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NOTES

ADMINISTRATIVE CONTROL OF MEDICAL PRACTICES IN INDIANA.—Since the time of Hippocrates a galaxy of schools or systems of healing, many of them antagonistic to the others, have competed among themselves for public recognition and approval. Most of them have some intrinsic merit. A perusal of the statute books of any state will disclose the extent to which these gradations of theory and practice have been recognized by the legislatures in their effort to regulate those engaged in the healing art.

The privilege of practicing *medicine,* using that word in its broadest sense, is so intimately bound up with the health and well being of the public that little doubt can be entertained that it is a proper subject of police power regulation by the states.[1]

Sec. 63-1301, Burns' Ind. Stat. Ann., provides as follows: "It shall hereafter be unlawful for any person to practice medicine, surgery or obstetrics in this state without first obtaining a license so to do, as hereinafter provided." Succeeding sections [2] provide in substance that any person desiring to begin the practice of medicine, surgery or obstetrics must procure from the State Board of Medical Registration and Examination a certificate that such person is entitled to a license. The applicant for a certificate must turn in a diploma from a medical school of "recognized standing" together with supporting affidavits and a fee of ten dollars. In addition, an examination is required of all applicants for licensure, except those seeking licensure through reciprocity.[3] The

1 State ex rel. Burroughs v. Webster, 150 Ind. 607, 50 N. E. 750 (1898); Parks v. State, 159 Ind. 211, 64 N. E. 862 (1902).

2 Burns' Ind. Stat. Ann., 1943 Replacement, Title 63, Sec. 1302 et seq.

3 Rule 63-1302-3, Horack's Ind. Administrative Code, 1941.

applicant is examined on the basic sciences, including anatomy, histology, embryology, pathology, bacteriology, physiology and chemistry. The clinical sciences covered by the examination include general surgery, materia medica and therapeutics, theory and practice of medicine, obstetrics, hygiene and sanitation, neurology, gynecology, medical jurisprudence, physical diagnosis, ophthalmology, otology and pediatrics. The examination consists of 100 questions. Each section must be passed with a score of at least seventy-five percent.[4] Certain of these subjects, notably materia medica, are omitted in examinations looking to the so-called drugless branches,[5] as will be mentioned later.

Upon successfully completing the above described examination, the applicant receives a *certificate* from the Board. This certificate is presented by him to the clerk of the county in which he resides, and under the law he is entitled to receive from the county clerk a *license* to practice medicine, surgery and obstetrics in the State of Indiana.

The State Board of Medical Registration and Examination was first established in 1897, and originally consisted of five members.[6] The language used is interesting. It provides, among other things, that "* * * no school or system of medicine shall have a majority representation on such board. * * * Each of the four (4) schools or systems of medicine having the largest numerical representation in the state shall have at least one (1) representative on the board." In 1905 the Board was enlarged to six members, and then to seven members under the Medical Practice Act of 1927.[7] It will be observed that the Act of 1897 and all acts amendatory thereof, carefully avoid the naming of specific schools or systems of medicine in determining eligibility to board membership. The obvious purpose of this is to allow osteopathic physicians, chiropractors and other groups to participate in board membership, in addition to the allopathic or "orthodox" practictioners (those holding M.D. degrees).

The Board of Medical Registration and Examination meets periodically in the city of Indianapolis. The Board's seven members are appointed by the governor, for terms of four years. Its members are compensated in the amount of six dollars per diem plus necessary traveling expenses. By law, the Board is invested with the power to fix minimum standards of education and character of those applying for certificates; also, the Board is authorized to establish and cause to be recorded a schedule of the minimum requirements and rules for the recognition of medical schools, provided that such rules shall not be retroactive in effect.[8] The Board may establish all necessary rules and regulations for

4 Rule 63-1302-4, Horack's Ind. Administrative Code, 1941.
5 Ibid.
6 Acts of 1897, ch. 169, Sec. 4, p. 255.
7 Burns' Ind. Stat. Ann., 1943 Replacement, Tit. 63, Sec. 1312.
8 Burns' Ind. Stat. Ann., 1943 Replacement Tit. 63, Sec. 1306.

the reciprocal recognition of certificates issued by other states.[9] The Board's rule making power cannot be used to discriminate for or against any school or system of medicine.[10] The law sets two standards which very definitely narrow the Board's administrative discretion:[11] "* * * no certificate shall be issued to any person * * * until he shall have satisfied said Board that he has graduated at a reputable medical college * * * and shall have passed before the Board a satisfactory examination as to his qualifications to practice medicine, surgery and obstetrics * * * (except in the case of reciprocal certificates)." The Board is given the power to revoke licenses obtained by fraud or misrepresentation.[12] And it may refuse to grant a certificate, or revoke one already granted, where the person has been found guilty of a felony, or is grossly immoral, or is addicted to the use of liquor or habit forming drugs to such a degree as to render him unfit to practice medicine or surgery.[13] The *modus operandi* is interesting:[14] A specific, written charge, supported by affidavit, must be filed with the Board, making definite and specific charges against the holder of a license. The Board thereupon must fix a time and place for a hearing of such charges, the notice to be at least twenty days before the time set for the hearing. In the event of revocation, the Board must make an entry to that effect upon its records, and a copy of the revocation order is forwarded to the clerk of the circuit court of the county in which the license was issued, which order is recorded on the margin of license record. In the case of revocation, an appeal from the Board's order may be taken to the circuit or superior court of the county in which the license was issued. Where the Board has refused to issue a certificate, resort may be had to the circuit or superior courts of the county where the applicant lives. But the appeal must be perfected within 30 days after the Board's order in either event; otherwise, resort to the courts is forever barred. The verified charges are treated as a complaint, and issues are formed thereon as in any civil case. The prosecuting attorney of the circuit in which the case is being determined appears on behalf of the Board. If the finding and judgment of the court is adverse to the petitioner on any of the charges brought, the Board's order will stand. If all allegations are determined adversely to the Board, its order will be vacated by the court. Appeals by either the licensee or the county prosecutor representing the Board may be prosecuted to the Indiana Supreme Court, but during the pendency of any appeal, the licensee cannot practice legally.

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9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

14 Ibid.

It will thus be observed that the review of the Board's orders, both in the trial courts and on appeal, is very much akin to any other civil action, even though the statute speaks in terms of "judgment of guilty" and "accused."

In re Coffin[15] held that a deputy prosecuting attorney representing the Board could not legally consent to a judgment in favor of an applicant appealing from a decision of the Board. The consent judgment was set aside, and the Board was permitted to proceed further.

Numerous cases have arisen under the "gross immorality" clause of Sec. 63-1306, which is set out as one ground upon which the Board may revoke licenses.[16] It is not germane to our purpose to go into them here, except to observe that in most cases the courts affirm the Board's orders, and the evidence upon which the board bases its orders is not normally weighed on appeal.

Where an applicant is refused an examination, and the Board declines to give him a certificate, it has been held that under this section (63-1306) the proper remedy of the applicant is an appeal, and not mandamus.[17]

Sec. 63-1308 provides for the restoration of rights after revocation, on a proper showing.

Sec. 63-1310 declares that the law shall not be construed as to discriminate against any school or system of medicine, or to prohibit gratuitous services in emergencies, or in any way affect the administration of family remedies.

Sec. 63-1311 undertakes to define the practice of medicine in the following language: "To open an office for such purpose or to announce to the public in any way a readiness to practice medicine in any county of the state, or to prescribe for, or to give surgical assistance to, or to heal, cure or relieve those suffering from injury or deformity, or disease of mind or body, or to advertise, or to announce to the public * * * shall be to engage in the practice of medicine within the meaning of this Act." The manufacture, advertisement or sale of proprietary medicines, as well as persons endeavoring to prevent or cure disease by prayer or spiritual means, are expressly exempted from the operation of this section. Another part of the same section provides that where a person is found to be practicing medicine within the State, who has not been duly licensed, he may be enjoined from further practice by

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15 152 Ind. 439, 53 N. E. 458 (1898).

16 Crum v. State Board of Med. Reg. and Exam., 219 Ind. 191, 37 N. E. (2d) 65 (1941); Revocation of license to practice chiropractic, naturopathy and electro-therapy.

17 State ex rel. Barnett v. State Board of Med. Reg., 173 Ind. 706, 91 N. E. 338 (1910).

the attorney general, a prosecuting attorney, the Board acting on its own initiative, or any citizen. Such actions are maintained in the name of the State.

In charging a person with practicing medicine without a license under Sec. 63-1311, it is sufficient to allege that fact generally, and it is not necessary to negative the exceptions contained in the statute.[18] And in *State ex rel. Indiana State Board of Medical Registration* and *Examination v. Cole*[19] the Indiana Supreme Court held that the defendant's answer to the Board's suit, to the effect that the Board had wrongfully denied him a license to practice, merely amounted to a collateral attack upon the action of the Board, and could avail the defendant nothing.

Sec. 63-1316 deals specifically with osteopathy, and is interesting because it highlights the traditional professional antagonism between the osteopaths and the M.D.'s. An applicant for an osteopathy certificate, under this section, must pass the examination on all basic and clinical sciences, except materia medica. With this sole exception, he is on an equal footing with the M.D. applicants. The law goes on to state categorically that the holder of a license in osteopathy shall "have the right to practice osteopathy, surgery and obstetrics and to administer anesthetics, antiseptics and narcotics." This is perhaps justified when one reflects on the high standards of the American Osteopathic Association, which is recognized by most state licensing boards as the official accrediting agency for osteopathic colleges.[20] In any event, the fact that osteopaths are licensed to practice *all forms of surgery* in Indiana is not something peculiar to this State. The same rule obtains in Arizona,[21] California,[22] Colorado,[23] Delaware,[24] District of Columbia,[25] Florida,[26] Kentucky,[27] Maine,[28] Massachusetts,[29] Michigan,[30] Missouri,[31] New Mexico,[32] Oklahoma,[33] Oregon,[34] Pennsylvania,[35]

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18 Melville v. State, 173 Ind. 352, 89 N. E. 490 (1910); Beyer v. State, 199 Ind. 647, 158 N. E. 477 (1928).

19 215 Ind. 562, 20 N. E. (2d) 972 (1939).

20 See Excellent Article in 23 N. Car. Law Rev. 129, by A. B. Weldon.

21 Ariz. Code Ann. (1939), Sec. 67-2101, et seq.

22 Cal. Gen. Laws (Deering, 1944) Act 5727, Sec. 1, et seq.

23 Col. Stat. Ann., c. 109, Sec. 6.

24 Del. Rev. Code (1935), Sec. 931; Op. Atty. Gen., Mar. 13, 1939.

25 D. C. Code, Sec. 2-109, et seq.

26 F. S. A. (1943), Sec. 459.01, et seq.

27 Ky. Rev. Stat. (Cullen, 1943), Sec. 311.010(2a), et seq.

28 Me. Gen. Code.

29 Mass. Ann. Laws (Michie, 1942), c. 112, Sec. 10.

30 Mich. Stat. Ann. (Henderson, 1937), Sec. 14.574.

31 Rev. Stat. Mo. (1939) Sec. 10044.

32 N. M. Stat. Ann. (Courtright, 1941), Sec. 51-809.

33 Okla. Stat. Ann. (1941), Tit. 59, Sec. 630.

34 Ore. Comp. Laws Ann. (1939), Sec. 54-821.

35 Pa. Stat. Ann. (Purdon, 1941), Tit. 63, Sec. 266, 68.

Rhode Island,[36] Tennessee,[37] Utah,[38] Vermont,[39] Virginia,[40] Washington,[41] and West Virginia.[42] In six other states, including New York, osteopathic physicians and surgeons are licensed to practice surgery on a restricted basis.[43] In all of the states noted above, with the exception of Indiana and New York, osteopaths are authorized to practice *medicine,* as well as surgery, on the same terms as allopathic physicians and with no limitations whatsoever as to practice rights. This means the administration of drugs in all forms. But in Indiana, as we have seen, the osteopath, although unrestricted in surgery, is limited in his use of drugs to anesthetics, antiseptics and narcotics.

Under the law as it is now constituted, the complexion of the Board can change quite radically as relative strength of the various schools and systems represented thereon advance and decline. The social objective involved is to keep the regulatory features of our Medical Practice Act in reasonable adjustment with the changing climate of medical practice.

David S. Landis.

ADMISSIONS BY PARTIES OR OTHERS INTERESTED IN THE CASE.—We shall be concerned in this paper with only those admissions by parties to the record. In *Corpus Juris* [1] it is stated that "admissions of a party to the record are competent against him, even though the declarant is prosecuting or defending the action in a representative capacity. The rule applies whether the admissions relate to the fact in issue or to a fact relevant to the issue, and regardless of the time when they were made, unless of course, the time of the statement of itself renders it irrelevant to the issue on which it is offered. Admissibility is not conditional upon showing that the conduct of the party offering the statement was affected by it or his ability to fix the time and place when it was made, provided the statement is satisfactorily traced to the party. Neither is it necessary that the admissions should be entirely consistent with the other evidence introduced by the party by whom they are shown. Where admissions are offered as those of a party, the declarant must be a party to the record at the time of the offer."

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36 R. I. Acts (1940), Ch. 889.
37 Tenn. Code Ann. (Michie, 1941), Sec. 7007.
38 Utah Code Ann. (1943), Sec. 79, et seq.
39 Vt. Pub. Laws (1933), Sec. 7477.
40 Va. Code Ann., Sec. 1609(c).
41 Wash. Rev. Stat. Ann. (Remington, 1933), Sec. 10056.
42 W. Va. Code Ann. (Michie, Sublett & Stedman, 1943), Sec. 2984.
43 N. Y. Ed. Law Sec. 1262.

1 22 Corpus Juris 400 p. 345.

The recent Ohio case of *Conrad v. Kirby* [2] held that "It is competent to show admissions made by parties to record, and such statements are evidence for adverse party and if testimony is of such a character as to constitute an admission of a party, it is not necessary to lay foundation for its reception, or to cross examine the party on subject covered by testimony." A late Ohio case [3] held that "admissions are declarations against interest may be given in evidence against declarant." In Illinois the court held in *People ex rel Nelson v. Central Manufacturing District Bank* [4] that "the admission of a party to a fact, no matter how made may be given in evidence against him."

As to the admissibility of statements as to particular facts, the court held in *River Park District v. Brand* [5] that in a condemnation suit testimony concerning conversations between landowner and Park Commissioners trying to buy property was held competent as admissions against landowner's interests. In *Wicker v. Kinney* [6] the court said that "in personal injury action against automobile owner testimony as to admissions by defendant, showing that he owned and operated automobile and that accident happened held admissible." In *Smith v. Cleveland Railway Company* [7] the court said that an "expert's testimony as to plaintiff's statements, during physical examination, that he sustained only injury then complained of, two months before, held admissible against him."

Statements of grantor, whether before or *after* signing of the deed, which tend to rebut the claim of fraud therein, are competent as declarations against interest the court pointed out in *McAdams v. McAdams*.[8] In an action on a note in *Kyger v. Stallings* [9] it was held that evidence that the maker had said to the payee that she owed the note but would not pay it until she got ready held admissible. In the Illinois case of *Lyman v. Kaul* [10] the court held that "in a will contest by testator's sole heir, statements of principal devisee as to contestant's having married a woman of immoral character, and that, if she were testator, she would cut him off, were admissible as statements against her interest."

In an action for injuries sustained by plaintiffs when their automobile struck a parked automobile when an attempt was made to avoid striking the defendant's automobile which was allegedly driven out onto the state highway in path of the plaintiff's automobile without defend-

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2 31 N. E. (2d) 168, 66 Ohio App. 359 (1940).
3 In Re Evans Estate, 41 N. E. (2d) 410, 71 Ohio App. 127 (1941).
4 28 N. E. (2d) 154, 306 Ill. App. 15 (1927).
5 158 N. E. 687, 327 Ill. 294 (1927).
6 19 Ohio App. 346 (1924).
7 164 N. E. 59, 30 Ohio App. 21 (1928).
8 88 N. E. 542, 80 Ohio St. 232 (1909).
9 103 N. E. 674, 55 Ind. App. 196 (1913).
10 113 N. E. 944, 275 Ill. 11 (1916).

ant stopping at stop sign the court held in *Hill v. Hiles* [11] that evidence that one of the plaintiff's paid the cost of repairing the damages to the parked automobile was not competent as an admission of negligence by plaintiffs, which would preclude them from recovering. *In re Heile,*[12] an Ohio case, holds that in an action arising out of automobile accident, admissions by a defendant while narrating circumstances of an accident to third person would be inadmissible against co-defendants.

The court held in *Hollenback v. Todd* [13] that where there is evidence tending to show that the father of the claimant was interested in the property attached, conversations and admissions on the part of the father with respect to the property are admissible in evidence, although not authorized or assented to by the son, the claimant. A later Illinois decision affirmed this [14] where in an action by an administrator for death of child who was struck by automobile evidence that parents on whose behalf action was brought, permitted the child to play in public road, and evidence of parents' admissions with respect to that subject, was admissible on issue of contributory negligence of the parents.

In cases where persons are suing or defending in different character or capacity the court held in *O'Brien v. Flanders* [15] that "on the trial of a proceeding supplementary to execution by a creditor against his debtor and a bank alleged to have funds of the latter on deposit, the answer of such banks, under oath of its president, filed in the cause, is not evidence against the debtor." An Illinois case discussing the same principle held in *Hassey v. A. C. Allyn & Co.*[16] that "in an action against an investment company for breach of contract to repurchase stock from plaintiff upon termination of his employment by the corporation, action of the corporation's board of directors, participated in by plaintiff as a director, authorizing corporation's purchase of stock owned by a salesman who left corporation's employ, was properly admitted as an admission against interest."

A recent Ohio case [17] said, however, that a letter written by guardian of an incompetent after incompetent's death, but before guardian filed final accounts and was appointed administratrix, was inadmissible in action by her as administratrix on debt due incompetent, as respects admission against incompetent's interest and exclusion of remainder of the letter after material part thereof was admitted was not error.

In cases of joint interest of parties in *Phillips v. Gannan* [18] the court held that "declarations as to the mental condition of the grantor, made

11 32 N. E. (2d) 933, 309 Ill. App. 321 (1941).
12 29 N. E. (2d) 175, 65 Ohio App. 45 (1939).
13 8 N. E. 829, 119 Ill. 543 (1886).
14 Isley v. McClandish, 20 N. E. (2d) 890, 299 Ill. App. 564 (1939).
15 58 Ind. 22 (1877).
16 28 N. E. (2d) 164, 306 Ill. App. 37 (1940).
17 Sullivan v. Sullivan, 31 N. E. (2d) 165, 66 Ohio App. 315 (1940).
18 92 N. E. 616, 246 Ill. 98 (1910).

by one of the grantees about the time the deed was executed, not having been made in the presence of the other grantee, are inadmissible against them in a suit to avoid the deed for mental incapacity of the grantor." It was held in the Indiana case of *Indianapolis and Cincinnati Traction Company v. Wiles* [19] that admissions of one joint owner of land sought to be condemned for an electric railroad right of way made in the absence of other owners are incompetent.

In a later Illinois case [20] the court said that in a will contest, statements or admissions made by devisee concerning testimentary capacity of testator or acts of undue influence in procuring execution of will are not admissible where interests of devisees are separate, although they will be admitted where interests of devisees are joint.

Thomas F. Bremer.

A SURVEY OF ILLINOIS LAW 1943-1944.—The constitutionality of the Federal Emergency Price Control Act of 1942 was involved in the case of *Regan v. Kroger Grocer and Baking Co.*[1] Plaintiff alleged he had been charged more than the ceiling price and the defendant claimed the statute was unconstitutional, that it could not be enforced in the courts of Illinois, that it violated the due process clause of the Federal Constitution. The court held that the validity of the act could be made an issue in actions to enforce its provisions, so that there was no violation of due process. The court further upheld the constitutionality of the act under the war powers of the Congress and said that the state court was not enforcing the penal laws of a foreign jurisdiction, in that acts of Congress are laws of Illinois as well, and that in the enforcement of such laws the state courts are given concurrent jurisdiction with the federal courts.

In the case of *People ex rel Baker v. Strantz* [2] a statute authorizing a judge or justice of the peace to order examination and treatment of any person charged with crime who may be suffering from any communicable venereal disease was held not to violate the due process clause in view of the fact that such examination will only be ordered "when it appears from the evidence that the accused person is suffering from such disease."

With regard to municipal corporations, the validity of municipal ordinances vacating public streets was questioned in two cases, in each of which the muncipality sought to justify its action under provisions of the

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19 91 N. E. 161, 174 Ind. 236 (1910).

20 Ginsberg v. Ginsberg, 198 N. E. 432, 361 Ill. 499 (1935).

1 386 Ill. 284, 54 N. E. (2d) 210 (1944).

2 386 Ill. 360, 54 N. E. (2d) 441 (1944).

statute which purports to declare that municipal action in such case is conclusive. This contention was upheld in *People ex rel Hill v. Eakin* [3] when it was found that some public benefit was derived from the vacation ordinance but in *People ex rel Foote v. Kelly* [4] the court held that the determination of the City Council is not necessarily conclusive on the courts, despite the language of the statute and that if there is an allegation that no public benefit arises from the vacation ordinance, the court can and will entertain such suit.

Failure by a municipal corporation to provide an appropriation in advance was held to be a reason to repudiate a contract to purchase a road grader in *Galion Iron Works and Manufacturing Company v. City of Georgetown* [5] and as that transaction was invalid, it necessarily followed that there could be no recovery for the use made by the municipality of the equipment.

Questions concerning tort liability of municipal corporations arose in *McKeown v. City of Chicago* [6] where the negligent act of city firemen in flooding a vacant lot for ice-skating purposes was held sufficient to establish municipal liability since it did not constitute a governmental function. For that matter carelessness in burning brush which had been removed from city streets after a storm so that private property was destroyed was held actionable in *Peterson v. City of Gibson.*[7]

The validity of a city ordinance requiring that milk be delivered in "standard milk bottles" was upheld in *Dean Milk Company v. City of Chicago* [8] where paper containers were said not to fulfill the statutory requirement. This act was later amended to permit the use of single service paper containers.[9]

The zoning case of *City of Watseka v. Blatt* [10] forbade the use of land for a junk yard on the ground that the power of the City Council to adopt zoning ordinances was a delegated power which could not be delegated by it to a zoning board, hence the restriction in question was invalid.

The district sued to enjoin the county collector of Will County from collecting real estate taxes levied against that portion of the district's main channel located within such county in the case of *Sanitary District of Chicago v. Rhodes.*[11] Exemption was claimed on the theory that the channel constituted "public grounds owned by a municipal

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3 383 Ill. 383, 50 N. E. (2d) 474 (1943).
4 385 Ill. 543, 53 N. E. (2d) 429 (1944).
5 322 Ill. App. 97, 54 N. E. (2d) 601 (1944).
6 319 Ill. App. 563, 49 N. E. (2d) 729 (1943).
7 322 Ill. App. 97, 54 N. E. (2d) 74 (1944).
8 385 Ill. 565, 53 N. E. (2d) 612 (1944).
9 Municipal Code, Chicago, Sec. 154-14.
10 320 Ill. App. 191, 50 N. E. (2d) 589 (1943).
11 386 Ill. 269, 53 N. E. (2d) 869 (1944).

corporation and used exclusively for public purposes." Upon finding that the channel was not used exclusively for public purposes, a decree denying an injunction was affirmed on the fundamental proposition that laws exempting property from taxation will be subject to strict construction.

An attempt by the legislature to impose taxes on the production of oil within the state collapsed in the decision of the *Ohio Oil Company v. Wright* [12] case which held the statute unconstitutional as a violation of Section 1, Article IX of the State Constitution on the theory that the tax was not one on an occupation but rather a direct tax on income from property hence a direct tax on the property itself, while in *People ex rel Voorhees v. Chicago, Burlington and Quincy Railroad* [13] the court held a town levy for "home relief, (including veterans)" was invalid due to the fact that it was the duty of the county to provide for destitute veterans and the duty of the township was limited to the care of paupers.

John F. Power.

DEMONSTRATIVE EVIDENCE — THE USE OF MODELS.—The courts of this country have at times found it expedient and proper in trials before jury to allow either or both of the parties to place before the court and jury a model of some piece of equipment or property about which an important question revolves in order to better explain the oral testimony of a witness. The purpose here is to determine under what rules the courts either admit or reject the use of such models.

In an early New York case where the question in issue was whether a certain bridge was properly constructed the court admitted a model of the bridge in order to show the general construction of said bridge to the jury. The court also said the question of accuracy, that is, of the model, was for the jury to decide.[1]

The next case we note is where, in a personal injury suit, the defendant was allowed to present a model of a "feed works" over the objection of the plaintiff. The court in holding that this admission was not error, said, "There was not error in admitting the platt and model after the necessary explanations have been made. They were valuable, no doubt, in giving the jury a general idea of the situation, and the defects or omissions were so clearly pointed out that the jury could not have been misled." [2] Thus it is seen that when the model is important

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12 386 Ill. 206, 53 N. E. (2d) 966 (1944).

13 386 Ill. 200, 53 N. E. (2d) 963 (1944).

1 Cooledge v. City of New York, et al. 99 App. Div. 175; 90 N. Y. S. 1078 (1904).

2 Burroughs v. Curtiss Lumber Co., 58 Ore. 270; 114 P. 103 (1911).

in demonstrating to the jury some important fact upon which the case will turn it is not error to admit such model. It is also well to note that before admission the model and its purposes must be explained to the court.

In a 1911 case the Federal Court held a model of a coupler on a railroad car, shown for the purpose of illustrating a mechanical defect, was admissible, although the model varied slightly from the coupler on the car involved.[3] It must be remembered that the mechanical principle was one of the important questions to be decided in the case at hand because if it had not been relevant to the issue it would not have been admissible. Again in an Alabama case where the plaintiff was trying to recover from a railroad for damages suffered to timber from a fire alleged to have been caused by the defendant's passing engine, the court allowed a model similar in construction to the engine in question to be used to explain said engine's construction and equipment.[4] Thus it is clear models used to explain complicated mechanical principles are admissible.

Models have been used to reconstruct situations such as automobile accidents so that the jury and court would have a better idea as to what took place. In holding that toy automobiles used as above explained by the trial court did not constitute error the supreme court of Colorado said, "Error is assigned as to evidence. The court admitted the map, drawn by one of the defendant's attorneys, of the road at the scene of the accident in question, drawn to scale, and three toy automobiles built to scale. We can see no error in this. The toys were, of course, for illustration, in connection with testimony, and the plaintiff could have had an instruction to that effect if she asked." [5] Concerning the same point, that is admitting models for illustrative purposes the Illinois supreme court said, "It is the constant practice in the courts to receive in evidence models, maps, and diagrams for the purpose of giving more accurate information of objects or places which cannot be conveniently shown to the jury. The diagrams, drawings, or models are not introduced as evidence within themselves, but for the purpose of enabling the jury to understand and apply the testimony in the case." [6] Thus from the last two cited cases it can be said that models are primarily used so that the jury can better understand the testimony offered which by itself may be more or less confusing.

The courts hold the presentation of models is important. In a case where a woman sued a railroad company because of a hernia allegedly caused when boarding defendant's train, the defendant railroad offered an exact model of the step plaintiff had ascended, but the trial court

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3 Norfolk & W. Ry. Co. v. United States, 191 Fed. 302 (1911).

4 Pettus v. Louisville & N. R. Co., 214 Ala. 178; 106 So. 807 (1925).

5 Small v. Clark, 83 Colo. 211; 263 P. 933 (1928).

6 Reinke v. Sanitary Dist. of Chicago, 260 Ill. 380; 103 N. E. 236 (1913).

refused to allow this demonstration. This refusal was held to be error, by the supreme court, which said as follows: (referring to the railroad corporation): "It tendered and offered to introduce that model, (the step) but the court overruled its motion, which we think was error, as will be seen from the Dean case, *supra,* and the correctness of the rule permitting the introduction of such accurately established models is fortified by the text in 22 C. J. 768, § 869, a part of which says: 'In cases where the things they represent are relevant, models when properly identified and authenticated, are admissible as a species of real evidence of the thing they represent. * * * Thus a model machine, a mechanical device, or a bridge may be submitted to the jury to aid them in understanding how an event occurred or might have been prevented.' . . ." [7] It is well to note in Nebraska the supreme court held it not error to refuse to admit a model where the expert testifying fully explained himself so that there would be little need for a model.[8] Thus it can be said that models can be either admitted or rejected at the discretion of the trial judge.

Thus it is clear that the admission of a model is left to the discretion of the trial judge, but it is also well to note that the abuse of this discretion is reversible error. In other words when a model is offered and said model is to be used for demonstrative purposes, or illustration in conjunction with a witness's testimony, and the model is a correct and true copy said exclusion will be reversible error.

In a 1940 Michigan case the question of admitting a model into evidence when the accuracy of said model was in question, the court said: "When the correctness of the illustrative representation is disputed if there is room for finding for the offering party, the trial court may admit it and submit the question to the jury for ultimate determination." Thus it is seen that the question of accuracy is left to the jury, but the relevancy of the model is to be determined by the judge. Speaking of models in general, the Michigan court said: "A photograph or *model* is used only as a 'non-verbal mode of expressing a witness's testimony' (Wigmore on Evidence, Sec. 790), and as testimonial aid it may often help the jury to understand the evidence more clearly than they could from the words of any witness. . . . The proposed aid must be sponsored by a witness who uses it to relate his personal knowledge or scientific skill and understanding. . . ." [9]

The question as to abuse of discretion by the trial court in Massachusetts [10] was raised when the court allowed the defendant to bring

7 Cincinnati N. O. & T. P. Ry. Co. v. Duvall, 263 Ky. 387; 92 S. W. (2d) 363 (1936); Bowling Green Gas Light Co. v. Deans Ex's. 142 Ky. 678; 134 S. W. 1115.

8 Falkinbury v. Prudential Ins. Co. of America, 103 Neb. 572; 273 N. W. 478 (1937).

9 Finch v. W. R. Roach Co., 295 Mich. 589; 295 N. W. 324 (1940).

10 Everson v. Casualty Co. of America, 208 Mass. 214; 94 N. E. 459 (1911).

in and present to the jury for inspection a model of a "drying chamber" about which an important issue in the case revolved. The Supreme Court held that the trial court had not abused its discretion in admitting this model because it aided the jury in obtaining a better understanding of the testimony. It is to be noted that relevancy and admissibility are to be determined at the discretion of the trial judge.

Accuracy of models offered in evidence has arisen in many cases, but one of the best cases was decided by the Wisconsin court.[11] In this case the trial court had admitted a model demonstrating the swing, into a safety zone, that the rear car of a train makes as it rounds a certain turn. The Supreme Court took the view that the model grossly misrepresented the contour of the safety zone and that the model also grossly exaggerated the extent the rear car entered the safety zone. The Supreme Court in the following words held the admission of this model error: "The prejudicial effect of the exhibit is manifest. Its receipt would require a new trial of the case if it were not dismissed."

From this case it can be said that if the model admitted does not conform to the facts as they exist said admission will be reversible error. It is the duty of the trial judge to make a complete investigation, by testimony or personal investigation of the fact or situation represented by the model before allowing this model to be used.

The rules for the use of models in court can be summed up in a few short lines. First, the model must be used in conjunction with the testimony of a witness. Secondly, the model must be accurate to a degree that it will not distort the situation as it really is or was. Thirdly, the model must be used either to describe a situation or illustrate a mechanical principle or the general construction of some piece of machinery that could not be conveniently described or shown to the jury. Finally, a model may be used at the discretion of the trial judge to aid the jury in understanding how an event occurred or might have been prevented.

L. E. Merman.

IRRESISTIBLE IMPULSE AS A PLEA IN COLORADO.—Traditionally courts have listened to pleas of not guilty by reason of insanity with somewhat hesitant and dimmed ears. Such a position is understandable and was frequently the correct attitude, for there is probably no other single principle in criminal law susceptible of so much abuse as is this plea. The subjective nature of the subject matter, the pathos accompanying the plea, the passions aroused and the blinding of facts by court-room dramatists all manifestly lend themselves to frequent and

11 Hadrian et al. v. Milwaukee Electric Railway and Transport Co., 214 Wis. 122 (1942).

flagrant abuses. For this reason courts have historically aligned themselves to the rule established in the famous M'Naghten's case. Although this test that came to be known as the "right and wrong" test has become part of criminal jurisprudence in America in many jurisdictions, it has not been immune from judicial criticism. So severe has this criticism become that in many states the rule has been expressly abrogated. In *State v. Keerl,*[1] we find the court stating that instructions following the lines laid down in M'Naghten's case are erroneous and further: "* * * that they [instructions based upon the rule] are radically wrong and should never be given." Another court that expressly criticized the rule is found in *State v. Jones* [2] in which we find a discussion of the rule that pointed out, "the absurdity as well as the inhumanity of it."

The courts that abrogated the right and wrong test were those that then turned to a more refined, a more psychological rule to aid them in the determination of insanity as an exculpating factor of criminal acts. It was to these courts that the irresistible impulse as a defense was particularly addressed and it was with these courts that it has been accepted and given judicial recognition. It is the recognition given this plea in Colorado that we shall examine in this note.

That the principle of irresistible impulses opened the door for even further judicial abuse is not difficult to perceive. So perhaps there is much to be said for courts that refuse to acknowledge the plea. Yet, that it is, in the proper case to which it is applied, not only the better rule, but imperative, is not to be doubted by those conversant with medico-jurisprudence. The difficulty in its use is not one of substance but only one of application. As Wharton says, in his treatise dealing with the plea: "In the enunciation of this conclusion (of irresistible impulse) there should be the strictest caution, and in the application of it the most jealous scrutiny." [3]

Much of the unfavorable reception given the principle has, no doubt, been fostered by a misinterpretation of the true elements that comprise the impulse. It is never to be used unless underlying the act and as a basis is a pre-existing mental disease. It can, therefore, never be used properly unless the mental condition is shown to exist. In its correct application it must be distinguished from moral insanity, delusional insanity, moral obliquity, mental depravity, passion arising from anger, hatred, revenge and other evil conditions, or irresistible impulses arising because of emotion. It is with this last condition that the true irresistible impulse has been most frequently confused both by the lay mind and by the courts.

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1 29 Mont. 508, 75 Pac. 362 (1904).

2 50 N. H. 369, 9 Am. Rep. 242 (1871).

3 Wharton's Criminal Law, Vol. I, No. 62, p. 86 (1932).

Legal definitions are frequently incomplete and always difficult to formulate. But, to gain a better understanding of the principle, an examination will be made of the two definitions of the plea, as stated by perhaps two of the foremost authorities in American criminal law. Miller defines the principle as follows, giving it three essential elements: "The theory of this test is that a person acts under an insane, irresistible impulse when, from disease of the mind, he is incapable of restraining himself, though he may know that he is doing wrong. In other words, a person may know, at the time the act was committed: (1) The nature and quality of the act he was doing, (2) that what he was doing was wrong, but still by reason of the duress of a mental disease, (3) he may have lost the power to choose between the right and wrong and to avoid doing the act; his free agency being at the time destroyed." [4]

Wharton, in his authoritative work, states the phrase irresistible impulse to be: "That plea of exculpating insanity in which the accused is driven to the commission of crime by an internal force, the source of whose impetus is an actual existing disease of the mind, by reason of which he is incapable of offering such internal resistance as would prevent commission of the crime." [5] He makes a further distinction of the plea in distinguishing between that form of impulse that forces a person to act notwithstanding the fact that the actor knows the act to be wrong, and that type of impulse that destroys the person's ability to realize that his acts are wrong. It is with the former distinction that the writer is interested, for it logically follows that courts which would acquit in the former situation would, *a fortiori*, acquit in the latter situation, which is more consonant with the right and wrong test.

The doctrine as defined by Wharton, that is the impulse that overwhelms volition making it impossible for the actor to refrain from accomplishing his criminal action even though he realized the act to be wrong is recognized in the following states: Alabama, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Georgia, Illinois, Indiana, Kentucky, Louisiana, Montana, Massachusetts, Michigan, New Hampshire, Pennsylvania, Utah, Vermont, Virginia and Washington.[6] The plea was formerly recognized in Iowa, but was repudiated in *State v. Buck* and no longer applies in that jurisdiction.[7] All other jurisdic-

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4 Miller's Criminal Law, No. 37, p. 127 (1934).

5 Wharton's Criminal Law, Vol. I, No. 408, p. 602.

6 81 Ala. 557, 2 So. 854 (1886); 146 Ark. 509, 226 S. W. 37 (1920); 60 Colo. 425, 153 Pac. 756 (1915); 40 Conn. 136 (1873); 9 Houst. 470, 14 Atl. 550 (1880); 36 Fed. (2d) 548, 70 A. L. R. 654 (1929); 152 Ga. 243, 109 S. E. 661 (1921); 148 Ill. 467, 36 N. E. 95 (1894); 118 Ind. 482, 21 N. E. 285 (1889); 225 Ky. 492, 9 S. W. (2d) 132 (1928); 113 La. 959, 37 So. 890 (1904); 44 Mont. 354, 120 Pac. 234 (1911); 219 Mass. 1, 106 N. E. 545 (1914); 134 Mich. 625, 96 N. W. 1061 (1903); 50 N. H. 369, 9 Am. Rep. 242 (1871); 284 Penn. 311, 131 Atl. 229 (1925); 43 Utah, 135, 134 Pac. 632 (1913); 93 Vt. 450, 108 Atl. 391 (1919); 107 Va. 912, 60 S. E. 99 (1908); 23 Wash. 289, 63 Pac. 258 (1900).

7 205 Iowa 1028, 219 N. W. 17 (1928).

tions have either expressly repudiated the plea or have refused to acknowledge it by implication in those cases brought before its tribunals.

In spite of the importance of the principle in the annals of criminal law the plea was not involved in any adjudication in Colorado until 1915. It was in that year that the leading case of *Ryan v. People* came before the courts and it was that case that lighted the legal beacons that guide courts in that jurisdiction today. An annotation in the American Law Reports remarks on the dearth of cases on point: "*Ryan v. People,* which appears to be the only decision on the doctrine of irresistible impulse from that jurisdiction, undoubtedly announces and adopts the doctrine as an element in the law regarding insanity." [8]

The Colorado courts repudiated the rule established in M'Naghten's case expressly in *Ryan v. People* and despite a manifest dearth of adjudications on the exact point since that time the rule of irresistible impulse as laid down in the Ryan case is still the law in that state today. In the Ryan case the defense was not strictly one of irresistible impulse, but rather one of delusional insanity. Yet the court not only allowed the recognition of that plea but went beyond the instant case and propounded the general rule in that state to be as follows: "A person who is so diseased in mind at the time of the act as to be incapable of distinguishing right from wrong with respect to it, or being able to so distinguish, has suffered such an impairment of mind by disease as to destroy the will power and render him incapable of choosing the right and refraining him from doing the wrong, is not accountable. *And this is true howsoever such insanity may be manifested, by insane delusions of whatever nature, by irresistible impulse or otherwise.*" [9]

Such a broad rule covers both situations mentioned and distinguished by Wharton and consequently it is immaterial whether the actor was aware that his actions were right or wrong. For, under the rule laid down in the Ryan case, both those who are aware of the culpable nature of their actions but are unable to stop because of a previous mental condition and those whose concepts of right and wrong are totally destroyed can successfully avail themselves of the plea of not guilty because of an irresistible impulse.

The rule seems to have been followed in later cases for in *Oldham v. People* [10] we find the state Supreme Court reversing a lower court's decision for submitting the following instruction: "The court instructs the jury that an insane delusion, to be a defense must be a mental delusion connected with the offense charged and it must be such a delusion which, if true, would excuse the crime committed." Not only

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8 70 A. L. R. 666.

9 Ryan v. People, 60 Colo. 425, 153 Pac. 756 (1915).

10 158 Pac. 148, 61 Colo. 413 (1916).

did the upper court reverse the judgment because the instruction was too limited in scope, and therefore erroneous, but called it an incorrect legal principle.

In *Shank v. People* [11] the court refused to give an instruction copied verbatim from the opinion of *Ryan v. People* but this was held to be no error because the court had previously given an instruction covering adequately criminal intent and insanity. This refusal in no way abrogates or even hints of repudiation of the recognition of the plea of irresistible impulse in that jurisdiction.

Recognizing the abuses that are inherent in a plea of insanity, Colorado has adopted a most practical, as well as a sound and intelligent, approach to the problem. There is a statutory provision that requires any defendant pleading insanity in criminal actions to spend a certain time at the state institution for observation and at the trial impartial competent medical experts testify as to the mental condition of the defendant.[12] In the instances employed the procedure has done substantial justice, not only to the state but also to the defendant. Such a procedure is highly commendable and has done much to take the uncertain mysticism from the plea of insanity in criminal actions. That it is unjust and wrong to punish a defendant who, because of a preexisting mental condition, is unable to refrain from criminal acts even though he may be aware of the criminality of the acts is undoubted. By giving judicial recognition to the plea of insanity by reason of irresistible impulse and making possible observation and testimony of highly skilled medical experts and making a working procedure for the correct use of the plea Colorado courts have wiped away some rather oppressive legal cobwebs that were spun by continental courts over a hundred years ago.

Francis J. Paulson.

LAW OF CONTRACTS IN REGARD TO PRIZE CONTESTS.—It seems that many Americans cannot resist taking a chance in one form or another, hence it is not surprising to find millions of our citizens entering prize contests every year. Consequently the law governing prize contests affects many of us though few probably realize it. Of course the relationship between the sponsor and the contestant is a contractual relationship, therefore we must see how the law of contract applies to contests.

First let us discuss offer and acceptance. In this regard contest cases resemble reward cases.[1] The offer is unilateral and demands some act

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11 247 Pac. 559, 79 Colo. 576 (1926).

12 Colo. Stat. Ann., ch. 48, Sections 507, 508 (1935).

1 Shuey v. United States, 92 U. S. 73, 23 L. Ed. 697.

or acts to constitute acceptance. It was held in *Scott v. Peoples Monthly Co.* that to constitute an acceptance of the offer made by one instituting a prize contest, so as to give rise to a contract, a contestant must substantially comply with the terms and conditions fixed.[2]

Such an offer, although usually made to the general public, is revocable and may be withdrawn at any time.[3] In *Holt v. Wood*[4] we find a good discussion of offer and acceptance in contest cases. Here the court said, "The defendants offered to give a house and lot to a person who would suggest a name for the village that might finally be accepted. The plaintiff, within the time specified, suggested a name and that was finally adopted. She accepted their offer and complied with all its conditions. The name she suggested was accepted and adopted. Here are all the essential elements of a contract."

In *Hood v. Polish National Alliance* we see that after the offer has been accepted an enforceable contract results.[5] In the Hood case there was a contest to select an architect to plan and supervise the construction of a building for a fraternal society, the first prize was a sum of money, employment as architect, and the usual commission on the cost of the building less the cash prize. One of the competing architects was awarded first prize and was paid the cash portion of the award. It was held by the court that a mutual contract was effected under which both the society and the architect could be compelled to perform or pay damages.

For the acceptance to be good, however, it must comply substantially with the offer. In the Scott case, *supra,* where the contestant intentionally violated one of the rules of a word building contest by including in his list obsolete, dialects and foreign words, the court held that said contestant was not entitled to first prize even though he had a larger number of permissible words than any other contestant.[6]

As to consideration, we see immediately that since contest contracts are unilateral the act of acceptance is the consideration. In *Alvord v. Smith,* an Indiana case, it was held that a premium offered to the owner of the horse making the best time in a proposed race may be recovered by appropriate action since, the doing of the act furnished a sufficient consideration to support the contract.[7]

Next we must focus our attention upon the possibility of changing the rules after contestants have entered the contest. It is generally agreed that a change in rules is not binding upon a contestant until he

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2 209 Iowa 503, 228 N. W. 263 (1929).

3 Hertz v. Montgomery Journal Publishing Co., 9 Ala. App. 178, 62 So. 564 (1913).

4 246 Ill. App. 137 (1927).

5 Scott v. Peoples Monthly Co. (2 Supra).

6 14 Pa. Co. Ct. 499, 24 Pittsburgh L. J. (N. S.) 443 (1894).

7 63 Ind. 58 (1878).

receives notice of the change. Just what constitutes notice is another question. In *Long v. Chronicle Publishing Co.* it was held that notice of change in rules published in newspaper was not binding on the contestants not reading it, personal notice being required.[8] In many cases a change in the rules amounts to a breach.[9]

Again in *Mooney v. Daily News Co. of Minneapolis* it was held that the person making an offer of specified compensation to the person obtaining the highest vote based on paid subscriptions to a newspaper, is bound by its terms after acceptance and cannot, without the consent of either party, change the terms of the offer or give to them an interpretation contrary to their true meaning.[10]

Many interesting cases arise when we consider performance and breach of the contest contract. In *Cope v. Hastings* it was held that architects whose plans violate the terms of the contest in which they enter by drawing plans for a public building whose cost would exceed the appropriation therefore had no cause of action when the state commission refused to consider their designs.[11] In an interesting Texas case a contestant for a prize offered by a business college for the greatest amount of money paid in for scholarship was held entitled to credit for the amount presented by certain tables desired by the college and which were accepted by the college as part payment on the scholarship account of the maker of the tables.[12]

In *Shorey v. Daniel* the court held that the winner of second prize offered in a newspaper subscription contest described as a "$500 Yuma Mesa lot," is justified in assuming that the value of lot to be awarded is $500, and is entitled to treat an attempted conveyance of a lot of less value as a breach of contract, and to recover the amount of damage where contestant did not know when she entered the contest that a particular lot had been selected for the winner of the second prize.[13]

Another phase of contest contract worth discussion is the usual clause that decision of the judges is final. This is not always enforced at law. For example in *Minton v. F. G. Smith Piano Co. of Washington* it was said that one who, in sending an answer to an advertised offer of a prize for a correct solution of a problem, agrees to abide by the decision of the judges does not thereby estop himself from contesting their rejection of his solution on a ground not made a condition of the contest in the advertisement.[14] In the Minton case there was an offer to give a prize to anyone rightly counting the dots in the advertise-

8 Long v. Chronical Publishing Co., 68 Cal. App. 171, 228 P. 873 (1924).
9 Hertz v. Montgomery Journal Publishing Co. (3 Supra).
10 116 Minn. 212, 133 N. W. 573 (1911).
11 183 Pa. 300, 38 Atl. 717 (1897).
12 Draughon's Practical Business College v. Dorsett, 166 S. W. 495 (1914).
13 27 Ariz. 496, 234 P. 551 (1925).
14 36 App. D. C. 137, 33 L. R. A. (N. S.) 305 (1911).

ment. The offer also stated that in case of tie a prize of equal value would be given to each one making a correct answer. The defendant then tried to avoid liability to the plaintiff on the ground that the answer was not as neatly and legibly written as was the one for which the prize was awarded, although this condition was not in the offer.

On the other hand let us look at two cases which uphold finality of a judges decision. The first is a Washington case. There it was held that one who offers a reward for the identification of a person called "the mysterious Mr. Raffles," in connection with an advertising scheme, has a right to make himself the sole judge of any dispute arising over claim to it, and provide that his decision, made in good faith, shall be final.[15] In *Trego v. Pennsylvania Academy,* speaking about the contest proposal, the court said: "The manifest meaning of the proposal is that prizes would be given in pursuance of awards, and not contrary thereto. The persons who shall compose the jury of awards are stated in the offer. They were to constitute the tribunal to pass upon the merits of the paintings, and to decide to which prizes should be awarded. Unless so awarded by this jury, no prize was demandable." [16] Thus we see that we must examine the offer carefully to determine the intentions of the party, as well as the peculiar circumstances of each case before we decide whether the decision of the judges is final.

While this discussion does not exhaust the subject on law of contract in regard to prize contests, it does show some of the main interesting situations that arise in an everyday pastime of many Americans. As a whole we saw that a contest contract was much like any other unilateral contract with the reward cases being its closest relation.

Arthur M. Diamond.

LITTORAL RIGHTS ON THE GREAT LAKES.—Riparian is from the Latin word *riparius* meaning of or belonging to the banks of a river, which in turn is derived from the Latin word *ripa* meaning a bank, and is defined as "pertaining to or situated on the bank of a river." The word has reference to the bank, therefore, and not to the bed of the stream.[1] The words riparian proprietor, however, have been heedlessly extended from rivers and streams to ownership on the shores of lakes, a condition more accurately expressed by the phrase "littoral proprietor."[2]

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15 Davidson v. Times Printing Co., 63 Wash. 577, 34 L. R. A. (N. S.) 1164, 116 P. 18 (1911).

16 2 Sadler (Pa.) 313, 3 Atl. 819 (1886).

1 Mobile Dry Docks Co. v. Mobile, 146 Ala. 198, 40 S. 205 (1906).

2 U. S. in City of Boston v. Lecraw, 58 U. S. 426, 15 L. E. 118 (1855).

Of course, the Great Lakes are not susceptible of private ownership, in the ordinary meaning of that term any more than is the ocean. Riparian or littoral rights necessarily include the right of adjacency to the water as well as the right to have the water come down to the riparian owner in its natural state, undiminished by anything except a reasonable use on the part of the upper riparians. The courts are not fully agreed as to whether the riparian or littoral right will vest title in the owner to the high or low water mark, but they are agreed that except for special purposes, the beds of the Great Lakes are not susceptible to private ownership.[3] Generally it can be said that the states hold the title to the beds of the Great Lakes in trust for the people of the entire state for the purposes of navigation and fishing,[4] and the boundary of private property on Lake Michigan is the line where the water usually stands unaffected by storms or other disturbing causes.[5] Indiana and Michigan seem to be in accord with this contention in that they hold the low water mark to be the boundary line of private property with frontage on the Great Lakes.

Some early Michigan cases tended to avoid the low water mark doctrine and extend the rights of the littoral owner into the water up to a point where navigation commences,[6] while in 1923, the Supreme Court of Michigan held that the title of a littoral owner of land on the Great Lakes extended only to the meander line, it being assumed that such line followed, at the time it was established, the shore line.[7] Upon this theory the court then proceeded to hold that all land beyond the meander line, that is the bed of Lake Michigan, is held in trust by the state for its citizens, and that a strip of land which was covered by water at the time of the admission of the state to the Union, even though thereafter uncovered by reliction or accretion, belongs to the state as the lake bottom in law, although now dry land in fact, rather than to the littoral owner whose title was said to extend only to the meander line.[8] The Michigan court in putting forth such an opinion relied on the case of *Munoskong Hunting and Fishing Club* which also was to the effect that a littoral owner on the Great Lakes owns only to the meander line, and all property beyond said meander line is held by the state in trust for the use of its citizens. Illinois courts have adopted a wholly different viewpoint on this matter in that a similar line of cases have held the littoral rights of landowners along the shores of Lake Michigan to include the right of accretion as well as the right of access to the water.[9]

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3 Miller v. Lincoln Park, 278 Ill. 400, 116 N. E. 178 (1917).
4 People ex rel. Moloney v. Kirk, 162 Ill. 138, 45 N. E. 830 (1896).
5 Brundage v. Knox, 279 Ill. 450, 117 N. E. 123 (1917).
6 Blodgett Lumber Co. v. Peters, 87 Mich. 498, 49 N. W. 917 (1891).
7 Kavanaugh v. Baird, 241 Mich. 240, 217 N. W. 2 (1928).
8 Kavanaugh v. Baird, 159 Mich. 61, 123 N. W. 802 (1909).
9 Miller v. Lincoln Park, 278 Ill. 400, 116 N. E. 178 (1917).

However, the Michigan ruling that the littoral owner owned only to the meander line was overruled in 1930, when the Supreme Court held that the boundary line of littoral owners along the Great Lakes was the waters edge rather than the meander line, and that the right to acquisitions to land through accretion or reliction is one of the littoral rights of said landowner. The court further held that the littoral right, that is the right of adjacency to the water, is a property right, for the taking or destruction of which by the state, compensation must be made.[10] Under this, a better and more just ruling, the littoral owner has the right to use the water for such general purposes as bathing, domestic use, etc.; to erect piers, docks and wharves upon and over the shore lands and water out to the point of navigability for his own use and benefit.[11] Michigan has since abided by the waters edge doctrine, and in 1934 reiterated that the owner of lake front property acquires title to soil formed by accretion.[12]

As we have said before Illinois is in accord with the rule that littoral or riparian rights extend to the waters edge and include the right of adjacency to the water. However, some exceptional cases have arisen in the City of Chicago which I think bear discussion. "Chicago, the City Beautiful," as it is known, bordering on the shores of Lake Michigan possesses one of the most beautiful shorelines in the United States. This is chiefly due to the intricate and spacious parks between the city proper and the shoreline. The park system as a whole is composed chiefly of "made land," that is land which has been filled in, so that the shoreline is now some distance from its original edge. This was all done under the provisions of a statute which gave to the municipality of Chicago the power to build such parks and either contract or condemn the littoral rights of abutting landowners to accomplish this end.[13] Under this and later statutory provisions, Lake, Lincoln, and Jackson parks were constructed, and a short time later the municipality changed the name of Lake Park to Grant Park and conveyed such land as well as the other parks to the park commissioners.[14] The legislature then proceeded to grant the title to submerged lands which was in the state to the Park Commissioners,[15] and put into effect an "Act to enable Park Commissioners to alter or enlarge park systems under their control by acquiring and improving additional lands or territories over beds of public waters." [16] The consideration going to the owners of said lake front property for giving up their littoral rights was that the parks would beautify their property, that no buildings would be built in the

10 Hilt v. Weber, 252 Mich. 198, 233 N. W. 15 (1930).
11 Black's Pomeroy on Water Rights, § 517.
12 Killmeister v. Zeidler, 209 Mich. 377, 257 N. W. 721 (1934).
13 Jones Illinois Statutes, § 96:280.
14 Jones Illinois Statutes, § 96:237, 96:238, 96:239, 96:241.
15 Jones Illinois Statutes, § 96:247, 96:249.
16 Jones Illinois Statutes, § 96:286.

parks which would interfere with their view of the lake, and a money settlement as well. Cases soon began to arise under the foregoing provisions, and litigation was turbulent and involved as to whether the right of view and access to the shore constituted a littoral right or merely an easement.

Boundaries for the construction of Grant Park, for example were set up by statute and deemed to extend into the lake as far as the harbor line set up by the Secretary of War. It was agreed that no buildings would be built on the park area to obstruct the view of Lake Michigan from property abutting the park, without the consent of the abutting landowners. It was also maintained that by such acts, the parks would extend to the shores of the lake, and that the title thereto would carry with it the littoral rights which were to be held in trust by the state for the people.[17] In 1928 a suit against the Chicago Yacht Club was brought into court by a landowner whose property was abutting the park. He sought to restrain the defendants from building a Yacht Club under the provision in the statute that no buildings were to be constructed on park property. It was first decided that the Yacht Club was beyond the harbor line, hence not in the park, and secondly, that the abutting landowners had no littoral rights (having contracted them away), and therefore had no land bordering on the lake, no right of access to the lake from their land, and hence that their right of view over the waters of the lake could be no greater than their right of access.[18] It was further held in a later case under the same circumstances, against the same defendant that the park stopped at the shore, that the title to the land beyond the shore underlying the waters of the lake was held in trust for the people by the state, and not by the Park Commissioners: That the littoral rights were appurtenant to the title of the park, and that though the landowners abutting the park have an *easement,* it gives the owners no better rights than owners of other similarly situated lots, and in such cases specific individuals cannot maintain an action unless their specific property has suffered special injury by reason of the littoral rights of the park held in trust for the public having been improperly or unlawfully used.[19]

A recent decision pertaining to the Park Commissioners in Illinois was *Wall v. Chicago Park District* in which Wall was said to have contracted away his littoral rights on Lake Michigan for the consideration that the Park Commissioners would beautify the view of the lake from his property. The park district failed to perform the conditions as set out in the contract and the court rescinded the contract and reinvested the landowner Wall with his littoral rights.[20]

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17 South Park Commrs. v. Ward, 248 Ill. 299, 93 N. E. 910 (1902).

18 McCormick v. Chicago Yacht Club, 331 Ill. 514, 163 N. E. 418 (1928).

19 Stevens Hotel v. Chicago Yacht Club, 339 Ill. 463, 171 N. E. 550 (1930).

20 Wall v. Chicago Park District, 378 Ill. 81, 37 N. E. (2d) 752 (1941).

The State of Indiana has specifically stated that for a landowner to possess littoral or riparian rights his land must border on a body of water. Because a deed reads that the property extends to the meander line of a stream does not necessarily mean that the property carries with it littoral or riparian rights unless the meander line actually is the shore line. If by a mistake in surveying there is land beyond said meander line rather than water, then title to said land will vest in the State.[21]

In conclusion then we can say that the right of a littoral or riparian owner to fill in the land in front of his premises seems to have existed even at common law, but that such rights in modern practice are more commonly conferred by legislative grant and made the subject of statutory regulation as was the case in Illinois where the park acted as littoral owner (having contracted with the abutting landowners for their littoral rights), holding said right in trust for the people of the State of Illinois. This right is exclusive against everyone but the state,[22] although it is subordinate to and must not be exercised in any manner inconsistent with the public rights.

John F. Power.

PERPETUAL CARE PROVISIONS FOR CEMETERIES AND THEIR CONSTRUCTION.—The Rule against Perpetuities was an effort by the English lawmakers to make real property more alienable, and to combat the tendencies of the landed nobility who endeavored to retain their property within their own families forever.

It may be stated in this way: "The Rule against Perpetuities prohibits the creation of future interests or estates which by possibility may not become vested within a life or lives in being at the time of the testator's death, or the effective date of the instrument creating the future interest, and twenty-one years thereafter. . . ." [1]

Because forbidding perpetuities of any kind was found to work a hardship on charitable institutions who depended upon such trusts for their support, a statute was passed during the reign of Elizabeth which excluded gifts to charitable uses from the rule against perpetuities.[2]

This statutory exception was not in contradiction to the spirit of the original rule, but rather in harmony, as it furthered the same common welfare that the rule was made to protect.

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21 78 Ind. App. 327, Tuesburg Land Co. v. State, 131 N. E. 530.
22 State v. Korrer, 127 Minn. 60, 148 N. W. 617 (1914).

1 American Jurisprudence, vol. 41, p. 50.
2 Statute of 43 Elizabeth, Chap. 4.

Regardless of rules and statutes, there seems to be an instinct of self-preservation in man that attempts to go even further than the grave in finding expression. The idea that their cemeteries and gravestones should eventually become part of the general landscape is repugnant to most men, and to gentlemen of means, statutes and rules, usually give way to new approaches and exceptions.

The first approach to the problem by courts was to hold bequests providing for perpetual care of graves valid, as being for charitable purposes, the general welfare, and within the charitable use exception to the rule on Perpetuities. In *Smart v. The Town of Durban,* 86 Atl. 821 (1913), we find a quotation telling us the reasons of the early judges who held such trusts charitable.

"1. For evidence and proof of descent and pedigrees.

2. What time he that is there buried deceased. (*sic*)

3. For example, to follow the good, or to eschew the evil.

4. To put the living in mind of their end, for all the sons of Adam must die."

On the other hand, the more general view, and the modern approach is to declare all such bequests within the rule of perpetuities, and void unless specially excepted under a statute enacted for that purpose. The reason one judge found such a fund non-charitable is found in *Shippee v. Industrial Trust Co.,* Rhode Island (1920).[3]

"However commendable this sentiment may be, and however desirable it may be that the graves of the dead be decently and reverently cared for, nevertheless we do not think a bequest of this kind falls within the limits of a charitable use. It is not a gift in aid of any public object, nor for any purpose which affects the public in any way. It benefits no one. Its purpose is purely private and personal."

In the face of such decisions, the courts neglecting to further the wishes of wealthy testators, the legislatures stepped in and passed a variety of acts. (Appended hereto is a selection of sample statutes from various states.) Many of these laws asked that perpetual care bequests be considered charitable, many declared them to be charitable, some merely gave provisions for the setting up of the trusts. A good number require certain qualifications of the holder of the fund, demanding him to be a town commissioner, a cemetery corporation, etc. However, there is little uniformity in the law, and even greater variance in the interpretations of them.

First we shall consider those states whose courts demand statutes for the creation of perpetual cemetery care trust funds, and insist on strict compliance with the statutory standards.

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3 43 R. I. 115, 110 Atl. 410.

California

In Re Gay (1903).[4]

The only California case on this subject in the books, it takes a strict stand on the matter.

Margaret Gay bequeathed $2,000 to Lizzie Gay, for perpetual grave care, and the court held that this was not authorized by the statute that gave cemetery corporations only, the power to hold such moneys.

Without the help of the statute the bequest could have not been made, because the use was not charitable it held. The judge pointed out that if the use was charitable, testators could leave 1/3 of their estates in trust for the maintenance of their graves. (In California only one-third of a man's property may be left to charity, if he has descendants.)

Illinois

Mason v. Bloomfield Library Association (1909).[5]

A perpetual trust to take care of a private burial lot is not a charitable trust, and neither can it stand under the statute which permits cemetery corporations to hold money for such purposes.

McCartney v. Jacobs (1919).[6]

A bequest of an *un*incorporated cemetery association of a fund to be held in trust in perpetuity to maintain burial lots violates the rule against perpetuities, and not coming under the statute is void.

Massachusetts

Bates v. Bates (1883).[7]

This is the leading American case holding a perpetual care trust not a charitable use. It also holds that such trusts are void under the Rule against Perpetuities when there is no statute or no compliance with the statute.

Connecticut

Coit v. Comstock (1883).[8]

Here the bequest for perpetual care of a grave was mixed with a real charitable use. Surplus after grave having been maintained going to a church. The court held that such a mixture can not validate and preserve the entire bequest. Held that Statute is necessary to create such a fund.

Tennessee

Travis v. Randolph (1938).[9]

"All cash to be left in bank, the interest to be used for the upkeep of the graves of myself and W. S. Hite."

Held void as a perpetuity.

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4 138 Cal. 552, 71 Pac. 707.
5 237 Ill. 442, 86 N. E. 1044.
6 288 Ill. 568, 123 N. E. 557.
7 45 Am. Rep. 305.
8 50 Am. Rep. 29.
9 172 Penn. 392, 112 S. W. (2d) 833.

Arkansas

Union Trust Co. v. Rossi (1929).[10]

"I direct that $2,000 shall be set apart and kept as a fund, the principal or interest shall be used to keep the grave of my wife and myself in order."

The Court: "It is doubtless true, however, that the testator could have provided for the burial of his own and the body of his wife in a cemetery established for taking perpetual care of the graves of those interred therein, since that would not have involved an unlawful suspension of the ownership of personal property."

Held invalid.

Other Jurisdictions holding the same, that is requiring a statute before recognizing perpetual care funds:

Texas, Alabama, Michigan, Pennsylvania, Rhode Island.

A smaller number of states hold the liberal view, either recognizing the bequest as charitable, or not requiring the statute, or interpreting whatever available statute there is freely and easily.

Delaware

State for use of *Woodlands Cemetery Co. v. Lodge* (1940).[11]

Where bequest to Pennsylvania cemetery corporation of a sum sufficient to keep family burial lots in perpetual care out of the interest was directed to be administered in Pennsylvania, where by statute such a bequest does not fail because made in perpetuity, but is held to be made for a charitable use, the public policy of Delaware could not be said to be violated by the directions of the will."

(But, in 96 Atl. 795, Delaware court holds such a bequest valid without a statute and without giving any reason for so holding.)

Kentucky

Street v. Cave Hill Inv. Co. (1921).[12]

Statute says: "perpetuities permitted for any charitable or humane purpose."

Court holds a bequest for perpetual care for a private grave not charitable, but a "humane purpose," and therefore a valid trust.

New York

In Re Beck's Estate.[13]

Bequest for perpetual care of burial lot was held "for a charitable and benevolent use" within such statute limiting perpetuities.

Iowa

Hipp v. Hibbs (1932).[14]

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10 180 Ark. 552, 22 S. W. (2d) 370.
11 41 Del. 125, 16 Atl. (2d) 250.
12 191 Ky. 422, 230 S. W. 536.
13 255 N. Y. S. 857.
14 215 Iowa 253, 245 N. W. 257.

Liberal and illogical decision.

Here the testator left $1,000 to his trustees for perpetual care of a private grave. At this time there was no statute to permit this, because under Statute 10211 of the existing code only special corporations could take and hold the money for this use.

However: "Had the will of the testator in this instance bequeathed the sum to any of the associations or corporations named in section 10211 of the code, it would have clearly been valid. It seems to us that the case presents a question of statutory interpretation."

Held, believe it or not, that the bequest was valid.

* * * * *

An obviously charitable exception to the Rule against Perpetuities, while at the same time providing for the perpetual care of graves, is the case where a testator leaves his money for the upkeep of entire cemeteries. (*Chapman v. Newell*, 125 N. W. 324, Iowa (1910)).

In Rhode Island the courts have been given wide powers as evidenced in the following case:

Todd v. St. Mary's Church (1923).[15]

Held that a $3,000 bequest for perpetual cemetery care is not a charitable use, but void as a perpetuity. However, under a statute giving such discretion to the court, it decided that $500 of the above fund was a reasonable amount for grave care, and ordered the money deducted from the estate and paid over to the Local Town Council to hold for that purpose. (See Statutes, (b), attached.)

Irrevocable

French v. Kensico Cemetery (1942).[16]

A perpetual care fund given to a cemetery association is irrevocable. This is not because it is a trust, but because the contracting cemetery would be subjected to the liability of keeping the cemetery in order without consideration if the donee rescinded. (Because there is a state law imposing the duty of proper maintenance on cemetery associations.)

FLOWERS

We have three cases determining the validity of bequests for perpetual placing of flowers on graves. The law on this differs in several jurisdictions, one court in particular holding very strictly, in direct opposition to the spirit if not the letter of the statute.

Not only does the Rhode Island court forbid the perpetual placing of flowers on graves, but in a bequest that provides for that service in addition to regular care and maintenance, complying fully with the

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15 45 R. I. 282, 120 Atl. 577.

16 35 N. Y. S. (2d) 826.

statute as regarding the trustee, a cemetery corporation, the court strikes down the entire bequest, including the ordinary care and maintenance clause.

Rhode Island

Rhode Island Hospital Trust Co. v. Swan Point Cemetery (1938).[17]

"Second, I order my above named executor to pay to the Swan Point Cemetery Corporation the sum of $1,000, the interest therefrom to be used for flowers on Decoration Day, and keeping my monument in condition."

1. Held that the placing of flowers was not one of the corporation's purposes under its charter, which included "to apply the same or the proceeds or income thereof to the care, support, or improvements of said cemetery, or any part thereof, or any lot or monument or structure thereon."

2. Neither does the perpetual care of graves statutes, Rhode Island General Laws, include or permit this.

3. Because the "flower fund" fails, the rest of the trust for keeping the monument in repair falls with it.

Indiana

McClarnon v. Slage (1939).[18]

Flowers were permitted to be put on the graves five times a year, on special days, in perpetuity, under an ordinary cemetery care statute.

New Jersey

Gallagher v. Venturini (1928).[19]

"13th. I direct my executrices to keep up my mother's grave with flowers each year."

Held to be charitable, hence not violating the rule against perpetuities.

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The law relating to cemetery trust funds for perpetual care is in extreme confusion, and the decisions on the validity of such trusts go from one extreme to another, using many and varied lines of reasoning.

The only safe thing to do, if one wants to set up a trust of this kind, is to refer to the state statute, and comply with it strictly. In every state there is some way of setting the fund up properly by law, and it usually consists of bequeathing the principal to an incorporated cemetery association, to be administered by them, using the interest only to keep up the grave sites and monuments. The surest way, in most states, to create an invalid trust, is to leave the money to a friend, executor or personal trustee, for their personal administration.

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17 62 R. I. 83, 3 Atl. (2d) 236.
18 215 Ind. 157, 19 N. E. (2d) 252.
19 124 N. J. Eq. 538, 3 Atl. (2d) 157.

California

Health and Safety Code, 1939, section 8776.

"The sums paid in or contributed to the fund authorized by this article are hereby expressly permitted as and for a charitable and eleemosynary purpose. Such contributions are a provision for the discharge of a duty due from the persons contributing to the person or persons interred or to be interred in the cemetery and likewise a provision for the benefit and protection of the public by preserving, beautifying, and keeping cemeteries from becoming unkept and places of reproach and desolation in the communities in which they are situated. No payment, gift, grant, bequest, or other contribution for such purpose is invalid by reason of any indefiniteness or uncertainty of the persons designated as beneficiaries in the instruments creating the fund nor is the fund or any contribution to it invalid as violating any law against perpetuities or the suspension of the power of alienation of title to property."

Indiana

Burns Indiana Statutes, 1933, section 21-212.

"Any church, corporation, or association which owns a cemetery shall have the power to receive from any person a deposit or legacy of money to be held in trust in perpetuity or for such period as the donor or testator shall designate in writing, the earnings of which deposit or legacy shall be used for the purpose of keeping in good condition any lot or lots, monument, vault, or gravestone in said cemetery, that may be designated by such donor or testator."

Section 21-214 provides for the administering and keeping of such funds by County Commissioners in Indiana.

Michigan

Michigan Statutes Annotated, 21.855.

"The board of trustees of any corporation (cemetery) organized under this act may provide for . . . and no such trust shall be invalid because contravening any statute or rule of law forbidding accumulations of income, but shall be valid notwithstanding such statute or rule.

Texas

Vernon's Texas Statutes, Article 915.

"Said trust and the administration thereof shall not be regarded and held to be a perpetuity, but as a provision for the discharge of a duty from the party founding such blocks or lots and to the public."

In Texas, however, 75% only of the trust can be used for the designated lot; the other 25% must be used for the general upkeep of the whole cemetery.

Illinois

Jones Illinois Statutes, 17.54 gives trust funds for the perpetual care of cemeteries validity, and makes laws of mortmain or against perpetuities inapplicable.

Pennsylvania

Pennsylvania General Laws, section 9, par. 4.

"No disposition of property hereafter made for the maintenance or care of any cemetery, churchyard or other place for the burial of the dead, or any portion thereof, or grave therein or monuments or such erections on or about the same, shall fail by reason of such disposition having been made in perpetuity, but said disposition shall be held to be made for a charitable use."

New Jersey

New Jersey General Laws, 1939, 8:2-30.

"Any Person, by his last will and testament or otherwise, may create a trust fund to be held in perpetuity or for a lesser time, the income thereof to be used for the care or embellishment of any cemetery or grave, plot or lot, the graves therein, the tombstones or monuments thereon, or a mausoleum. *Provided,* however, that where any last will and testament purports to create a trust fund for any of the enumerated purposes, the court of chancery of New Jersey may, upon or prior to the settlement of such an account, hear and determine the question whether, in view of the size of the estate and other pertinent circumstances, the testamentary provision aforesaid is reasonable, and should the court find that the amount of the trust fund so provided is excessive, it may fix in lieu thereof a reasonable sum, which said sum shall not exceed the maximum amount of such trust fund, and providing, further, that the person or corporation designated to hold such a trust fund shall consent to the hearing and determination as herein provided."

Iowa

Iowa General Statutes, 10198.

"1. The effect of this statute is to permit perpetual trusts or endowments for privately owned cemeteries. It has no application by inference or in terms to public cemeteries the maintenance of which is a charitable act, and therefore within the recognized exception to the operation of the statute of perpetuities."

South Carolina

South Carolina Code, 1932, section 9052.

"No gift, devise, bequest, or settlement in trust shall be held to be a perpetuity where the same is made for the purpose of maintaining, caring for, or keeping in repair any tomb, monument, burial lot, burial ground, or cemetery, whether public or private, where the remains of human beings are interred and all said gifts, devises, bequests or settlements in trust or otherwise are hereby declared to be for a charitable purpose."

Harold Berliner.

PUBLIC POLICY AND THE RECOGNITION OF FOREIGN DIVORCE DECREES.—In introducing the topic of public policy and the recognition of foreign divorce decrees it is well to first investigate the factual situation regarding divorce in this country.

As a purely practical matter, and entirely unrelated to the constitutional problem of "full faith and credit" of foreign, (meaning sister states), judgments in divorce proceedings, it is clear that one of the chief reasons for the recognition of divorce decrees of other states is to insure that adultery and loose moral relationships will not be encouraged. The law puts the mantle of the marriage relationship over those obtaining easy divorces so as to give the relationship a legal rather than illegal aspect. The courts feel, either rightly or wrongly, that it is better to sanctify a doubtful situation, rather than encourage loose moral relationships by refusing to grant the divorce and run the chance of the parties, or at least one of the parties in the marriage relationship, living in promiscuity and a doubtful relationship. In these questions the court must make a choice as to the effect, practical effect, of its decisions. Either to sanction or not sanction the general divorce because of allied social and moral problems.

By statute, in Indiana, the courts sustaining the law, have provided that Indiana will not give "full faith and credit" to the foreign judgments of courts when attempting to enforce a judgment on a cognovit promissory note. The law states, and the courts sustain, that it is against the public policy of the state of Indiana to honor or recognize the legality of cognovit notes. This is an unrelated problem to the subject of divorce; however, it does set and establish a precedent in Indiana and considering the broad social problems involved in divorce actions, the ruling is entitled to consideration in the matter of divorce.

Since it is established that the Indiana courts are not required to give "full faith and credit" in all cases to foreign judgments, the problem resolves itself into a discussion of which public policy is to be observed in Indiana so far as the recognition of foreign divorce decrees is concerned. The Indiana public policy might not recognize a foreign divorce, using the cases involving cognovit notes as authority. However, under the Federal Constitution, Indiana is required to give full faith and credit in such cases.

An alarming situation is being created in the United States because of the great divorce ratio. Homes are broken, children are left to shift for themselves, and what is most deplorable, the sanctity of the marriage relationship is being overthrown. The divorce mills of Reno and like jurisdictions are encouraging this decline because of their easy divorce proceedings. On grounds of public policy, I *do not* believe such a decree, as that of the Nevada courts should be granted "full faith and credit," at least in the State of Indiana.

The case of *Haddock v. Haddock* [1] denied the right to secure a divorce in a state other than that of domicile of matrimony where the spouse is still domiciled in that state. In other words, a husband or wife could not leave the domicile of matrimony and go to another state and therein acquire a domicile, no matter how long he or she resided therein, that would entitle him or her to bring an action for divorce within that state where the other spouse still resided in the domicile of matrimony.

The Haddock case was overruled by the Williams case, *Williams v. North Carolina.*[2] In that case the court decided that if there was a bona fide domicile in another state, other than the state of the domicile of matrimony (the state where the husband and wife last lived together as husband and wife), that domicile would be considered valid so far as granting the courts jurisdiction in a divorce proceeding.

The case however, which was not overruled by the Williams case is the case of *Bell v. Bell.*[3] In that case the court determined "a case in which the Court held that a decree of divorce was not entitled to full faith and credit when it had been granted on constructive service by the courts of a state in which neither spouse was domiciled."

According to Bouvier's Law Dictionary a domicile can only be changed by making a new home with intention of abandoning the old and to adopt the new. Certainly, in those states, such as Nevada, the divorce petitioner cannot show an actual intent to adopt the Nevada jurisdiction as his new domicile. The Nevada residence is only for the purpose of obtaining the divorce. In this respect the Bell case (*supra*) will apply, or should apply, and other jurisdictions need not give "full faith and credit" because of this lack of domiciliary intent.

A recent case of *Davis v. Davis,*[4] decided August 1, 1944, by the Court of Appeals in Ohio adopted the above opinion. The court stated: "'Domicile' means place where one has voluntarily fixed his habitation, not for a temporary or special purpose, but with the intention of making it his permanent home and to which whenever he is absent he intends to return." "Where citizen of Ohio did not obtain a bona fide domicile in Nevada where he had gone solely for the purpose of obtaining a divorce as soon as possible and of returning to Ohio, in wife's action for alimony, court was not required under full faith and credit clause to recognize divorce decree procured in Nevada by her husband."

It is my opinion that from a purely legal point of view, divorces such as the Reno type, are not entitled to "full faith and credit" if it is shown that the person obtaining the divorce went to the jurisdiction merely for the purpose of obtaining residence or domicile for a divorce.

1 Haddock v. Haddock, 201 U. S. 562, 50 L. Ed. 867.
2 Williams v. North Carolina, 317 U. S. 287, 87 L. Ed. 279.
3 Bell v. Bell, 181 U. S. 175, 54 L. Ed. 804.
4 Davis v. Davis, 57 N. E. (2d) 703, August 1, 1944.

There is a great distinction and a great public policy involved between the domicile of matrimony and the domicile of divorce or separation. The intent should be fulfilled without question, that the applicant for a divorce, intended to make that jurisdiction his domicile, not for purposes of divorce but for purposes of actual residence, with an intention to abandon the old domicile and adopt the new.

Further, from a social viewpoint, a policy such as above set out would discourage divorce and would promote a healthier social behavior. In view of the alarming divorce problem, it would be well for courts to again investigate this problem of proper intent and proper jurisdiction to determine if "full faith and credit" as it effects local public policy should be considered when granting validity to foreign divorce decrees.

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EDITOR'S NOTE: Since this paper was written the United States Supreme Court on May 21, 1945, on rehearing the *Williams v. North Carolina* case ruled that other states are not bound by the "full faith and credit" clause of the United States Constitution, to recognize divorce decrees of Nevada courts, where it is shown that no actual intent to change the residence of the parties to Nevada and where the domicile in Nevada is established for the purpose of the divorce only, and the parties returned immediately after the decree of divorce, to the state where they had bona fide residence.

Robert A. Oberfell.

RIGHTS OF CREDITORS OF FRAUDULENT GRANTEE.—There are many cases in the law where there is a balance of interests. One of these cases, and one of great importance, is presented in a situation where there is a fraudulent conveyance and the creditors of the fraudulent grantee levy on the property. The question then presented for determination is who shall prevail, the creditors of the fraudulent grantor or the creditors of the fraudulent grantee?

In order to fully understand the importance and all of the ramifications of this problem it is necessary to review some of the more important principles of the law of fraudulent conveyances.

A conveyance has been defined as fraudulent when its object or effect is to defraud another, or its intent is to avoid some duty or debt owing by the party making the transfer.[1] This definition has been broadened by the Uniform Fraudulent Conveyance Act which declares that every conveyance made and every obligation incurred by a person who

[1] Turner v. Hammock, 18 S. W. (2d) 285, 229 Ky. 836 (1929).

is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.[2]

At the outset it is important to note that although the statutes declare a fraudulent conveyance void, it is not void in the sense that it is a nullity, it is merely voidable at the instance of the creditors.[3]

Thus we see that a fraudulent conveyance is a valid conveyance as far as the original parties and their heirs are concerned.[4] In fact where the parties to the conveyance are in *pari delicto* the courts [5] will not reenforce a promise made by the fraudulent transferee to reconvey the property to the fraudulent transferor. However, where the parties to a suit for the cancellation of a conveyance in fraud of creditors are not in *pari delicto,* equity [6] will intervene in the protection of the less guilty.

Of course a transfer of property that comes within the definition of a fraudulent conveyance is generally invalid as to the creditors of the grantor and they, the creditors, may disregard the conveyance and sell the property while it is in the hands of the fraudulent transferee.[7]

The rule is different in the case of a sale by a vendor to defraud his creditors made to an innocent purchaser for value, the courts [8] holding in this situation that the rights of the bona fide transferee are superior to those of the trausferor's creditors.

And again if the transferee although fraudulent has transferred the property to a bona fide purchaser for value, the bona fide purchaser holds the property discharged of the fraud and has rights that are superior to those of the creditors.[9]

We have previously noticed that while the transferee will not be compelled to return the property to the fraudulent transferor, he may restore it, in which event the ownership is again vested in the transferor.[10]

However, upon the first conveyance the title to the property becomes vested in the grantee so that a reconveyance by him to the grantor will be void as against the creditors of the grantee.[11]

Thus we have seen that although it is generally true that a creditor may treat a fraudulent conveyance as void, there are certain exceptions

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2 Unif. Fraud. Con. Act, Sec. 4.
3 Anderson v. Roberts, 18 Johns (N. Y.) 513 (1820).
4 Jackson v. Garnsy, 16 Johns (N. Y.) 189 (1819).
5 Dent v. Fergusson, 132 U. S. 50, 33 L. Ed. 242, 10 S. Ct. 13 (1889).
6 Coleman v. Coleman, 48 Ariz. 337, 61 P. (2d) 106 (1936).
7 Scoville v. Halladay, 16 Abb. N. Cas. (N. Y.) 43 (1886).
8 Jones v. Simpson, 116 U. S. 609, 29 L. Ed. 742, 6 S. Ct. 538 (1885).
9 Morrow v. New England Mfg. Co., 57 F. 685, 60 F. 341 (1894).
10 McCann v. Commissioner, 87 F. (2d) 275, 108 A. L. R. 504 (1937).
11 Farmers Bank v. Gould, 48 W. Va. 99, 35 S. E. 878 (1900).

and it is quite possible that some third person has a right that is superior to that of the defrauded creditor. The issue then is, should the creditors of the fraudulent grantee come within the class of exceptions of those whose rights are superior to those of the fraudulent creditor?

It is apparent from an examination of the problem that both of these adverse creditors have a meritorious claim. The creditor of the grantor has a legal right to the property in order to satisfy a debt, and if the law prefers him it is merely removing obstacles fraudulently interposed to prevent the exercise of this legal right. Of course, if the creditors of the grantee have acted and have taken the property into their own custody, then the court is faced with a balance of interests.

However, even though there seems to be a balance of interests, the courts have favored the creditors of the fraudulent grantee who have laid hold of the property. An early case [12] holding that an attachment by a creditor of a fraudulent vendee of real estate, not proved to have notice of the nature of the vendee's title, on the property while in the possession of his debtor, will hold the property against the creditors of the fraudulent vendor. And this is not an isolated instance because the courts [13] have consistently given a priority to the creditors of the fraudulent grantee.

All that remains to be seen then is the reason for this preference. It can be seen that the reason for this preference might be based on the doctrine of estoppel, because there is action on one side and a lack of it on the other. For we have seen that the conveyance is not void but only voidable at the election of the creditors and where they have failed to act they should not now be able to complain because some other person has taken affirmative action in order to get the property under his control.

The common law statute [14] provides that the defrauded creditor of the grantor may set aside the conveyance in all cases except where a bona fide purchaser for value has intervened. And our modern Uniform Fraudulent Conveyance Act [15] gives a defrauded creditor the right to set aside the conveyance, or disregard it in all cases except where the property is in the hands of a bona fide purchaser for value. Our question then narrows down to whether or not a creditor who has levied on the property is a bona fide purchaser.

There is a conflict of authority on this point, an early case [16] holding that "the attaching creditor is not a bona fide purchaser for value, although in some respects he may resemble one." However, more re-

12 Stockton v. Craddick, 4 La. Ann. 282 (1849).

13 Applegate v. Applegate, 107 Iowa 312 (1899).

14 13 Eliz. ch. 5.

15 Unif. Fraud. Con. Act, Sec. 9.

16 In Re Mullen, 101 Fed. 413 (1900).

cent cases [17] have held that an execution creditor is applying the proceeds of his attachment to the payment of an antecedent debt and is within the definition of fair consideration and stands in the position of a bona fide purchaser as to whom the conveyance is valid.

Thus we see that under two different views that the creditors of the vendee are given a priority. However, since the creditors of the grantor find themselves cut off because of the fraud, they may proceed against the fraudulent grantee and hold him personally liable for the debt.[18]

Eugene Charles Wohlhorn.

TORT ACTIONS AGAINST AIRPORT OR AIRPLANE OPERATORS BY OWNERS OF ADJACENT PROPERTY.—The purpose of this paper is to determine which of two methods should be used in obtaining relief against an airport or airplane operator for damage suffered by adjacent landowners. For this purpose the discussion will be divided into two sections: suits in trespass, and suits in tort for damages for nuisance.

The problem of the airplane and airport was small before this war compared to the problems anticipated in the post-war world. Great plans have been made and astounding changes are envisioned for the use of the airplane. The development of aviation since the first world war has been unequalled in any other field of transportation. The progress of aviation as a means of commercial transportation is so important that it supersedes any detriment that property owners might suffer as a result of the flight of planes over their property or because of noise, light or any other nuisance that might result from the operation of an airport or airplane.

Nevertheless, property owners are entitled to some protection from such nuisance and to a right of action for damages resulting from negligence or from the resulting nuisance. This discussion is limited to two of the most common actions available to these property owners against the airplane or airport operator.

It has become apparent that the most logical, reasonable and successful cause of action has been an action for damages because of nuisance. Under an action for trespass, a pilot could be sued every time he had made a low flight or some other infraction of the regulations. However, in an action for nuisance it must be shown definitely that actual damages were suffered, and if this can be proved, relief will be given.

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17 N. Y. C. v. Johnson, 137 F. (2d) 163 (1943).

18 Koellhoffer v. Peterson, 82 M. R. 180, 143 N. Y. S. 353 (1913).

It has been held that an airport is not a nuisance *per se,* but its mode of operation may make it so. In *Warren Township School District v. City of Detroit* [1] the Michigan Supreme Court made the above statement. Here, the township attempted to stop the city of Detroit from constructing an airport on the grounds that it would cause great general disturbances and would be a nuisance. The court said that the airport could not be a nuisance until it had actually made itself such and that airports were not nuisances *per se.*

In *Swetland v. Curtiss Airports Corporation* [2] an injunction was granted against the airport. Here, it was shown that there had been a profound depreciation in value of a real estate project near the airport caused by the noise, dust and bright lights from the airport at night. The court said that since the owners of the real estate project had informed the airport owners before the port was constructed an injunction should be and was granted as against the airport.

Dust is oftentimes one of the items complained of. In *Gay v. Taylor* [3] the court said, ". . . the dust complained of undoubtedly constitutes a real annoyance. It is caused chiefly by traffic over the driveway to the landing field, and is used by spectators attracted by curiosity as well as by customers and pilots, and employees of the port, who drive over it in automobiles. The dust is carried by the wind and the blast of propellers of planes onto and into the premises and dwelling house of the Gays. Less dust came from the landing field, since the airport was apparently well sodded. However, defendants must assume responsibility for raising the dust complained of, whether it comes from the driveway or is stirred up in the landing field by the blast of air from the propellers of planes warming up or taxiing over the ground." This is merely the opinion in this one case and about the one item complained of. If, however, it can be established that any one of the things complained of is a nuisance, relief can be had.

It is generally believed that spite structures can be removed by the court's order. Constructing towers and other such objects, merely to make the landing on a nearby airport perilous, is an act which can be abated.[4]

Generally, an injunction can be had against continual low flights over one's land. In *Vanderslice v. Shawn* [5] the court stated, "Here, the operation of the airport has not been found to be a nuisance, except insofar as the repeated low flights are concerned. If these be eliminated, the sole element of nuisance will be removed." In *Mohican and Reena v. Tobias* [6] the court enjoined all flights under 100 feet. In *Burnham v.*

1 14 N. W. (2d) 134, ... Mich. ..... (1944).
2 41 F. (2d) 929 (1930).
3 19 Pa. Dist. & Co. Rep. 31 (Ct. of Com. Pl. Chester Co. Pa., Sept. 8, 1932).
4 Commonwealth v. Bestecki, 43 Dauphin County, Rep. 446.
5 27 Atl. (2d) 87 (1943).
6 U. S. Av. Rep. 1 (1938).