the estate. A clause in a deed operates as a condition subsequent rather than a covenant only when it is apparent and expressly stated to provide the right of re-entry and a forfeiture,[1] but if, from the language employed in the deed, it is doubtful whether the clause creates a covenant or a condition subsequent the court will favor its construction as a covenant.[2] However, even though the intention of the parties is to create a covenant so as to provide the remedy of an injunction in the event of a violation of said clause, if the clause is so constructed as to permit a forfeiture and the right of re-entry by the grantor, and these rights are expressly set forth in the deed, the court will be forced to construe the provision as a condition subsequent.[3] In estates created on condition subsequent, a breach in the condition can be taken advantage of only by the grantor or his heirs,[4] and is of no advantage to a creditor or a stranger to the deed, nor can it be assigned.[5]

In the instant case the express provision of the grantor creates a condition subsequent with a forfeiture by the grantee and the right of re-entry in the grantor. Hence upon the breach of such a provision the only remedy available is the right of the grantor to re-enter and reclaim, and K, the adjoining grantee, cannot maintain an action in his behalf based on the clause in the deed.

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1 Rooks Creek Evangelical Lutheran Church v. First Lutheran Church of Pontiac, 290 Ill. 133, 124 N. E. 793 (1919).

2 Nowak v. Dombrowski, 267 Ill. 103, 107 N. E. 807 (1915).

3 Northwestern U. v. Wesley Memorial Hospital, 290 Ill. 205, 125 N. E. 13 (1919).

4 O'Donnell v. Robson, 239 Ill. 634, 88 N. E. 175 (1909).

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

Restraints on the alienation of property arose originally in the feudal system in England as between the Lord and his tenants but were abolished by the Statute of *Quia Emptores*. It is now uniformly maintained that one of the incidents of ownership of property is the right to convey it, and the law severely frowns on the imposition of restraints on the rights of ownership, sought to be impressed by grantors who seek to convey their property and at the same time maintain control over its alienation.[6] With the evolution of time courts have modified their views insofar as to recognize and permit reasonable restraints on property, no matter whether they be restraints on the use or on the alienation of such property, as long as said restrictions are reasonable, not contrary to public policy, and not in restraint of trade. Included in this list are zoning ordinances, and covenants which restrict; certain offensive businesses; the sale of intoxicating liquors on the property; as well as restrictions forbidding the sale to or occupancy by certain racial groups. Nevertheless, it is a cardinal rule that an attempted total restraint on alienation is repugnant to and inconsistent with an estate in fee simple and hence totally inoperative,[7] for even though there be an agreement by the parties to consent to such a provision, a fee simple estate and a restraint upon its alienation cannot in their nature co-exist.[8]

A case closely allied to our problem arose in the early history of California law in 1883 and it was there decided that when the granting clause of a deed conveys an estate in fee simple, a subsequent proviso that the grantee shall not convey without the consent of the grantor is void as a restriction upon alienation, general as to time and persons, and therefore repugnant to the estate created.[9] Thus it seems clear that a condition or a limitation in a conveyance in fee to the effect that the grantee is not to alienate except with the consent of some other person (in the instant case, the trustees of the Corporation) is void.[10]

Having previously stated that, were the clause in the deed to be construed as a covenant running with the land, there would be a possibility for the surrounding grantees such as K to avail themselves of such a covenant and bring an action for an injunction or damages, we now arrive at the conclusion that covenants which create a restraint on alienation must be reasonable restraints also, or be declared void. A classic example of such a covenant is present in the Maryland case of *Northwest Real Estate Company versus Serio* [11] and reads as follows:

6 Wakefield v. Van Tassell, 202 Ill. 41, 66 N. E. 830 (1903).

7 Porter v. Porter, 381 Ill. 322, 45 N. E. (2d) 635 (1942); Streit v. Fay, 230 Ill. 319, 82 N. E. 648 (1907).

8 DePeyster v. Michael, 6 N. Y. 467, 57 Am. Dec. 470.

9 Murray v. Green, 64 Cal. 363, 28 Pac. 118 (1883).

10 Hill v. Gray, 160 Ala. 273, 49 So. 676 (1909).

11 Northwest Real Estate Co. v. Serio, 156 Md. 229, 144 Atl. 245 (1929).

"And for the purpose of maintaining the property hereby conveyed and the surrounding property as a desirable high class residential section for themselves, their heirs, successors, executors, administrators, and assigns, that until the first day of January, 1932 (four years hence), no owner of the land hereby conveyed shall have the right to sell or rent the same without the written consent of the grantor herein who shall have the right to pass upon the character, desirability, and other qualifications of the proposed purchaser or occupant of the property until said date, and the grantor further agrees that all deeds or leases hereinafter made by it of the remaining unimproved lots on the plat of Ashburton, Section 6 shall contain the same covenant to the sale or renting of such property." In spite of the fact that the restraint was for a limited time, the covenant was declared void and unenforceable for the reason that it was a total restraint on any alienation of the property until 1932, and such a restraint on alienation cannot be reconciled with the right of disposition inherent in a fee simple estate. A strong and lengthy dissenting opinion with some merit was filed in this case in which Chief Justice Bond pointed out that such a covenant, intended to give the developer of a suburban area of land power to control the development for a time so as to secure his outlay, as well as to protect the outlay of early purchasers of said lots, was entirely reasonable, and in fact actually desirable from the point that it established an economically based community advantageous to a progressive democracy.

In conclusion, then, we reiterate that were the clause a covenant running with the land created with the intention of favoring and protecting the adjoining grantees, a suit by said grantees for an injunction might be allowed, if the restraint were reasonable. But even though the clause in question were construed to be a covenant, it would be an unreasonable restraint on alienation, void, and unenforceable by the grantees.

However in view of the express provision that upon non-compliance with said clause in the deed, the grantee would forfeit and the grantor would have a right of reentry, the clause must necessarily be construed as a condition subsequent. Such a construction will place the remedy in the hands of the grantor or his heirs, since such a right may not be assigned or enforced by strangers or anyone other than the grantor or his heirs. In any event, whether the clause be a covenant or a condition subsequent, it is a void provision for the reason that alienation is an incident of ownership, and an unreasonable restraint on alienation is repugnant to a fee simple estate.

As a result, though we construe the clause in the deed from the South Shore Corporation to X to be a condition subsequent, and the remedy to be in the corporation with no rights in the adjoining grantee

K, we find the provision void on the ground that it is an unreasonable restraint on alienation, and that not even the corporation may enforce the provision. Therefore X may lease to whomsoever he pleases without any fear of interference by the grantor or the adjoining grantee K, and in the event he wishes to sell and there is a question as to said clause, he may go into equity and have the clause removed by an action to remove cloud on title.

John F. Power.

THE ADMISSIBILITY OF BALLISTIC EVIDENCE.—To the layman, uninitiated with legal principles, jurisprudence appears to be a static science. He harbors this misconception principally perhaps because of his inaccurate understanding of the application of the doctrine of *stare decisis* and the manifold historical principles. That this view is erroneous needs not to be explained to those conversant with the legal profession for the law is not composed of doctrines formulated in antiquity or is its practical application unduly burdened with minute technicalities. The law in America is dynamic. True it is that the evolutions may come about slowly but it must be conceded that the law always seeks the truth and in this search it adopts methods most expeditious to that end. And of the many branches of legal science that are constantly exploring the labyrinths to seek the most just rule, none is more dynamic, more resourceful than the law of evidence.

The past quarter century, comparatively recent when compared to the age of many legal treatises still quoted as authority, has seen an amazing number of new methods of proof offered and accepted in the field of evidence. Courts in the nineteenth century would have looked with askance and would have undoubtedly rejected any evidence offered on the subject of finger-prints, forensic ballistics, photographs, and lie detectors. Today the first three are highly regarded forms of evidence and it seems only a matter of time until the last one is judicially recognized. In this paper we shall briefly examine the admissibility of ballistic evidence.

As late as 1923 we find courts refusing to admit the testimony of ballistic experts testifying as to the identity of the gun and the bullet alleged to have been used in the homicide. In refusing to admit the testimony the court made remarks that today appear as preposterous as the evidence it sought to condemn. The court said: "The evidence of this officer (of the expert) is clearly absurd, besides not being based upon any known rule that would make it admissible. If the real facts were brought out, it would undoubtedly show that all Colt revolvers of the same model and of the same caliber are rifled precisely in the same manner, and the statement that one can know that a certain

bullet was fired out of a 32-caliber revolver, when there are hundreds, and perhaps thousands of others rifled in precisely the same manner and of precisely the same character, is preposterous." [1]

Such unequivocal denunciation of ballistic evidence by the courts as late as 1923 seems almost unbelievable when considered in the light and number of august tribunals that have since given judicial recognition to the science. Indeed the entire story of the reception by the courts of ballistic evidence can best be seen in the record of the Illinois courts for nowhere at the present time is the evidence of a competent ballistic expert clothed with more legal recognition and dignity than in that state where less than 20 years previously their courts had categorically denied the validity and even the existence of such evidence. The Illinois courts completed their legal metamorphosis in *People v. Fisher* [2] when it allowed a ballistic expert's testimony to go to the jury. In that case the defendant relied upon *People v. Berkman,* the case that earlier had refused to admit such evidence, but the court overruled the defendant's contention and allowed the testimony to be admitted which completely abrogated the rule as laid down in the Berkman case. In admitting the evidence the court said: "The general rule is that whatever tends to prove any material fact is relevant and competent. Expert testimony is admissible when the subject matter of the inquiry is of such a character that only persons of skill and experience in it are capable of forming a correct judgment as to any facts connected therewith. Such evidence is not confined to classified and special professions, but is admissible wherever peculiar skill and judgment applied to a particular subject are required to explain results by tracing them to their causes. Such evidence is admissible when the witnesses offered as experts have peculiar knowledge or experience not common to the world which renders their opinion founded on such knowledge and experience an aid to the court or jury determining the issues."

Such a complete reversal is a commentary on the dynamic aspect of the law for in it we find a court in one of the most important American jurisdictions reversing its holdings as to evidence when it appears by scientific proof that the evidence is material despite a diametric holding by the courts for long periods of time previously.

Much of the credit for the recognition given by courts to ballistic evidence must be given to Calvin Goddard, who, probably more than any other single person, has done much to aid in acquiring judicial approbation to the science of ballistic evidence. Possessing unusual talents he has, by intensive training and experiments, done much in keeping the law of evidence abreast of modern scientific advancements in this line.

1 People v. Berkman, 307 Ill. 492, 139 N. E. 91 (1923).
2 340 Ill. 216, 172 N. E. 743 (1930).

Aside from any element of expert testimony there is no valid reason for the exclusion of ballistic evidence if it clearly is material to the controversy. Corpus Juris makes the general statement: "Weapons, bullets, tools, instruments, or other articles used, or respecting which there is sufficient evidence to justify a reasonable inference that they were, or may have been used, and that such weapons, bullets, tools, instruments, or other articles were or may have been used by the accused or his co-actors in the commission of the crime are, if sufficiently identified and pertinent to an issue, admissible in evidence, even though the commission of the acts by means of the article offered is admitted." [3]

Frequently the sufficiency of the identification of the bullet or of the weapon itself is challenged and the general rule appears to be one largely of judicial discretion. Each case must be determined by its peculiar facts and circumstances and what would amount to reversible error because of judicial abuse would, in other cases, be clearly admissible. An outstanding example of the wide latitude allowed the trial judge is *State v. Boccadoro* [4] in which the ballistic expert was allowed to compare the fatal bullet with one that had been fired into the ground some two or three years previously. The court held that such evidence was entitled to go to the jury and the appellate court concurred.

Another frequent objection contended for by defendants runs to the the propriety of experiments conducted in the court by ballistic experts. This phase of the subject is also one that is governed largely by the decorous use of the court's discretion. In *Evans v. Commonwealth,*[5] one of the leading cases both as to the admissibility of ballistic evidence and also of courtroom experiments, we find the court allowing the expert to fire the weapon, to make explanatory blackboard sketches and even allowing the jury to compare photographs and being permitted to look at exhibits through microscopes. None of the acts was held to constitute an abuse of judicial discretion. In *Ferrell v. Commonwealth* [6] we find a recent court adhering to the rules established in the Evans case not only as to experiments but also as to the admissibility of ballistic evidence. In adjudication the court said of ballistic evidence: "* * * Such opinion testimony is admissible not only when scientific knowledge is required, but when experience and observation in a special calling give the expert knowledge of a subject beyond that of persons of common intelligence and ordinary experience. The scope of such evidence extends to any subject in respect of which one may derive special knowledge by experience, when his knowledge

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3 22 Corpus Juris Secundum, # 712, p. 1208.

4 105 N. J. L. 352, 144 Atl. 612, p. 1208.

5 230 Ky. 411, 19 S. W. (2d) 1091, 66 A. L. R. 360 (1929).

6 14 S. E. (2d) 293, 177 Va. 861 (1941).

of the matter in relations to which his opinion is asked is such, or so great, that it will probably aid the trier in the search for the truth."

Probably the other objection most frequently heard opposing the admissibility of ballistic evidence is to the weight and credence of such testimony after it has been admitted. Yet, considered in the light of other expert testimony there is nothing inherently detrimental to the interests of any litigant nor is the way fraught with pitfalls as many defendants have asserted in the admissibility of such evidence. It appears to be the general rule, followed in practically every jurisdiction, that the weight and the credence given to a ballistic expert, like that given to the testimony of any other witness, is a matter solely for the jury. Nowhere is the general rule more succintly set forth than in *Dobry v. State*[7] where the court said: "The credibility of each witness produced as one skilled in ballistics and the weight to be given to his testimony are matters that are clearly within the province of the jury to determine. It cannot be said that any one of these skilled witnesses, is, as a matter of law, entitled to have his opinion treated as a conclusively established fact. This is a matter that is within the province of the jury."

That ballistic evidence is now an important part of the law of evidence is not to be doubted. Jurisdictions from all over America now include this scientific field of inquiry in their systems of trial work.[8] So completely has this field been incorporated by our courts that it is difficult if indeed not impossible to find a court rejecting the testimony of a ballistic expert if he has been properly qualified. Such innovations, adopted only after their scientific validity has been established and handled discreetly in application, only eloquently manifests the dynamic aspect of the law of evidence and proves once again, as has been proved innumerable times previously throughout the past centuries of Anglo-American law, that as man learns, and seeks more refined methods of living and grows in stature, so does the law.

Francis J. Paulson.

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7 263 N. W. 681, 293 U. S. 519 (1935).

8 State v. Hendel, 4 Idaho 88, 35 P. 836 (1894); State v. Veeckovich, 61 Mont. 480, 203 P. 491 (1921); State v. Casey, 108 Oregon 386, 213 P. 771 (1923); People v. Bolton, 215 Cal. 12, 8 P. (2d) 116 (1932); People v. Fisher, et al, 340 Ill. 216, 172 N. E. 743 (1930); Commonwealth v. Snyder, et al., 282 Mass. 401, 185 N. E. 376 (1933); State v. Nearkell, 336 Mo. 129, 77 S. W. (2d) 112 (1940); Burchett v. State, 35 Ohio App. 463, 172 N. E. 555 (1930); Kent v. State, 121 Texas Cr. Rep. 396, 50 S. W. (2d) 817 (1932).

THE DEFENSE OF UNOCCUPIED PROPERTY AGAINST NUISANCE.—In discussing the defense of unoccupied property against nuisances, it may be well to gain some idea of the nature of a nuisance, itself. In the Restatement of Torts, a nuisance to real property has been defined as a non trespassory invasion of another's interest in the private use and enjoyment of his land.[1] A nuisance is usually of a continuous nature, recourse may be had in an action at law for damages resulting to the land, and in a suit at equity to enjoin the further continuance of the nuisance.

In the case of private property which is unoccupied, however, there may be some difficulty in establishing use and enjoyment, and if the above definition be strictly construed, and a nuisance be considered an invasion of a personal right or interest, there can be no nuisance in such a case. On the other hand, if a nuisance is thought of as an injury to the land, occupation or vacancy is irrelevant.

The courts, however, have not made this distinction. They have agreed that the owner of unoccupied land is entitled to have damages for any loss in value of the property due to the nuisance,[2] but disagree sharply as to whether or not he is entitled to an injunction. One group of courts hold that the owner of the land has an adequate remedy at law, in a suit for damages,[3] and the other group insists that equity can enjoin any nuisance which is damaging nearby land, or reducing its value, regardless of the fact that the land is unoccupied.[4]

When confronted with this situation, the greater number of courts have refused to issue an injunction, on the grounds that the owner of the unoccupied property has an adequate remedy at law for damage to the property or reduction in its value. In *Dana v. Valentine*,[5] the court said; "As to the first ground of defense, we are of the opinion, that the several plaintiffs, who own vacant lots, on which there are no dwelling-houses, have a complete and adequate remedy at law, and that an action at law for the recovery of damages for the diminution of the value of their lands, by the nuisance alleged, is the only suitable and appropriate remedy. Upon no principle of equity can the court interpose in their favor—there being no certainty that dwelling-houses will ever be erected on the premises. . . . . to require this extra-ordinary relief, the injury complained of must actually exist, or

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1 4 Restatement, Torts, Sec. 822 (1939).

2 Ruckman v. Green, 9 Hun. (N. Y.) 225 (1876).

3 Ruckman v. Green, 9 Hun. (N. Y.) 225 (1876); Purcell v. Davis, 100 Mont. 480, 50 P. (2d) 255 (1935); Busch v. New York, L. and W. Ry. Co., 12 N. Y. S. 85 (1890); Smith v. Morse, 148 Mass. 407, 19 N. E. 393 (1889); Edwards v. Allouez Mining Company, 38 Mich. 46, 31 Amer. Rep. 301 (1878); Dana v. Valentine, 5 Metc. 8, 46 Mass. 8 (1842).

4 Wilson v. Townend, 1 Drew and Sm. 324 (England, 1860); Romano v. Birmingham Ry., Light and Power Co., 182 Ala. 335, 62 So. 677 (1913).

5 Dana v. Valentine, 5 Metc. 8, 46 Mass. 8 (1842).

the danger must appear to be certain and immediate, and not depending on any contingency." The court is apparently distinguishing between two types of nuisance. For one, which damages the land, or reduces its value, an action at law is the suitable remedy. For the other, which interferes with the enjoyment and use of the land, an injunction may issue. This is an interesting refinement and amounts to this; in unoccupied land, the invasion causes a reduction in the value of the land. Once this reduction is established, provided the agent creating the nuisance does not expand, the value of the land becomes constant, and the difference in values is the measure of the total damage done. The nuisance may continue, but will not, if it remains unchanged, further reduce the value of the land. If the land is occupied, however, the nuisance may not only cause a decrease in the value of the land but may also impair the enjoyment of the land by its occupier. This offense is continuous to the occupant of the land and is a constant source of discomfort. An action at law for damages is not satisfactory, since the nuisance may continue. Unless an injunction is granted, the remedy plaintiff has is a series of suits at law for damages. In most cases, the plaintiff will willingly forego damages for the sake of an injunction.

The majority of the decisions are in accord with this rule. In *Purcell v. Davis*,[6] the court said, "Damage by way of reduction in the market value of the nearby property which the owner desires to sell is not sufficient to move a court of equity, as such injury may be readily compensated by damages in an action at law." In no case has the fact that the land is unoccupied served to move the court to refuse damages. In answering plaintiff's contention that it should, a New York court said, "But it is claimed in this case that no action will lie because the premises were vacant lots unoccupied by any person living thereon. This fact we think is only a circumstance bearing upon the nature and extent of the damage. It may be more difficult in a case where the lots are unoccupied to ascertain strictly the measure of damages, but the fact goes to the extent of the recovery, and not to the right of recovery." [7]

The opposite view, that an injunction should be issued to restrain operation of a nuisance against unoccupied land, is accepted only in a few cases. In granting an injunction against a melting house, in 1849, a New York court said; [8] "That the court of chancery has jurisdiction to restrain nuisances which are injurious to the property of individuals, is now too well settled to admit of discussion. And the facts show that the carrying on such an offensive business in the neighborhood must be necessarily injurious to their property, and render the enjoyment

6 Ruckman v. Green, 9 Hun. (N. Y.) 225 (1876).
7 Ruckman v. Green, 9 Hun. (N. Y.) 225 (1876).
8 Peck v. Elder, 3 Sandf. (N. Y.) 126 (1849).

thereof unsafe to health. And it is of no consequence whether the complainants reside on their property or not. It is sufficient that the nuisance is calculated directly to diminish its value, by preventing its being occupied by the complainants or by good tenants who are able and willing to pay the rent, or to destroy the value of the property as building lots." Likewise, in issuing an injunction against a gas and oil company to restrain operation of an oil storage tank, the Supreme Court of Alabama said; [9] "Complainants ought not to be required to submit to a use of defendant's property—a use hurtful to complainants and others, though valuable to defendant—which a court of equity would deny to complainants in respect to their own property on the application of other neighbors. A court of equity interposes by injunction to prevent future injury in respect of a legal right attaching to land simply on the ground of the damage it will produce to the land and its ownership; and in a case like this it is of no consequence whether complainants reside on their property or not." In an English case, involving Ancient Lights,[10] it was contended that the court ought not to interfere, inasmuch as the only injury the plaintiffs could sustain was diminution of the value of the property, for which compensation could be recovered at law. The court disagreed, however, and stated, in granting the injunction, that a court of equity would always interfere to prevent an injury being done to property.

The second part of this topic, the question of when the cause of action arises in defense of unoccupied property, is of importance in determining when, in case the perpetrator of the nuisance claims a prescriptive right, the statutory time began to run against the property owner. In *Dana v. Valentine, supra,* the plaintiff objected to defendant's title by prescription by claiming that he had suffered no damage from the alleged nuisance until recently, and therefore could not interfere to prevent its continuance until that time. The court dismissed this argument, however, and said that proof of special damage is not necessary to maintain an action for the invasion of a property right. The plaintiff had a cause of action as soon as the nuisance began. This seems to be the general rule, and cases to the contrary are few, and are highly criticised.[11]

John Merryman.

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9 Romano v. Birmingham Ry., Light and Power Co., 182 Ala. 335, 62 So. 677 (1913).

10 Wilson v. Townend, 1 Drew and Sm. 324 (England, 1860).

11 Sturges v. Bridgman, 11 Ch. 852 (England, 1879); See criticism of this case in 13 Harv. Law Rev. 142 (1889).

THE REBIRTH OF TITLE THROUGH SALE OF TAX DELINQUENT LAND IN ILLINOIS.—Due to the depression throughout the United States and many other untold circumstances that have affected the business man and every individual in some manner, property, real and personal, stands as evidence of what the several States have experienced throughout the years. States, as has been proven through long years of history, must have revenue in order to carry out their many governmental functions. The first common-sense moral law of procuring revenue is that the inhabitants of a community should pay for the operation of the community according to their ability to pay. And the logical basis for determining ability to pay is the property, real and personal, owned by the individual. The states have taken a fair outlook on the matter of assessing taxes on real property using as a guide location and many other factors that go to determine worth of realty and upon that basis assess a proportional tax to cover the expense of administering state government.

In the state of Illinois, as in every other state, millions of dollars worth of lands have become tax delinquent due to the many changes in the world that have affected the citizens of the state and their ability to own property. When the owner of land fails to pay the taxes on his land when due, the land begins to be tax delinquent and these past due taxes must now be collected by process of law. One process of law (the most final and expedient one) in the state of Illinois to collect these past due taxes is the sale of the land.

Sec. 216 of the Illinois Revenue Act as amended July 24, 1943 provides that taxes shall constitute a prior and first lien on real property, paramount to all others. It further provides that when the property has been tax delinquent for at least two years, the taxes having been forfeited to the State for that period of time, the State, by foreclosure in equity, shall have the power to cause the property to be sold at public sale, with notice as is required by law and as is provided by sec. 4 and sec. 5 Art. IX of the Constitution of Illinois, and to apply the money obtained from the sale to the taxes due on the property.

The back taxes due constitute a debt owed the State and such debt may be foreclosed on in a Court of Equity and a judgment obtained and an execution issued pursuant to the judgment, authorizing the sheriff of the county to sell the property. The statute expressly provides that the foreclosure proceeding shall be an action *in rem,* (Sec. 216 as amended July 24, 1943) hence the debt is firmly attached to the land and cannot be recovered by an action *in personam* against the owner of the land once foreclosure has been accomplished.

When a particular piece of land is purchased at a tax sale in Illinois the purchaser receives first a tax certificate of sale. This is all he gets for at least two years. For the statute provides that the land held

under a tax certificate may be redeemed up to the time of the issuance of a tax deed which deed may be obtained by the purchaser not less than two years after the sale for taxes. If the property is redeemed before the tax deed is issued to the purchaser the redeemer gets his property free of all prior liens and incumbrances. (Under sec. 216 as amended, foreclosure in Equity extinguishes this lien together with all lesser liens and incumbrances.)

After the purchaser has held the tax certificate for the two year period of redemption and the property has not been redeemed he may ask the court to compel the county clerk to issue to him a deed to the property for which he holds the tax certificate. If the deed is not granted by the county court the purchase price shall be returned as in the case of sales in error. (235a Rev. Act 1939 as amended.) Where the purchaser is granted the deed and it is properly executed he must go into possession within one year after he obtains the deed. If he doesn't go into possession within one year or if he does but fails to keep up the taxes and assessments accruing subsequent to his purchase, it shall be lawful for the owner, his attorneys, or his agents upon payment of the taxes and assessments (if any be due) and the price of the sale plus 7% per annum interest thereon to have the property re-conveyed from the holder of the tax deed. (235a) But if he goes into possession within one year and keeps up the payments of taxes and assessments for a period of seven successive years his deed becomes immune to a reconveyance. (216 Ill. Rev. Act as amended.)

At this point the purchaser now has: (1) A foreclosure judgment, and a precept, issued in pursuance of the judgment, authorizing the sheriff to sell the property, (2) A certificate of sale, (3) A deed of conveyance from the sheriff.

Now the question is: What is the nature of the title acquired by the purchaser? Does he now have an original and paramount title, unimpeachable in all respects?

Black, in his treatise on Tax Titles says, "It is within the constitutional power of the legislature to enact that the purchaser at tax sale shall acquire a new, independent, and unincumbered title. That is to say, the connection between the land and the tax is usually formed, as we have seen, by the creation of a special lien; and this lien may be made paramount to all others, so that when it is foreclosed, and the land sold, not only the title of the original owner shall be divested but all other claims, interests, and liens shall be swept away with it. 'It is not only competent for the state,' says Judge Cooley, 'thus to charge the land with the tax, but the legislature may, if it shall deem it proper or necessary to do so, make the lien a first claim on the property, with precedence of all other claims and liens whatsoever, whether created by judgment, mortgage, execution, or otherwise, and whether arising before or after the assessment of the tax. When that is done,

the lien does not stand on the same footing with an ordinary incumbrance, but attaches itself to the *res* without regard to the original ownership, and if enforced by sale of the land, the purchaser will take a valid and unimpeachable title.' "

The Revenue Act of Illinois, as amended, establishes "taxes, assessments and penalties due on land" to be a prior and first lien, superior to all other liens and incumbrances.

As far back as 1845 it was held that: If a tract of land, subject to taxation, is sold for taxes, and the proceedings under the revenue law have been regular and the owner has failed to redeem within the time limited by law then the whole legal and equitable estate is vested in the purchaser; a new and perfect title is established, and superior to that acquired by a purchase at a sheriff's sale under an ordinary judgment where the purchaser only succeeds to the title which the debtor had at the recovery of the judgment.[1]

Again in 1928 an Illinois court [2] held "Title will pass at tax sale regardless of any encumbrances resting on the land," and still later in 1940 the same court held "The foreclosure in equity of a tax lien extinguishes it, discharges the premises therefrom, and purchaser takes property free from a lien for unpaid portion of amount due and even the failure of a purchaser to take a deed after redemption period has expired does not reinstate the lien." [3]

The same doctrine was laid down in *Murch v. Epley* [4] where the court said: "Taxes levied on real estate become a charge upon the land itself and if not paid land may be sold for taxes due thereon and title will pass irrespective of any incumbrance resting on the land."

However, it must be noted that the title does not vest wholely in the purchaser until the time when the tax deed is issued to the purchaser. In *French v. Toman* [5] the court said: "Where after foreclosure and sale of realty for delinquent taxes at less than amount due, person who acquired title to the property after taxes became a lien redeemed, such redemption voided the sale and certificate." And again in an earlier case [6] the court stated: "Purchaser of tax certificate assignable by indorsement does not, until expiration of period of redemption and issuance of tax deed acquire any equity or title to the land, certificate being a mere species of personal property, and it being uncertain whether right of redemption will be exercised."

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1 Atkins v. Hinman, 7 Ill. 437, 2 Gilman 437 (1845).

2 McConnell v. Jones, 332 Ill. 620, 164 N. E. 186 (1928).

3 French v. Toman, 375 Ill. 389, 31 N. E. (2d) 801 (1940).

4 385 Ill. 138, 52 N. E. (2d) 125 (1943).

5 375 Ill. 389, 31 N. E. (2d) 801 (1940).

6 Wells v. Glos, 227 Ill. 516, 115 N. E. 658 (1917).

From the foregoing decisions it seems to follow that where the purchaser of tax delinquent land in Illinois, after full compliance with the statutory provisions as enumerated in the Revenue Act, has acquired a valid, original and paramount title free from any and all prior incumbrances.

J. Barrett Guthrie and *Robert T. Fanning.*

COMMON LAW RIGHTS AS TO SURFACE WATERS.—Any subject to be discussed properly should be defined, so first I will endeavor to give a full definition of "surface water." Surface waters are waters that fall on the land from the skies or arise in springs and diffuse themselves over the surface of the ground following no defined course or have no channel defined and not gathering into or forming any more definite body of water than a mere bog or marsh and are lost by being diffused over the ground through percolation, evaporation or natural drainage.[1]

We find the courts defining the rule as follows: Surface water is a common enemy which every proprietor may fight as he deems best, regardless of its effect on other proprietors, and that accordingly the lower proprietor may take any measures necessary for the protection or improvement of his property, although the result is to throw the water back upon the land of an adjoining proprietor, providing it is not done in a reckless manner or in such a way as to create a nuisance and destroy his property.

This common law rule is distinguished from the civil law rule which states as between the owners of higher and lower ground the upper proprietor has an easement to have the surface water flow naturally from his land onto the land of the lower proprietor which is subject to a corresponding servitude, and hence the lower proprietor has not the right to obstruct its flow and cast the water back upon the land above. He also has a right to receive the water.[2]

The damage resulting to one from the defense by his neighbors from surface water under the "common enemy rule" is considered *"damnum absque injuria."* [3]

It is interesting to look into the various rights of adjoining landowners in common law states. We can well imagine a landowner seeking to drain his land of surface water and having no place to put it so it would drain, but on the land of the adjoining owner. Now under

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1 67 C. J. 862.

2 67 C. J. 867.

3 Melhous v. State Highway Department, 194 S. C. 33, 8 S. E. (2d) 852 (1940).

common law surface waters may be controlled by the owner of land on which they fall or originate or over which they flow and he may appropriate to his own use all that falls or comes on his land and refuse to receive any that falls or originates or flows on or over adjoining property.[4]

Now we can see the problem for the courts to decide. Which of two adjoining landowners both have equal rights as to the acceptance or non-acceptance of surface waters. Suppose that C has a beautiful farm but for the fact that B, who has a farm above C allows his surface water to all run down to C's farm and consequently makes a large soggy field, which C can not use. So C in the interest of good husbandry and because he knows that his state is a common law state as to surface water builds a large dam by piling dirt, rocks and etc., thus preventing B from letting his surface water run off of B's land and causing considerable damage to B's property, but giving to C the desired effect of drying up the soggy land of C's caused by B's surface water.

We see very definetely where an injury could occur but still no action would lie in the majority of cases. In one case where the defendant constructed a ditch entirely on his own property and erected a dam at one end thereof, defendant was not liable for damages to adjoining property caused by the surface water which accumulated in the ditch flowing over and seeping into adjoining property. The retention diversion, repulsion or altered transmission of surface water is not an actionable injury even though damage issues.[5]

Again we can see the case of the lower proprietor who expects surface water to run down to his farm but not in such large quantities as to cause damage to him. "A landowner who is not guilty of negligence may, in the interest of good husbandry, accelerate surface waters in the natural cause of drainage without liability to the lower proprietor. The quantity of water thus discharged upon the land of an adjoining proprietor may be increased." [6]

In the following case the rule of the common law which exists here states the owner has the right to obstruct and hinder the flow of mere surface waters upon his land from the land of other proprietors; that he may even turn the same back upon or unto the land of his neighbor without incurring liability for injuries caused by such obstruction.[7]

We can see the courts in these various common law states desperately trying to find a just solution to the problem consequently even though they follow the common law rule basically they have modified its use to suit their own decisions.

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4 Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. (2d) 576 (1942).
5 Zamelli v. Trost, 132 N. J. L. 388, 40 Atl. (2d) 783 (1945).
6 Steiner v. Steiner, 97 Neb. 449, 150 N. W. 205 (1914).
7 Hoyt v. City of Dudson, 27 Wis. 656 (1871).

In *Watts v. Evansville,* "Land owners may not collect such waters into a channel, he is not liable only so long as the flow is natural and not in a ditch form" [8] It would seem to me that this is substantially changing the common law rule. The question comes to my mind if he can't use a ditch to drain his land, but only the natural lay-out of the land to what extent does the common law rule help him?

Again the courts try to modify common law rule so to aid justice, the courts say in the state of Nebraska, that the state follows the common law rule, but that in fighting surface water the upper proprietor may not accumulate surface water in a ditch, or drain, and thereby increase the flow, and discharge them in volume on the servient estate and cannot divert the surface waters by changing the direction of them.[9]

Then we find various courts in the states who supposedly are common law states as to surface water, using a middle road theory. Their decisions can not be classified as either common or civil law ruling. It would seem that they attempt to settle each case on its own merits and use the general rules when and if, they desire to use them.

This definitely puts a burden on the citizens of these states, as it keeps them constantly in doubt as to the correct law for their states. But I do believe that if the true common law rule were used that it would allow the owners of adjoining land to settle their own disputes as to surface waters on their lands. The common law seems to say "let every man do as he sees fit with his surface water."

If the true common law rule or the true civil law rule were followed it would do away with much litigation. Confusion comes when the courts take the "middle road" theory and try to settle each case on its own merits and consequently leaves the law in a state of confusion.

Robert S. Stewart.

DAMAGES FOR CONVERSION OF METALS.—In Costigan on Mining law,[1] we find the following general statements:

"Trespass is the action usually resorted to when damages are sought for the wrongful taking of ore."

"The measure of damages for the taking of ore varies in different jurisdictions. In some the good faith of the defendant will enable him to deduct the cost of getting out the ore, and in others it will not;

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8 Watts v. City of Evansville, 191 Ind. 27, 129 N. E. 315 (1921).

9 Hengelfelt v. Ehrmann, 141 Neb. 322, 3 N. W. (2d) 576 (1942).

1 Costigan on Mining Law 144-144a; page 513.

and to put it another way, in some, the bad faith of the defendant will prevent him from deducting the cost of getting out the ore, and in others it will not. In some the bad faith of the defendant makes him liable for exemplary damages, and in others it does not."

In the case of *Kahle v. Crown Oil Co.*,[2] we find the following words of the court. "One who willfully and intentionally takes ore, timbers, or other property from the land of another must respond in damages for the full value of the property taken, at the time of the conversion, without any deduction for the labor bestowed or expense incurred in removing and preparing it for the market; but if he commits the wrongful act unintentionally, or by mistake, or in the honest belief that he is acting within his legal rights, the recovery against him must be limited to the value of the property taken, less what it costs to produce it. The test to determine whether one is a willful or mistaken trespasser, is his belief and intention at the time he committed the trespass."

Again in the case of *Bryson v. Crown Oil Co.*,[3] we have an added measure of damages recited as follows. "In an action to recover damages from one who acting in good faith, has taken oil (held in same case that it is immaterial whether substance coverted is oil or any other natural resource) from the land of another, additional damages, in the nature of interest, may be allowed for the lapse of time that the property has been withheld, so that the rightful owner may be compensated as of the time of the conversion."

It goes further in the same case to state that in an action where damages were awarded against a trespasser for oil taken from the land of another in good faith, the burden rested on the defendant to obtain a finding of facts containing all credits to which he was properly entitled in the determination of the amount of damages assessable.

In the case of *Cypress Creek Coal Company et al. v. Boonville Mining Company*,[4] the court again expressed the general rule by stating, "In an action for damages for the wrongful removal of coal from land, the measure of damages, if the trespass was willful and intentional, is the value of the mineral at the time and place of conversion, with nothing deducted for labor expended in mining and marketing it; if the taking was not willful, but was the result of a mistake, then the taker is entitled, to have the cost of production deducted from its value."

We have the case of *The Sunnyside Coal and Coke Company v. Reitz et al.*,[5] where the plaintiff charges that on the first day of January, 1887, and on divers other dates between that and the commencement of this action the Sunnyside Coal and Coke Co. wrongfully and

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2 Kahle v. Crown Oil Co., 180 Ind. 131 (1913).
3 Bryson v. Crown Oil Co., 185 Ind. 156 (1916).

unlawfully and without leave entered the premises of the plaintiff and dug, mined and removed eight thousand tons of bituminous coal of the value of $10,000.00, of which coal the plaintiff was the owner, and in possession and converted and disposed of the same to its own use and otherwise injured said premises to the plaintiff's damage in the sum of $10,000.00.

The judge laid down the following rule. "While the coal lay in the vein it was a part of the realty; when it became severed it became a chattel. The change in its condition did not change its ownership, it still belonged to the owner of the soil. He was entitled to recover its possession, and if this could not be done he was entitled to recover its value as a chattel. If a trespass is willful and intentional, the law will not permit the trespasser to profit by his own wrong. Whatever labor the trespasser voluntarily bestows upon property under such circumstances he must lose.

If a trespass is the result of a mistake the damages may be reduced by the value of the labor expended upon it. The one is a positive aggressive wrong, the other a mere inadvertence.

Other Indiana cases which hold to the above general rules are *Everson v. Seller,*[6] and *American Sand and Gravel Company v. Spencer.*[7]

From the above cases and from a review of the law in the other cases we find a general rule as laid down in the first above cited quotation. One who by innocent mistake of fact mines the ore of another, has a right of a quasi contractual nature to mitigate the damages by deducting from the fair value of the ore, after its severance from the soil, the amount which that value has been enhanced by his labor in getting out the ore. In other words, the majority of the courts allow the plaintiff simply the value of the ore before its severance from the land. Some states do not permit this however and Alabama is the most notable example where plaintiff gets the value after severance. Kentucky allows the recovery of a reasonable royalty against a defendant who acted in good faith.

If, in addition, to the defendant's action being in good faith, the plaintiff has knowingly let the defendant labor under the mistake, the general rule appears that the defendant's right everywhere to a deduction of the increase in value which he gave the ore is perfectly clear. *Single v. Schneider,*[8] is the leading case on this point. There are views of certain courts which allow the defendant who knowingly trespasses

4 Cypress Creek Coal Company et al. v. Boonville Mining Company, 194 Ind. 187 (1924).

5 Sunnyside Coal and Coke Company v. Reitz et al., 14 Ind. App. 478 (1895).

6 Everson v. Seller, 105 Ind. 266 (1885).

7 American Sand and Gravel Company v. Spencer, 55 Ind. App. 523 (1913).

8 Single v. Schneider, 24 Wis. 299 (1869).