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NOTES

ADVERSE POSSESSION: *The Statute of Limitations in a Suit for Ejectment*—The question involved in this problem is whether a person can successfully defend an ejectment suit by setting up the statute of limitations although he has failed to fulfill some of the requirements of an adverse possessor, and whether or not it makes any difference if one claiming title of adverse possession has claim or color of title? Let us assume that A has been in possession of land for more than twenty years but has failed to hold it hostilely and without claim or color of title, has failed to hold it for the statutory period, may B, the true owner, eject A who pleads the Statute of Limitations?

The decisions and text book writers agree almost unanimously that in order to bar or prevent the true owner from recovering land held adversely by another claiming ownership of the property through the operation of the statute of limitations, that the adverse possessor must have been for the statutory period in exclusive possession, it must be actual, openly, notoriously, continuously, hostilely, with a claim of right or color of title or an intent to hold adverse to the true owner's title, and the world.[1] And in some states where the statute fixes a shorter term of limitations, payment of taxes is expressly made an element of adverse possession.[2] All these elements that are mentioned above are essential and to lack one of them would prove detrimental to the validity of the claim of an adverse possessor,[3] and the bar of the statute of limitations will not be complete[4] until the requirements are met.

In our problem the adverse possessor although he was in possession for more than twenty years failed to hold it hostilely for the statutory period and we see in the Jackson case[5] an action of ejectment was brought by J. Berner against J. Jackson to recover the possession of a lot. The plaintiff (Berner) derived his title from the state, while the defendants (Jackson) claim to have held through their ancestor G. M.

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1 Armstrong v. Morrill 14 Wall 120; 20 L Ed. 765; 1782.
Horn v. Metzger 234 Ill 240; 84 N. E. 893; 1908.
Wod v. Riper 27 Ind. App. 356; 61 N. E. 608; 1901.
Courtney v. Ashcraft 31 Ky L. Rep. 1324; 105 S. W. 106; 1907.
Warren v. Bowdran 156 Mass. 280; 31 N. E. 300; 1892.
Lasley v. Kniskern 152 Mich 244; 115 N. W. 971; 1908.
See also 15 L. R. A. (N.S) 1189.

2 Seven years' payment of taxes, with color of title and possession.
Ill. Revised Statutes Chap. 83 sec. 6; 1943.
In re Dixion 120 Cal. App. 635; 8 P (2d) 881; 1932.
Blayden v. Morris 37 Idaho 37; 214 P 1039; 1923.
Bryson v. Ferrill (Tex. civ. app) 25 S. W. (2d) 1001; 1930.
Peterson v. Johnson 34 P (2d) 697 (Utah) 1934.
See also C. J. S. sec. 171 page 745.

3 Cook v. Babcock 65 Mass 206; 11 Cush 206; 1853.

4 Beasley v. Howell 117 Ala 499; 22 So. 989; 1898.
Eastern Oregon Land Co. v. Cole 35 CCA 100; 92 Fed. 949; 1899.

5 Jonathan Jackson et al v. Jacob Berner 48 Ill 203; 1868.

Jackson, and have held this property for more than twenty years and set this up as a bar to the plaintiff's action of ejectment. The court said that if this possession of the defendants was adverse possession that the plaintiffs could not recover possession of the land. During the course of the trial no witness testified that defendants had held any portion of the land in question in hostility to that claim of the plaintiff or adversely to plaintiff's claim. The court held "that adverse possession sufficient to defeat the legal title where there is no paper title must be hostile in its inception and continue hostile uninterruptedly for twenty years,"[6] and that the statute of limitations did not run in favor of the defendants and the plaintiff could recover the land. There are many other cases that hold that adverse possession must be hostile in its inception and continue so for the statutory period.[7] In the Walton case[8] the court said "to bar a recovery in ejectment by one who has title to the premises the possessor is required to prove not only that his possession was taken at the outset under a hostile claim but that such hostility continued"; however, if the entry made by a person is not hostile when he enters, the possession must then become hostile before the Statute of Limitations will begin to run[9] and once it is held hostilely if continued for the statutory period it will ripen into a perfect title by adverse possession.[10] When the possession is not held adversely in its inception, but held in harmony with that of the real or rightful owner's title, the statute of limitations will not begin to run in the adverse persons favor until there is a disclaimer and disavowal of the true owner's title.[11] This is also true where one is in possession of land and is seeking the owner in order to purchase title, the statute of limitations does not and will not run until it is held adversely to that of the owner's and for the statutory period.[12] It is also true in the case of a tenant who holds his title subservient to a paramount title, and he is not an adverse possessor[13] unless the tenant claims the premises ad-

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6 Turney v. Chamberlain 15 Ill. 272, 1853.
Rigg v. Cook 4 Gilm 336; 1847.
McClellan v. Kellogg 17 Ill. 498 1856. These were earlier cases cited in support of the Jackson v. Berner case, supra.

7 Gildehaus v. Whiting 39 Kan 706; 18 P 916; 1888.
McDonald v. Fox 20 Nev. 364; 22 P 234 1889.
Mhoon v. Cain 77 Tex. 316; 14 S. W. 24; 1890.
Abbott v. Sturtevant 30 Me. 40; 1849.
Sommer v. Compton 96 P 124; (Or.) 1908.
Maxwell v. Cunningham 50 W. Va. 298; 40 S. E. 499; 1901.

8 Brandt ex dem. Walton v. Ogden 1 Johns 156 (N. Y.) 1806.

9 Johnston v. Albuquerque 12 N. H. 20; 72 P 9; 1903.

10 Hays v. Lemoine 156 Ala. 465; 47 So. 97; 1908.

11 Whitlock v. Johnson 87 Va. 323; 12 S. E. 614; 1891.
Virginia Midland R. Co. v. Barbour 97 Va. 118; 33 S. E. 554; 1899.

12 Mhoon v. Cain 77 Tex 316; 14 S. W. 24; 1890.

13 Elmendorf v. Taylor 10 Wheat. 152; 6 L. Ed. 289; 1825.
Williams v. Morris 95, U. S. 444; 24 L. Ed. 360; 1877.
Goode v. Gaines 145 U. S. 141; 36 L. Ed. 654; 1891.

versely as his own and the landlord is aware of his tenant's claim and allows the tenant to stay in possession for the statutory period.[14] So possession which is not hostile has no basis for title by adverse possession[15] no matter how long continued[16] or how exclusive it may be in character.[17]

Now as to claim of right or color of title we see that it is also essential for an adverse possessor to hold the land under a claim of right or a color of title[18] however, this is not true in some of the states.[19] In the Jasperson case[20] the court stated that where one took possession and occupied vacant land he is nothing more than a mere squatter and as such does not work a dissession of the real owner, nor would such possession by a squatter ripen into title, and that to have or constitute adverse possession it must originate under a claim or color of title having reference to some distinct source from which it is claimed to have been deraigned. In *Balch v. Smith*[21] the supreme court also stated that the basis for adverse possession must be under a claim or color of title, otherwise it would not ripen into title. This doctrine was also affirmed in *Blake v. Shriver*.[22] Here the court said there must be a decision of the original owner for there cannot be seisin at the same time and that until there is a diseisin the statute of limitations will not commence to run against the true owner, and to work a diseisin it must be under a claim of right or color of title.[23] In the

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14 Lea v. Netherton 9 yerg 315 (Tenn.) 1836.

15 Evert v. Tuner 184 Iowa 1253; 169 N. W. 625; 1918.
King v. Battle Creek Box Co. 235 Mich. 24. 209 N. W. 133; 1926.
Nelson v. Johnson 189 Ky. 815 226 S. W. 94; 1920.
Trimboli v. Kinkel 226 N. Y. 147; 123 N. E. 205; 1919.
Bank of Eagle v. Morrison 197 Wis. 40; 221 N. W. 383; 1928.
2 C. J. page 124 note 45, page 265, note 87.

16 Missouri Lumber Co. v. Chronister 259 S. W. 1042 (Mo.) 1924.

17 Dobbins v. Economic Gas Co. 182 Cal. 616; 189 P 1073; 1920.
See also 2 C. J. page 124 notes 49-51.

18 Jasperson v. Scharnikow 150 Fed. 571; 15 L. R. A. (N.S) 1178; 1907.
Adams v. Pearce 218 Ala. 525; 119 So. 236; 1928.
Jacobi v. Jacobi 345 Ill. 518; 178 N. E. 88. 1931.
Town of Kaneville v. Meredith 351 Ill. 620; 184 N. E. 883; 1933.
Crismond v. Kendrick 325 Mo. 619; 29 S. W. (2d) 1100; 1930.
Smith v. Feneley 240 Mich. 439; 215 N. W. 353; 1927.
Green v. Trumbull 37 N. H. 604; 26 P (2d) 1079;
Honeyman v. Andrew 124 Okl. 18; 253 P 489; 1927.
Pocahontas Coal & Coke Co. v. Bower 111 W. Va. 712; 163 S. E. 421; 1932.
Fitschen Bros. Com. Co. v. Noyes' Estate 76 Mont. 175; 246 P. 773; 1926.
Chicago M. St. P. & P. R. Co. v. Cross 212 Iowa 218; 234 N. W. 569; 1931.

19 Ahern v. Travelers Ins. Co. 108 Conn. 1; 142 A 400; 1928.
Davis v. Biddle 89 Ind. App. 361; 166 N. E. 301; 1929.
Thurston v. Batchellor 100 Vt. 334; 137 A 199; 1927.

20 Jasperson v. Scharnikow 150 Fed. 571; 15 L. R. A. (N.S) 1178; 1907.

21 Balch v. Smith 4 Wash. 497; 30 P 648; 1892.

22 Blake v. Shriver 27 Wash 593; 68 P 330; 1902.

23 In Yesler Estate v. Holmes 39 Wash 34; 80 P 851; 1905.

Alsup case[24] the court held the defendant not to be an adverse possessor even though he had complied with the statute[25] by paying taxes and holding possession for seven years, because the statute did not apply to him for it was his duty as the mortgagor's successor to pay the taxes and therefore he recognized title in another and to be an adverse possessor possession must be hostile and under a claim of title and not in recognition of the title of the real owner and that he would not become an adverse possessor until the purchase money was paid. In McDaniel v. Sloss Iron and Steal Co.[26] the court quoted Washburn on *Real Property*[27] where it is stated that "where a party enters upon land and takes possession, without claim of title or right his occupation is subservient to the paramount owner and not adverse to it." It is nothing more than a trespass, and no matter how long continued can never ripen into a good title.[28] The Tyler case[29] also held that possession without claim of title was subservient to a paramount title and not adverse to it. In a New York case a woman found an island in Westchester creek near New York City, unoccupied, entered upon it and without claim or color of title, record or otherwise, and had erected buildings and remained in possession for twenty years, the court held that she was a mere squatter and consequently could not obtain title by adverse possession.[30] In the Jacobi case[31] the court held that possession must be hostile and adverse and must be under a claim of ownership and until this is shown the statute of limitations does not run. And in the Frazier case[32] it was held a claim of right, title or ownership is essential and if such element is absent possession is deemed subservient to the title of the record owner and not adverse. If one enters upon the land without color of title and then subsequently becomes adverse by acquiring and asserting a claim of title, the statute of limitations will then begin to run from the time of such assertion[33] and will ripen into a good title.

Consequently the failure of A to hold the property hostilely and under a claim of right or color of title for the statutory period, which elements are necessary requirements in order for one to obtain title by adverse possession, A, in our case, would not obtain title by adverse possession by pleading the statute of limitations as against the true owner B.

—*Saverio Alonzi*

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24 Alsup v. Stewart 194 Ill. 595; 62 N. E. 795; 1902.

25 Seven years' payment of taxes, with color of title and possession. Ill. Revised Statutes Chap 83 sec. 6; 1943.

26 McDaniel v. Sloss Iron & Steel Co. 152 Ala. 414; 44 So. 705; 1907.

27 3 Washburn on Real Property 4th ed. page 135-136.

28 Bernstein v. Humes 75 Ala. 241; 1883.
Dothard v. Denson 72 Ala 541; 1882.

29 Harvey v. Tyler 69 U. S. (2 Wall) 328; 17 L. Ed. 871; 1865.

30 In re city of NY 63 Hun 630; 18 N. Y. Supp. 82; 1892.

31 Jacobi v. Jacobi 345 Ill. 518; 178 N. E. 88; 1931.

32 Frazier v. Banks 294 Ky 61; 170 S. W. (2d) 900; 1943.

33 Weckham v. Henthorn 91 Iowa 242; 59 N. W. 276; 1894.

BALANCE OF CONVENIENCE DOCTRINE.—This paper will present the general rule and the prevailing rule in Indiana with reference to the balance of convenience doctrine. This doctrine seems to be mainly concerned with cases wherein the complainant is seeking to enjoin some large industry from operating due to the latter's obnoxious operations. The defendant contends that the resulting injuries must be balanced by the court, and that, where the hardship inflicted upon one party by the granting of an injunction would be very much greater than that which would be suffered by the other party if the nuisance were permitted to continue, injunctive relief should be denied. This substantially covers the type of case brought under the balance of convenience doctrine.

The court applied this rule in *Grey et rel Simmonset al v. Mayor of City of Paterson*[1] in a case which grew out of a nuisance. Here the city maintained a system of sewers which discharged its contents into the Passaic River. This pollution constituted a nuisance and the riparian landowners sought an injunction to stop this pollution and thus save their property from pollution. However, the injunction was denied and the court held that by reason of the great injury which would fall upon the city by restraining the continuous use of its sewage system, and the acquiescence of the riparian owners above where the tide flows, their injury being comparatively small, it would be inequitable to grant them an injunction.

But what of this great injury to the city? It seems that the city had gone to great expense in establishing this system of sewers. The system accommodated over 100,000 people. If this restraint were granted the homes of these hundred thousand people would be rendered perilous to health and life and unfit for occupancy. Thus, due to these facts the injunction was vacated.

The legal determination of the balance of convenience doctrine can be divided into four categories:

1. Decisions definitely favoring the doctrine and large industries.
2. Decisions involving a case wherein the industries have done all they can to stop the offending operations and wherein said injunction will not be granted due to the diligence of the industry.
3. Decisions definitely favoring the plaintiff wherein the injunction will be granted.
4. Decisions involving cases wherein the industries have done all they can toward stopping the offending operations but have failed, and due to this failure an injunction will be granted despite their efforts.

Under the first category we find the case of *Bliss v. Anaconda Copper Refining Co.*[2] Here it seems that complainant owner of a farm brought suit to enjoin the maintenance and operation by defendant of a smelter on the ground that the fumes and arsenic precipitated from the smoke from the smelter injured the crops and poisoned the stock thereon. The smelter was built at a cost of nearly ten million dollars and treated

1 45 Atl. 995, 60 N. J. Eq. 385, (1900).

2 167 Fed. 342 (1909).

7,000 tons of ore per day. Its production of copper was from 17% to 20% of that produced in the United States. The livelihood of a great number of people depended on the operation of this company for it was one of the main industries. Thus the injunction was not granted for the gain of the plaintiff would be entirely disproportionate to the loss of the defendant if this company was enjoined.

Likewise, in the case of *Madison v. Ducktown Sulphur Copper and Iron Co.*[3] we have a similar decision. Defendant caused to emit large volumes of smoke which settled upon the surrounding territory and rendered the homes of tthe complainants less comfortable. The court refused to enjoin defendant from operating and held that such a decree would cause thousands of people to lose their homes and starve, and the loss would be disproportionate to the gain of plaintiff.

Tennessee has a statute which authorizes the application of the balance of convenience doctrine. Thus in Tennessee it is merely a matter of determining whether the doctrine is applicable, and large industries are very definitely favored. To further this point, it is found that some states have passed statutes which seem to authorize the application of the balance of conveniencedoctrine. We will find such statutes in Colorado,[4] Georgia,[5] and Tennessee.[6]

Under the second point, *McCarthy v. Bunker Hill Mining Company*[7] very aptly presents a good example. This mining company, through operations, rendered impure the water of the river, which, when it overflowed, poisoned and injured the riparian landowners' land. They sought an injunction restraining defendants from operating. The court refused to grant the injunction. The owners did all they could to prevent injury to others by the construction of dams, etcetera. The injunction would have closed mines in which ten to twelve thousand men were employed and in which large capital was invested. Due to this great loss and the fact that the gain of plaintiff would have been out of proportion to the loss of defendant if the injunction had been granted, the injunction was denied.

Some decisions favor the landowners despite the hardship inflicted upon the industries. Such is the situation in the following cases. In *Welton v.* DJ *East Oak Street Building Corporation*[8] a zoning law violated by constructing a building too close to the alley. The court held that the building had to be set back despite the cost. The "balance of convenience" doctrine was not followed here for the health and comfort of the public was involved. Defendant in *Whalen v. Union Bag and Paper Company*[9] owned and operated a pulp mill on a stream. Plaintiff's land was located down the stream which was very unsanitary due to

3 83 S. W. 658 113 Tenn. 331 (1904).

4 Ann. Stat. Colorado 1912, Sec. 3241.

5 Parks Ann. Code Georgia, 1914, Sec. 5497.

6 Ann. Code Tennessee, 1918. Sec. 5188.

7 147 Fed. 981 (1906).

8 70 F. 2d. 377 (1934).

pollution by defendant. Despite the fact that the defendant had expended great sums in building his factory and would suffer heavily if enjoined, he was enjoined from polluting the stream. The balance of convenience doctrine is not usually followed where the health of the public is in danger.

In *Weston Paper Company v. Pope* [10] large concerns polluted a stream to the detriment of riparian land owners. They were enjoined despite their heavy loss, for they should have foreseen such a condition would develop. In *Kenyon v. Edmundson* [11] defendant's desiccating plant gave forth very obnoxious odors which were very offensive to residents of that vicinity and interfered with their comfort and the enjoyment of their homes. Defendant was enjoined from operating despite the fact that he would stand to lose heavily. He was given a chance to operate without such odors but he was unable to so perform.

From reading the above cases, it is quite apparent that equity will do its utmost to protect the health and safe living of individual landowners. Equity holds the unrestricted enjoyment of one's land high as a precious right of landowners.

Finally under point four where industry is given a chance to protect itself we have the case of *Hulbert v. California Portland Cement Co.*[12] Defendant here manufactured cement nearly two miles from a city and had expended great sums in the construction of the building. It gave off certain dust and smoke which ruined plaintiff's fruit trees and acted as a nuisance. Defendant earnestly did his best to avoid giving off such products but had failed. Defendant was enjoined despite his great loss in buildings, etcetera.

This case presents a very inclusive definition of this doctrine now before us. It states that where the hardship inflicted upon one party by the granting of an injunction would be very much greater than that which would be suffered by the other party if the nuisance were permitted to continue, injunctive relief should be denied. This doctrine is known as the "balance of hardship."

Let us now proceed to determine the trend of decisions in Indiana concerning this doctrine. As the result of exhaustive research, I found that the earlier decisions definitely favored the landowners, but with the industrialization of Indiana came the swing of balance of favor over to the industrial side.

Some of the earlier cases to be presented will clear the picture of this early trend in Indiana as to whether the landowners or large industries were favored. In *Bowers v. Indianapolis* [13] it was declared that a municipal ordinance declaring emission of black smoke from a factory

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9 101 N. E. 805, 208 N. Y. 1 (1913).

10 155 Ind. 394 57 N. E. 719 (1900).

11 193 Pac. 739, 79 Okl. 313 (1920).

12 38 L. R. A. N. S. 436, 118 Pac. 928, 161 Cal. 239 (1911).

13 169 Ind. 105 81, N. E. 1097 (1907).

a nuisance is not void. *Reichert v. Geers* [14] declared that a slaughter house in use in a populous part of a city is a nuisance and may be enjoined. *Over v. Dehne* [15] decided that the operation of a foundry for more than twenty years at the same location does not give the owner a prescriptive right to maintain it when it becomes dangerous and a nuisance to enjoyment of plaintiff's land.

In *Niagara Oil Company v. Ogle* [16] where the productive power of land has been destroyed by reason of the existence of a nuisance, a recovery for permanent injury to the land is authorized although such nuisance can be abated. *Cleveland C.C. and St. L. Ry. Co. v. King* [17] decided that where the acts complained of in an action for damages to plaintiff's property and the comfortable enjoyment thereof consisted of defendant's casting into a large pond near her premises carloads of dirt and offensive material, causing thereby the water to become foul and poisonous, the nuisance was one which could be abated.

Now let us turn our attention to a recent case which presents what seems to be the prevailing opinion today in Indiana. In *Owen v. Phillips* [18] which is a rather early case, the court seems to indicate the initial point of shifting of views. It held that courts interfere, by injunction, against establishments such as mills and manufactories, with great caution, and only in cases where the facts are weighty and important, and the injury complained of is serious and permanent in character.

In 1935, as mentioned above, we have the case of *Northern Indiana Public Service Co. v. W. T. and M. S. Veasey,* [19] which is an atcion by the owner of greenhouses against owner of an adjacent gas plant for damages for property injury resulting from the emission of poisonous gases, etcetera, for an injunction. The court found that the gas plant could not be operated in such a manner as not to emit the poisonous gases, or in such manner as not to injure plaintiff's plants and flowers, and that it would be of less damage to permit the gas company to continue its operation than to enjoin it, and held that it followed that the gas plant might continue operating in he same manner forever. If he plaintiff suffered a total loss of property and business they could not enjoin, but could recover damages due to such continuous operation.

After reading the above decision, the present position of large industries in Indiana becomes clear. By "industries" we refer to those native to the Calumet region, namely, the Standard Oil Company of Indiana, Carbon and Carbide Company, Federated Metals, Iever Brothers, American Maize, et al. Obvious property damage has resulted to residents of that area as a result of the operation of these and other industries. Inhabitants have inhaled the stench, and have borne the smoke and

14 98 Ind. 73 (1884).

15 38 Ind. App. 427 75 N. E. 664, 76 N. E. 883 (1906).

16 177 Ind. 292 98 N. E. 60 (1912).

17 23 Ind. App. 573 55 N. E. 875 (1900).

18 73 Ind. 284 (1881).

19 210 Ind. 338 400 N. E. 620 (1936).

excess gases for years. Paint has been peeled from homes due to the acid element in the smoke from a certain chemical plant. Neighboring residents to an asphalt works along a highway are subject to coughing spasms due to odors emitted from this plant. Smoke from these industries at times obscures vision so that traffic is almost completely halted. Bathing water in Lake Michigan is sometimes covered with a film of oil as a result of deposits of excess oil poured into the lake by certain refineries. Youngsters have been seen to break out with sores as the result of this impure condition of the waters. These and many more can be seen, but the most tragic effect is seen in the pale and unhealthy appearance of the small children of this region. Life itself seems to be demanded as a sacrifice on the altar of industrialization. A typical example of this situation is in the case of the Standard Oil Company of Indiana which owns 5,688,911 acres outside of Whiting, Indiana. It's output is 103,000 bbls. per day, and its gross operating income in 1942 was $458,167,052. Shares outstanding amount to 15,284,892 shares. It employs 33,113 persons.[20]

The East Chicago bhanch of the American Steel Foundries produces 24,740 tons of steel castings per year. It has 56 buildings and 331,132 square feet of floor space.[21]

The Hammond branch has 29 buildings and 319,350 square feet of floor space. It produces 33,500 tons of brakes, etcetera per year.[22]

Thus it can be seen from these facts that if these industries were enjoined they would stand to lose very heavily as would the whole region. So it is generally felt that it is better to follow the balance of convenience doctrine in a region wherein large industries predominate, despite the hardships of the surrounding populace, who are in a sense of the word, the minority.

Despite this rather apparent dark picture for the landowners of this region, there are indications that relief might soon be available to them. Not long ago the South Bend chapter of the Natinal Assciatin of Power Engineers discussed the necessity of cooperation between city officials, industrial heads and power engineers to bring about adequate smoke control and told the engineers that their work in South Bend on the problem is expected to set an example for the rest of the State. Proposed ordinances to control the smoke nuisance are being prepared by a three-man committee.

Other industrial leaders are undertaking to cooperate with civic leaders to correct this intolerable situation by agreeing to take all possible precautions to eliminate nuisances created by the operations of their plants. Thus industrial concerns who have enjoyed the benefits of the "balance of convenience" doctrine will, it seems, voluntarily undertake to compensate in some manner for the injuries suffered by neighboring residents to their plants which are not actionable in court because of this doctrine. —*William J. Obermiller.*

20 Moody's Reports.
21 Moody's Reports.
22 Moody's Reports.

FIREMEN AS PUBLIC OFFICERS OR EMPLOYEES. — Plaintiff was a fireman in the defendant city, and plaintiff was paid a set salary under Ordinance 1457 of the city. Also, there was an allowance given to each fireman of not more than one hundred and twenty dollars for each year for the purpose of purchasing uniforms and caps. Subsequently Ordinance 1694 was passed which reduced the salaries of firemen for the year starting April 1, 1934. Plaintiff accepted this reduced salary and also has been forced to purchase his uniforms and caps at his own expense.[1] Plaintiff alleges that he was appointed to the fire department in 1933 for a five year term at a fixed annual salary, and that said fixed salary has been reduced $16.25 per month for which the plaintiff sought to recover. Plaintiff, also, sought to recover the expenditures which he has made for uniforms and caps on the theory that the defendant had been unjustly enriched and should be held accountable on quasi contract. Defendant answered pleading Ordinance 1694 and estoppel of the plaintiff to recover. The lower court struck from the answer the defense of estoppel and acquiescence to the claim of salary reduction on the theory that Ordinance 1694 was an amendment or revision of the 1926 Ordinance 1698 and that the amending ordinance did not comply with section 5715 Code 1939 which provided:[2] "No ordinance shall contain more than one subject which shall be clearly expressed in its title. An ordinance revising or amending an ordinance or section thereof shall specifically repeal the ordinance or section amended or revised, and set forth in full the ordinance or section as amended or revised," and therefore ordinance 1694 was invalid. Also, the lower court pointed out that the firemen were not estopped by accepting a lower salary. Also, the lower court struck the defense of estoppel to the claim that money expended for uniforms and caps without a protest or demand for reimbursement. The court held this alone was not sufficient to constitute an estoppel. The supreme court sustained the latter ruling but overruled the former holding, saying that even though the ordinance 1694 was inoperative because of non-compliance with ordinance 5715, nevertheless, the firemen is estopped to claim a right to back salary because he accepted the former salary without protest, and thus he is barred from bringing the present claim.

It is the purpose of this comment to show the legal status of firemen as developed by the court in other jurisdictions; and also to point out some general principles in regard to the proper procedure for amending and revising ordinances.

In regard to the proper procedure for changing an existing ordinance it has been said, "Express repeals can only be effected by an act of equal grade with that by which the ordinance was originally put in

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1 Glaser v. City of Burlington, 1 N. W. 2d 709 (1942).

2 Code, 1939, §5715 provides: "No ordinance shall contain more than one subject, which shall be clearly expressed in its title. An ordinance revising or amending an ordinance or section thereof shall specifically repeal the ordinance or section amended or revised, and set forth in full the ordinance or section as amended or revised." (In the 1934 Ordinance 1694 no mention was made to Ordinances 1498 and 1457 which Ordinance 1694 revised and amended.)

operation. No part or feature of an existing ordinance can be changed by a mere resolution of the council even though signed by the mayor and recorder. A new ordinance must be passed."[3] This general principle has found favor in many jurisdictions.[4] It has also been held a defect in an existing ordinance can not be cured or amended by a motion of the council; rather a new ordinance must be passed which cures the defect.[5] Thus, generally, it may be said that to change an existing ordinance one must conform to the same procedure and pass legislation of the same force and effect of the original ordinance.[6] This is illustrated in *G. W. Mart v. City of Grinnell* where an ordinance prescribes a set salary this salary can not be subsequently changed by a resolution.[7] *Swindell v. State* develops the rule that where an act was done under an ordinance, even though it could have originally been enacted by resolution alone, nevertheless a subsequent change must be made by an ordinance and a resolution will not have the effect to amend, revise, or overrule the former ordinance.[8] In the case of *Murphy v. Gilman* it was held that a fireman's salary could be changed by resolution alone and no new ordinance was necessary.[9] In this case they refused to follow the ordinance and designated the firemen's salary by resolution. But, it is conceded that the council could prescribe the firemen's salary either by resolution or by ordinance. This rule has now been changed in Iowa and firemen's salaries must be by ordinance.[10]

Generally, it may be said where an ordinance is used in the first instance any subsequent change to said ordinance can not be by resolution or motion, but it may only be accomplished by another valid ordinance of equal force.[11]

When is a person an officer and when is one an employee? This question has created some interesting distinctions by the courts. One authority, namely Judge Cooley, makes a fine distinction between an employer and a public officer when he says, "An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer. The officer is distinguished from the employer in the greater importance, dignity and independence of his

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3 Horr and B., Mun. Pol. Ord. §61.

4 Jones v. McAlpine, 64 Ala. 511 (1879); Horner v. Rowley, 51 Ia. 620, 2 N.W. 436 (1879); Campbell v. City of Cincinnati, 49 O. S. 463, 31 N. E. 606 (1892); City of Loganasport v. Crockett, 64 Ind. 319 (1878). Also see: Dillon, Municipal Corporation, §291.

5 Bills v. City of Goshen, 117 Ind. 221, 20 N. E. 115 (1889).

6 Jones v. McAlpine, 64 Ala. 511 (1879).

7 187 N.W. 471, 194 Ia. 499 (1922).

8 143 Ind. 153 (1895).

9 Murphy v. Gilman, 204 Ia. 58, 214 N. W. 679 (1927). See Also Footnote 10.

10 Iowa Code, §6519 (1939).

11 2 McQuillan, Mun. Corps. 2d Ed., p. 348. 43 C. J. 564.

position; in being required to take an oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general."[12] Also. in *Shelby v. Alcorn*[13] the court says, "It may be stated as universally true that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office and the person who performs it is an officer." Similar definitions have been given by other courts.[14]

But, into what classification does the fireman fall? Is a fireman a public officer or an employee? Also, of what legal consequence is it whether the fireman is an employee or a public officer?

The state of New York, by legislation has rather consistently held firemen to be public officers. The case of *Padden v. City of New York* held a fireman was a city officer, and where the fireman was wrongfully discharged and accepted a job *as an employee* in another branch of the city government his earnings as an employee can not be set-off against what is owed him as fireman on the theory that one can not hold two public offices at the same time.[15] In another case where the Fire Marshal took an oath and the statute designated the Fire Marshal as a public officer, the court held that the intent was to have the Fire Marshal a public officer and not an employee and the court so held.[16] Also, in another instance where the Fire Marshal was designated by statute to be a public officer, it was held he could not be removed without cause, and his liabilities and rights were to be ascertained from the statute creating the public office.[17]

Wisconsin by statute has also held firemen to be public officers, and as such the court held that their salary can not be reduced during their tenure of office. Even if they attempt to contract away their right to their salary they are not estopped to later recover the salary prescribed by statute. The court went on to say, ". . . where the law, as in this case, prohibits a municipality from meddling, during an officer's term of office, with the compensation he will receive for his services, the doctrine of estoppel cannot be invoked to thwart it. . . ."[18] Another case[19] holds

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12 Throop v. Langdon, 40 Mich. 673 (1879).

13 36 Miss. 273, 72 Am. Dec. 169 (1858).

14 Bunn v. People, 45 Ill. 397 (1867); People v. Loeffler, 175 Ill. 585, 51 N.E. 785 (1898); State v. Spaulding, 102 Ia. 639, 72 N.W. 288 (1897).

15 92 N. Y. S. 926, 45 Misc. Rep. 517 (1904).

16 People v. Scannel, 49 N. Y. S. 1096, 22 Misc. Rep. 298 (1898).

17 In re Freeman, 50 N.Y.S. 520, 27 App. Div. 593 (1898).

18 Nelson v. City of Superior, 109 Wis. 618, 85 N.W. 412 (1901). Also see: Clarke v. County of Milwaukee, 53 Wis. 65, 9 N.W. 782 (1881).

19 Jackson v. Wilde, 198 P. 822, 52 Cal. App. 259 (1921).

that a fireman is an officer and not an employee and as an officer his salary cannot be altered during tenure of office. The court says, "Plaintiff's title to the office of fireman is not disputed. To that office the law attaches a monthly salary, and to that salary he is entitled so long as the law creating it remains in force and he continues to hold the office."

Also, in Pennsylvania in a 1941 case a fireman is held to be a public officer.[20] But, another Pennsylvania case held that if a fireman was a de facto officer acting in bad faith he can not recover even on *quantum meruit.* However, where one in good faith renders services under the impression that he is a legal officer he may recover for work labor and services.[21] Where a fireman lied about his age he cannot recover for services.[22]

In *Smiddy v. City of Memphis* the court found that a fireman by accepting the old salary had not waived his right to a higher salary prescribed by legislative act. This would tend to show that the fireman is regarded as a public officer for under the same circumstances the employee of the city would be estopped to claim the higher salary.[23] But, in other cases it has been held that a fireman can contract away his right to higher salary, and his subsequent claim for his original salary is barred as the contract is valid as a matter of policy.[24] This conclusion would tend to prove that the fireman is an employee; for it has been held with good authority that an officer of a city cannot contract away his right to his salary.[25] However, in the case of *Barfield v. City of Athens* is was held that where a city fireman's written acknowledgment on the back of his pay check that check was in full payment of salary due him and that deductions were made at the payee's request the fireman had waived his right to higher wages.[26] This again tends to show that the fireman is regarded as an employee rather than an officer.

There are many cases which hold unquestionably that a fireman is an employee and not a public officer.[27] Also, it was held without question in *State v. Jennings*[28] that a fireman employed by the council under a city ordinance are not public officers, but employees of the city.

The case of *Schmitt v. Martin Dooling* while admitting that firemen are not public officers, nevertheless, hold that firemen should not be

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20 Gerson v. City of Philadelphia, 20 A. 2d 283 (1941).

21 Lauzerene Township v. Fayette County, 330 Pa. 247, 199 A. 327 (1938).

22 Commonwealth v. Thomas, 325 Pa. 19, 195 A. 103 (1938).

23 203 S.W. 512 (1918).

24 Gamble v. City of Sacramento, 110 P. 2d 530 (1941); City of Fort Worth v. Morrison, 151 S. W. 2d 300 (1941).

25 Van Gilder v. Madison, 267 N.W. 25 (1936).

26 187 S.E. 407 (1936); Jones v. Winnebago County, 5 N.E. 2d 862 (1937).

27 State v. Johnson, 123 Mo. 43, 27 S.W. 399 (1894).

28 57 O.S. 415, 49 N.E. 404, 63 Am. St. Rep. 723 (1898).

allowed to assign their unearned salary. The basis for this ruling is on the theory that the firemen are performing a public function and an assignment of their unearned income might tend to lessen their efficiency in their public office and consequently such an assignment is against public policy.[29]

There seems to be a definite split of authority in regard to the validity of an agreement by an officer or employee to accept less compensation than that provided by law. One authority says: "acceptance of a less sum than that allowed by law, as salary or compensation, without objection, and in full satisfaction for services rendered will ordinarily estop the officer or employee from claiming more."[30] A recent case expresses this opinion.[31] However, many other recent cases hold an officer or employee is not estopped to recover back salary because the officer or employee accepted a lesser sum as payment.[32]

Some of the recent cases tend to hold firemen are public officers and as such are entitled to the privileges and immunities of other public officers.[33] In the case of *Jackson County v. Reed*[34] it was held that an agreement to accept less compensation than that provided by law was unenforceable as against public policy. Another case[35] holds that where firemen worked more than required they are not estopped to receive extra compensation.

Thus, it would seem to be the better rule that firemen are officers of a city rather than employees. However, there is a split of authority on the point as the cases illustrate; and it seems pertinent to point out that for more clarity on the point there should be legislation on the legal status of firemen to avoid further confusion by the courts decisions.

James H. Neu

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29 145 Ky. 240, 140 S.W. 197, 57 L. R. A. (N.S.) 775 (1911).

30 2 McQuillan, Mun. Corps., 2d ed. 249, §542.

31 Maxwell v. City of Madison, 292 N.W. 301 (1940); Van Houghten v. City of Eaglewood, 12 Atl. 2d 668 (1940).

32 Reed v. Jackson County, 142 S.W. 2d 862 (1940); Steck v. Bd. of Ed. of City of Camden (1940).

33 Morgan v. City of Rockford, 31 N.E. 2d 596 (1940).

34 142 S.W. 2d 862 (1941).

35 City of Galveston v. O Mara, 146 S. W. 2d 416 (1941).

THE MODERN LEASE: CONTRACT OR CONVEYANCE.—The question of construing a leasehold either as a contract, that is as personalty, or as a conveyance, or realty is one that has been constantly before the courts and one which has undergone significant statutory changes occasioned by our complex economic life. The distinction between an interest in land that is personalty and one that is realty is one of historical origin. There seems no question that at common law a leasehold interest whether for one of 100 years, was a chattel real and was denominated personal property. So fundamental was this idea in the English courts and so well preserved did it pass to some American jurisdictions that we find in *Lenow v. Fones,* the court declaring: "No proposition has been better settled from the earliest days of the common law than than a lease of whatever duration is but a chattel."[1]

This common law concept of construing leases as personalty seems due to the fact that when a lessee, possessing anything less than an estate of a freehold character, was ejected from the land by the lessor he could not assert a property right to reclaim his interest, but his action was analogous to an action in contract, his only remedy being a personal action for damages. In 1235 the action of *quare ejecit* was created for the amelioration of the lessee and by the end of the 13th century, with the establishment of the actions of *trespass quare clausum fregit* and *trespass de ejectione firmae,* the lessee for years could assert a possessory right to reclaim the property when he had been wrongfully evicted as judicially powerful as that of a holder of a freehold.

A lease has been defined in Blackstone as "properly a conveyance of any lands or tenements, made for life, for years or at will, but always for a less time than the lessor hath in the premises; for it be for the whole interest, it is more properly an assignment than a lease."[2]

Further looking into the matter, we find that "Teffany describes a lease as they say 'in a more extended sense to describe not only the legal act (the conveyance) by which a lessor estate is vested in another, but in addition, the legal act or acts by which various contractural obligations are created in connection with such conveyances."[3]

It is not surprising that quite frequently the courts have lost sight of the fact that the really essential part of the transaction is a conveyance, and instead regard it as involving the creation of contractual obligations only, frequently speaking of the "contract of lease."

"The failure for many today to recognize that lease is something more than a mere contract," says chief Baron Gilbert, "is, it is conceived to a considerable extent due to the fact . . . for the possession and profits of lands on one side, and a recompense by rent or other consideration on the other."[4]

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1 Lenow v. Fones, 4 S. W. 56, 48 Ark. 557 (1887).

2 2 *Blackstone's Commentaries* 317.

3 Tiffany's *Landlord and Tenant,* p. 159.

4 Bac. Abr. Tit. *Leases,* p. 433.

This rule was accepted in many cases frequently upon the express authority of the writer referred to.[5]

Fundamental objection to such a definition of a lease is that it entirely ignores the common law theory of a particular and a reversionary estate in the lessee and lessor respectively and substitutes therefor the civil law conception of a contract of hiring, which passes no title or property in the thing hired, but merely binds the owner to secure the enjoyment of the thing to the hirer.

Corpus Juris says, "The word 'lease' is used in various senses. It is sometimes applied to the term or estate created sometimes to be written evidence of the term or estate and again to the demise or conveyance by which the tenure or estate is created. A lease for the term of years is chattel real, and is regarded as an encumbrance on the leased land.[6]

This is further shown in the case of *Mayberry v. Johnson*[7] which stated, "A written lease for more than three years signed by the party making it, though not under seal, is good and valid under the Statute of Frauds and can no more be turned into a lease at will, than it can be assigned or surrendered by parol.

Further quoting from Corpus Juris, it states concerning a lease as a contract, that "the word lease is frequently used to designate the contract by which the relation of landlord and tenant is created and has been defined as a species of contract for the possession and profits of land and tenements, either for life, or for a certain period of time, or during the pleasure of the parties, and as a contract for the possession and profits of land, for a determinate period with the recompense of rent. The essentials of a contract must be present, and the lease is governed by rules which govern contracts generally.

This rule was set out in the following cases: *Thomas v. West Jersey R. Co.*[8] and *U. S. v. Gratiat.*[9]

Corpus Juris continues by defining as a conveyance by saying "a lease is generally regarded as a conveyance or grant of an estate in real property for a limited term with conditions attached and in this connection has been defined as a conveyance to a person for life or years, or at will, in consideration of a return of rent or other recompense and as a conveyance of any lands or tenements usually in consideration of rent or other annual recompense, made for life, for years, or at will, but always for a less time than the lessor has in the premises.

This was found in the case of *Chittem v. Gassett*,[10] where a lease was defined as properly a conveyance of a particular estate in lands for life, or for years, or at will where reversion is left in the grantor.

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5 U. S. v. Gratiat, 10 Law. Ed. 573 (1840).
Heywood v. Fulmer, 158 Ind. 658 (1892).
Paul v. Cragnay, 59 Pac. 857, 25 Nev. 293 (1900).
6 35 Corpus Juris 1139.
7 15 N. J. L. 116 (1835).
8 101 U. S. 78 (1879).
9 14 Pet. 526 (1840).
10 148 Ark. 654 (1921).

The opinions on whether a lease is a contract or a conveyance vary from state to state. American Jurisprudence states it thus, "A lease is both an executory contract and a present conveyance. It creates a privity of contract and a privity of estate. Again as ordinarily employed, the word 'lease' implies a term and a reversion to the owner of the land after its termination and only a chattel interest passes thereunder.[11]

In Ohio, it is the general rule that a lease for a term of less than three years is a contract and that all leases for a term longer than three years must be attested, acknowledged or recorded, which would make the lease a conveyance.[12]

This Ohio rule is backed up by the case of *People's Building, Loan & Savings Co. v. McIntire*,[13] where the court decided that "The option provided in the lease for four consecutive years must be held to be 'an interest in real property' and would bring the lease within Section 8510 Ohio General Code requiring acknowledgment and attestation of the same."

We may then come to the conclusion that if a lease is a contract as held to be in Ohio, when the contract is broken, action can be brought immediately against the person breaking the contract. However, when a lease is a conveyance, you must wait until the termination of the lease or conveyance before you can bring any action for a breach of the lease.

A Pennsylvania court, in deciding *Townsend v. Boyd*, states: "A leasehold interest is not real estate, but merely a chattel real which is personal property."[14]

In other jurisdictions the question has undergone striking legislative evolution, and courts have been forced, by various acts of the legislature, to do a judicial "about-face" and declare certain types of leases real property rather than personal property. Michigan courts, following the dictates of the legislature, declare certain types of leases real property rather than personality. Any lease for a period of time longer than three years is declared to be real property and consequently is governed by the rules of real property. Other states make no specifications but unequivocally state that any interest in land less than a freehold is real property. The Oregon Code provides: "The terms, 'land,' 'real estate,' and 'real property' as used in this act shall be construed to include the land itself, * * * all buildings, * * * and improvements erected thereon belonging or in any wise appertaining; also any estate, right, title or interest whatever in land or real property less than the fee simple."[15]

A Colorado statute declares: "The words 'land' or 'lands' and the words 'real estate' shall be construed to include lands, tenements, and hereditaments, and all rights thereto and all interest therein."[16] Colorado courts, apparently following closely the intent of their legislature,

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11 32 Amer. Jur. 28.
12 Ohio General Code, Sec. 8510 and 8517.
13 14 Ohio App. 28 (1846).
14 Townsend v. Boyd, 12 L. R. A. N. S. 1148, 66 Atl. 1099, 217 Pa. 386 (1907).
15 Oregon Code, Sec. 69-102.
16 Colorado Gen. Statutes, Sec. 3141; 2 Mills Ann. St. Sec. 4185.

declare categorically: "In this state leases of land for a term of years are regarded as real estate instead of personalty.[17] "

Besides these two jurisdictions, one that retains the common law view of construing leases as personalty and the other, because of statutory evolution, holding any interest in land as realty, there is another view that some courts have adopted. A view that, while remaining cognizant of the original common law interpretation of a lease as personalty, has frequently conveniently construed leases to be real property for reasons that we shall discuss later. In the famed, *Fidelity Trust v. Wayne County*,[18] the court said: "* * * However, it (a lease) is in fact, as generally understood, an interest in real property, and while for the general purposes of the law it retains its common law classification, courts and legislatures frequently treat it as included in real property." An Illinois court, in deciding *Chicago v. University of Chicago*, declared: "Although a lease is considered at common law a chattel real the legislature may, nevertheless, regard it as real property and render it taxable as such."[19]

The subtle distinctions that courts have been called upon to make in the adjudication of property cases takes on added importance because of our complex taxation program. Indeed, one of the most important consequences of having a lease construed as real rather than personal properay can be traced directly to taxation. In *Fidelity Trust Co. v. Wayne County Supra*, the court, in approving the levying of taxes *of* a mortgage on a leasehold interest said: "A mortgage on leasehold interest for 99 years held to be mortgage on real property within meaning of mortgage tax statute, and therefore subject to tax therein imposed, since words 'real property' are equivalent to 'real estate' which, includes an interest in land and an estate for years is an 'interest in land' for this purpose." In *Chicago v. University of Chicago, Supra*, the court in rather unequivocalterms tell that a lease can be regarded as real property and "is taxable as such." In *De Wyne v. Lewis*,[20] a New Jersey court summarized the present status of a lease when it declared: "That a term for years while denominated a chattel real is not in strict legal accuracy considered real estate but, on the contrary, is considered personal property whether the duration is for one or 99 years. At common law chattels real were considered personal property. In the state of New Jersey our courts have considered chattels real or leasehold interest personal property for many purposes. Courts in construing the law, must in order to discover the legislative intent look to statutory language in its application to the subject. It is the determination of this court that while leaseholds, in the past, have been considered as personal property for many purposes, in the matter of taxation it has been the practice to consider them as real property."

—*Thomas F. Bremer.*
—*Francis J. Paulson.*

17 Bonfils v. McDonald, 270 Pac. 650, 84 Colo. 325 (1928).
18 244 Mich. 182, 221 N. W. 11 (1928).
19 302 Ill. 455, 134 N. E. 723, 23 A. L. R. 244 (1922).
20 139 Atl. 434, 5 N. J. Misc. Rep. 948 (1927).

MODIFICATION IN THE SALE OF REALTY.—Sales in gross may be divided into various subordinate classes: First, sales strictly and essentially by the tract, without reference to a definite quantity of acres. Second, those sales where the acreage is only made in a descriptive manner where the parties are willing to chance that the land might fall short of or exceed the estimation. Third, the sale by the acre where almost perfect exactness is striven for by the parties. Fourth, sales in gross which are actually sales by the acre as understood by the parties.

The first two divisions will not stand modification under the general rules of the several states, to illustrate, if there have been no fraudulent acts on the part of the parties, but in the latter two divisions equitable relief will be granted unless previously waived or forfeited by conduct of the party sustaining the loss.

The first two types of sales are usually found to bear the words, "more or less" in the instrument of conveyance and the courts of the several states have expressed their opinion as to the use of these words in some of the cases herein cited.

The Kentucky courts in the case of *Adkins v. Osborne* [1] said, "in an action to recover part of money payed for land under mistake as to the quantity, if the sales are made by the acre compensation for the discrepancy, no matter how small, will be allowed, but if the sale is in gross the rule is that the deficit must be as much as ten per cent before the complaining party is entitled to relief except where the sale is strictly and essentially by the tract or where a supposed quantity by estimation is mentioned or referred to in the land contract only for the purpose of description."

The Louisiana courts have held that the words "more or less," when used in a deed are words of safety and precaution and are intended to cover some slight or unimportant inaccuracy in the frontage, depth, or quantity in the land conveyed, but the words are never used for the purpose of covering serious discrepancies or major inaccuracies, and where the words will enable an adjustment to the imperative demands or fixed monuments, they do not warrant or destroy the indicative of distance when no other guides are furnished." [2]

As the Louisiana court has shown in the foregoing paragraph the use of the words in modification will not take an effect on a serious misrepresentation and the doctrine of mistake will permit reformation, but let us look into the courts of the other states where the learned justices have decided cases on this same point and see what their interpretation on this point would be.

The Kentucky courts have put down an excellent rule by their interpretation of this point of contract when they said in the case of *Sayler et ux. v. Poulos et al*,[3] "The use of the words more or less in describ-

1 275 Ky. 613, 122 S. W. 2nd 515 (1938).
2 Pierce et al v. Lefort et al, 197 La. 1, 200 S. 801 (1941).
3 Ky., 122 S. W. 2nd 996 (1939).

ing a boundary line relieves a stated distance of exactness means that the parties are to risk the quantity of the land conveyed, and implies waiver of the warranty as to a specification."

This point of view as taken by the Kentucky court seems to be very logical and is an excellent means of preventing wild litigation by persons willing to take a chance if they can make correction in court for a poor bargain. It also makes everyone that is a party in a conveyance alert and is a good means of holding down the temptation of fraud.

The Minnesota courts have stepped even further in this by making greater qualifications to prevent fraud. In the case of *Ingleson et al. v. Olson*[4] the court said, "words *about, more or less,* and other such words used in regard to distances may be disregarded if not controlled or explained by monuments, boundaries, and other expressions of intention, and may be given meaning and effect when so controlled and explained."

It is very apparent by the decisions which we have at hand that the courts have been dealing with the intention of the parties to assume a risk of quantity, and the courts giving there full sanction to the parties to assume the risk if there is no indication of fraud intermingled in the transaction. This is found to be true in Maryland[5] where it has been said, "The words more or less used to qualify a representation of quantity in a contract to convey indicate the intention of the parties to assume a risk of quantity." It is said that these words when used in good faith is an instrument and there is a deficiency or surplus neither party may recover as they have assumed the risk by agreement to the instrument, but where the deficiency is unreasonably large it may strongly indicate an attempt to commit fraud.[6]

In the Kentucky case of *Harrison vs. Talbott*[7] the court said that the plain and most obvious meaning of the words more or less is that the parties were to run the risk of gain or loss, as there might happen to be an excess or deficiency in the estimated quantity.

The court said that the words *"more or less"* as applied to quantity and used in a contract for the sale of lands are to be construed to quality the representations of quantity in such a manner that, if made in good faith, neither party should be entitled to any relief on account of deficiency or surplus if there is a reasonable apprehension of the quantity stipulated.[8] With this decision the many courts of the country and the several states seem to definitely concur as it is just law and is founded on reasonable interpretation of the law of contracts.

Quasi contract law has attempted to place both parties on an equal standard by giving reformation of contractual instruments so that the defendant in a cause of action will be in no better position than the plaintiff in a case of mistake. The courts have accomplished this by

4 199 Minn. 422, 272 N. W. 270 (1937).
5 Kriel v. Cullison, 165 Md. 402, 169 A. 203 (1933).
6 Musselman et al v. Moxley, 152 Md. 13, 136 A. 48 (1927).
7 32 Ky. 258 (1889).

reformation of contractual instruments so that the defendant in a cause of action will be in no better position than the plaintiff in a case of mistake. The courts have accomplished this by reformation and the assessment of damages so that the parties will be on an even standard where one has benefited through mistake, but in the case where chance of a variance is invited the courts have no other course than to give the parties what they have bargained for unless a definite unreasonable variance is apparent and a strong indication of fraudulent conduct by the action of one of the parties is seen.

—*Robert T. Fanning.*

OPERATION OF THE STATUTE OF LIMITATIONS IN MECHANIC'S LIEN SUITS.—The mechanic's lien is a statutory device for the protection of one who furnishes labor or materials for the improvement of real property. It is a security device for the benefit of materialmen and laborers and is recorded under provisions of the statute. So far as creditors are concerned such public record serves the same purpose as possession in the case of a common law lien; it gives notice to anyone dealing with the owner that certain property is subject to some security interest, and since public records are accessible to all, the law will treat persons dealing with the owner as if they were informed of all facts a diligent search would have revealed, whether or not such search has in fact been made.

The mechanic's lien has met and overcome several difficulties in the problems of contractors, subcontractors, and materialmen as well as laborers, by giving them all a direct claim against the property on which they work or into which their materials go, instead of limiting them to personal actions against those with whom they have dealt directly. It has, furthermore, given them the equivalent of a shorthand mortgage on the property acquired by merely filing in the proper public office an affidavit or a notice of claim. For practical purposes this is a cloud on the title which the property holder must remove by settling the account or forcing a test of the claim in court.

As a purely statutory creation which varies in various places and is amended in each from time to time, it is the victim of much judicial interpretation which has frequently been overly technical. Its law is consequently full of pitfalls for owners, purchasers, and lien claimants, particularly where the statute gives a short retroactive effect to the act of filing the notice. In one state where the statute permitted the filing of a lien within so many months after the work was "finished", an unpaid subcontractor long after the period expired took advantage of a property owner's complaint about some of his work. He admitted that it was not "finished" and after putting a very littling "finishing" work on it filed his lien for the whole of his claim, and the court upheld him. In another case, Whitcomb vs. Roll,[1] a contract for decorating a storeroom did not fix the time for the completion of the work. In March the contractor rendered his bill for the contract price, and the owner, on

1 Whitcomb v. Roll 81 N. E. 106; 40 Ind. App. 119; 1907.

May 6th, sent a check on account stipulating that the payment did not carry with it the acceptance of the work. On June 20th the owner made objections to the work. The contractor made changes and additions thereto, and within 60 days thereafter filed his notice of intention to hold a mechanic's lien. Held, that the notice was filed within the statutory time; the delay in the completion being caused by the owner.

The Indiana law reads as follows regarding notice in the filing of mechanis lien claims: 2

> "Any person wishing to acquire such a lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, at any time within sixty days after performing such labor or furnishing such materials or machinery, described in Section 43-701, notice of his intention to hold a lien upon such property for the amount of his claim, specifically setting forth the amount claimed, and giving a substantial description of such lot———"

The general law regarding the extension of the period for filing by doing or furnishing further work or materials is set out as follows in Corpus Juris.3 "Where the period allowed by statute for filing a lien has commenced to run by reason of the accrual of the indebtedness, the completion of the building, the work of claimant, or the furnishing of the materials, claimant cannot therafter extend the time by doing or furnishing small items and thereby fixing a date from which the period must commence anew to run, especially where the furnishing of such item is merely colorable and the real intention is to save or restore a right which is already imperiled or lost, or to obtain an advantage over other persons, or where the additional work is done or additional materials are furnished without the knowledge, authority, request, of consent of the owner, or the work done is not properly construction work, or the materials furnished are not reasonable necessary to the completion of the building or improvement in question, or the furnishing of labor is relied on to extend the time for filing a lien for materials. This labor gratuitously performed cannot have the effect of extending the time for filing a lien for what was done or furnished under a contract, nor can a materialman extend the time for filing his lien claim by gratuitously replacing defective articles previously furnished and charged for. It has been held in some cases that the extra work done or additional materials furnished at the request of the owner after the full completion of the original contract may extend the time for filing a lien claim for all the work; but in other cases the contrary is held. The question whether the work done is sufficient to extend the time for filing the lien does not arise where the work is done by a person other than claimant, and the statute requires the filing of the claim within a specified period of time after claimant has ceased to labor or furnish materials."

The Indiana courts are in the habit of putting a strict construction upon the operation of the mechanic's lien statute. A review of two cases

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2 Burn's Indiana Statutes, Section 43-703.

3 40 *Corpus Juris* Page 202-204, Section 238.

will illustrate the fact. In the case of Chapman-Stein Co. vs. Lippincott Glass Co.[4] the court held." Where the time had elapsed for filing a mechanic's lien against real estate for labor and material furnished by claimant for the construction of tanks by the lien-claimant's employee after the expiration of the time in which to assert a lien, did not give the right to assert a lien." Here the court by construing the statute strictly, held the insertion of bricks in tanks already completed except for this minor detail, was not of sufficient consequence to entitle the claimant to enforce the alleged lien. In the case of Kendallville Lumber Co. vs. Adams,[5] the court held: "Where a contractor abandoned the work and it was completed by the owner, the latter purchasing materials from the same materialman, the time for filing notice of lien for the materials furnished to the contractor could not be extended by tacking together the two accounts of the contractor and the owner". Again the court held on a strict contruction of the statute.

In a strictly equitable situation it is probable that a court of equity would hold different if the facts of case justified the action. Under the rule laid down in Drake Lumber Co. v. E. L. Semple,[6] a Florida case, the court held: "Courts of equity will keep an encumbrance alive or consider it extinguished, as will best serve the purpose of justice and the just intention of the parties." In a Massachusetts case of Miller vs. Wilkinson,[7] the facts were as follows: A contractor for the plumbing work and heating apparatus of a house finished, in August, everything except placing at the back of a washbowl a marble slab about 8 inches high by 18 inches long. The owner of the building refused payment until the slab was placed in position, and later stated that he was unable to pay. The contractor then placed the slab in position for the purpose of enabling him to file a mechanic's lien for the entire work. The court held that the contract was not completed until the slab was put up, and the finding of the lower court that the time ran from then would not be disturbed. Further examples sustain the theory that equity will intervene in certain cases. In the case of Frederick County National Bank vs. Dunn.[8] a Maryland case, the court held: "Where the owner insists that a building is not completed and that he will not accept it, owing to some imperfection, he is estopped thereafter from denying that the building was completed prior to the date of corrections of the imperfection." On the theory of estoppel, a California court[9] clearly stated the equitable theory of the problem. Here the court held that the owner may be estopped by his acts or representations from taking advantage of the failure of a sub-contractor to file his claim or notice of lien within the statutory period; but merely standing by and permitting claimant to sleep upon his rights does not estop the owner.

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4 Chapman-Stein Co. v. Lippincott Glass Works 161 N. E. 645; 87 Ind. App. 411; 1928.

5 Kendallville Lumber Co. v. Adams. 176 N. E. 555; 93 Ind. App. 141; 1931.

6 Drake Lumber Co. v. E. L. Semple. 130. So. 577; 100 Fla. 1757; 1930.

7 Miller v. Wilkinson. 44 N. E. 1083; 167 Mass. 136; 1896.

8 Frederick County National Bank v. Dunn. 1915; 93 Atl. 984; 125 Md. 392.

9 Pence v. Martin. 185 Pac. 503; 43 Cal. App. 626. (1919).

As evidenced by the Ohio General Code it is clear that the equitable principles run not only in favor of the claimant but also when proper presented in favor of owner of the property. Section 8310 and 8314 of the Ohio General Code provide:

> "Contract to furnish material being completed,[10] subsequent gratuitous replacement to remedy original defect will not extend time for claiming mechanic's lien."

> "In absence of contract provisions, subcontractor,[11] having completed work, cannot, by gratuitous repairs or by asserting obligation to repair for indefinite period extend statutory period for filing mechanic's lien."

Of particular interest with regard to the rights of creditors, is the case of Randall vs. Wagner Glass Co.,[12] which presents an exceptional situation among the cases. In this[13] case it appeared that the holder of a mechanic's lien on corporate property was a party to receivership proceedings to wind up the corporation's affairs brought within the year in which foreclosure proceedings could be instituted. The holder of the mechanic's lien filed an intervening petition in such proceedings to enforce the lien within the time fixed by the court for the proof of claims, but not within the time, sixty days, allowed for enforcing such liens after filing the same. The court held, however, that the claimant was entitled to the enforcement of the lien notwithstanding the intervening petition was not filed until more than a year, the statutory period of enforcement, from the date the lien was filed; and in so doing it said: "The receivership being in the nature of an "equitable execution", the court having absolute control of the property and full power to adjust claims, determine priorities, order sale, and fix the distribution of funds; the whole case is drawn into equity. A party need not litigate his claim in another suit; and where he does not ask for leave so to do, but submits his claim to the court having control of the receivership, in full compliance with its orders, no good reason can be found for making an exception to the equitable procedure in the receivership by invoking the limitations of the statute."

A final case involving the filing of a mechanic's lien is the case of New York-Brooklyn Fuel Corp. vs. Fuller.[14] In that case the referee in bankruptcy was reversed by the Circuit Judge, holding that when a claimant under a mechanic's lien claim filed his claim after the defendant was adjudged a bankrupt, but within the period allowed by the Lien Law of the state, the lien was good, and the trustee in bankruptcy took the property subject to the lien v. Fuller.

—*Robert A. Oberfell.*

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10 Ohio General Code, Section 8310.

11 Ohio General Code, Section 8314.

12 Randall v. Wagner Glass Works. 94 N. E. 739; 47 Ind. App. 439; 1911.

13 Randall v. Wagner Glass Works. 75 A. L. R. 718; 1911.

14 New York-Brooklyn Fuel Corp. v. Fuller, 11 Fed. 2nd. 802; 1926.

REFORMATION BY SELF-HELP.—The consideration of the problem of self-help in reforming contracts involves the question of whether one of the parties to the contract, without the knowledge or assent of the other parties, may alter the instrument so that it conforms to the actual intent of the parties and reads as the parties intended it to read.

There is a well settled rule of law that a material alteration of a contract or instrument by one of the parties thereto will release the other contracting party.[1] The test as to whether the alteration is material or not is whether it changes the instrument, giving it a different legal effect, and works a change in the rights, interests or obligations of the parties,[2] or, briefly, whether the instrument will have the same legal effect after the alteration as before.[3]

Despite the generality of the above rule there is a wide split of authority when the instrument is altered merely for the purpose of correcting a mistake and reforming the contract so that it conforms to the original agreement and there is no fraud committed by the party altering the instrument. The majority of the courts hold that when the alteration is done innocently and with the intent of reforming the instrument so that it expresses the original agreement of the parties then that is not such an alteration as will vitiate the instrument. There is a large minority holding that any material alteration, regardless of the intent of the party altering, will release the other party and vitiate the instrument.[4]

The majority rule holds that an alteration for the innocent purpose of reforming the instrument so that it conforms to the original agreement is not such an alteration as will vitiate the instrument.[5] The reasoning of the courts in upholding this rule is that the assent of the parties to such an alteration will be implied.[6] In keeping with the majority rule the Georgia court in Jackson *vs.* Johnson, held that in a case where a bond was executed and the amount was mistakenly written as $150 rather than $150,000 as the parties intended and the principal and payee, without the assent of the sureties, put in the word thousand, such was not an alteration that would vitiate the

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1 Barnes-Smith Mercantile Co. *vs.* Tate (1911) 156 Mo. App. 236, 137 S. W. 619, Koons *vs.* St. Louis Car Co. (1907) 203 Mo. 227, 101 S. W. 49.

2 Bank of Moberly *vs.* Meals (1927) 316 Mo. 1158, 295 S. W. 73.

3 Criner *vs.* Davenport-Bethel Co. (1936) 144 Okl. 74, 289 Pac. 742.

4 States following the majority rule are: Illinois (cases both ways), Indiana, Kentucky, Maryland, Massachusetts, Maine, Minnesota, Mississippi, North Dakota, New Hampshire, New York, Ohio, Oregon, Utah, Washington, Wisconsin. States following the minority rule are: Illinois, Iowa, Kansas, Missouri, Montana, Nebraska, New Jersey, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia. See annotation in 73 A. L. R. 652.

5 Klundby *vs.* Hodgin (1930) Wis 232 N. W. 858, Levy *vs.* Arons (1913) 142 N. Y. Supp. 312,

6 Busjohn *vs.* McLean (1892) 3 Ind. App. 281, 29 N. E. 494, Lee *vs.* Butler (1897) 167 Mass. 426, 46 N. E. 52, Klundby *vs.* Hodgin, *supra* 5.

instrument if the sureties signed with the knowledge and understanding that it would be for the larger amount.[7] In a case where the amount on a note was changed from $170 to $175 without the knowledge or consent of the surety but with the knowledge of the payee the Indiana court held that the surety impliedly consented to the alteration.[8]

The courts holding the minority rule say that any material alteration will vitiate the instrument and release the non-assenting party.[9] The reasons given by these courts for the rule is that it is unwise to permit one party to alter it without the assent of the other party. The courts say to do so would do away with the jurisdiction of the court of equity to reform contracts and the party has an adequate remedy in a court of chancery to reform the instrument.[10] The New Jersey court, on this point in Hunt *vs.* Gray,[11] stated as the reason for the rule that "To maintain that a party may reform a written instrument by his own act is, in reality, to convert all contracts into oral contracts; the written instrument would no longer be the depositary of the intention of the parties, but either party could make it accord with the remembrance of the bystanders. This would be to allow the party to do what the court cannot do at the trial—that is, resort to evidence aliunde to ascertain what was meant. If the writing does not hit the real design of the parties to it, the error must be corrected in a court of equity."

Following the minority rule the Missouri Court in Owings *vs.* Arnot[12] where a note was executed on the 14th of May 1859 but was mistakenly dated May 1858 and was payable at a certain date after date and the note was assigned on the same day it was executed by the payee and the assignee wrote the figure 9 over the figure 8 so that the note read 1859 the actual date of its execution, held that it was a material alteration and the instrument was vitiated. In Kelly *vs.* Trimble,[13] the obligee in a bond added certain words to the instrument which was for the future conveyance of land. The words gave him immediate right of possession rather than forcing him to wait until the conveyance was made. The court held that even though this agreed with the true intent of the parties it was a material alteration and the instrument was vitiated thereby.

It would seem that between the two rules the minority rule has the better reasoning. After all the whole purpose of allowing reformation in courts of equity is to provide a remedy for people who make innocent

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7 (1881) 67 Ga. 167.

8 Busjohn *vs.* McLean *supra* 6.

9 *Supra* 1.

10 Taylor *vs.* Taylor (1883) 12 Lea (Tenn) 714,
Merritt *vs.* Dewey (1905) 218 Ill. 599, 75 N. E. 1066.

11 (1871) 35 N. J. L. 227.

12 (1863) 33 Mo. 406.

13 74 Ill. 428 (1874).

mistakes in writing their contracts. These courts would be better able to decide when an innocent mistake, one that will be just grounds for relief, has occurred than the party to the contract whose view just might be prejudiced. Some weight too should be given to the parol evidence rule. The alterations, in effect, throw the who proceedings in parol testimony and it becomes little more than a dispute of fact and the written instrument is practically valueless.

Another reason for upholding the minority rule might be found in the weight of evidence necessary to sustain an action, for relief of an innocent mistake. In the equity courts in reformation in order to be entitled to relief the plaintiff must prove the mistake by clear, convincing and satisfactory evidence,[14] and mere preponderance of the evidence is insufficient.[15] The courts of law require only a prepondence of the evidence and under the minority rule it seems that the question of mistake is decided by the court of law. After a careful examination of the cases under the majority rule the courts merely say that the mistake is "amply sustained by the evidence" [16] and it does not seem fallacious to reason from this statement that the courts do not mean that the mistake was proved by clear, convincing and satisfactory evidence but it seems more likely they are referring to a preponderance of the evidence. If this reasoning is true then no attorney would take his client into an equity court for reformation in a mistake of this kind for the simple thing to do is to have the client reform the instrument so that it agrees with the intent of the parties and then sue on the instrument and prove the mistake by a preponderance of the evidence rather than by clear, convincing and satisfactory evidence as the equity courts demand. This sort of thing provides the means by which unscrupulous persons take advantage of the law and commit fraud in derogation of the rights of innocent parties.

A large number of the cases following the majority rule hold that an alteration made innocently and only with the intent of making the instrument conform to the agreement of the parties, that such an alteration is immaterial and upon this ground in theory the cases may be reconciled. When the courts following the majority rule base their decision upon the ground that assent to the alteration will be implied then the cases are completely irreconcilable.

As an example of the complete conflict between the cases the case of changing the date in a note is an example. The minority rule holds this to be a material alteration and it thus vitiates the instrument.[17] The

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14 Peters *vs.* Schochner 312 Mo. 609, 200 S. W. 424 (1931).

15 General Refractories Co. *vs.* Sebek 238 Mo. 1143, 44 S. W. (2d) 60.

16 Klundbly *vs.* Hogden *supra* 5.
Busjohn *vs.* McLean *supra* 6.

17 Murray *vs.* Graham (1870) 29 Iowa 520,
Owings *vs.* Arnot (1863) 33 Mo. 406.

majority rule holds that this is not such an alteration as will vitiate the instrument.[18]

The effect of the enactment of the Negotiable Instruments Law in the states holding the majority rule may change the rule as to negotiable instruments. The State of Indiana prior to the enactment of the Negotiable Instruments Law held with the majority rule[19] but in later cases dealing with negotiable instruments in which the alteration was to the interest and which under the Negotiable Instruments Law was a material alteration, the court cited the act and held that the alteration voided the instrument.[20]

There is another question closely allied with the preceding one and that is whether the party altering the instrument, after having lost his action at law on the instrument because the defense was alteration, could come into a court of equity and ask for reformation because of his innocent mistake and the contract does not express the true intent of the parties before the alteration. This question would not arise under the majority rule because the case would be good in a court of law but in the states following the minority rule the question is very pertinent.

The state of Missouri follows the minority rule and holds that a material alteration of a written instrument by one of the parties will release the other party if made without his consent, even though the alteration is made in good faith to make the instrument conform to the real agreement of the parties.[21] This alone would seem authority for holding that the party altering could not have reformation for if the party is discharged as to the instrument then the court could hardly reform the instrument and again charge him under it. However the courts of Missouri have gone further than this and in a case where a trust deed was altered so as to conform to the land actually affected by description, the court held it to be a material alteration rendering the instrument void and reformation of the instrument would not be given.[22]

Hal E. Hunter, Jr.

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18 Duker *vs.* Franz (1870) 7 Bush (Ky.) 273,
First Nat. Bank *vs.* Spalding (1918) 177 Cal. 217, 170 Pac. 407.

19 Busjohn *vs.* McLean *supra* 6,
John Kindler Co. *vs.* First Nat. Bank (1915) 61 Ind. App. 79, 109 N. E. 66.

20 Born *vs.* Lafayette Auto Co. 196 Ind. 399, 145 N. E. 833. (1923).

21 *Supra* 1.

22 Barnhart *vs.* Little 185 S. W. 175.

RIGHTS—A right is a well-founded claim. Thomas Jefferson expressed the fundamental doctrine of rights and government as applied to our system when he stated in the Declaration of Independence: *"We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed; . ."*[1]

"The idea of rights is coexistent with that of authority (or government); both are inherent in man; but if we understand by government a coherent system of laws by which a state is ruled, and if we understand by state, a sovereign society with distinct authorities to make and execute laws, then rights precede government, or the establishment of states, which is expressed in the ancient law maxim: 'Ne ex regula jus sumatur, sed ex jure quod est, regula fiat.'" [2]

Let us classify[3] rights so that we may better understand their natures. There are, first of all, Perfect and Imperfect rights; things we have a right to possess or actions we have a right to do, are or may be fixed and determinate; these are perfect rights. For example: the withholding of a man's property brings forth a perfect right in that man to recover it. Things or actions are vague and indeterminate such as in the case of a man of poor means asking for relief; although we have a moral obligation to aid this poor individual, there isn't the demand of that obligation in the law. It is discretionary with the individual or group. This type is an imperfect right.

We further classify rights as to Absolute and Qualified rights. One absolute is similar to the perfect type, of a man to recover what belongs to him, as distinguished from the qualified right of an agent, in possession of property of his principal, to regain it, if taken from his custody.

Natural and civil rights have been merged into one kind, for the reason that the civil right is the modern pronouncement of the natural right. However, we do have a distinction between political and civil rights. The political, more properly called, privilege, consists in the power to participate, directly or indirectly in the establishment or management of government. This is fixed by the constitution and includes privileges of voting and holding a public office. Now, civil rights cover a vast area of rights, and in noting the sub-classification remember the words quoted from the Declaration of Independence, above. Civil rights have no relation whatever to the establishment and management of government, but rather, give powers to acquire and enjoy property, exercise paternal and marital functions, etc. Full enjoyment is guaranteed to everyone, but this is not so with political rights; for instance: aliens have no political, but always have civil rights.

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1 Declaration of Independence.

2 Bouvier's Law Dictionary (Vol. 2), p. 2960.

3 Ibid, pp. 2960-2962.

Civil rights are sub-divided into absolute and relative forms. There are three kinds of those absolute:[4] (1) that of personal security; the legal and uninterrupted enjoyment of life, limbs, body, health, and reputation. (2) the right of personal liberty; the power of locomotion, of changing one's situation or removing one's person to whatsoever place the inclination may direct, without any restraint unless by due course of law. And (3) the right of property; the free use, enjoyment, and disposal of all his acquisitions without any control or diminution save only the laws of the land.[5]

Those which are relative are either public or private in nature. They are public when between the people and the government; the protection for the people in return for the allegiance to the state. They are private as to reciprocal rights between husband and wife; parent and child; guardian and ward; and master and servant.

Beyond this there are the legal as distinguished from the equitable rights, the former being when possessing legal title, one's remedy is an action in law, and the latter calling for an enforcement of equitable rights in the courts of Equity.

There we have the whole classification in its many phases. The governing factor should always be borne in mind: rights do precede government and the state.[6] This is fundamental, important, and vital to our way of life!

William Bodden.

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4 Hale V. Everett, 534 N. H. 9, 60, 16 Am. Rep. 82.

5 State V. Greer, 102 So. 739, 743, 88 Fla. 249; 37A. L. R. 1293.

6 State ex. rel. McGreal v. Phelps, 128 N. W. 1041, 1045, 144 Wis. 1, 35 L. R. A. N. S. 353.

THE EMERGENCY PRICE CONTROL ACT OF 1942

When the United States started its program of building for its defense at the start of World War II, immediately forces were put in motion which threw a tremendous strain on the normal economic activity within the country. During normal times prices of goods are determined by the economic law of supply and demand. And supply and demand are forced toward equalization by prices. However, when the United States began to arm and produce goods for war, many consumer goods were discontinued. The government, regardless of prices, needed materials for war. By using its great purchasing power, money was poured into the markets for these goods. The "law of supply and demand" and other economic principles were unable to meet this sudden force. People found themselves with more money but fewer commodities to buy. Thus the demand for goods was much greater than the supply. A process of bidding for these consumer goods forced the prices up higher and higher. When this happened more money was demanded for work. Thus was started the turmoil of spiraling inflation.

The danger of economic chaos was made a stark reality to the people of the country, particularly people of fixed incomes and businesses. In order to protect the people from this situation and prevent the collapse of the home front economically behind the war front, the United States Congress passed the Emergency Price Control Act of 1942[1] early in 1942. A brief summary of the Act will help in understanding just what the government is doing to prevent the disaster of inflation from breaking loose in this country.

Section 901 sets out the purpose of the Act as in the interest of national defense and security and necessary to the effective prosecution of the present war—to stabilize prices and prevent speculative and unwarranted and abnormal increases in prices and rents; to prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices; to prevent defense appropriations from being dissipated by excess prices; to protect persons with relatively fixed incomes; to secure adequate production; and to prevent post emergency collapse of values.

Section 902 empowers the administrator to set maximum or minimum prices for commodities which threaten to raise or have risen to a point which is contrary to the purpose of the Act. He can do this by order and in his judgment fair and equitable to give effect to the purpose of the Act. He shall be guided by prices which prevailed between October 1 and October 15, 1941. Further factors are set out which shall further guide the administrator. Every maximum price order as set shall be accompanied by a statement of the considerations involved in its issuance. It provides also that insofar as possible the Administrator shall consult with advisory representative committees of industries to be affected by the price fixing. Then in cases where a maximum price has been fixed, upon request of a substantial representative number of the industry affected by the price, the Administrator shall appoint a com-

1 50 U. S. A. C. A. App. Sec. 901-946.

mittee truly representative of the industry affected, to consult with and determine the difficulties arising under the regulation. But regardless of this, the Administrator may issue temporary maximum price regulations effective for no more than sixty days, which may freeze the price prevailing for any commodity within five days prior to the date of issuance of the regulation.

Under this section it is important to note with regard to the question of "notice and hearing" that the statute itself evidences some doubt as to the necessity of notice and hearing, but yet by the wording, the Act provides a ground or implied basis whereby the courts could find that a notice and hearing are provided for. This question will be discussed more fully later.

Subdivision (b) of the same section empowers the Administrator to set rentals and make April 1, 1941, the date upon which, as nearly as practicable, rates should be set.

Subdivision (e) empowers the Administrator, whenever he determines that the maximum necessary production of the commodity is not being obtained, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, to buy or sell at public or private sale, or store or use, such commodity in such a manner as he determines to be necessary to obtain the maximum necessary production.

Section 903 puts limitations on the Administrator in his power to effect and set prices on Agricultural produce.

Under Title II—Administration and Enforcement, Section 9921, provides for the creation of the Office of Price Administration and the office of the Administrator.

Section 922 (a) authorized the Administrator to make such studies and investigations and to obtain such information as he deems necessary or proper to assist him in prescribing any regulation or order under the Act.

Subsection (b) provides that the Administrator is authorized by regulation or order to require any person engaged in business of dealing with commodities or who rents, to furnish such information under oath and to make and keep records and make reports.

Subsection (c) authorizes the use of subpoenas to require appearance.

Section 923 provides that within sixty days after the issuance of any regulation or order or price schedule, any person subject to it may file a protest specifically setting forth objections to the order or schedule. Provides that after sixty days a person can file a protest but only on grounds which arise after the sixty-day period. The section then says "the administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing or provide an opportunity to present further evidence in connection therewith." If the Administrator denies the protest he shall answer by giving economic data or other facts on which his opinion is based.

Under the above quoted language it can be seen that the Administrator may in acting on a protest, grant a hearing or deny the protest at his own discretion. There is no provision which allows a hearing on the protest as a matter of right. If the Administrator refuses to grant a hearing on the protest, the protestor will have to appeal to the court.

This appeal is provided for in Section 924 which establishes for review of the denial or partial denial of the Administrator of a protest by filing within thirty days a complaint in the Emergency Court of Appeals. This court is to have exclusive jurisdiction to set aside the order or regulation or to dismiss the complaint. This section also creates the Emergency Court of Appeals.

Section 925 provides for the enforcement and penalties for failure to comply with the Act.

After examining this Act, grave questions arise as to whether such a broad program such as price fixing and rent regulation can be sustained as constitutional. The justification for the Act must be found if at all under the War Powers of the Federal Government. The Constitution[2] in Article 1 provides for the War Powers. It provides that Congress shall have power to lay and collect taxes . . ., to pay the debts and provide for the common defense and general welfare of the United States. Clauses 11 to 17 provide for the control of the army and navy and carrying out the defense by enumerated powers of control over and pursuant to military forces and war. Clause 18 authorizes Congress to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

The Federal District Courts have been presented with the question of the constitutionality of the Act several times. An examination of these decisions will help toward understanding of the scope of the War Powers, with reference to this Emergency Price Control Act. These decisions also discuss the problem of the delegation of legislative power to an administrative tribunal. This later problem is of utmost importance as to the constitutionality of the Act as far as Administrative Law is concerned as the direct constitutional question of the power to enact the law in the first place.

In the case of *United States v. Hark et al*[3] the court held that the price control feature of the Emergency Price Control Act of 1942 constitute a legitimate exercise of the war power of Congress and are constitutional. The court reasoned that since the Supreme Court had under the same War Powers upheld such measures as taking over railroads,[4] taking over and operating telephone and telegraph lines;[5] and has ap-

2 Article 1, Sec. 8, Clause 1.

3 49 Fed. Supp. 95, (1943). See also *Brown, Administrator v. Wick et al*, 48 Fed. Supp. 887. (1942).

4 *N. Pac. Railroad Co. v. Dakota*, 250 U. S. 135, 63 L ed. 897, (1919).

5. *Dakota Central Telephone Co. v. South Dakta, ex rel.*, 250 U. S. 163, 63 Leed. 910, (1919).

proved the invasion of the freedom of the individual by compulsory military service,[6] these War Powers are broad enough to cover the fixing of prices and protecting the home front. The court says that this act is a legitimate exercise of the War Powers of Congress "which is broad and well-nigh limitless."

The court also sustains the act on the grounds of a valid delegation of power to the Administrative agency.[7] It held that "the delegation here is specific and limited by the very terms of the Act. Congress in the exercise of its legislative function has determined the legislative policy and its formulation as a rule of conduct, by specifying the basic conclusions of fact upon ascertainment of which from relevant data by a designated administrative agency, it ordains that its statutory command is to be effective."

Then in the case of *United States v. C. Thomas Stores*[8] the court said that war does not in and of itself give rise to any additional constitutional power, but power to meet any emergency caused by war is granted by the Constitution, and any limitation on such power must likewise be found in the Constitution. The court gives the same reasons as the *U. S. v. Hark* case (supra). Then the court says that in determining whether the Emergency Price Control Act of 1942 violated constitutional limitations on the delegation of legislative power, practical and rational considerations must be applied because of the necessity for adopting and applying intricate and complex details to rapidly changing conditions. The court added that "the statute does not violate constitutional limitations on the delegation of legislative power if the statute clearly states its purpose and establishes standards by which such purposes are to be accomplished. The Court then discusses the act and its established standards and concludes that the act is sufficient and is not an unconstitutional delegation of legislative power.

In the case of *Brown, Administrator v. Wyatt Food Stores, Inc.*[9] the court held in effect the same as the above mentioned cases. But the court added that "under the Constitutional provision that Congress shall have power to declare war and to make all necessary and proper laws, the power of Congress is almost limitless." The court said that the "due process" clause of the Fifth amendment is for the protection of the citizen but such amendment does not work a destruction of the general war declaring and war making provisions of the Constitution."

In *Brown, Administrator v. Ayello*[10] the court said, "in determining how far Congress should go in defining the power of the Administrator, the wide spread effect of the Emergency Price Control Act and the impossibility of enacting a law to cover all contingencies and the necessity

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6 *Arver et al v. United States*, 245 U. S. 366, 62 L. ed. 349, (1918).

7 See als U. S. v. Slobodkin, 48 F. Supp. 913, (1943).

8 49 F. Supp. 111 (1943). See also Brown, Administrator, v. Bernstein, 49 F. Supp. 497 (1943).

9 49 F. Supp. 538 (1943). See also U. S. v. Tire Center, Inc., 50 F. Supp. 404 (1943).

10 50 F. Supp. 391 (1943).

of permitting administrative discretion in carrying out the Act must be considered." The court then decided that the Act sufficiently set up standards by which the Administrator is to be guided and thus was not unconstitutional as a delegation of legislative power. The case also attacked the Act on the grounds that it was an infringement of the "reserved powers of the states." However, the court said that Congress under the War Powers has ample power to enact the law. In answer to the charge that the Act takes property without "due process of law" the court said that "all property rights are held subject to proper legislative regulation."

In the case of *United States v. Friedman*[11] the court gave predominate notice to the "state of emergency." The court said "the Emergency Price Control Act of 1942 does not violate the constitutional limitation against "delegation of legislative power" in view of the broad delegation permissible because of the war emergency."

The case of *Brown, Administrator v. Warner Holding Co.*[12] goes farther than the others in upholding the Act. The court here saying "that under its war power, the United States Government may not only direct the lives of its citizens but may utilize their complete resources. To support its contention the court here cites the Supreme Court in its holdings on the taking over of railroads and telephone communications under the war powers. The court then held that the act does not exceed the war powers granted to Congress.

One case, *Roach v. Johnson*,[13] in construing the Act under the rent regulations has held it unconstitutional. Later, however, the Supreme Court dismissed the whole case on the grounds of collusion.[13a] But in spite of this, the court's holdings are interesting. The court said that "the constitution is intended to be enforced and complied with in time of war as well as time of peace. If the citizens are to be punished for the crime of violating a legislative order of an executive officer or of a board or commission "due process of law" requires that it shall appear that the order is within the authority of the officer or board, and if that authority depends on determination of fact those determinations must be shown." The court said that in creating an administrative agency certain rules and standards must be established with which the agency is to operate. Then the court adds this interesting note, "Congress never intended that the Administrator of the Emergency Price Control Act should have the power to create defense rental areas and fix maximum rentals *without hearings* or determinations of fact, otherwise such act would be unconstitutional as a "delegation of legislative power" and as contrary to "due process of law." The court finally held that when the Administrator created a defense rental area with-

11 50 F. Supp. 584 (1943). See also U. S. v. Sosnowitz & Lotstein, Inc., et al. 50 F. Supp. 586 (1943).

12 50 F. Supp. 593 (1943).

13 48 F. Supp. 833 (1943.

13a 63 Sup. Ct. 1975, 319 U. S. 302.

out hearings or determinations of fact, the action was unconstitutional.[13b]

Another case, *Payne v. Griffin*,[14] also held the rent feature of the act unconstitutional. The court said, and it is sound, that "war conditions do not enlarge constitutional power, but Congress must establish the standards of legal obligation." Under the constitutional article enumerating the powers of Congress, powers are granted to Congress but Congress is not authorized to delegate those powers. Congress must declare a policy and fix a definite standard by which an administrator is to be controlled and authorize him to make subordinate rules for administration of the act, but Congress cannot permit the administrator to determine what the law shall be.

The court added that when Congress enacts a law to become effective when specified conditions come into existence and delegates to an administrative officer authority to determine when such conditions have come into existence, the prerequisites to the administrator's action must be stated and compliance must be shown with the standard laid down by Congress and if the administrator's authority depends upon a determination of facts, that determination must be shown. The courts have no power to determine policy, but they have the duty to preserve constitutional liberties.

The court then held the section of the Emergency Price Control Act, authorizing the administrator, without a notice or hearing, to fix generally fair and equitable maximum rents for defense rental areas and making such rents conclusive after sixty days, denies "due process of law," notwithstanding the provision for protest and appeal from the administrator's regulations, where the protest and appellate procedure was inconvenient and expensive.

The court went even further and declared the rent control section

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13b An interesting attack on the act was made in Diefenbaugh v. Cook, 1942 Ind. O.P.A. Service p. 622:1, 142 A.L.R. 1522. The grounds for attack on the constitutionality of the act were based on the contention that Congress did not have the power to set up special courts exclusively to hear contests arising under the act. The whole thing was that this procedure being unconstitutional the act was also invalid and the attack was thus centered on this procedural question under the act.

Dean Clarence Manion of the University of Notre Dame Law School, sitting as special judge said: "While the power of inferior tribunals, such as the court, to pass upon the validity of statutes in the course of judicial administration is unquestioned, nevertheless, the exercise of such power should be carefully limited. Unless it appears clearly beyond a reasonable doubt that the statute is unconstitutional it is considered better practice for inferior courts to assume that it is constitutional until the contrary is declared by a court of appellate jurisdiction. In a complete and ultimate consideration of the constitutional validity of the Emergency Price Control Act of 1942, grave questions will be encountered concerning the extent to which Congress has attempted therein to delegate its power and to what effect upon the right of this plaintiff under the due process clause of the Fifth Article of Amendment to the United States Constitution. . . . Meanwhile neither the Act nor the proceedings taken pursuant to its provisions have been shown to this court to be unconstitutional beyond a reasonable dooubt. This being the case, the inferior court is at liberty, nay, it is required to consider the practical results of its decision herein."

14 51 F. Supp. 588 (1943).

unconstitutional on the grounds of an invalid delegation of legislative power.

These cases brings up the important question of notice and hearing. As we have seen the Act itself does not specifically provide for a notice and a hearing. This brings up an important Administrative Law problem which is aimed directly at the action taken by the Administrator under the Act which is also a constitutional problem. Thus in order to sustain the Act on this later ground the courts must find implied noticing and hearing at some point under the Act. Several cases show the Supreme Courts view on the subject of implied notice and hearing.

In the case of *Johan Paulson et al v. City of Portland*[15] a city ordinance which made no provision for a notice and a hearing of any kind to property holders for assessments for new sewers was being attacked as unconstitutional. The court held that "that which is implied in a statute is as much a part of it as that which is expressed; and where a statute or an ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held, and directs that all persons interested in the matter may be heard before it, it is implied thereby, that some suitable notice shall be given to the parties interested." The court said that the taxpayer has a right to be heard where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost for the construction of a sewer. The court held under the facts that since provision is made for notice and hearing (implied being used here) of each proprietor, at some stage of the proceedings, there is no taking of his property without due process of law.

Then in the case of *R. W. Bratton v. William C. Chandler*[16] a statute provided the Real Estate Brokers License Commission not only could require applicant to furnish evidence of his qualifications, but could procure independent of him any proof it may deem desirable, and this without any provision for notice or opportunity to meet the evidence so procured, not even to be advised of the notice or source of the evidence, and the ordinance is challenged on the grounds that there is no "due process of law" because of no provision for hearing and notice. The court held that in view of the rule that a statute must be construed if fairly possible so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score, the words of a statute that the commission is authorized to "require and procure" satisfactory proof as to the applicant, will not be held to be unconstitutional as giving the applicant no opportunity to meet evidence procured by the commission as to his qualifications. The court reasoned that by the careful drawing of the act, the licensing process was to be conducted openly and freely. The word, "procure" means nothing more than "affirmative direction on the part of the commission, necessarily to be exercised in supplement to the action of the appli-

15 149 U. S. 30, 37 L. Ed. 637 (1883).

16 260 U. S. 110, 67 L. Ed. 157 (1922).

cant and with the same publicity and opportunity of the applicant to be heard." Thus the court in effect held that an implied notice and hearing would be read into the statute.

However, the court's holding can be questioned. This is because the court does not point out the ground for reading into the statute implied notice and hearing. The judge merely states that there is such a thing, but does not justify the application of it to the ordinance involved in the case. The judge begs the issue of implied notice and hearing.

In the case of *Gabriel Toombs Appt. v. Citizens Bank of Waynesboro*[17] a state statute provided that it shall be the duty of the officers and directors of the bank, upon receiving notice from the superintendent of banking, that its capital has become impaired to immediately call a special meeting of the stockholders for the purpose of making an assessment on its stockholders sufficient to cover the impairment. The court held that even where there is no provision in the statute for notice to stockholders of a corporate meeting, common law principles require that reasnable notice be given. In construing the statute itself as distinguished from the action taken under it, the court held that from the words of the statute itself, it may be construed as impliedly requiring reasonable notice of such meeting to be first given.

One of the most comprehensive cases on the subject which was decided under the Emergency Price Control Act is *Brown, Administrator v. Winter*.[18] The court held that the Emergency Price Control Act of 1942, as amended, is not unconstitutional as being an unwarranted "delegation of legislative power," since it states in clear, concise language Congressional policy with respect to the subject matter and embodies a standard of administration. The court then says, "the establishment of a maximum rent is a quasi-legislative function, rather than quasi-judicial, since such regulation operates prospectively and establishes rules of general conduct binding upon many persons. There is no constitutional requirement of a hearing prior to or in connection with this exercise of a quasi-legislative function."

Then the court held that Congress has tremendous power to enact drastic legislation to meet the emergency of war, which would be wholly improper in peace time and under such "war power" may regulate prices of food, rent and other necessities of life. The "war power" of Congress is the power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation. Thus the court held that the Emergency Price Control Act is a valid exercise of the "war powers" of Congress.

However, there are several cases which hold that implied notice and hearing will not be read into an Act, and if they are not provided for the act is unconstitutional. In the case of *Wuchter v. Pizzutti*[19] the

17 281 U. S. 643, 74 L. Ed. 1088 (1930).
18 50 F. Supp. 804 (1943).
19 276 U. S. 13, 72 L. Ed. 446 (1928).

constitutionality of a non-resident automobilist statute was attacked. The court said that "a law designating a state official as the proper person to receive service of process in an action against a non-resident for injury by the use of a motor vehicle on the highway must, to be valid, contain a provision making it reasonably probable that the notice will be communicated to the person sued." The fact that the defendant non-resident had actual notice of the suit does not render valid the statute under which the suit was brought, which permitted service of process on a state official without providing notice to the defendant, or validate the judgment rendered in accordance with the provisions of such statute.

From this case, the Supreme Court refused to read in an implied notice and hearing. Thus when a statute does not provide for these requisites it is unconstitutional.

From the foregoing cases certain important principles can be deduced by which the Emergency Price Control Act can be tested. First of all it will be seen that if the act is to be justified under the Constitution, it must be sustained under the "war powers" of Congress. This is the grounds by which the cases have sustained the act. However, since the act creates an administrative agency to carry out its purpose, several important questions immediately arise: (1) Was there a valid delegation of power by Congress? (2) Were the functions to be performed by the administrator legislative or judicial? and (3) was "due process of law" given the individual by the provisions of the act?

Under the first question as to the delegation of powers by Congress, most of the cases have held that there was a valid delegation. They base their decisions on the ground that Congress has in the act itself, established a definite policy and purpose or framework of limitations within which the administrator must confine his operations. Citing the provisions of the act like establishing rent as of April 1, 1941, the courts say that standards are sufficiently designated so that the administrator is merely carrying out the legislative policy as set by Congress.

However, the two main cases which hold the act unconstitutional on this ground feel that the act does not establish any standard nor any definite policy of legislative enactment. Rather these cases feel that the act leaves the administrator free to legislate by himself. In other words, the administrator determines what the law will be, he enacts it by order, and then carries it out. This, as far as these courts are concerned, is going too far to uphold the delegation of power to an administrative agency. One of the courts[20] said that the provision of the act setting April 1, 1941, as the basis for setting rents was a mere subsidiary provision which was not binding on the administrator since he could use that date or any other date as he saw fit. The court concluded that this was no limitation or standard set for the administrator since he could disregard it. Thus the question is a very close one, and the answer to it depends upon whether the courts take a sympathetic

20 Payne v. Griffin, 51 F. Supp. 588 (1943).

attitude toward the principle of administrative agencies or a contrary attitude.

As to the second question, whether the functions to be exercised are legislative or judicial, the courts seem to be generally agreed. It is held that the administrator is to exercise legislative functions since it is the formulation of policy to effect general conduct in the future. The cases that uphold the act as constitutional, designate the powers under it as legislative. Thus they dispense with the requirement of notice and hearing on the ground that since no notice and hearing are required for legislative action, none is required in exercising legislative functions by the administrator.

The cases which hold the act unconstitutional do not specifically mention whether the functions are legislative or not. But they do bring out the third problem, "due process," under the Act. These courts said that "due process" was denied because the administrator could arbitrarily set rentals without hearings or making any determinations of fact. One case went further and stated that "due process" was denied because there was no provision for hearings and that this defect was not remedied by appeal processes since they were inconvenient and expensive.

The courts which upheld the act say that since there is a valid delegation of power the act is good. But they do not touch directly on the question of "due process" except to say that the aggrieved individual does have a chance to test the actions of the administrator by the appeal process of the act.

Since it appears that the Supreme Court will, if possible, read implied notice and hearing into an act to save it constitutionally, the question of "due process" can be defeated as a stumbling block to the act. This device is important since the entire validity of the act may depend on this question.

Since the decision of *Payne v. Griffin*[21] the entire question of the constitutionality of the Emergency Price Control Act of 1942 was left directly in the lap of the Supreme Court. The court was not long in passing on this important problem for on March 27, 1944, the case of *Bowles v. Willinghans*[22] was decided.

This case involved the very questions of constitutionality which all the previous cases had considered including the decisions of *Roach v. Johnson*, supra, and *Payne v. Griffin*, supra, which had ruled the act unconstitutional.

The Willinghan case arose in Georgia. Mrs. Willinghan sought to rent her apartments which had not been rented on April 1, 1941, in the summer of 1941. The Rent Director gave notice that the rents were to be decreased since they were greater than the maximum of those generally prevailing in the area for comparable quarters on April 1, 1941.

21 51 F. Supp. 588 (1943).
22 64 Sup. Ct. Repr. 641, 88 L. Ed 626 (1944).

Mrs. Willinghan filed her objection, but the Rent Director advised her that he would issue the order for the reduction. Mrs. Willinghan filed to enjoin the issuance of the order in the Georgia court and a temporary injunction with an order to show cause was issued. The Office of Price Administration brought this suit in the Federal District Court to restrain Mrs. Willinghan from proceeding further in the Georgia court. The Federal district court of Georgia, in line with its decision in the Payne v Griffin case, dismissed the Administrator's bill. The case was then brought on direct appeal to the Supreme Court. The court revised the decision of the District Court and upheld the Emergency Price Control Act of 1942 as constitutional. The court answered the principal attacks made on the validity of the act which have been considered above.

First, it considered the question of the "delegation of powers." The court held that the act "sufficiently" set up standards or limits to guide the Administrator in regulating rents. These standards are sufficient in that maximum rents shall be fixed for a defense rental area whenever, in the judgment of the Administrator, it is necessary or proper to give effect to the purpose of the act. It is sufficient in that the rents shall be "*generally fair and equitable,*" and that the administrator, insofar as practicable, shall ascertain and consider the rents prevailing on a designated date, April 1, 1941, with the right to choose an earlier date or a later date under certain circumstances. Further, the Act is sufficiently definite in its prescribed standards even though the Administrator is allowed to make adjustments and exceptions for relevant factors in order to give effect to the purpose of the Act. Mr. Justice Douglas said:

> "There is no grant of unbridled administrative discretion— Congress has not told the Administrator to fix rents whenever and wherever he might like and at whatever levels he pleases. Congress has directed that maximum rents be fixed in those areas where defense activities have resulted or threatened to result in increased rentals inconsistent with the purpose of the Act. And it has supplied the standards and the base period to guide the Administrator in determining what the maximum rentals should be in a given area."

The court then answers the question of the delegation of discretionary powers. It held that where there is a delegation of authority to an administrative officer, and there happens to be a zone for the exercise of his discretion, this does not make the delegation unconstitutional provided that Congress has defined the limits and standards, and has left to the Administrator the mere work of applying the statute to different situations which arise. The court so found the necessary limits and standards included in the act and thus overcame the objection of discretionary power in the Administrator.

The court held in regard to the sufficiency of the standards that in the exercise of the war power through the Price Control Act, it is not unconstitutional because the Act provides merely that the rents shall be fixed "generally fair and equitable" with regard to each individual landlord. The court said:

> "A nation which can demand the lives of its men and women in the waging of the war is under *no constitutional necessity* of providing a system of price control on the domestic front which will assure each landlord a "fair return" on his property."

The court discussed the problem of due process of law and held in effect that no greater burden is placed in the Federal Government by the Fifth Amendment than is placed on the States by the Fourteenth Amendment. And since the police power of the State is used to affect individuals within a class and their property without violating the Fourteenth Amendment, the Federal Government, being under no greater restraint within the Fifth Amendment, can certainly affect individual landlords within the large class of landlords even to the extent of not assuring to each one a "fair return" on his property.

The problem of notice and a hearing was also answered by the court when it held that Congress need not require the Administrator to hold hearings before an order or regulation is issued since ample provision is made for a hearing and review by the Administrator and the courts after the regulation has gone into effect. The exigencies of war make it imperative that action be taken quickly.

Thus the constitutionality of the Emergency Price Control Act of 1942 is settled. However, with all due respect to the Supreme Court and its decisions, there are several questions which the court did not fully answer. For example, under the problem of the delegation of powers, the court stated that sufficient standards were set by the Act to guide the Administrator. However, the court does not explain with much detail just what or how these standards are operative. There is a distinction between stating that standards and limitations are present, and actually pointing out these standards and how they limit the power of the Administrator in his actual activities. In other words the court did not show how the standards were definite and set so that the Administrator would have to follow them or at least not surpass them.

In line with this, the Act itself sets the date of April 1, 1941, as the basis to guide the Administrator in establishing the rents. But the Act also adds that this date shall be given "due consideration" insofar "as practicable." By the use of these terms, it can be clearly seen that if the Administrator chose to disregard the bare date of April 1, 1941, and use any date, he would not be violating the purpose of the Act or exceeding his delegated powers.

The court points out that the rents must be "fair and equitable." This may be true but the Act also provides that "as in his (administrator's) judgment (the rents) will be generally fair and equitable." Thus the standard or limitation of "fair and equitable" is a standard only insofar as the judgment of the Administrator makes it one.

The same point can be made of the court's decision in *Yakus v. United States*[23] where the constitutionality of the Price Control sections of the

23 64 Sup. Ct. Repr. 660, 88 L. Ed. 653 (1944).

Act were under attack on the same grounds. The court answered the question of unbridled delegation of power in the same manner. Yet in this case the court again did not show how the standards actually limited or confined the Price Administrator in his orders and regulations under the Act. True the dates of October 1 to the 15th, 1941, are set as a guide for the Administrator, but still by the use of the words "in his judgment" and "insofar as practicable" leave the door wide open and tear down the standards or limits as far as the actual conduct of the Administrators are concerned under the Act.

Under both of these decisions if it were assumed that the standards or limits of the Act were definite and certain, there would still be the complaint that the Administrator is absolutely free to use his discretion in the matter of fixing maximum prices or rents. While the use of discretionary power is permitted under a delegation of power provided that there are limits on the use of such power, still under this Act the Administrators are free to use their discretion. For the words "in his judgment" and "as far as practicable" take down the standards or limits, if there be any, and open the way for unbridled discretionary action on the part of these Administrators.

Thus it can be seen from the Supreme Court's decisions in both of these recent cases that the question of the delegation of power to an Administrator is not fully answered. However, it must be said that the aims of the Act are worthy. It has probably been the one great factor in preventing the disaster of inflation from breaking loose in this country as a result of the spending of the government during this war emergency. Without doubt this fact and the circumstance of the impact of the war on our entire economic structure helped influence the Supreme Court in its decisions. The justification or merits of this influence on the Court are not passed upon here. The only purpose and aim here contained is to see how the court answered or failed to answer the attacks on the constitutionality of the Emergency Price Control Act of 1942.

—Charles M. Boynton.