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Notes

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illumination, table lamps have been installed. These lamps are the latest development in reading lamps.

LAW CLUB: At a recent meeting of the Law Club, a by-law was adopted providing for regular monthly dinners. They are to be held every second Tuesday of the month during the school year. Outside speakers are to be invited for each dinner. The Law Club under the leadership of its president, Paul O'Neil, has taken under consideration the furnishing of the Reception Lounge in the Law Building. The other officers of the Club for the ensuing year are: Frank G. Matavovsky, vice-president; Arthur A. Sandusky, secretary; John S. Montedonico, treasurer.

ANNOTATIONS: Professor Homer Q. Earl has taken charge of the work of annotating the Restatement of the Law of Agency for the state of Indiana.

BAR EXAMINATIONS: A check-up has been made on the record at bar examinations made by the classes of 1932-33 and 1933-34. Of the 27 of the class of 1932-33 who reported taking the bar examination, 20 or 74% passed the first time and the rest passed at subsequent examinations. Of the 28 of the class of 1933-34 who reported as having taken the bar examination in the spring and summer of 1934, 25 or 89% passed. This is undoubtedly a record that ought to inspire future classes to attain or surpass.

NOTES

CONSTITUTIONAL LAW—JURY—JURY OF LESS THAN TWELVE MEN —STATUTES—VALIDITY OF ACTS RELATING TO CLASS—ACTS RELATING TO CITIES IN GENERAL.—An Act [1] of the General Assembly of Indiana provided for the institution of city courts in those cities "being in the second class according to the last preceding United States census, not having either a circuit court or superior court located in such city." This court was to have jurisdiction of all civil cases for the enforcement of demands not exceeding $2000, where the parties are, or the subject matter is, in the township in which the city is located. Such a court having been located in East Chicago, a case involving an auto insurance policy was brought before it. Just what transpired in this court is not known, for the record is incomplete; whether a judgment was rendered is doubtful. At any rate, there was an appeal to the "Lake

[1] Ind. Acts 1921, c. 215, p. 587, IND. ANN. STAT. (Burns, 1926) § 11028.

circuit court." This court held the Act mentioned above to be unconstitutional; it then granted a trial *de novo* in which no jury was used, and granted a judgment against the appellant in the sum of $500. The case, *Miller Nat. Ins. Co. v. American State Bank*,[2] went to the Supreme Court of Indiana on appeal.

In his appeal, the appellant asserted that the city court of East Chicago had no jurisdiction over the subject matter of the action, and that, therefore, the "Lake circuit court" did not have jurisdiction. This contention was grounded upon appellant's claim that the Act of the General Assembly mentioned above, conferring special jurisdiction upon certain city courts, including the city court of East Chicago, was void and unconstitutional because: (1) The Act does not classify certain cities, but only identifies one city, and that therefore the classification is void under section 22 of article 4 of the Constitution of Indiana; (2) That the Act is unconstitutional since it deprives a party litigant of the constitutional right to a trial by a jury of twelve men; and (3) That the Act is a local and special act regulating the practice in courts of justice, and is unconstitutional under article 4, section 22, of the Constitution of Indiana.

The Supreme Court attacked the second objection first. A provision in the Act authorizing the formation of the city courts concerning jury trials stipulates that: " 'All issues of fact (in a civil action) pending in said city courts shall be triable by the judge, unless either party shall demand a jury trial, which jury shall consist of six qualified voters of the city, to be summoned by the bailiff by venire issued by the judge.' " Mr. Justice Fansler, delivering the opinion of the court, stated: "The courts of numerous states having a constitutional provision as to juries identical or similar to ours,[3] and the United States Supreme Court,[4] have universally held that such a constitutional provision preserves the right to a trial by a common-law jury. At common law, the right to a trial by jury was only satisfied by a trial before a jury of twelve, presided over by a judge with power and authority to direct the conduct of the trial, and advise the jury concerning the law, and to arrest and set aside judgments. It is well settled that the constitutional requirement is only satisfied by a trial by such a jury, so presided over, and that the right may not be curtailed by legislative enactment reducing the number of jurors or dispensing with judicial supervision of the trial." Thus, by these words, the statutory provision [4] authorizing trial in a city court by a jury of six qualified voters was held invalid as being in violation of constitutional right to a trial by a common-law jury of twelve men. But, it was also held that the invalidity of the statutory provision did not affect the val-

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2 190 N. E. 433 (Ind. 1934).

3 "In all civil cases, the right of trial by jury shall remain inviolate." IND. CONST. art. I, § 20.

4 Walker v. New Mexico & S. P. R. Co., 165 U. S. 593, 41 L. ed. 837 (1897).

idity of other provisions of the Act creating the city court and defining jurisdiction thereof, for "without this clause the statute is workable, and must be considered as operative, and the clear intention of the Legislature that the statute should be operative, notwithstanding any portion might be declared unconstitutional, is manifested by a clause in the act to that effect."

On the question concerning the number of jurors necessary to render a valid verdict, the various courts are divided. New Hampshire,[5] New Jersey,[6] Mississippi,[7] Missouri,[8] Nevada,[9] Tennessee,[10] Vermont,[11] Virginia,[12] and Wisconsin [13] demand a full jury of twelve in all cases, whether criminal or civil. In the states of Florida,[14] Illinois,[15] Ohio,[16] Texas,[17] West Virginia,[18] Montana,[19] and Pennsylvania [20] a trial by a jury of twelve men is provided, but such provision applies only to capital cases and to suits at common law. In regard to other cases, the states hold differently. The Iowa constitution reads: "The right of trial by jury shall remain inviolate; but the General Assembly may authorize trial by a jury of a less number than twelve men in inferior courts. . . ." [21] Utah permits trials by juries of less than twelve men under state laws. In Alabama it is held [22] that "where a jury of twelve men is not demandable of right by the common law, it is not demandable of right under a constitutional provision." In Illinois, by the constitution of 1870, juries of less than twelve in justice's courts are legal. In Michigan, in all courts not of record, the jury may consist of less than twelve.[23] In New York [24] and Ohio [25] a jury of six in a justice court is constitutional. In Oregon it is held that the constitutional provisions do not apply or give right to a

5 Opinion of the Justices, 41 N. H. 550 (1860).
6 Howe v. Treasurer of Plainfield, 37 N. J. L. 145 (1874).
7 Byrd v. State, 1 How. 163 (1834).
8 State v. Van Matre, 49 Mo. 268 (1872).
9 State v. McClear, 11 Nev. 39 (1876).
10 McGinnis v. State, 9 Humph. 43, 49 Am. Dec. 697 (1848).
11 Plimpton v. Somerset, 33 Vt. 283 (1860).
12 Miller v. Commonwealth, 88 Va. 618, 15 L. R. A. 441 (1892).
13 Norval v. Rice, 2 Wis. 22 (1853).
14 Shannon v. State, 89 Fla. 64, 102 So. 829 (1925).
15 Povlich v. Glodich, 311 Ill. 149, 142 N. E. 466 (1924).
16 State v. Baer, 134 N. E. 786 (Ohio 1921).
17 Dunn v. State, 92 Tex. Cr. R. 126, 242 S. W. 1049 (1922).
18 State v. Wyndham, 80 W. Va. 482, 92 S. E. 687 (1917).
19 Territory v. Ah Wah, 4 Mont. 149, 47 Am. Rep. 341 (1881).
20 Rhines v. Clark, 51 Pa. 96 (1865).
21 Art. 1, § 9.
22 Montgomery & F. R. Co. v. McKensie, 85 Ala. 546, 5 So. 322 (1889).
23 Hill v. People, 16 Mich. 351 (1868).
24 Knight v. Campbell, 62 Barb. 16 (1872).
25 Norton v. McLeary, 8 Oh. St. 205 (1858).

jury of twelve in proceedings for violation of city ordinances.[26] South Carolina permits a jury of less than twelve in inferior courts of the state.[27]

After thus settling that a jury of less than twelve men in any trial whatsoever in Indiana is invalid, the court passed on to the question of whether the Act of the Indiana legislature, providing for the formation of the city courts, does not classify certain cities, but only indicates one city, and that therefore the classification is void under section 22 of article 4 of the Constitution of Indiana.[28] Prior to the passage of the Act, because of the crowded condition of the circuit courts of the counties, there was a necessity for a court of some kind in those cities of the second class which did not have a circuit or a superior court. This court was established by the Act. It is claimed by the appellant that this statute is unconstitutional in that at the time of its passage it affected only the city of East Chicago. Justice Fansler said: "We take judicial notice of the fact that since its passage a superior court has been created in the city of East Chicago, which takes that city out of the operation of the statute, and we are advised that at least one other city now has a sufficient population to bring it within the operation of the statute if its size does not diminish before the next United States census." Thus, the court held that a statute classifying cities upon the basis of population for purpose of applying methods of governmental organization, will be deemed *general* and not *special,* if applying to all cities coming within the class throughout the State under the same circumstances. The Act, therefore, was held not to be invalid as a "local or special law." The term "local," in constitutional provisions prohibiting local laws, means laws relating to a portion only of the territory of the state. The United States Supreme Court has said of a local law: "Primarily, at least, a law that in fact, if not in form, is directed only to a specific spot." [29] The fundamental objection to a local law is its application to one, and only one, of a class. "The legislature may, for purposes of legislation, divide the subject matter of legislation into classes and then legislate for each class as a whole. *But a valid classification must have a basis in reason, and not be adopted arbitrarily as a mere cover for special legislation under the form of general legislation.*"[30] (Italics are mine.) Local law breeds jealousy and sectionalism and opens the channels flowed by favoritism which in their treacherous windings engulf the holders of public offices in a sea of graft. It breeds

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26 Wong v. Astoria, 13 Ore. 538 (1886).

27 State v. Williams, 40 S. C. 373 (1893).

28 "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . regulating the practice in courts of justice. . ."

29 Gray v. Taylor, 227 U. S. 51 (1913).

30 ELLIOTT, MUNICIPAL CORPORATIONS (3d ed. 1925) § 322.

chicanery; it disrupts a peaceful state. Now it is entirely possible that a law in its application may pertain to just one of a class, but if that law can apply to the entire group, it is not rendered "local" merely because the remaining units do not at the time of the enactment possess the necessary prerequisites to bring them within its limits.

The Supreme Court of Indiana took cognizance of the fact that whenever a law of a general nature is passed by the legislature for the whole state, and is not applied by the legislature to any particular locality thereof, and has no words prohibiting its operation in any particular locality, it is a law having a uniform operation throughout the state within the meaning of the said constitutional provision, although it may not practically have operation in every part of the state. This same court had previously held [31] that "a law is not local and special if it applies to all who come within its provisions generally and without exception, rests upon an inherent and substantial basis of classification, and its operation is the same in all parts of the state under the same circumstances." Moreover, it has been decided that "acts creating inferior courts are not invalid as being local or special." [32] The Supreme Court of Georgia, in 1902, has given the same interpretation to this question when it was brought before it;[33] and the Supreme Court of Illinois [34] has adopted the same view. In North Carolina, a private act conferring additional jurisdiction in criminal matters on the mayor's court of Farmville was held constitutional.[35]

The Texas Court of Criminal Appeals, too, in common with these has held [36] that an act creating a corporation court for a particular city was a special law within the constitutional provision.

The Supreme Court of Kansas held that a statute [37] creating city courts was not special legislation and hence was constitutional.[38] The court said: "The law as amended is general in form and is made applicable to all first-class cities of the state, and to all second-class cities attaining a population of 13,900. It covers all cities of the state

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31 Saraceno v. State, 202 Ind. 663, 177 N. E. 436 (1931).

32 Woods v. McCoy, 144 Ind. 316 (1895).

33 Welborne v. Donaldson, 115 Ga. 563, 41 S. E. 999 (1902).

34 Sixby v. Chicago Ry. Co., 260 Ill. 478, 103 N. E. 249, Ann. Cas. 1914D, 539 (1913).

35 State v. Horne, 191 N. C. 375, 131 S. E. 753 (1926).

36 King v. State, 105 Tex. Cr. R. 416, 289 S. W. 69 (1926) (The court said: "'A local act is an act applicable only to a particular part of the legislative jurisdiction. . . . The act under consideration was applicable, in its terms, only to that particular part of the legislative jurisdiction of the Texas Legislature comprised within the boundaries defining the city of [Port Arthur] . . . as set out in the special act . . . and affected only persons of this State in those limits. That the act was local or special cannot be denied.'").

37 Kan. Laws 1923, c. 132, as amended by Laws 1927, c. 179.

38 State v. Smith, 130 Kan. 228, 285 Pac. 542 (1930).

of the classes mentioned and provides for city courts, all with the same jurisdiction, the same procedure, and the same official organization. Instead of being special legislation, it is of a general nature, if uniform in its operation upon all cities of a certain class throughout the state, and was manifestly enacted to get rid of the numerous demands upon the Legislature to provide for special city courts in particular cities."

Decisions on this point are few in number. Some states, such as Florida, have no constitutional limitations on the power of the legislature in regard to such laws. But of those states which have declared themselves, the majority hold that the legislature has the authority to pass acts of the nature of the one involved in the principal case.

Turning to the principal case, the court held that the statute authorizing the organization of the inferior court set forth a certain procedure to be followed in appealing to the circuit court from a judgment rendered in the inferior court, such procedure to be similar to that employed in an appeal to the appellate court. It is fundamental that such appeals can be taken only from a final judgment, and the record in this case did not show any such judgment to have been rendered. The circuit court of Lake county erred, the court held, in not dismissing such appeal; but the court recognized the possibility that the record of the city court as certified to it may not have been the complete record certified to and filed in the circuit court. But at any rate, said the court, the circuit court having no jurisdiction to try the cause *de novo,* its judgment was erroneous. Being thus of no legal effect, this judgment was reversed, with instructions that the circuit court of Lake county dismiss the appeal, or, in the event the record of the city court filed with it shows a final judgment to have been rendered, that it consider and review any errors that may be assigned, and affirm or reverse the cause as contemplated in the act under which the city court operates.

Richard A. Molique.

CONVERSION—MEASURE OF DAMAGES—SENTIMENTAL VALUE.—In two recent cases the question as to whether, in ascertaining the value of personal property that has been converted or destroyed or injured, the jury may consider the *pretium affectionis* (that is, a value placed upon the property by reason of attachment for or association with the property) has been considered and in each case the court ruled that in estimating the damages the jury was not entitled to consider the *pretium affectionis* (which, perhaps, may not inaptly be called sentimental value). In *Twersky v. Pennsylvania R. Co.*[1] an action was brought to recover $2,500, the declared value of the contents of the

[1] 273 N. Y. S. 328 (1934).

plaintiff's trunk received by the defendant for transportation and lost. The trunk contained a manuscript and scroll. It was held that the trial court erred in allowing the jury to consider the sentimental value of the manuscript and scroll. In *Wilcox v. Butt's Drug Stores* [2] an action was brought to recover damages for the loss of a dog due to the alleged negligence of the defendant, a druggist, who had sold the plaintiff a deleterious drug when the plaintiff called for a harmless one to administer to the dog. The dog was one of a rare species, a well-bred and intelligent animal, and had been a prize winner at a dog show. The court held that sentimental value is not an element of damages, even though the dog had no market value, saying: " 'The true rule being that the owner of a dog wrongfully killed is not circumscribed in his proof to its market value, for, if it has no market value, he may prove its special value to him by showing its qualities, characteristics, and pedigree, and may offer the opinions of witnesses who are familiar with such qualities.' "

It has been said that the satisfaction and pleasure which the possession and pleasure of an article gives, like the satisfaction which comes from having a contract performed, is of such a nature that the law does not recognize it as a subject for compensation.[3] In discussing the jurisdiction of courts of equity to grant injunctions, the Supreme Court of North Carolina has said:[4] ". . . it [a court of equity] finally assumed jurisdiction for the prevention of torts or injuries to property by means of an injunction, under certain safeguards and restrictions, and two conditions were required to concur before it would thus interfere in those cases, namely, the plaintiff's title must have been admitted or manifestly appear to be good, or it must have been established by a legal adjudication, unless the complainant was attempting to establish it by an action at law and needed protection during its pendency, and secondly, the threatened injury must have been of such a peculiar nature as to cause irreparable damage, as, for instance, in the case of the destruction of shade trees or of any other wrongful invasion of property which, by reason of the character of the property or the form of the injury, rendered the wrong incapable of being atoned for by compensation in money, such as torts committed on property and things having a value distinct from their intrinsic worth, for instance, a *pretium affectionis* though not a merely imaginary value." Here we see that equity takes cognizance of a *pretium affectionis* in the matter

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2 35 Pac. (2d) 978 (N. M. 1934).

3 1 SEDGWICK ON DAMAGES (9th ed.) § 251a.

4 East Lake Lumber Co. v. East Coast Cedar Co., 55 S. E. 304, 306 (N. C. 1906).

of granting injunctions to prevent a threatened injury, but not a *pretium affectionis* considered from the standpoint of a merely imaginary or whimsical value.

In the conversion cases, where the injury is *tortious*, considered from the standpoint of intentional or wilful conduct, there is a conflict of authority as to whether a *pretium affectionis* is an element of damages. In *Bateman v. Ryder* [5] the plaintiff brought an action for the conversion of a guitar, four oil paintings bought in Italy by the plaintiff's husband and presented to her, and manuscripts of prose and poetry composed by the plaintiff's husband which had not been published and probably could not be reproduced. It was held that an instruction to the jury that the plaintiff's relation to and association with the articles could be considered in estimating the damages was proper. In *Pennington v. Redman Van & Storage Co.*[6] an action was brought for the conversion of a number of small articles which were termed "heirlooms" or "keepsakes." The court approved the doctrine that, in determining the measure of damages for the conversion of such property, which had no market value, consideration may be given by the jury to the special, sentimental value which such articles have to the owner, quoting with approval from Sutherland on Damages:[7] " 'One criterion of damage may be its actual value to the owner, and this is the rule where it is chiefly or exclusively valuable to him. Such articles as family pictures, plate, and heirlooms should be valued with reasonable consideration of and sympathy with the feelings of the owner.' " In *Shewalter v. Wood* [8] the plaintiff's petition in conversion alleged both the market value of the articles converted and a special value to the owner "as heirlooms or sacred keepsakes." The court held that the plaintiff could not recover such special value and also the market value, and also that the special damages could be recovered in this type of case. The court quoted with approval the above extract from Sutherland on Damages and added: "As a rule, recovery for sentimental value of personal property cannot be had in a suit for conversion, and that rule applies to property for personal use, but which may easily be replaced, such as wearing apparel and household goods. . . . As to such things as family pictures and heirlooms, which cannot be replaced and are valuable only to the owner, the most fundamental rule of damages that every wrongful injury to person or property should be adequately and reasonably compensated would seem to require the allowance of damages in compensation of the rea-

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5 106 Tenn. 712, 64 S. W. 48, 82 Am. St. Rep. 910 (1901).

6 34 Utah 223, 97 Pac. 115 (1908).

7 4 SUTHERLAND ON DAMAGES (3rd ed.) § 1099.

8 183 S. W. 1127 (Mo. 1916).

sonable special value of such articles to their owner." The court emphasized the fact that the petition made out a case for punitive damages.

On the other hand, in a number of cases [9] in conversion involving *heirlooms* and *keepsakes,* as well as household goods and wearing apparel, the courts have adopted a contrary doctrine excluding from the jury any consideration of sentimental value. But apparently there is no case in which it is squarely held that in conversion of *heirlooms* or *keepsakes* sentimental value, where it has some basis in fact and is not merely whimsical or fanciful, is not an element of damages.

Where the action is for a negligent destruction or loss of or injury to personal property, the courts generally agree that sentimental value is no element of damages.[10]

The general rule is that the measure of damages, in actions for conversion, is the value of the property converted at the time and place of conversion.[11] In actions of tort for the loss or destruction of property, the value is to be estimated as of the time of the loss or destruction.[12] In actions against carriers for failure to deliver goods, the value is to be determined at the place of delivery.[13] These rules are based upon the theory that this value will constitute fair compensation to the owner who is deprived of his property. It is fundamental that the common law will award a pecuniary equivalent to a party injured by the loss of his property. This is the most that the common law attempts to do. The value of a thing is simply its pecuniary equivalent. The market value is used to estimate the value on the theory that the property has a value on the market. But there are certain species of property that are not kept for sale in the ordinary course of mercantile transactions and have at most only a value, in some instances, on the secondhand market; wearing apparel and household goods and furnishings come within this category. In such cases there is no real market value which will afford a standard of fair compensation to the owner who is deprived of these types of property. In such cases the general rule is

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9 Barker v. S. A. Lewis Storage & Transfer Co., 61 Atl. 363 (Conn. 1905) (The leading case in support of this doctrine.); Aufderheide v. Fulk, 112 N. E. 399 (Ind. App. 1916) (Quoting from the Barker case with approval.); Lake v. Dye, 133 N. E. 488 (N. Y. 1921). *Cf.* Kuzemka v. Gregory, 146 Atl. 17 (Conn. 1929) (Conversion of an automobile. The court quoted from the Barker case with approval.).

10 Twersky v. Pennsylvania R. Co., *op. cit. supra* note 1; Valentino v. Nasio Studio, 242 N. Y. S. 277 (1930); Louisville & N. R. Co. v. Stewart, 29 So. 394 (Miss. 1901) (Apparently an action for negligent injury to oil portraits). *Cf.* Green v. Boston & Lowell Railroad, 128 Mass. 221, 35 Am. Rep. 370 (1880) (Contract against a carrier to recover the value of an oil painting, the portrait of the plaintiff's father.).

11 HALE, LAW OF DAMAGES (2nd ed.) 281.

12 HALE, *op. cit. supra* note 11, at 283.

13 HALE, *loc. cit. supra* note 12.

that the damages are to be estimated by considering their actual value to the owner, who is deprived of them through loss or destruction by the tort of another, considering the original cost, the cost of replacement where possible, the amount of the use to which the property has been subjected, its condition at the time of the loss or destruction, and any other consideration affecting the actual value to the owner.[14]

If the courts consider the actual value to the owner, it is but reasonable and logical that the actual value to the owner should include the association of the owner with the property, especially where the wrongdoer wilfully destroys the property. If it is reasonable to consider that a coat, for instance, which is made to fit the owner and is of no value to any one else, may be worth $25 to that owner, why is it not reasonable to consider that a portrait of a member of the family, which is the only one extant and the only one that can ever be obtained, is of special value to the owner because of his or her association with it? In either case the wrongdoer would be apprised of the possible special value to the owner.

Difficulty in assessing damages, if there be such, is not a ground for denying relief.[15] Again, the owner of chattels, by reason of that relationship alone is qualified to give his estimate of their value.[16] This position of ownership gives the witness the means of knowledge concerning the value of the article which is obviously prerequisite to expressing an opinion on the injuries sustained. The authorities have consistently held that the mere fact of ownership of personal property is sufficient to qualify one to estimate their value in the conversion cases.[17]

In conclusion then we think that although the plaintiff, in the case of *Twersky v. Pennsylvania R. Co.*, could not have recovered for a "fanciful" loss (using the term synonymously with whimsical), still in all justice she should have recovered the sentimental value of the converted scroll. We have cited sufficient cases allowing a like recovery, and we have shown, on authority, that she was a competent witness to prove this loss. Therefore her evidence as to the affection attached to the manuscript of her dead husband, the comfort and consolation she obtained from possessing it and all the circumstances tending to make it valuable to her, since it had no market value, should have been admissible to justly compensate her.

F. Louis Fautsch.

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14 Note, L. R. A. 1917D, 495, 496, and cases there cited.

15 Dreelan v. Karon, 254 N. W. 433 (Minn. 1934).

16 Note (1911) 37 L. R. A. (N. S.) 588; Note, L. R. A. 1917D, 506; 1 WIGMORE ON EVIDENCE (2nd ed.) § 716.

17 EVIDENCE, 22 C. J. § 683 d, and cases there cited; 1 WIGMORE, *loc. cit. supra* note 16, and cases there cited.

COURTS—CONCURRENT AND CONFLICTING JURISDICTION AND COMITY—JURISDICTION OF STATE COURTS TO ENJOIN VIOLATIONS OF THE NATIONAL INDUSTRIAL RECOVERY ACT CODES.—In a recent Wisconsin case [1] the problem was presented as to whether the state courts of Wisconsin had jurisdiction to enjoin an employer from violating an industrial code established for his industry under the National Industrial Recovery Act. Suit was brought by a labor union to enjoin the defendant employer from violating the industrial code and also certain state statutes by prohibiting its employees from organizing and bargaining collectively through representatives of their own choice. The lower court granted the injunction on the ground that the agreement made by the employer with the President of the United States was an agreement for the benefit of the employees, and that the plaintiff labor union was entitled to the injunction as the representative of the employees to prevent the continued breach of this agreement. However, the agreement between the President and the employer provided that it should go out of effect upon the approval by the President of a code to which the employer was subject. The code for this industry was approved on October 3, 1933, and became effective on the expiration of ten days. The trial court rendered its decision on October 13 and issued the injunction on October 25, *nunc pro tunc*. The National Industrial Recovery Act [2] provides as follows: "The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of any code of fair competition approved under this chapter; and it shall be the duties of the several district attorneys of the United States in their respective districts, under the direction of the Attorney-General, to institute proceedings in Equity to prevent and restrain such violations." On the appeal to the Supreme Court of Wisconsin that court affirmed the granting of the injunction on the ground that the defendant's actions were in violation of certain state statutes. The court refrained from passing upon the question of whether the state courts of Wisconsin had jurisdiction to enjoin violations of the code established under the National Recovery Act, saying that a decision on that point could be made with finality only by the United States Supreme Court.

If a state court assumes jurisdiction to restrain such violations it must do so on some other ground than the violation of a third party beneficiary contract made between the employer and the President. These agreements provided that they should cease upon the approval of a code by the President for the employer's industry, and the President has now approved codes for practically all industries. Therefore,

[1] Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Co., 256 N. W. 56 (Wis. 1934).

[2] 15 U. S. C. A. § 703 (c) (1933).

the rights of the employees under these contracts are already lost and could not be the basis for the granting of an injunction.[3] The question is, therefore, presented as to whether the state courts have jurisdiction to restrain the employers from infringing upon the rights given to employees by the codes formulated under the United States statute.

At the outset it should be stated that it is not within the scope of this article to consider the constitutionality of the National Industrial Recovery Act. Assuming that the Act and the codes formed under it are constitutional, does a state court have jurisdiction to enforce them?

It might be well to consider first the enforcement in a state court of a statutory right acquired under a statute of a foreign state. The law on this point is stated in Corpus Juris as follows: "Courts of justice in one state will, out of comity, assume jurisdiction of causes of action which are transitory in their nature, given by and arising under the statutes of a foreign state where by so doing they will not violate their own laws or inflict injury on their own citizens." [4] The fact that the statute creating the right provides expressly that the right is to be enforced only in the courts of that state does not prevent a foreign state court from assuming jurisdiction to enforce the statutory right. In *Tennessee Coal, Iron & Railroad Co. v. George* [5] the plaintiff brought an action in a Georgia state court to recover for injuries received while in the employment of the defendant in Alabama, which injuries were caused by certain defective machinery with which the plaintiff was working. The plaintiff based his right to recover on an Alabama statute which gave a right of action for injuries caused by defective machinery. The statute also provided that the action "must be brought in a court of competent jurisdiction within the state of Alabama, and not elsewhere." The defendant contended that it would violate the "Full Faith and Credit" clause of the Federal Constitution for the Georgia court to assume jurisdiction of the action. The United States Supreme Court held that the Georgia court could properly assume jurisdiction of the suit, saying: "The courts of the sister state, trying the case, would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the cause of action, or which name conditions on which the right to sue depend. But venue is no part of the right; and

[3] INJUNCTIONS, 32 C. J. 45.

[4] COURTS, 15 C. J. 779, citing cases from the following jurisdictions: U. S., Ind., Iowa., Kan., Mass., Minn., Miss., Mo., Neb., N. Y., Pa., Tenn., and Wis. For a recent case in which the court refused to assume jurisdiction on the ground that it was against the public policy of the state, see Herzog v. Stern, 191 N. E. 23 (N. Y. 1934).

[5] 233 U. S. 354, 58 L. ed. 997, 34 Sup. Ct. 587 (1914).

a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any court having jurisdiction. That jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extra-territorial operation of a statute of another state, even though it created the right of action."

If this same rule of law prevails with regard to the jurisdiction of a state court to enforce a right created by a United States statute, then it would seem that a state court would have jurisdiction to enjoin violations of the National Industrial Recovery Act even though Congress, in passing the statute, intended to confer exclusive jurisdiction on the Federal courts. However, this same rule of law does not prevail where a United States statute is involved. It is true that the laws of the United States are in effect throughout all the states, and ordinarily a state court is a proper tribunal to enforce a right conferred by a United States statute. However, with regard to those matters over which power is given to the United States Government by the constitution, its jurisdiction is paramount to that of the states. Congress may expressly or by necessary implication give the Federal courts exclusive jurisdiction to enforce a right created by a United States statute.[6] In *Claflin v. Houseman*[7] an action was brought in a New York state court by an assignee in bankruptcy who based his cause of action on the United States statute. Mr. Justice Bradley, delivering the opinion of the court, said: "The laws of the United States are the laws of the several states, and just as much binding on the citizens and courts thereof as the state laws are. . . . So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice Field, in The Moses Taylor, 4 Wall. 429, 18 L. ed. 401, and Story, J., in Martin v. Hunter, 1 Wheat. 334; and Mr. Justice Swayne, in Ex parte McNeil, 13 Wall. 236, 20 L. ed. 624. This jurisdiction is sometimes exclusive by express enactment and sometimes by implication."

In 1877 the Supreme Court of Maryland was presented with the question as to whether the Maryland state courts had jurisdiction of actions against national banks to recover double the amount of usurious interest exacted upon loans by such banks.[8] In holding that

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[6] COURTS, 15 C. J. 1155.

[7] 93 U. S. 130, 23 L. ed. 833 (1876).

[8] Ordway v. Central National Bank of Baltimore, 47 Md. 217, 28 Am. Rep 455 (1877).

the State courts had jurisdiction, the following statement of the law was made by Alvey, J.: "The question of concurrent jurisdiction of the state courts with those of the United States has been the subject of a good deal of discussion both by statesmen and the courts of the country. It was one of the objections urged against the adoption of the Federal Constitution, that it would detract from and materially impair the existing jurisdictions of the state courts. This objection was answered by Mr. Hamilton, in the 82nd number of the *Federalist*, in which he maintained that the Congress of the Union, in the course of legislation upon the objects intrusted to their direction, might or might not commit the decision of causes arising upon the regulation of any particular subject to the Federal courts solely, but that, in every case in which the state courts are not expressly excluded by the statutes, they would of course take cognizance of the causes to which those acts might give origin. This he inferred from the nature of judiciary power, and from the general genius of the system. And Chancellor Kent, taking the same view of the subject, and after a full review of the course of decisions, state and federal, down to the time he wrote, concludes that in judicial matters the concurrent jurisdiction of the state tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts; and that without an express provision to the contrary the state courts will retain a concurrent jurisdiction, in all cases where they had jurisdiction originally over the subject-matter. 1 Kent's Com. 396, 400."

From these early cases we may now turn to a recent New Jersey case where the law was stated to the same effect. In *Fryns v. Fair Lawn Fur Dressing Co.*[9] a suit in equity was brought to enjoin the defendant employer from breaching his agreement with the President of the United States by compelling his employees to join a particular union. The defendant contended that the court had no jurisdiction over the case because the Federal courts were given exclusive jurisdiction by section 703 (c) of the National Industrial Recovery Act.[10] Bigelow, J., stated: "Rights whether legal or equitable, acquired under the laws of the United States, may be prosecuted in a state court competent to decide rights of the like character, and class, subject, however, to this qualification that Congress may, if it see fit, give to the Federal courts exclusive jurisdiction. Where such exclusive jurisdiction is not given or necessarily implied, resort may be had to the state court." The court went on to hold that since this action was based upon the President's agreement and not on a code, section 703

[9] 114 N. J. Eq. 462, 168 Atl. 862 (1933).

[10] For provision of this Section, see note 2 *supra*.

(c) of the National Industrial Recovery Act did not apply and the state court had jurisdiction of the action.[11]

It seems well settled, therefore, that in creating a statutory right Congress may, if it so desires, confer exclusive jurisdiction upon the Federal courts to enforce that right. The next question that must be considered is whether Congress, in enacting the National Industrial Recovery Act, intended to confer exclusive jurisdiction on the Federal courts to restrain violation of the codes.

The Act expressly makes it the duty of the United States district attorneys, under the direction of the United States Attorney-General, to bring suits in equity to enjoin violation of codes. While the Act does not expressly exclude other remedies it would seem that this would be a necessary implication from the provision for the special remedy.[12]

In three recent cases [13] brought in Federal district courts employees or labor unions sought to enjoin employers from violating the codes established for their industries, by attempting to force their employees to join company unions. In each of these cases it was held that the suit could not be maintained. It was reasoned that since Congress provided for injunctions against the breach of the codes in suits brought by the district attorneys and provided for no other remedy, the remedy set forth was intended to be exclusive. A private individual had no right to maintain a suit for such an injunction. In rendering these decisions the courts relied on the interpretation that the United States Supreme Court had made of the Federal Anti-Trust Act.[14] The wording of this statute, in providing for an injunction in suits brought by the district attorneys, was exactly the same as that used in section 703 (c) of the National Industrial Recovery Act. The United States Supreme Court has held in several cases that a private individual could not maintain a suit for an injunction under this

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11 For cases where it was held that Congress conferred exclusive jurisdiction on the Federal courts to enforce a remedy see: Pennsylvania Railroad Co. v. Clark Bros. Coal Mining Co., 238 U. S. 456, 35 Sup. Ct. 896, 59 L. ed. 1406 (1915); United States v. Illinois Surety Co., 253 Pa. St. 557, 98 Atl. 730 (1916).

For cases recognizing the rule that Congress can confer exclusive jurisdiction on the Federal courts to enforce a right created by a United States statute see: Southern Pac. Co. v. Crenshaw Bros., 5 Ga. App. 675, 63 S. E. 865 (1909); Bruen v. Ogden, 11 N. J. L. 370, 20 Am. Dec. 593 (1830); Bletz v. Colombia National Bank, 87 Pa. St. 87, 30 Am. Rep. 343 (1878); Divine v. Unaka Nat. Bank, 125 Tenn. 98, 140 S. W. 747, 39 L. R. A. (N. S.) 586 (1911); Missouri K. & T. Ry. Co. of Texas v. Blalack, 128 S. E. 706 (Tex. Civ. App. 1910).

12 Pollard v. Bailey, 20 Wall. 520, 527, 22 L. ed. 376 (1874).

13 Purvis v. Bazenmore, 5 F. Supp. 230 (1933); Stanley v. Peabody Coal Co., 5 F. Supp. 612 (1933); Western Powder Mfg. Co. v. Interstate Coal Co., 5 F. Supp. 619 (1934).

14 15 U. S. C. A. § 9 (1894).

Act.[15] In one of these cases, *Wilder Mfg. Co. v. Corn Products Co.*,[16] the court said: "Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." While the question as to whether a state court had jurisdiction to enjoin violations of this Federal Anti-Trust Act seems not to have been considered often, in *Locker v. American Tobacco Co.*[17] the view was accepted without question that state courts had no such jurisdiction.

In using the same words in the National Industrial Recovery Act that were used in the Federal Anti-Trust Act of 1890, Congress must have intended that the words should be given the same interpretation. It was evidently the intention of Congress to provide for the enforcement of the codes solely by suits brought by the district attorneys in the Federal courts. By this method the codes can be enforced in accordance with some unified plan under the direction of the Attorney-General. From the cases considered it would seem that the conclusion must be reached that the state courts have no jurisdiction to enjoin breaches of the codes formed under the National Industrial Recovery Act.

John A. Berry.

DIVORCE—IN REM OR IN PERSONAM PROCEEDING—VALIDITY OF NEVADA AND MEXICAN DIVORCES IN OTHER STATES.—The recent case of *Bergeron v. Bergeron* [1] has raised again the troublesome question of divorce jurisdiction, as applying to the comity shown by one state to the divorce decrees of a sister state or foreign country. This proceeding was instituted in the Massachusetts Superior Court by Haze Joseph Bergeron to secure the custody of his minor child. After the opening of the case he made a motion to dismiss the cause for want of jurisdiction. From an order denying this motion and a decree awarding custody of the child to the defendant, Claire Isobel Bergeron, he appealed to the Supreme Judicial Court of Massachusetts. According to the facts of the case the plaintiff and defendant were married in California in 1928. The child was born in 1929 in the state of Wash-

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[15] Minnesota v. Northern Securities Company, 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. 598 (1903); D. R. Wilder Manufacturing Company v. Corn Products Company, 236 U. S. 165, 174, 35 Sup. Ct. 398, 59 L. ed. 520 (1914); Paine Lumber Company v. Neal, 244 U. S. 459, 61 L. ed. 1256, 459 Sup. Ct. 485 (1916).

[16] *Op. cit. supra* note 15.

[17] 121 App. Div. 443, 106 N. Y. S. 115, *aff'd without a written opinion*, 195 N. Y. 565, 88 N. E. 289 (1907).

[1] 192 N. E. 87 (Mass. 1934).

ington. In 1930 they moved to Baltimore, and the following year the defendant left the plaintiff for justifiable cause, taking the child with her. After a time she moved to Massachusetts, where she met and soon wished to marry one White, a friend of the plaintiff. She consulted a New York attorney and through his advice sought and obtained a Mexican divorce. She then married White. The plaintiff later learned of the divorce and marriage, and seemed to acquiesce. However, he filed the present petition in May of 1933. The Supreme Judicial Court reversed the order denying the plaintiff's motion to dismiss, and entered a decree so dismissing the petition for want of jurisdiction.

There were a number of issues propounded in the opinion given by the court, but I shall here confine myself to the issue of jurisdiction, as appertaining to recognition of a Mexican divorce decree by a state in this country. Under the General Laws of Massachusetts [2] it is provided that if after a decree of divorce awarded in another jurisdiction the minor children of the marriage are inhabitants of Massachusetts the Superior Court has jurisdiction over their care, custody, education and maintenance. However, in the event that there has been no divorce, jurisdiction over these subject matters is given to the probate courts.[3] Thus the decree dismissing this petition from the Superior Court for want of jurisdiction involved the impeachment of the Mexican divorce obtained by the defendant.

The validity of the divorce in the principal case was denied on the grounds that neither party had at any time resided in Mexico, and that there was no personal service on the defendant, who is the present petitioner. The Massachusetts statute [4] provides, on this point, that "A divorce decreed in another jurisdiction according to the laws thereof by a court having jurisdiction of the cause and of both the parties shall be valid and effectual in this Commonwealth." This is true except where a wife has deserted her husband and set up her domicile in another jurisdiction. In this case, by a legal fiction, the wife's domicile is considered to remain with that of the husband.[5] Thus it will be seen that in Massachusetts the matter of jurisdiction in divorce is considered purely from an *in rem* standpoint. If the foreign state did not have jurisdiction over the subject matter and both parties, the decree of divorce is invalid.

It is rare, however, to find so consistent a point of view as that maintained in Massachusetts. The question of whether divorce proceedings are *in rem* or *in personam* offers one of the most bewildering

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2 GEN. LAWS OF MASS. (Tercentenary ed. 1932) c. 208, § 29.

3 GEN. LAWS OF MASS. (Tercentenary ed. 1932) c. 208, § § 32, 37.

4 GEN. LAWS OF MASS. (Tercentenary ed. 1932) c. 208 § 39.

5 Kendrick v. Kendrick, 188 Mass. 550, 75 N. E. 151 (1905); Post v. Post, 105 N. Y. S. 910 (1907).

and widely divergent variety of opinions in the whole field of law. It is my purpose to briefly delineate here a few holdings on this moot question. In England the issue was fully discussed in the leading case of *Le Mesurier v. Le Mesurier*,[6] where it was held that "According to international law, the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage." This is a strong expression of the *in rem* theory. In America the question had been raised in 1813, when a Massachusetts case set the precedent for the present holding of that Commonwealth. In *Barber v. Root* [7] the court said: "The laws of Vermont, which authorize the Supreme Court of that State to proceed in suits for divorce instituted in favor of persons resident for a time, but having no settled domicile within that state, against persons resident and domiciled in other states. . . in short, where no jurisdiction of the parties, or of the subject matter can be suggested or supposed—are not to be justified by any principles of comity which have been known to prevail in the intercourse of civilized states." This, like the ruling in the *Le Mesurier* case, is also an expression of the *in rem* theory.

Before proceeding further, it would be well to examine the two theories of jurisdiction—*in rem* and *in personam*—as they apply to divorce suits. The problem of divorce presents a situation comparable to none, since within its scope it involves both personal actions and actions applying to the *rem* intermixed to an almost inseparable degree. To begin with, marriage is a contract which creates a status. It is obvious that a state has jurisdiction over actions dealing with this status within its own borders. As long as a couple married within the state remain there the action is purely *in rem*, and, in whatever litigation arises, the judgment is unassailable in the home state and everywhere else, by virtue of the "full faith and credit" clause of the Federal Constitution. But if and when either or both of the parties leave the state of the original marriage domicile the difficulties begin. If they continue to cohabit, the situation is not materially changed under the modern rule,[8] which gives jurisdiction to the state of their new domicile. (This was not always so, for at least one state formerly held that a marriage contracted within the state could not be dissolved by a foreign state.[9]) What, however, is the situation when the parties live in different states? Both states cannot have jurisdiction, obviously; but of the two which is it to be?

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6 [1895] A. C. 517.

7 10 Mass. 260 (1813).

8 Cheever v. Wilson, 9 Wall. 108 (1870); Cheely v. Clayton, 110 U. S. 701, 4 Sup. Ct. 328, 28 L. ed. 298 (1884); Williams v. Williams, 10 Neb. 369, 163 N. W. 147 (1917).

9 Duke v. Fulmer, 5 Rich. Eq. 121 (1852).

The Restatement on Conflict of Laws has this to say about the matter:[10]

"Section 111. *State of Domicil of Neither Spouse.* A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state."

"Section 113. A state can exercise through its courts jurisdiction to dissolve the marriage of spouses of whom one is domiciled within the state and the other is domiciled outside the state, if

(a) the spouse who is not domiciled in the state
  (i) has consented that the other spouse acquire a separate home; or,
  (ii) by his or her misconduct has ceased to have the right to object to the acquisition of such separate home; or
  (iii) is personally subject to the jurisdiction of the state which grants the divorce;

or,

(b) the state is the last state in which the spouses were domiciled together as man and wife."

This would seem to be a fair and practicable rule to follow. Yet it has been held that divorce decrees of foreign tribunals where one party is a nonresident are void.[11] But where the nonresident spouse appeared and submitted to the jurisdiction of the foreign state the decree has been held valid,[12] although there is one authority the other way.[13]

The Uniform Divorce Jurisdiction Act,[14] which was drawn up in the hope of bringing order out of chaos, is much in line with the rules given by Restatement. It provides that the courts of the several states shall have jurisdiction when either the defendant is domiciled in the particular state or the state is the state of the matrimonial domicile; or the complainant has a separate domicile in the state (the defendant being domiciled outside of the state) and by consent, or owing to the conduct of the defendant such domicile is the rightful domicile of the complainant. This Act further provides: "If, however, only one of the parties is domiciled in this state and has acquired such domicile subsequent to the arising of the ground for divorce, such domicile must have continued uninterruptedly for the period of one year next preceding the bringing of the action." Full faith and credit must be given to this decree where these provisions are not inconsistent with the statutes of other states.

So far only one state—Vermont—has seen fit to incorporate the Uniform Divorce Jurisdiction Act within its statutes. Elsewhere, as in

10 RESTATEMENT, CONFLICT OF LAWS (Student ed.).

11 Taylor v. Taylor, 1 Chest. Co. Rep. (Pa.) 485 (1873).

12 Rich v. Rich, 34 N. Y. S. 854 (1895); Cheever v. Wilson, *op. cit. supra* note 8; Dodge v. Campbell, 220 N. Y. S. 262 (1927); Krumrine v. Krumrine, 106 So. 131 (Fla. 1926).

13 Harrison v. Harrison, 20 Ala. 629, 56 Am. Dec. 227 (1852).

14 9 U. L. A. 134.

the case of the provisions of Restatement of Conflict of Laws, there is a wide divergence from the Act.

Let us consider some of the variegated holdings of the different states. First of all there is the view of the Supreme Court of the United States to be considered. In a thoughtful and timely article [15] recently published in the American Bar Association Journal, Professor Hamilton Vreeland, of Catholic University Law School, points out the inconsistency of some of the decisions handed down by the Supreme Court on this question. He offers as a possible solution that "the several states should declare that a divorce suit is henceforth to be regarded as a proceeding *in personam*, with personal service upon or appearance by the defendant required, and with domicil of the plaintiff at the forum established as evidence of the absence of fraud against another state." [16] This would be a beautifully logical solution for what is at present a bewildering puzzle. First, in *Cheever v. Wilson*,[17] the Supreme Court held that jurisdiction is conferred upon a court to render a divorce entitled to extra-territorial recognition where the plaintiff has his domicile therein and the defendant is personally served there or makes his appearance. Then, in *Andrews v. Andrews* [18] the court turned around and ruled that defective jurisdiction by reason of a foreign domicile of both parties cannot be cured by residence of the plaintiff at the forum and appearance of the defendant there. The first holding is clearly upon the *in rem* theory, and the second as clearly upon that of *in personam*. Again, in the case of *Haddock v. Haddock* [19] the court did another about face and implied that appearance or personal service within the state would confer jurisdiction where the defendant was a nonresident. With such confusion in high places as an example, is it any wonder that the views of the state courts appear at first glance to be in chaos?

The *in rem* theory appears to be most strongly supported by Massachusetts. It is held there, according to the ruling of the leading case of *Andrews v. Andrews*,[20] which has been quoted, that personal service within the foreign state upon the defendant, or even his appearance therein, does not cure the defect of jurisdiction caused by lack of domicile of both parties. In accord with this is an early New York case [21] and one also from Rhode Island.[22] Under this view the state where the parties have their marriage domicile alone has jurisdiction of the marriage status. This view of course does not provide for the

15 Issue of September, 1934, p. 568.
16 *Op. cit. supra* note 15, at 574.
17 *Op. cit. supra* note 8.
18 176 Mass. 92 (1900), *aff'd*, 23 Sup. Ct. 237 (1903).
19 26 Sup. Ct. 525 (1905).
20 *Op. cit. supra* note 18.
21 Moe v. Moe, 2 Thomp. & C. (N. Y.) 647 (1874).
22 Ditson v. Ditson, 4 R. I. 87 (1856).

event of a separation between the parties. In Massachusetts [23] and some other states the marital domicile is presumed to remain in the husband; but this presumption may of course be overcome. In *Cheever v. Wilson* [24] it was held that a wife may acquire a separate domicile whenever it is proper and necessary. It is in this situation that the first rift between the *in personam* and *in rem* theories appears. If the parties move to separate states, where is the jurisdiction over the cause, and how may jurisdiction be obtained over the nonresident party? Some courts attempt to straddle the question by retaining part of the *in rem* theory and adding other features of the *in personam* view. That is to say, they will grant jurisdiction if the petitioner has remained in the state of the matrimonial domicile—thus holding the place of the status, even though the other spouse has gone.[25] But even here they are not consistent, for under this situation there is a split as to the means of gaining jurisdiction over the nonresident spouse. Some views allow constructive service,[26] others demand the appearance of the defendant at the forum or personal service upon the defendant within the state.[27] It is generally held, however, that to give jurisdiction under this situation the spouse remaining in the state of the marriage domicile must be the petitioner [28] although there are rulings to the contrary.[29] When it is required that the remaining spouse be the petitioner, there is often a statutory requirement as to the necessary duration of residence before suit can be brought.[30] This is to avoid the possibility of fraud upon another state.

On the other hand, there are courts which seem to drop the last vestige of the *in rem* theory, and consider divorce as an *in personam* proceeding. Even here there is a variety of holdings. Particularly is there a split on the requirements necessary to gain jurisdiction over the nonresident defendant. Some courts have held that service by pub-

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23 Kendrick v. Kendrick, *op. cit. supra* note 5.

24 *Op. cit. supra* note 8.

25 Snyder v. Buckeye Building & Loan Co., 160 N. E. 37 (Ohio 1928); Weir v. Weir, 226 N. Y. S. 833 (1928).

26 Ewing v. Ewing, 24 Ind. 468 (1865); Hubbell v. Hubbell, 3 Wis. 662 (1854); Stuart v. Cole, 92 S. W. 1040 (Tex. Civ. App. 1906).

27 Winston v. Winston, 54 N. Y. S. 298 (1898); Parish v. Parish, 32 Ga. 53 (1861); Bentley v. Hosmer, 68 N. W. 650 (Mich. 1896); Mead v. Mead, 205 Ill. App. 327 (1917); Doughty v. Doughty 28 N. J. Eq. 581 (1877).

28 Fellows v. Fellows, 8 N. H. 160 (1835); Ready v. Ready, 158 N. E. 493 (Ohio 1927); Hilyard v. Hilyard, 87 Pa. Super. Ct. 1 (1927).

29 Freet v. Holdorf, 216 N. W. 619 (Iowa 1928); Petersen v. Petersen, 156 Ky. 202, 160 S. W. 952 (1913); David v. David, 132 Atl. 879 (R. I. 1926).

30 Hatfield v. Hatfield, 6 D. C. 80 (1864); Hayes v. Hayes, 152 N. E. 91 (Mass. 1926); Pope v. Pope, 116 Okl. 188, 243 Pac. 962 (1926); Coleman v. Coleman, 23 Cal. App. 423, 138 Pac. 362 (1913).

lication is sufficient.[31] Others have held that there must be personal service.[32] Then, at what might be called the extreme left, are some decisions holding that where both parties appear at the forum, the court has jurisdiction, regardless of domicile,[33] so as to estop either spouse from attacking it.

It is a logical step from a discussion of divorce jurisdiction to the very timely topic of the validity of Reno and Mexican divorces in the several states. The ease and expedition with which these divorces are obtained, and the rapidly growing number of applicants is by way of becoming a national scandal. However, a sweeping movement in the American courts declaring these divorces invalid and void is negating their baneful influence. Almost without exception the various states have refused to recognize these divorces.[34] The usual ground of impeachment is that where a complainant has established residence without any intention of permanence, but merely for the purpose of obtaining a divorce he does not gain a bona fide residence therein, and the jurisdiction is defective. The court said, in *De Bouchel v. Candler,*[35] that any divorce awarded under these facts would not be good in Nevada, and was certainly not in Georgia. The Nevada court itself has ruled that no divorce shall be valid unless the petitioner has a bona fide residence in the State, even though both parties appear and submit themselves to the jurisdiction.[36] It seems that what is true of Reno divorces is even more pronounced in the case of Mexican divorces, where it is often the case that neither of the parties have been present at the forum. Decrees under these circumstances have no basis whatsoever for recognition, and it is never given them.[37]

In conclusion it can be clearly seen that there is great need for the adoption of some standard set of rules, such as those of the Uniform Divorce Jurisdiction Act, to be applied in the several states, whereby the courts of one state may with some certitude issue decrees of divorce which will not be denied in another state because of a flaw in the proceedings peculiar to the latter state's views on the *in rem* or *in personam* question. It is sincerely hoped that the courts of this nation will not suffer a condition to exist very much longer which is a daily reproach to public policy and an impairment of our judicial perspicuity.

Joseph A. McCabe.

31 Schafer v. Ritchie, 49 Utah 111, 162 Pac. 618 (1916).

32 Zentzis v. Zentzis, 163 Wis. 342, 158 N. W. 284 (1916).

33 In re Ellis' Estate, 55 Minn. 401 56 N. W. 1056 (1893).

34 Lister v. Lister, 86 N. J. Eq. 30 (1916); Kaufman v. Kaufman, 160 N. Y. S. 19 (1917); Broder v. Broder, 10 Fed. (2d) 182 (1932); Cochran v. Cochran, 162 S. E. 99 (Ga. 1932).

35 296 Fed. 482 (1924).

36 Worthington v. District Court, 142 Pac. 230 (Nev. 1914).

37 Bonner v. Reandrew, 214 N. W. 536 (Iowa 1927); Commonwealth v. MacMaster, 88 Pa. Super. Ct. 37 (1927).

MORTGAGES—TRANSFER OF PROPERTY SUBJECT TO MORTGAGE—LIABILITY OF PURCHASER OR GRANTEE AS PRINCIPAL AND OF MORTGAGOR AS SURETY—EXTENSION OF TIME OF PAYMENT.—Where the grantee of mortgaged property does not assume the mortgage, but merely takes *subject* to it, and the mortgagee by a valid contract with the grantee postpones the time for the payment of the mortgage beyond the time provided for therein, without the consent of the mortgagor, the general rule is that the mortgagor is released from liability to the extent of the value of the mortgaged property (land) at the time the extension is made.[1] While no strict or technical relation of principal and surety arises between the mortgagor and the grantee who takes subject to the mortgage, an equity does exist, in such a situation, in favor of the mortgagor, which can not be taken from him without his consent, and which bears a close resemblance to the equitable right of a surety the terms of whose contract have been modified by a contract made between the creditor and principal debtor. The conveyance made by the mortgagor may be made expressly subject to the mortgage; this is probably the usual case. But where the conveyance is not made expressly subject to the mortgage, and the grantee does not assume the mortgage, the amount of the mortgage would usually be deducted from the purchase price and the understanding of the parties generally is that the mortgaged property should first be exhausted in payment of the mortgage. Thus the mortgagor-grantor and the grantee both act upon the understanding that the land bound for the debt should pay the debt as far as it will go. While we cannot accurately denominate the grantee as a principal debtor, since he is not personally liable at all, the land is the primary fund for the payment of the mortgage debt, and so the grantee's land stands specifically liable to the extent of its value in exoneration of the mortgagor from personal liability. The understanding of the mortgagor-grantor and the grantee and the nature of the transaction gives rise to this equity in favor of the mortgagor which he can enforce through the right of subrogation. If the mortgagee seeks to collect the mortgage debt by bringing an action against the mortgagor on his personal obligation, which he is entitled to do in most jurisdictions, and the mortgagor satisfies the claim, he is entitled to be subrogated to the right of the mortgagee to foreclose the mortgage against the grantee and thus enforce the equity that exists in his favor; or he may, after conveyance, and after maturity of the mortgage debt, pay the debt and enforce his equity against the grantee by way of subrogation.

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[1] Mutual Ben. Life Ins. Co. v. Lindley, 183 N. E. 127 (Ind. App. 1932); Travers v. Dorr, 60 Minn. 173, 62 N. W. 269 (1895); Murray v. Marshall, 94 N. Y. 611 (1884).

Where the mortgagee makes a valid agreement [2] with the grantee extending the time of payment of the debt, without the mortgagor's consent, the mortgagee thus modifies the mortgagor's right of subrogation. The mortgaged land may decrease in value between the original date of maturity of the debt and the extension date. The extension increases the amount of interest; and it takes away the mortgagor's right of subrogation during this period of extension. It is clearly unjust to the mortgagor to subject him to a new risk which he has not assented to and does not anticipate. It is more desirable and is just that the mortgagee, in such a situation, assume the risk of depreciation and of collecting the accumulation of interest during the extension period by being obligated to seek payment out of the land itself to the extent of the value of the land at the time the extension agreement was made and thus release the mortgagor to this extent. The result is that while the mortgagee may foreclose the mortgage, he is not entitled to a deficiency judgment against the mortgagor, unless at the time of the extension the value of the land did not equal the amount of the debt. It seems that in an action by the mortgagee to foreclose and obtain a deficiency judgment against the mortgagor the burden is on the mortgagor to allege and prove the value of the land at the time the extension agreement is made, in order to show the extent of his release. If the mortgagor shows that the value of land is equal to or greater than the mortgage debt, at the time the extension agreement is made, there is no liability on his part at all, since the making of the agreement without his consent released him to the extent of the value of the land at that time. That is to say, there is a complete release under such circumstances. If the value of the land was less than the amount of the debt, the mortgagor is only released to the extent of the value of the land; and he is personally liable to the extent of the difference.

In *Braun v. Crew*,[3] a California decision, the mortgagor conveyed the mortgaged premises to *P.*, and thereafter by subsequent conveyances *C.* became the owner thereof, and while he was owner the mortgagee agreed with *C.* to extend the time of payment of the mortgage debt for two years. This extension was made without the knowledge or consent of the mortgagor. While the mortgage was recorded, it was not alleged or found that the purchaser from the mortgagor or any

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2 In order to constitute a valid "extension," as that term is used herein, there must be valid agreement based upon a sufficient consideration which in substance varies the original contract of the mortgagor, as it is contained in the mortgage, by postponing the time for its performance beyond that fixed by the terms of the mortgage; and such extension must be one that ties the hands of the creditor-mortgagee for a reasonably definite or ascertainable time. Slottow v. Hull Inv. Co., 129 So. 577, 581 (Fla. 1930).

3 183 Cal. 728, 192 Pac. 531 (1920).

subsequent purchaser assumed or agreed to pay the mortgage debt, or that the same constituted a part of the consideration of either of the transfers. The California Civil Code provided that where the original contract of the *guarantor* is altered *in any respect* by the creditor, without the consent of the *guarantor,* or where the creditor impairs or suspends his rights or remedies against the principal, in respect thereto, the "guarantor is exonerated." Also, the Civil Code provided that the mortgagee could not collect his debt by action except by foreclosing the mortgage. In view of these provisions of the Civil Code, the Supreme Court of California held that the mortgagor was released completely, and stated that the fact that he did not allege and prove the value of the land at the time the extension agreement was made was immaterial. The court said: ". . . the surety is entitled to stand on the strict letter of the contract upon which he is liable, and that any change therein made without his consent, by which the contract is altered so as to impair or suspend the right of the creditor to proceed to enforce payment, fully releases the surety. . . . the question of the extent of the injury which the surety sustains therefrom cannot be inquired into. The creditor cannot show, for example, that the principal debtor was then wholly or partially insolvent, and so remained. The surety is released by the mere fact that his contract is materially altered without his consent."

The general rule that a surety is released completely by an extension agreement made between the creditor and the principal debtor without his consent was probably never intended to apply to such mortgage transactions.[4] In the ordinary suretyship transaction, involving only *personal* liability, the injury to the surety by an exten-

[4] In Murray v. Marshall, *op. cit. supra* note 1, at 614, the court said: "The trial court held, that the extension by plaintiff's testator of the time of payment of defendant's bond and mortgage, by a valid agreement with her grantee, who had taken a deed subject to the mortgage but without assuming its payment, operated to discharge the defendant wholly from liability. This conclusion rested upon the rule applicable to principal and surety which forbids the former to change the essential terms of the contract without the consent of the latter, except at the peril of the surety's complete discharge. In most of these cases the courts have refused to enter upon the inquiry whether the surety was damaged or not by the change, and the justification of such refusal ordinarily lies in the fact that the surety is bound only by the contract which he made, and not by the new and substituted one which alone can be legally enforced. . . . But the present case is not a case of principal and surety in the strict and technical definition of such relation. . . ."

Cf. the following remarks of the court in Bunnell v. Carter, 46 Pac. 755, 756 (Utah, 1896),: "The measure of his [the mortgagor's] injury was his right of subrogation, and that was necessarily measured by the value of the land. The extension of time took away his right of subrogation, and discharged him to the extent of the value of the land. . . . From the time of the extension of the time of payment by the mortgagee, the risk of future depreciation fell upon the creditor. . . ."

sion of time given to the principal debtor by the creditor without the surety's consent is the amount of the principal debtor's obligation; the surety's contract is affected to this extent.

"The relation of principal and surety is not limited to two persons, but may exist between a person and a fund or between two funds." [5] In the type of mortgage transaction under consideration, the relation involves a person (the mortgagor) and a fund (the mortgaged land). The relation is not created by a contract between the mortgagor, mortgagee and the purchaser of the premises subject to the mortgage. It exists by virtue of the conveyance by the mortgagor. If the mortgagor is called upon to respond for the whole debt, he is entitled to reimbursement from the purchaser by being subrogated to the right of the mortgagee to foreclose the mortgage and thus enforce the understanding between him and the purchaser. The extent to which the rights of the mortgagor are affected by an extension agreement is the value of the land—not the whole debt.

It is the writer's opinion that the provisions of the California Civil Code, relating to the release of the guarantor where the creditor alters his contract *in any respect,* without his consent, were probably not intended to be applicable to the type of transactions under consideration. If the Legislature had intended the statute to apply to all suretyship transactions, of whatever nature, it would have been a simple matter to have so provided. This statute was enacted in 1872, and was based on Field's Draft of the New York Civil Code.[6] The New York rule was established in *Murray v. Marshall* [7] in 1884; and the rule announced in this case seems to be the present rule in New York.[8] The New York cases apparently consider that the matter is controlled in accordance with the rule that where the creditor has security for a debt, which he relinquishes, or as to which he misconducts himself, the surety is not wholly discharged, but only to the extent to which he is injured; that is to say, the value of the security. The mortgagor is not released entirely, under the New York doctrine. As was said in *Murray v. Marshall,* "The measure of his injury was his right of subrogation, and that necessarily was bounded by the value of the land. The extension of time, therefore, operated to discharge him only to the extent of that value."

The fact that the mortgage debt cannot be collected by action, except by foreclosing the mortgage, would not seem to make any difference. If the mortgagee forecloses, and seeks a deficiency judgment

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[5] Per Mitchell, J., in Travers v. Dorr, 62 N. W. 269, 270 (Minn. 1895).

[6] See Note to section 2819, CAL. CIV. CODE (Deering, 1929).

[7] *Op. cit. supra* note 1.

[8] See White v. Augello, 254 N. Y. S. 228 (1931); Antisdell v. Williamson, 59 N. E. 207 (N. Y. 1901).

against the mortgagor, he thereby seeks full payment of the debt. Likewise, he seeks a complete payment of the debt where he sues the mortgagor at law on the bond, note or other contract, separate from the mortgage and which the mortgage secures. In either case an agreement extending the time of payment, made without the mortgagor's consent, would affect his right of subrogation.

There is some authority for the rule that where a mortgagor conveys subject to the mortgage, no relation of principal and surety exists between them. Thus, in *Chilton v. Brooks* [9] the Court of Appeals of Maryland said: "The terms of the deed creating no personal obligation on the grantee to pay the mortgage debt, there was no such relation existing between the grantor and grantee in the deed as that of principal and surety; and, as that relation did not exist, the grantor was not discharged, nor his liability on the note affected, by an indulgence as to time of payment, given by the plaintiffs to the grantee in the deed. Shepherd v. May, 115 U. S. 514, 6 Sup. Ct. Rep. 119." The statement in *Shepherd v. May* to the effect that an agreement of the mortgagor's grantee, to which the mortgagee was not a party, to pay the mortgage does not put the mortgagor and the mortgagee in the relation of principal and surety towards the mortgagee, so that the latter, by giving time to the grantee, will not discharge the mortgagor, was wholly unnecessary to the decision, and none of the authorities cited have any tendency to support it. That the court had not had full opportunity to consider the question is evident from what was said in *Union Mutual Life Ins. Co. v. Hanford.*[10] It has been pointed out that the relation of principal and surety is not limited to two persons. If the Maryland Court intended to leave this inference, its view is clearly contra to the better view and the weight of authority. It would overlook the real nature of the transaction where a mortgagor conveys subject to the mortgage.

Stephen P. Banas.

TAXATION—CONSTITUTIONAL REQUIREMENTS—NATURE AND EXTENT OF THE POWER IN GENERAL—LICENSES—FOR OCCUPATIONS AND PRIVILEGES—EXEMPTIONS.—As a very lucrative course of revenue many legislatures have passed laws taxing gasoline sold in the state. Counties in performing their various duties often use a large quantity of gasoline. To pay the tax on the gasoline they use would impose a burden on the counties which they do not care to bear and which they seek to avoid. Whether or not they can avoid these taxes has been adjudicated in several recent cases.

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9 72 Md. 554, 20 Atl. 125, 127 (1890).

10 143 U. S. 187, 12 Sup. Ct. 437, 36 L. ed. 118 (1891).

Some of the aspects of the problem were presented in a case of this year.[1] In this article the author will first present the various points of law which are thought to govern the problem and then show how these legal principles were applied in the various cases.

"Taxes are defined as being the enforced proportional contribution of persons and property, levied by the authority of the state for the support of the government, and for all public needs." [2] "The power of taxation rests upon necessity, and is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent state or government, and it is as extensive as the range of subjects over which the power of that government extends. As to such subjects and except in so far as it is limited or restrained by the provisions of the constitutions, national and state, a state's power of taxation, if exercised for public purposes, is general, unlimited and absolute, extending to all persons, property, and business within its jurisdiction, the only security against an abuse of the power being found in the structure of the government itself in that in imposing a tax the legislature acts upon its constituents." [3] In the absence of constitutional limitations then, the legislature has an absolute *right* to tax whom and what they desire to any extent. The courts have no power to check the legislature in this matter. It is only when the legislature imposes a levy which is not actually a tax and therefore not within its power to legislate that the courts can interfere.[4] For example, if the legislature passed a "tax" law for *private purposes* it would not be a tax and the courts would interfere.[5]

Any limitations on the *right* of a state to impose a gasoline tax on a county must be in its constitution and in it alone. It is generally held that since the constitution in limiting the power to tax is limiting a vested right in the legislature, its provisions for limitation must be clear and explicit.[6] Under this rule of construction a constitutional provision exempting the *property* of a county from taxation would not exempt the county from an *excise* tax.[7] Gasoline taxes have frequently been held to be excise taxes.[8] Constitutions, while not specifically exempting the property of counties from taxation, frequently provide that the property of "the state and its governmental subdivisions" be ex-

1 State v. Cheyenne County, 256 N. W. 67 (Neb. 1934).

2 COOLEY, LAW OF TAXATION (1881) 1.

3 TAXATION, 61 C. J. § 7.

4 COOLEY, *op. cit. supra* note 2, at 35, and cases cited therein.

5 COOLEY, *op. cit. supra* note 2, at 36.

6 State v. Cheyenne County, *op. cit. supra* note 1; see, also, cases cited in note 27 *infra*.

7 State v. Cheyenne County, *op. cit. supra* note 1.

8 See cases cited in note 27 *infra*; but see Commonwealth v. Pure Oil Company, 303 Pa. St. 112, 154 Atl. 307 (1931).

empted. A county is a governmental subdivision of the state and would come under such an exemption.[9]

Would the property of a county be exempted from taxation by a constitutional exemption of the property of *municipal corporations?* The general rule is that counties are not municipal corporations, although some courts have held them to be such.[10] A liberal construction of the words "municipal corporation" so as to include counties would seem justifiable. A municipal corporation is a division of government. To tax a municipal corporation is merely to tax indirectly its inhabitants, since the tax must come ultimately from the pockets of the people of the municipality. Such a process of taxation is expensive and poor policy. It is for this reason that the constitutions exempt municipal corporations from taxation.[11] But if a county is not strictly a municipal corporation, counties and municipalities are both parts of the same political system,[12] and the public policy which excluded the property of municipalities from taxation should have equal force with counties. It would seem that the courts could construe "municipal corporations" as used in such constitutional provisions to include counties within its scope.[13]

The extent of the *right* of the legislature to impose a gasoline tax on a county being determined, the next step is to determine whether or not the legislature has actually imposed such a tax. The law imposing the tax might specifically include counties in those taxed. In the absence of constitutional limitations the tax is valid.[14] If a constitutional provision exempts the property of the county from taxation,[15] and this provision is held not to exempt the county from excise taxes,[16] the problem presents itself as to whether the gasoline tax is a property or an excise tax. Bouvier defines an excise as "an inland imposition paid sometimes upon the consumption of the commodity and frequently upon the retail sale." It appears that an excise tax is one imposed for the privilege of doing something beneficial with property, while a property tax is a tax on the possession of the property.[17] The majority of the courts hold gasoline taxes to be excise taxes.[18]

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9 COUNTIES, 15 C. J. § 1.

10 COUNTIES, 15 C. J. § 2, notes 31, 32, 33.

11 2 COOLEY, LAW OF TAXATION (4th ed.) 621.

12 COUNTIES, 15 C. J. § 2, note 32.

13 See O'Berry v. Mecklenburg County, 198 N. C. 357, 151 S. E. 880, 67 A. L. R. 1304 (1930).

14 TAXATION, *loc. cit. supra* note 3.

15 State v. Cheyenne County, *op. cit. supra* note 1; COUNTIES, *loc. cit. supra* note 9; COUNTIES, *loc. cit. supra* note 10; cases cited in note 27 *infra.*

16 State v. Cheyenne County, *op. cit. supra* note 1.

17 INTERNAL REVENUE, 33 C. J. § 3.

18 See cases cited in note 27 *infra*; but see Commonwealth v. Pure Oil Company, *op. cit. supra* note 8.

Often the gasoline tax is in general terms so that counties are not specifically mentioned. The question then arises as to whether the terms used are inclusive of counties. The intent of the legislature governs. In construing this intent the courts are faced by two conflicting presumptions. The general rule is that all exemptions from taxation must be strictly construed.[19] Under this rule taxation in general terms would include counties. But Cooley, in his work on Taxation,[20] says: "Some things are always presumptively exempted from the operation of general tax laws because it is reasonable to suppose they are not within the intent of the legislature in adopting them. Such is the case with property belonging to the state and its municipalities, and which is held by them for public purposes. All such property is taxable, if the state shall see fit to tax it; but to levy a tax upon it would render necessary new taxes to meet the demand of this tax, and thus the public would be taxing itself in order to raise money to pay over to itself, and no one would be benefited but the officers employed, whose compensation would go to increase the useless levy. It cannot be supposed that the legislature would ever purposely lay such a burden upon public property, and it is therefore a reasonable conclusion that, however general may be the enumeration of property for taxation, the property held by the state and by all its municipalities for public purposes was intended to be excluded, and the law will be administered as excluding it in fact, unless it is unmistakably included in the taxable property by the constitution or a statute." The rule which Cooley puts with such force and conviction has received the support of the courts in a good many of the gasoline tax cases.

Any one of the following conditions, then, should be sufficient to make a gasoline tax invalid as against a county: 1. A specific constitutional exemption of the county from *all* taxation;[21] 2. A constitutional exemption of the "state and its governmental subdivisions" from *all* taxation;[22] 3. A constitutional exemption of municipal corporations from *all* taxation provided the court holds a county to come under the class designated municipal corporations;[23] 4. A constitutional provision of one of the above three forms exempting only *property* of the county from taxation, *provided* the tax is construed as a property tax;[24] 5. No constitutional exemption, but either a statutory exemption or a failure on the part of the legislature to specifically in-

19 TAXATION, 61 C. J. § 396.

20 2 COOLEY, *loc. cit. supra* note 11.

21 TAXATION, *loc. cit. supra* note 3.

22 COUNTIES, *loc. cit. supra* note 9.

23 COUNTIES, *loc. cit. supra* note 10; O'Berry v. Mecklenburg County, *op. cit. supra* note 13.

24 INTERNAL REVENUE, *loc. cit. supra* note 17; and see cases cited in note 27 *infra*. But see Commonwealth v. Pure Oil Company, *op. cit. supra* note 8.

clude the county in those taxed, and in adoption by the courts of the doctrine stated by Cooley.[25]

A brief resume of several cases will serve to illustrate these rules and their application. In *State v. Cheyenne County*[26] the State of Nebraska brought proceedings against the County of Cheyenne to collect taxes under a statute which *specifically* included counties in those taxed. The County set up in defense two constitutional provisions: one that "The Legislature shall not impose taxes upon municipal corporations . . . for corporate purposes"; the other that "The property of the State and its governmental subdivisions shall be exempt from taxation." The court held in behalf of the state. The constitutional exemption of municipal corporations from taxation was held not to apply to counties because a county is not in its nature strictly a municipal corporation, and constitutional restrictions on the sovereign power of taxation cannot be extended by implication but must be specific. In considering the property exemption the court pointed out that it must be construed strictly since it was limiting a vested right of the legislature, and that therefore it only exempted the county from *property* taxation. Turning its attention then to the gasoline tax statute the court decided, citing authority, that it was an excise tax and not a property tax.

Five conditions were set out above, any one of which would be sufficient to render a gasoline tax against a county invalid. The procedure of the court in deciding this case in favor of the State amounted to a finding that no one of these was present. Condition number one was not met because the constitution had no such provision. Condition number two was not met because the constitutional exemption was held to apply only to property. Condition number three was not met because the court held that counties were not municipal corporations. Condition number four was not met because the court found that a gasoline tax was an excise tax. Condition number five was not not met because the statute specifically included counties in those taxed.

Since all the cases have been decided in just such a manner, the author will take up each condition and show how the cause of the county stood or fell on each condition in the various cases.

Condition number one, as set out above, under which the county would escape the tax is "a specific constitutional exemption of the county from *all* taxation." No case has been found in which the court was faced with such a provision. In several cases the constitution provided that the county was exempt from property taxation but the courts uniformly held that such provisions *only* exempted the county from property taxes and not excise or license taxes.[27]

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25 TAXATION, *loc. cit. supra* note 19; 2 COOLEY, *loc. cit. supra* note 11.

26 State v. Cheyenne County, *op. cit. supra* note 1.

27 People v. City and County of Denver, 84 Colo. 576, 272 Pac. 629 (1928); Crockett v. Salt Lake County, 270 Pac. 142, 60 A. L. R. 867 (Utah 1928); In-

No constitutional provisions met condition number two which is a constitutional exemption of the "state and its governmental subdivisions" from *all* taxation. While a similar provision was held to include counties in its scope [28] it only exempted property from taxation.[29]

No case has been found in which a constitutional exemption of municipal corporations was held to apply to counties.[30]

Condition number four has been considered in practically every case. In discussing numbers one and two, it was seen that several constitutions did exempt the property of the county from taxation. Provided the gasoline tax was a property tax this would invalidate it against counties. In *Commonwealth v. Pure Oil Company* [31] the tax was held to be a property tax because the statute imposed the tax *on fuel*, not on its use, consumption, or any other privilege, but on the property itself. But the great weight of authority is that the statutes impose excise taxes.[32] In *People v. Deep Rock Oil Corporation* [33] the statute was found to impose an excise because the Act provided: "It is the purpose of this Act to impose a tax upon the privilege of operating each motor vehicle upon the public highways of this State, such tax to be based upon the consumption of motor fuel in such motor vehicle." [34]

Finally, the county could escape a gasoline tax even when no constitutional provision prohibited it, provided there existed either a statutory exemption or a failure on the part of the legislature to specifically include the county in those taxed, and an adoption by the courts of the doctrine stated by Cooley.[35] In *O'Berry v. Mecklenburg County*,[36] where the statute imposed the tax on a "distributor," the court held that counties were not included because statutes do not bind the sovereign unless the sovereign is expressly mentioned. The court also pointed out that the statute went on to impose fines on the "distributor" for violation of its provisions, and the property of the "distributor" was subject to execution and sale to collect these fines. Since the property of the county is not subject to execution and sale, the

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dependent School District, etc., v. Pfost, 4 Pac. (2d) 893 (Idaho 1931); People v. Deep Rock Oil Corp., 343 Ill. 338, 175 N. E. 572 (1931); City of Ardmore v. State, 32 Pac. (2d) 728 (Okla. 1934); City of Louisville v. Cromwell, 27 S. W. (2d) 377 (Ky. 1930); Stedman v. City of Winston-Salem, 204 N. C. 203, 167 S. E. 813 (1933); State v. City of Monroe, 149 So. 541 (La. 1933).

28 O'Berry v. Mecklenburg County, *op. cit. supra* note 13.

29 See cases cited in note 27 *supra*, which discuss the scope of a property tax exemption.

30 See State v. Cheyenne County, *op. cit. supra* note 1.

31 *Op. cit. supra* note 8.

32 See cases cited in note 27 *supra*.

33 *Op. cit. supra* note 27.

34 Compare with reasons given for decisions in the cases cited in note 27 *supra*.

35 2 COOLEY, *loc. cit. supra* note 11.

36 *Op. cit. supra* note 13.

legislature did not intend to include counties. In *Commonwealth v. Pure Oil Company* [37] the court held that to bind a municipality the tax statute must contain an express or necessarily implied purpose to bind it.

In *People v. City and County of Denver* [38] the failure to expressly tax counties and cities was held to relieve them of the tax. The court in this case cited *Denver v. Bonesteel,*[39] which contains an excellent discussion of the principle. In *Crockett v. Salt Lake County* [40] the court held that counties were sufficiently designated among those taxed by the words "distributor or retail dealer." A strong dissenting opinion holds that general terms should not bind the county, going at great length into the principle stated by Cooley.

A great number of courts have refused to recognize this principle, and have held general terms sufficient to bind the county.[41] For a reason the courts point out that the tax money goes towards the upkeep of the state highways which the county and the people of the county use as well as the rest of the individuals who must pay the tax. This argument is open to some criticism. First, the people of the county who actually use the state highways will pay this tax in their individual consumption of gasoline. Secondly, the county in buying gasoline is using it to a great extent in keeping its own roads in shape. If it be said that the county uses the state roads, the state also uses the county roads. One use balances the other. Why should the county be compelled to give the state the added help of taxes?

In conclusion it must be pointed out that however excellent the theories advanced by the counties may be, the later decisions are practically unanimous in upholding the right of the state to collect these gasoline taxes. The reason for this may be attributed to a reluctancy of the courts to act affirmatively where the legislatures have not clearly done so in a matter peculiarly a legislative function. The courts apparently feel that arguments of public policy are for the legislature and not for the court to entertain.

Robert Devine.

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37 *Op. cit. supra* note 8.

38 *Op. cit. supra* note 27.

39 28 Colo. 483, 65 Pac. 628 (1901).

40 *Op. cit. supra* note 27.

41 Crockett v. Salt Lake County, *op. cit. supra* note 27; State v. Sioux Falls, 244 N. W. 365 (S. D. 1932); City of Louisville v. Cromwell, *op. cit. supra* note 27; People v. Deep Rock Oil Corp., *op. cit. supra* note 27. See also City of West Palm Beach v. Amos, 130 So. 711 (Fla. 1930).

TORTS—ACTS OR OMISSIONS CONSTITUTING BREACHES OF DUTY OR OBLIGATIONS IN GENERAL.—The Supreme Judicial Court of Massachusetts in a recent case, *Ross v. Wright*,[1] held that the failure of the clerk of a business trust to transfer shares of stock as requested by the owner thereof does not give rise to a cause of action in favor of the intended transferee. The plaintiff, in his declaration, alleged, in substance, that the owner of shares of business trust some time before his death, attempted to make a gift of shares to the plaintiff. The clerk of the business trust, the defendant in this case and the son of the decedent, refused to transfer the shares so as to complete the gift, after he had failed to persuade his father to make a corresponding gift of shares to him and to his sisters. The declaration did not allege any right against the clerk of the business trust, whose duty was to transfer the shares of stock at the direction of the owners. The plaintiff did not allege a right in the shares apart from the transaction between the decedent and the clerk of the business trust, or that any contract was entered into between the plaintiff and the decedent, or that any completed gift of the shares was made; and there was no allegation of any act on the part of the clerk of the business trust which was wrongful toward the decedent. The Supreme Judicial Court affirmed the order of the lower court sustaining a demurrer to the declaration on the ground that the declaration set forth no cause of action. The plaintiff's case rests solely upon the ground that the defendant, by refusing to transfer the shares of stock so as to carry out the intention of the decedent, intentionally, but not maliciously, interfered with the completion of an attempted gift, that is, interfered with the plaintiff's expectancy of receiving such stock as a gift. The accusation of the plaintiff, then, presents the question squarely: Does the defendant's failure to transfer the shares of stock in his capacity as clerk of the business trust as requested by a shareholder thereof give rise to a cause of action in favor of the anticipated recipient of the gift?

It has long been a fundamental principle that in order to constitute a tort there must be conduct constituting a breach of duty and a violation of right.[2] The alleged right in this instance was the anticipated use and enjoyment of the shares of stock which the decedent had intended to give to the plaintiff. The violation of alleged "right," under the facts of the present case lay in the defendant's failure to make a transfer of the shares of stock as intended by the decedent. Does the law protect such a "right"?

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1 190 N. E. 514 (Mass. 1934).
2 162 N. E. 99 (N. Y. 1928).

In *Tuttle v. Buck* [3] the court laid down the broad proposition that the mere establishment of a barber shop by the defendant for the sole purpose of maliciously injuring the plaintiff and the use of his prestige and influence to entice customers away from the plaintiff's shop gave rise to a cause of action. This court rendered its decision on the ground that it is not competition where the act is done merely to injure a competitor. The maliciousness of the act complained of was the element which converted it into a tort and a cause of action. ". . . the case carries to an unusual, if not unprecedented, length the doctrine that a malicious motive may convert into a tort and a cause of action what otherwise might be done without imputation of wrong or liability to damages. If this position can be maintained it would seem to be within the power of a business or professional man to invoke the powers of the courts to search the motives of his competitor or rival, and determine whether the latter is actuated by the desire to promote his own happiness and prosperity, or merely to defeat that of the plaintiff. . . . The case is, perhaps, another illustration of the maxim that hard cases make poor law." [4]

The theory of unfair competition and of tortious interference in another's business appears to have had application in a leading case, *Keeble v. Hickeringill*,[5] wherein Lord Holt declared that the defendant was not entitled to exercise a privilege solely to injure the plaintiff. However, an important English case, *Mogul Steamship Company v. McGregor Gow & Co.*,[6] supports the proposition that mere competition to advance one's own interest and for the purpose of gain is privileged even though it is intended thereby to drive the rival in trade out of business, and though the intention be actually carried into effect. Likewise in the "Schoolmaster's case," [7] as early as 1410, this contentious problem as to the legal right of exercising a privilege with the intention of injuring others arose for adjudication. In this case the plaintiffs were the only school teachers in a town. The defendant started a competing school and cut the price for teaching. The plaintiffs' writ of trespass was dismissed, the court holding the price the defendant had fixed was fair and that there was no ground to maintain this action.

In *Dunshee v. Standard Oil Co.*[8] the court held that a wholesale dealer who enters the retail business for the *sole purpose* of driving a retailer out of business is liable for the injury thus inflicted by him.

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[3] 107 Minn. 145, 119 N. W. 946, 22 L. R. A. (N. S.) 599, 16 Ann. Cas. 807 (1909).

[4] Note (1909) 22 L. R. A. (N. S.) 599.

[5] 11 East 547 (1809).

[6] L. R. 23 Q. B. Div. 598 (1889).

[7] Y. B. 11 Henry IV 47 (1410).

[8] 132 N. W. 371 (Iowa 1911).

The Supreme Court of Minnesota, in *Buck v. Latham,*[9] held that no action in tort arose where the defendant purchased the past due promissory note of plaintiff and brought suit on it for the *purpose of oppressing the defendant,* subjecting him to the costs of the suit, forcing him to dispose of his property at a sacrifice, and injuring his financial standing. The principle that an injury to one man resulting from the exercise by another of an absolute right does not constitute a tort was applied in this case even though the action was malicious.

Prima facie, perhaps, these cases seem to be irrelevant to the instant case, but they have been noted to indicate the tenor of the court's decisions in protecting the exercise of absolute rights even though injury to another may result. It is to be specifically noted that in all the cases cited *active misconduct* and *intentional interference* on the part of the defendant were the motivating causes of the injuries for which redress is sought. In *Ross v. Wright,*[10] the subject of this note, nonfeasance, or failure to act, was the cause of the alleged injury. No contractual right, no property right, no business right, no right that might arise from any legal relation whatever was the subject of the so-called interference. The plaintiff is in reality no worse off because of the passive inactivity of the defendant than he was before. In the cases aforementioned, the defendant by interfering with the plaintiff or his affairs, has brought a new harm upon him and created a positive loss. In this case the defendant has not bettered the position of the plaintiff, but he has not damaged it by his failure to benefit him. Professor Bohlen compresses the whole idea into a few words, when, in speaking of nonfeasance, he says: "There is here a loss only in the sense of an absence of a plus quantity." [11] The plaintiff's expectancy of receiving as a gift property which she had no special right to acquire is obviously a much less definite right—if it may properly be described as a right —than the right of a person to carry on a trade or business. It would be difficult to find legal justification for the extension of liability in tort if damages were awarded the plaintiff in this case.

The recent case of *Thomas v Briggs* [12] presents a problem analogous to the present case. In this Indiana case the defendant had promised to procure witnesses in order that the testatrix might execute her will. The defendant failed to act in compliance with his promise until such time as the testatrix had fallen into a stupor when the will was executed. Probate was refused the will, presumably because of defective execution. The court decided the case in favor of the plaintiff, imposing a constructive trust on the defendant in favor of the beneficiaries un-

9 126 N. W. 278 (Minn. 1910).
10 *Op. cit. supra* note 1.
11 BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 295.
12 189 N. E. 389 (Ind. 1934), reviewed in 9 NOTRE DAME LAWY. 457.

der the will, on the grounds of fraud. "The decision seems to have only a moral basis. There is no liability at common law; and never before has a constructive trust been imposed on one failing to act where he is under no duty to do so." [13] There was no tort liability in the above case for failure of the defendant to act; neither is there any such liability in the present case. The decision tends to show how far afield the Indiana Appellate Court journeyed to finally attach liability on the very dubious ground of a constructive trust. No mention of this principle was made in the present case for what seems to us an obvious reason.

In *Hutchins v. Hutchins*,[14] an early New York case, a will had been made and executed devising certain real estate to the plaintiff. The defendants in the action conspired with each other to induce the testator to revoke it, and effected their object by means of false and fraudulent representations. It was held that the plaintiff could not maintain the action, as the revocation of the will merely deprived him of an expected gratuity, without interfering with any of his rights. The court said: "The only foundation of his [the plaintiff's] claim rests upon the mere unexecuted intention of his father to make a gift of the property; and this cannot be said to have conferred a right of any kind. To hold otherwise, and sanction the doctrine contended for by the plaintiff, would be next to saying that every voluntary courtesy was matter of legal obligation; that private thoughts and intentions, concerning benevolent or charitable distributions of property, might be seized upon as the foundation of a right which the law would deal with and protect." The relation between this and the principal case is apparent. In neither case was there a duty of the defendant toward the plaintiff; in this respect, the facts and the alleged grounds for relief in both cases are practically identical. The plaintiffs in both cases were deprived of an expected gratuity. A stronger claim for relief was presented by the plaintiff in the New York case, in that it was a specific affirmative act and not mere nonfeasance that produced the alleged injury. And still the court held that the plaintiff did not state a cause of action.

Although the point was not argued in the case, the question may arise as to whether the defendant was under a moral obligation to transfer the stocks and thereby carry out the intentions of the decedent. There seems to be no reason for such a moral obligation. The defendant had no moral duty, as such, toward the plaintiff. No moral relationship had arisen between them. A comparable situation would tend to clarify these remarks. Suppose the defendant were asked as to the plain-

[13] Note (1934) 9 NOTRE DAME LAWY. 457, 460.
[14] 7 Hill 104 (N. Y. 1845).

tiff's need of a gift such as the decedent intended to give in the present case. If the defendant answered that he did not believe the plaintiff needed such a gift, there would certainly be an interference with the probable expectancy of the gift being made, but it hardly can be said that because of his advice the defendant became morally obligated to the plaintiff. The plaintiff's position, unsupported by any moral or legal relationship with the defendant, makes him a total stranger to the entire transaction. Likewise, there seems to be no grounds on which to base a charitable obligation from the defendant to the plaintiff. It is impossible, therefore, to find a basis for the recovery of damages by the plaintiff in the present case. Although it is apparent that he had an interest which might indeed influence his hopes and expectations, that interest is altogether too shadowy and evanescent to be dealt with by the courts of law.

John J. Locher, Jr.

WILLS—RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES—CONTRIBUTION—APPEAL AND ERROR—REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.—Two recent decisions [1] of the Court of Appeals of Kentucky present an interesting question in the administration of estates. The opinion in each case is brief and deals only with the fact that the amount involved in each case (in one case the amount was less than $200, in the other it was $409.35) was not sufficient to give the Court of Appeals jurisdiction; there being no discussion in either instance of the merits of the controversy. The facts in each case are substantially the same, as far as the merits of each controversy are concerned: *X* died, leaving a will which made devises and bequests to *A*, *B* and *C*; the rest of his property was insufficient to pay the debts of the estate. *A* and *B* "had to sell the property bequeathed and devised to them respectively in order to liquidate the indebtedness of" the estate of *X*; they bring an action seeking to recover from *C*, by way of contribution, his proportion of the indebtedness of the estate which they had paid out of their respective bequests and devises. The lower court denied them the relief sought, and they filed a motion for an appeal in the Court of Appeals; the appeal was denied in each instance on the ground stated above. The Act of 1914,[2] regulating the jurisdiction of the Court of Appeals, in so far as pertinent to this discussion, provides that "no appeal shall be taken to the Court of Appeals as a matter of right from a

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[1] Rinehart v. McElroy, 72 S. W. (2d) 45 (Ky. 1932); Purdy's Adm'r v. Rinehart, 73 S. W. (2d) 33 (Ky. 1934).

[2] KY. STAT. (Carroll, 1922) § 950-1. See rule 20 (169 S. W. vii) of the Court of Appeals, adopted for the purpose of administering the Act.

judgment for the recovery of money or personal property, or any interest therein, or to enforce any lien thereon, if the value in controversy be less than five hundred dollars, exclusive of interest and costs. . . . Provided, however, that the Court of Appeals may grant an appeal when it is satisfied from an examination of the record that the ends of justice require that the judgment appealed from should be reversed; or when the construction or validity of a statute or the construction of a section of the constitution is necessarily and directly put in issue, and a correct decision of the case cannot be had without passing on the validity of the statute or construing the section of the constitution or the statute involved, if the value of the amount or thing in controversy, exclusive of interest and costs, is as much as two hundred dollars."

In analyzing this Act, two provisions stand out: First, There is no *right* to an appeal in either of the two cases; Second, While the amount in controversy in each case is less than five hundred dollars, it is *within the discretion* of the Court of Appeals to grant an appeal even when the *ends of justice require* that the judgment of the lower court be reversed. Even though *A* and *B* have equity and justice on their side of the case, they could not compel an exercise of that discretion in their favor.

As to the justice of the case being in favor of *A* and *B*, there can be no substantial doubt. It is provided by statute [3] in this State that "When any estate, real or personal, which has or shall be devised, shall be taken from the devisee for the payment of a debt of the testator, or one of the devisees shall pay such debt to save his devise, each of the other devisees shall contribute his proportion of the debt, interest and costs to the person so paying the same, according to the value received by him, except as hereinafter provided." As far as the facts of the two cases appear, the *exceptions* referred to are of no importance. The right to contribution, under this statute, does not depend upon the *amount* involved. In the second place, the devisee or legatee paying a debt of the testator to protect his devise or legacy need not wait until he has been sued on the debt before he pays to be entitled to contribution from the non-paying devisees and legatees. The basis of the right has been tersely put by the Court of Appeals as follows: ". . . though the right to contribution is given by the statute, still it is based upon the theory of an implied warranty of title and undertaking by the other devisees to contribute, of what they received, enough to restore the losing one to an equal footing." [4] In other words, it is based upon the maxim that *equality is equity*. The general devisees and legatees, in the two cases under consideration, would clearly be entitled to contribution, regardless of the amount in-

[3] Ky. Stat. (Carroll, 1922) § 2073.

[4] Pusey's Trustee v. Wathen, 14 S. W. 418, 419 (Ky. 1890).

volved, whether it be less than two hundred dollars or more than this amount. If the right to contribution is thus clearly established, the trial court would be bound to apply the law in favor of *A* and *B*. If the trial court refuses to do so, *A* and *B*, under the two decisions, apparently would be left without relief because of the smallness of the amount involved in their claims, resulting in a denial of justice. There would apparently be no way in which to control arbitrary and unjust decisions in such cases. If the Court of Appeals refuses to grant the appeal, it would probably refuse to mandamus the trial judge to decide the case according to the law. In *Shine v. Kentucky Cent. R. Co.*[5] an application was made in the Court of Appeals to compel the trial judge to impanel a jury and try the issue raised in a petition for condemnation of certain property. In refusing the writ, the Court of Appeals said: ". . . the writ should have been refused, for two reasons at least. Unquestionably the action of the county court was judicial. It did not refuse to act. . . . It exercised its judgment, and dismissed [the proceeding]. . . . while mandamus will lie to set a court in motion, it cannot be used to control the result. It might compel the trial of an issue, but not how it shall be tried. . . . If so, new trials could in effect be thus obtained; and this writ cannot be used for such purpose. The inferior court must be left free to exercise its own judgment, and the opinion of another tribunal cannot be substituted for it. . . . There is another one, however, why *mandamus* will not lie in this instance. The appellees had a right to appeal. . . . If an inferior court dismisses . . . an action without a trial upon the merits, or the intervention of a jury in a case where one is allowable, yet the party may appeal, and have the action tried *de novo*." Thus it will be noticed that one of the reasons advanced for denying a writ of mandamus was that there was another remedy available.

As a general rule, mandamus does not supersede other legal remedies, but rather supplies the want of a legal remedy; and it must appear that the law affords no other adequate or specific remedy to secure the performance of the duty which it is sought to enforce. The writer contends that if no other remedy is available to a litigant, after the decision in the trial court has denied him justice and is contrary to legal principles, the writ of mandamus should be available to him in the court of last resort. It should make no difference whether the writ is used for the purpose of compelling a trial of the controversy or to correct an erroneous decision. In either case, the writ would be available to prevent an unjust result when no other remedy is available. There is authority for this view. In *Ex parte S. & R. McLeod*[6]

[5] 3 S. W. 18 (Ky. 1887).

[6] 20 Ala. App. 641, 104 So. 688 (1925). See, also, Ex parte Sovereign Camp, W. O. W., 20 Ala. App. 531, 104 So. 899 (1925), *cert. denied*, Ex parte Gay, 213 Ala. 411, 104 So. 900 (1925).

the writ of mandamus was held to lie to compel the trial court to annul, set aside, and strike from the record, the docket entry and judgment entry purported to modify a void judgment *nunc pro tunc*, no other remedy being available. In other words, the writ of mandamus has been liberally employed to correct errors in the rulings of lower courts where injury has resulted, and there exists no right of appeal or other adequate means of redress. While the writer does not contend that the writ of mandamus should be used to control a discretion of the trial court, yet where the facts are clear and not disputed and the trial court renders a decision that is clearly erroneous, mandamus should be available, if there is no other remedy available to correct such error.

J. S. Montedonico.