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## Contributors to the March Issue/Notes

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## CONTRIBUTORS TO THE MARCH ISSUE

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## NOTES

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BILLS AND NOTES—NEGOTIABILITY—INTEREST ON INTEREST.—In *Burns Mortgage Co., Inc. v. Fried*<sup>1</sup> the plaintiff brought an action on six promissory notes, each of which contained the following provision: "With interest thereon (the principal sum) at the rate of 7% per annum from date until fully paid. Interest payable semi-annually. Deferred interest payments to bear interest from maturity at 10% per annum, payable semi-annually." The court held that this provision rendered the instruments nonnegotiable, and that the plaintiff was not entitled to maintain the action, as indorsee of the notes, in his own name.

The Negotiable Instruments Law provides in Section 1 that "An instrument to be negotiable must conform to the following requirements: . . . 2. Must contain an unconditional promise or order to pay

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<sup>1</sup> 67 Fed. (2d) 352 (1933).

a sum certain in money." Section 2 specifies that "The sum payable is a sum certain within the meaning of this act, although it is to be paid: 1. With interest; or 2. By stated instalments; or 3. By stated instalments, with a provision that upon default in payment of any instalment or of interest, the whole shall become due. . . ." In the above case the court reasoned that the instruments did not call for the payment of a sum certain within the meaning of these provisions of the Negotiable Instruments Law. The amount to be collected on the notes could not be determined by looking at their face, because it could not be ascertained whether or not there had been a default in interest. It was uncertain whether any interest was due on defaulted interest or not.

Two recent cases are in accord with this Federal case. In *First National Bank of Miami Florida v. Bosler*<sup>2</sup> the note in question provided that it was to be with interest thereon, payable semi-annually, at the rate of 8% per annum from date until paid. Deferred payments were to bear interest from maturity at 10% per annum semi-annually. The court held this instrument to be nonnegotiable, saying that "if the note provides for the payment of a principal sum and interest, it must clearly appear from the note itself, that at any given date the two will always aggregate a sum certain." In *New Miami Shores Corporation v. Duggan*<sup>3</sup> a note providing for interest at 8% until paid, and 10% on deferred payments was held nonnegotiable. In this case the court made no comment upon the point; it merely cited *First National Bank of Miami Florida v. Bosler* and based its decision entirely upon that case.

Courts in other jurisdictions have not taken the same view of this question as is set forth in the above cases. In *Continental & Commercial National Bank v. Jefferson*<sup>4</sup> a note provided for interest at 8% per annum, payable semi-annually from date until due. A further provision was as follows: "Should any of the principal or interest not be paid when due it shall bear interest at the rate of 10% per annum payable semi-annually, until paid." It was argued by counsel that this provision made the instrument nonnegotiable because there might or might not be a default in interest before the maturity of the instrument. However, the court held the instrument to be negotiable. The decision of the court was based on the following reasoning: "In a note in this form, if the maker complies with his contract, there is no question as to the amount necessary to pay the note at maturity and if he does not so comply the matter is one of simple computation.

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<sup>2</sup> 297 Pa. 353, 147 Atl. 74 (1929).

<sup>3</sup> 115 Atl. 262, 9 N. J. Misc. 620, Aff'd., 109 N. J. Law 220, 160 Atl. 515 (1931).

<sup>4</sup> 51 S. D. 477, 215 N. W. 533 (1927).

We think that there is no commercial uncertainty in the notes in question, and approve the language of Judge Amidon when he said:

“The rule requiring certainty in commercial paper was a rule of commerce before it was a rule of law. It requires commercial, not mathematical, certainty. An uncertainty which does not impair the functions of negotiable instruments in the judgment of business men ought not to be regarded by the courts.’ *Cudahy Packing Co. v. State National Bank*, 134 F. 538, 67 C. C. A. 662, at 666.”

The Kansas City Court of Appeals of Missouri held in *Brown v. Vossen*<sup>5</sup> that an interest bearing note providing that if the interest be not paid semi-annually, it should become as principal and bear the same rate of interest, was negotiable. The court stated that there was nothing indefinite, contingent, or uncertain about the terms of this note, and that no proper objection could be made to it within the law merchant. A similar note was before the Supreme Court of Washington in the case of *Barker v. Sartori*.<sup>6</sup> The note provided for the payment of interest semi-annually at the rate of 9% from date until paid, and if the interest was not so paid it was to bear interest after delinquency until date at the rate of 9%. In holding the instrument to be negotiable the court compared it to a note payable in instalments. The fact that an instalment might not be paid, and thereafter the note would not show on its face the amount to be due at maturity, does not affect the negotiability of such an instrument. The Kansas Supreme Court, in *Gilmore v. Hirst*,<sup>7</sup> held a note payable with interest at the rate of 8% per annum until paid, interest due to become principal and draw 8% interest, to be negotiable. The only comment made by the court was that such a provision did not make the amount uncertain.

In deciding which of these two views is the sounder, it should be remembered that the entire law of negotiable instruments arose from the needs of business men. From the standpoint of the business man such a provision in an instrument would not render it less desirable. No one would hesitate to purchase such an instrument merely because of the presence of the provision. Ordinarily men carry out their contracts according to their terms. If such a contract is carried out there could be no uncertainty as to the amount to be paid under it. It is only upon default or breach of contract that the provision becomes operative. In that case it would seem better to consider it merely as a provision for liquidated damages caused by the breach of contract, and not affecting the negotiability of the instrument. In an instrument payable with current exchange, due to the fluctuations in the rate of

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<sup>5</sup> 112 Mo. App. 676, 87 S. W. 577 (1905).

<sup>6</sup> 66 Wash. 260, 119 Pac. 611 (1911).

<sup>7</sup> 56 Kan. 626, 44 Pac. 603 (1896).

exchange, it is impossible to determine at any given date the exact amount to be paid on the instrument at maturity. Yet such instruments are negotiable. To hold that an instrument providing for the payment of interest upon deferred interest is nonnegotiable, is to adhere to the letter rather than to the spirit of the Negotiable Instruments Law.

*John A. Berry.*

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BILLS AND NOTES—STATEMENTS INCORPORATING EXTRINSIC INSTRUMENTS—EFFECT ON NEGOTIABILITY.—The necessity of certainty and precision in mercantile affairs, and the inconvenience which would result if commercial paper were encumbered with conditions and contingencies, have led to the establishment of an inflexible rule, that to be negotiable a contract must be payable absolutely and without any conditions or contingencies to embarrass its circulation.<sup>1</sup>

The Negotiable Instrument Law provides that an instrument to be negotiable "must contain an unconditional promise to pay a sum certain in money." The reason of the rule, it was well said by Lord Kenyon, is, "that it would perplex the commercial transactions of mankind if paper securities of this kind were issued out into the world encumbered with conditions and contingencies, and if the parties to whom they were offered in negotiation were obliged to inquire when the uncertain events would probably be reduced to a certainty."<sup>2</sup>

The questions to be considered in this note are: (1) What statements in a note referring to extrinsic instruments will operate to incorporate the extrinsic instrument in the note?; and (2) Under what conditions will incorporating extrinsic instruments in the note destroy the negotiable character of the note?

The problem involved under our first question is illustrated by the following cases: In *Lockrow v. Cline*<sup>3</sup> a bond which was otherwise negotiable, in specific terms made a mortgage deed, which was given to secure its payment, a part of that contract. The words of incorporation were as follows: "To which said deed reference is hereby made, and which is made a part of this contract." It was held that each and every condition, provision, and stipulation contained in the mortgage deed thereby became a part of the bond to the same extent that it would have been had the same been written in full upon the face of said instrument; and where the mortgage deed contains any promise or stipulation which, if inserted in the bond, would render it nonnegotiable, such will be the legal effect of that clause which makes the

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<sup>1</sup> "Bills and Notes," 3 R. C. L. 882, § 68.

<sup>2</sup> *Carlos v. Fancourt*, 5 T. R. 482, 4 Eng. Rul. Cas. 180 (1794).

<sup>3</sup> 4 Kan. App. 716, 46 Pac. 720 (1896).

mortgage deed a part of the contract. Also in *Chapman v. Steiner*<sup>4</sup> the note contained the following clause: "In case of the breach of any of the covenants or conditions in the mortgage deed securing this bond contained, to which said deed reference is hereby made, and which is made a part of this contract, in either such case the said principal sum with all accrued interest, shall, at the election of the legal holder or holders hereof, at once become due and payable without further notice and may be demanded and collected, anything herein contained to the contrary notwithstanding." It was held here that the mortgage was incorporated into the note so as to destroy negotiability. The court said: "You may not incorporate with such a promise stipulation and agreements as to other matters, and then say that the absolute promise to pay money lifts the contract into the region of negotiable paper."

But in the case of *Farmer v. Malvern First National Bank*<sup>5</sup> the following statement was held not to incorporate the mortgage in the note: "This note is given for borrowed money and is secured by a mortgage of this date." Also, in *Page v. Ford*<sup>6</sup> incorporation was held not to result from the provision: "This note is secured by mortgage of even date given to secure the balance of the purchase price of the property described in said mortgage."

In the recent Illinois case of *Pfueger v. Broadway Trust and Savings Bank*<sup>7</sup> a similar decision is reached. In this case the plaintiff brings an action of replevin against the Broadway Trust and Savings Bank for the recovery of three debenture bonds. The defendant entered a special plea alleging that the bonds were payable to bearer and negotiable. On December 26, 1926, the defendant bank accepted the three debentures as collateral security for a seven-day loan made to one Hoffmeyer who gave his note for the amount of the loan which was unpaid. The plaintiff, who was the owner of the debentures, placed them in a safe from which they were stolen about April 9, 1928, by some unknown persons. He maintains that they are nonnegotiable

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<sup>4</sup> 5 Kan. App. 326, 48 Pac. 607 (1897). Accord: *Northwestern Nat. Ins. Co. v. Southern States Phosphate & Fertilizer Co.*, 20 Ga. App. 506, 93 S. E. 157 (1917); *Titlow v. Hubbard*, 63 Ind. 6 (1878); *McComas v. Haas*, 107 Ind. 512, 8 N. E. 579 (1886); *Continental Bank & Trust Co. v. Times Pub. Co.*, 143 La. 209, 76 So. 612 (1917); *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293 (1879); *Grimison v. Russell*, 14 Neb. 521, 45 Am. Rep. 126, 16 N. W. 819 (1883); *Dakin v. Graves*, 48 N. H. 45 (1868); *Riech v. Daigle*, 17 N. D. 365, 117 N. W. 346 (1908); *Reynolds v. Richards*, 14 Pa. 205 (1850); *Dilley v. Van Wie*, 6 Wis. 206 (1858); *International Finance Corp. v. Calvert Drug Co.*, 124 Atl. 891 (Md. 1924).

<sup>5</sup> 89 Ark. 132, 115 S. W. 1141, 131 Am. St. Rep. 79 (1909).

<sup>6</sup> 65 Or. 450, 131 Pac. 1013, Ann. Cas. 1915 A, 1048, 45 L. R. A. (N. S.) 247 (1913).

<sup>7</sup> 351 Ill. 170, 184 N. E. 318 (1932), aff'g. 265 Ill. App. 569. Accord: *Bright v. Offield*, 81 Wash. 442, 143 Pac. 159 (1914); *Utah Lake Irrigation Co. v. Allen*, 64 Utah 511, 231 Pac. 818 (1924); *Sturgis Nat. Bank v. Harris Trust & Savings Bank*, 351 Ill. 465, 184 N. E. 589 (1933), aff'g. 266 Ill. App. 199.

because they were issued under a certain trust agreement. The statement in the debentures referring to said trust agreement was as follows: "To which trust agreement reference is hereby made for a statement of the terms under which the said debentures are issued and the rights and obligations of the company, of the trustees and of the respective holders of the said debentures under the said trust agreement." Plaintiff claims that this clause so modifies the unconditional promise to pay that it renders the debentures nonnegotiable. In order for the above clause to render the debentures nonnegotiable it must be of such a nature that the unconditional promise to pay has become qualified or uncertain; this must be determined from the writing itself and not from extrinsic evidence. The quoted reference to the trust agreement does not affect this unconditional promise to pay, but only means that the holder is referred to the trust agreement for his rights under the agreement. The court decided the question on this theory and held the debentures were negotiable.

This distinction as to the unconditional promise to pay under the trust agreement is clearly drawn by the Supreme Court of Michigan in *Paepcke v. Paine*.<sup>8</sup> There the court said in commenting on a reference which was practically the same as stated in the above-mentioned Illinois case: "The reference in the bond above quoted does not assume to in any way affect the unconditional promise to pay. A purchaser is referred to the trust agreement for a statement of the rights and obligations of the company, the trustee and the holders of the bonds 'under the said trust agreement.' It in no way refers to or qualifies the unconditional promise of the company to pay the bond at maturity theretofore clearly expressed. The reference gives notice to the bondholder that he may examine the trust agreement to ascertain the nature and kind of security pledged to insure payment and the procedure provided for to enforce the same, should he care to do so before making purchase thereof. But it in no way imposes that duty upon him in order to determine the status of the bond as a negotiable instrument."

In *Sturgis National Bank v. Harris Trust & Savings Bank*<sup>9</sup> the statement on the note was: "This bond is one of a series of bonds

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<sup>8</sup> 253 Mich. 636, 235 N. W. 871 (1931). Accord: *Farmer v. Malvern First Nat. Bank*, *op. cit. supra* note 5; *Dumas v. People's Bank*, 146 Ala. 226, 40 So. 964 (1906); *Aspen First Nat. Bank v. Mineral Farms Cons. Min. Co.*, 17 Col. App. 452, 68 Pac. 981 (1902); *Hayward Lumber & Investment Co. v. Naslund*, 13 Pac. (2d) 775 (Cal. 1932); *Duncan v. Louisville*, 13 Bush 378, 26 Am. Rep. 201 (1877); *Collins v. Bradbury*, 64 Me. 37 (1875); *Towne v. Rice*, 122 Mass. 67 (1877); *Howry v. Eppinger*, 34 Mich. 29 (1876); *Ewing v. Clark*, 76 Mo. 545 (1882); *Heard v. Dubuque County Bank*, 8 Neb. 10, 30 Am. Rep. 811 (1878); *Valley Nat. Bank v. Crowell*, 148 Pa. 284, 23 Atl. 1068, 33 Am. St. Rep. 824 (1892).

<sup>9</sup> *Op. cit. supra* note 7.

for the aggregate principal sum of two million five hundred thousand dollars (\$2,500,000) or five hundred and thirteen thousand seven hundred and sixteen pounds, four shillings and five pence . . . sterling, and is entitled to the benefits and subject to the provisions of a mortgage or deed of trust dated January 3, 1910, made by the obligor company to City Trust Company, as trustee. This bond is subject to redemption at 10% and accrued interest on January 1, 1915, and any interest date thereafter. The obligor company is required to create a sinking fund which is to be used in the purchase of bonds of said series at or below said redemption price, and the principal of said bonds may become due in case of default or sale under said mortgage or deed of trust, all as provided in said mortgage or deed of trust, to which reference is made for a complete statement." Upon giving his decision that the bonds were negotiable, the court said: "There is no statement in the bonds that the terms or provisions of the mortgage are made or shall be considered a part of the bonds, and no reference to any provisions of the mortgage or deed of trust except those which have been mentioned. The only word in the bond which lends slight color to the plaintiff in error's claim is the word 'subject.' It is manifest that the only purpose of the recital in the bonds was to notify the purchaser that, besides the absolute personal obligation which was enforceable against the corporation, there was a specific mortgage lien on real estate to which the purchaser might resort for information as to the situation, extent and value of the security and for the means, right, manner, and limitation of the enforcement of such security. The bond specifically recites that it is entitled to the benefits of the mortgage or deed of trust and subject to its provisions, which amounts to no more than that it is entitled to the security of the mortgage or deed of trust subject to its provisions for making the security available. This is the fair and reasonable interpretation of the bonds in this case, particularly in view of the rule stated by Professor Williston in his work on Negotiable Instruments, on page 266: 'When the reference presents a questionable problem of interpretation because of the desirability of upholding the negotiability of an instrument which the commercial world treats as negotiable, the courts will incline to interpret the reference as one which does not qualify the corporation's promise to pay but simply refers the holder to the indenture for the determination of his rights with reference to the security.'

As to the second question, under what conditions incorporating extrinsic instruments into the note will destroy its negotiable character, the student is confronted with two propositions: (1) The negotiability must be determined from the face of the note itself. Anything requiring reference to another document to determine the terms of the instrument destroys negotiability. (2) Negotiability of the note will not be destroyed merely by incorporating an extrinsic instrument in



the note if nothing in the extrinsic instrument conflicts with the requisites of a negotiable contract.

One of the leading cases supporting the first proposition is *Enoch v. Brandon*.<sup>10</sup> In this case The Manitoba Power Company issued a series of bonds all of which were equally secured by and entitled to the benefits and subject to the provisions of a trust mortgage. The bonds contained the following clause in referring to the mortgage: "To which reference is hereby made for a description of the property mortgaged and pledged, the nature and extent of the security, the rights of the holders of the bonds with respect thereto, the manner in which notice may be given to such holders, and the terms and conditions upon which said bonds are issued and secured." The court said that such a reference made the bonds nonnegotiable and set out the reason that in order to be negotiable a bond or note must contain an unconditional promise to pay a fixed sum on demand, or at a fixed or determinable future time, to order or bearer. Only if it fulfills these requirements is it negotiable. If in the bond or note anything appears requiring reference to another document to determine whether in fact the unconditional promise to pay a fixed sum at a future date is modified or subject to some contingency, then the promise is no longer unconditional. What that document may provide is immaterial.

In *King Cattle Company v. Joseph*<sup>11</sup> an action was brought to recover bonds issued by the plaintiff and held by the defendant. Plaintiff's president, R. S. Nutt, borrowed money from Slimmer and Thomas and gave his note for \$12,000, depositing 40 bonds and a certificate for 750 shares of stock in the plaintiff company as collateral. Stevens and Company indorsed the note and Nutt failing to pay, the former paid it and took the note and collateral. Stevens and Company pledged Nutt's notes to the Union State Bank of Minneapolis. Twenty of the bonds were also pledged in this same bank. Stevens and Company later pledged the remaining twenty to the defendant to secure a debt of \$11,200. The bonds contained a clause which read: "All of which bonds have been issued, or are to be issued, under and in pursuance of, and are all equally secured by, and are subject to an indenture of mortgage or deed of trust, dated September fifteenth, 1920, duly executed by the company to said Yellowstone Bank & Trust Company, of Sidney, Montana, as trustee, under which indenture all of the property of the company, real, personal, and mixed, now owned or hereafter acquired, has been transferred and mortgaged to said trustee and hereby reference is made to said indenture and the same made a part hereof, with the same effect as if herein fully set forth." The language of these bonds goes far beyond a mere reference to the

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<sup>10</sup> 249 N. Y. 263, 164 N. E. 45 (1933).

<sup>11</sup> 158 Minn. 481, 198 N. W. 798, 199 N. W. 437 (1924).

underlying security. The parties evidently intended to incorporate and include the provisions of the trust deed in the bonds. They wrote into them a notice to an intending purchaser that, in determining the nature of the obligation of the maker, he could not stop with a reading of the bonds, but must also read the trust deed, for the conditions of the trust deed were impressed upon them. In one sense the bonds were incomplete, not because there were unfilled blanks or omissions to be supplied, for there were none, but because on their face the bonds carried notice that the entire contract of the parties was not expressed. It was necessary to look to a separate instrument to be certain as to when and how the maker of the bonds could be compelled to pay them. For these reasons the bonds were held to be nonnegotiable.

The note in *Hull v. Angus*<sup>12</sup> contained upon its face a condition in these words: "This note is given as a part of the purchase price of real property, and is secured by mortgage of even date herewith, and is subject to all the terms and conditions of said mortgage." The court laid down the rule that when the language of a bond not only refers to the provisions of the trust deed securing it, but makes the bond subordinate to the conditions of the deed, the bond shows upon its face that it is not a complete and regular negotiable instrument. A purchaser cannot determine from a mere inspection of the bond that it contains an unconditional promise to pay a sum certain at a fixed or determinable future time, but must examine the deed to ascertain the precise nature of the obligation of the maker of the bond.

A leading case supporting the second proposition is *Hunter v. Clarke*<sup>13</sup> in which case a note was involved providing as follows: "I promise to pay to the order of Edward T. Oliver five thousand dollars, with interest on the same at the rate of eight per cent. per annum, after due, until paid, according to the tenor of a certain mortgage deed bearing even date herewith, given by John B. Hunter and wife to Edward T. Oliver. Payable at the State National Bank, with exchange. John B. Hunter." Plaintiff also set out the mortgage mentioned in said principal note, which secured the same and the notes given for interest up to its maturity. The mortgage provides that, in case of the neglect or refusal to pay any of said notes when due, or in case of waste or nonpayment of taxes and assessments, or neglect to insure or keep insured the buildings on the mortgaged premises for the benefit of the mortgagee, the principal note, with all accrued interest thereon, should become due and payable at the option of the legal holder thereof, and the mortgage might then be foreclosed. The objections made to this note are that, when read with the mortgage

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<sup>12</sup> 60 Or. 95, 118 Pac. 284 (1911).

<sup>13</sup> 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160 (1900).

therein referred to, it may become payable before the time specified in the note; and by virtue of the provisions of the mortgage it secures an uncertain sum for taxes and insurance, and secures the holder against acts constituting waste. Assuming that the note and mortgage are to be construed as one instrument so far as the stipulations of the mortgage may affect the note, the first question is whether a provision that upon a certain contingency the holder shall have the option to declare a note due before the time fixed for its maturity will destroy its negotiability. It is true that the money must be certainly payable, and, if it is uncertain whether the money will ever become due, the instrument is not a promissory note. Here it is certain that the time would arrive when the note would be payable. It would be absolutely due on March 1, 1894, but upon a certain contingency it might become due earlier. Notes payable at or before a given date are negotiable. An option of the maker to pay before the date fixed does not affect the negotiability of the note, and it is payable absolutely notwithstanding the option. Consequently, the incorporation in the promissory note of the mortgage not interfering with the requisites of negotiability, the note must be held to be negotiable.

In *Farmer et al. v. First Nat. Bank of Malvern*<sup>14</sup> the note read: "I promise to pay to Jesse M. Grubbs, or order, the sum of one thousand dollars with ten per cent interest from date until paid for value received of him. This note is given for borrowed money and is secured by a mortgage of this date on the following personal property, to wit: (Describing it.) The appraisal of property is waived in the face of said mortgage, and it includes any other indebtedness that may be due from the maker of this note to the said Jesse M. Grubbs, and the undersigned agrees to have said property insured in some good insurance company in the sum of \$1,000 to protect the holder of this note. This first day of April, A. D. 1904. P. B. Farmer." Wood, J., stated that the note was a negotiable instrument, saying: "The general rule is that 'it is essential to the negotiability of a note that it purport to be only for the payment of money; for, if any other agreement of a different character be ingrafted upon it, it becomes a special contract clogged and involved with other matters, and loses thereby its character as a commercial instrument.' But the general rule is subject to the qualification that, if the superadded agreement do not impair the certainty of the promise to pay the certain amount named but only facilitates the means of its collection, it does not in any degree destroy the negotiability of the instrument, but is embodied in

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<sup>14</sup> *Op. cit. supra* note 5. See also: *Des Moines Sav. Bank v. Arthur*, 163 Iowa 205, 143 N. W. 556 (1913); *Blumenthal v. Jassoy*, 29 Minn. 177, 12 N. W. 517 (1882); *Bradbury v. Kinney*, 63 Neb. 754, 89 N. W. 257 (1902); *Cunningham v. McDonald*, 98 Tex. 316, 83 S. W. 372 (1904); *Thorp v. Mindeman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003 (1904).

the contract of all the parties, and passes as an incident of the paper itself to every holder.' ' . . . The point to determine is . . . whether such agreement is a part of or necessary to the fulfillment of the promise or order. If it is not, it does not destroy the instrument's negotiability.' . . . Here the recitals of the fact of the mortgage as a collateral to the note and of the promise to have the property insured as an additional security do not in any wise impair the obligation to pay the certain amount in money named. It does not tend to impede, but rather to facilitate, its collection. The promise to pay a certain sum of money at a certain time remains absolute. The collateral contract does not affect the principal obligation except to aid in its fulfillment. The note therefore remains a courier without luggage."

*Joseph P. Judge.*

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CONSTITUTIONAL LAW—DUE PROCESS OF LAW—MORATORIA ACTS.—*Home Building and Loan Ass'n. v. Blaisdell*,<sup>1</sup> recently decided by the Supreme Court of the United States, shows a more marked tendency toward a more liberal construction of the Constitution than any previously decided case. The case attracted much public attention since it was the first important judicial test that the so-called "New Deal" legislation was forced to undergo. Its fate might be regarded as a forerunner of the future of like legislative enactment which will depend upon the exigency of the times as a reason for their affirmation.

Briefly, the case came to litigation under the moratorium statute passed by the Minnesota legislature in 1933.<sup>2</sup> That Act provides that "the period of redemption may be extended for such additional time as the court may deem just and equitable, but in no event beyond May 1st, 1935."<sup>3</sup> The principal question involved was as to the constitutionality of the above Statute under which the appellee mortgagor claimed the statutory extension, and which the appellant mortgagee claimed as a violation of the contract clause<sup>4</sup> and the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The Minnesota court held the Statute constitutional<sup>5</sup> and this decision was affirmed by the Supreme Court of the United States.

In 1811 the United States Supreme Court had its first real opportunity to decide whether the constitution was to be an air-tight doc-

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<sup>1</sup> 54 S. Ct. 231 (1933), affirming *Blaisdell v. Home Building & Loan Ass'n*, 249 N. W. 893, 86 A. L. R. 1507 (Minn. 1933).

<sup>2</sup> Chapter 339, Laws of Minnesota (1933).

<sup>3</sup> *Op. cit. supra* note 2.

<sup>4</sup> Art. 1, § 10.

<sup>5</sup> *Blaisdell v. Home Building & Loan Ass'n, op. cit. supra* note 1.

ument or a flexible guide to suit the exigencies of the times. Chief Justice Marshall, in deciding *Sturges v. Crowninshield*,<sup>6</sup> which held invalid all discharges of debtors by insolvency and bankruptcy laws passed subsequently to the making of the contracts affected thereby, held to a strict adherence of the constitutional principles as laid down by the makers of the constitution. The case is an oft repeated one and has influenced almost every constitutionality test since it was decided. In that case Marshall differentiates between a remedy and an obligation in a contract. The present Court dismisses Marshall's distinction by merely saying that neither the reasoning nor the case parallels the present case. Whether it does or does not is a question we are not prepared to answer here. It does, however, show the ever present tendency away from strict interpretations and precedent.

The question of moratorium statutes is by no means a new one. No serious economic crisis ever passed without numerous attempts at debtor relief.<sup>7</sup> Heretofore it had been an uninterrupted practice of the Supreme Court, with but few exceptions, to overrule such attempts as a violation of the contract clause of the Constitution. The questions presented and the arguments given on both sides are not new in the records of the Supreme Court. In all these statutes the relief provided for was for extension of redemption after sale, while in the Minnesota case both the sale and the redemption are postponed. Likewise in the Minnesota Statute there was a provision for the payment of rents which the court emphasizes, while in all the other statutes no such provision was made. In 1841 a statute in Illinois provided that redemption on mortgages be postponed.<sup>8</sup> The case of *Brown v. Kinzie*<sup>9</sup> was litigated under this statute and the United States Supreme Court held the law to be unconstitutional. *Brown v. Kinzie* has been the leading case<sup>10</sup> on the subject for years and its holding is apparently in direct conflict with the decision in the case under consideration. However, the Court, in *Brown v. Kinzie*, does not consider any *emergency* nor does there appear to have been one at that time. The court in this case holds to the strictest interpretation of

<sup>6</sup> 4 Wheat. 118; 4 Law. Ed. 529 (1819).

<sup>7</sup> See "Mortgages," 41 C. J. 863.

<sup>8</sup> Act of the legislature of Illinois, approved February 27, 1841.

<sup>9</sup> 1 How. 310, 11 Law. Ed. 143 (1843).

<sup>10</sup> *M'Crackin v. Hayward*, 11 Law. Ed. 399, 2 How. 606 (1844); *Hathorn v. Calef*, 17 Law Ed. 779, 69 U. S. 10 (1864); *U. S. v. Muscatine*, 19 Law. Ed. 494, 75 U. S. 575 (1869); *Tennessee v. Sneed*, 24 Law. Ed. 612, 96 U. S. 69 (1877); *Hoyt Metal Co. v. Atwood*, 289 Fed. 455 (1923); *M'Clintick-Marshall Co. v. Scandinavian American Bld'g Co.*, 296 Fed. 604 (1924); *Smith v. Spillman*, 205 S. W. 107, 1 A. L. R. 136 (Ark. 1918); Notes: 1 A. L. R. 143; 9 A. L. R. 9.

In *Tennessee v. Sneed*, 24 Law. Ed. 612, 96 U. S. 69 (1877), the court modified somewhat the rule but still followed *Brown v. Kinzie*. The court said a state legislature could alter or modify a remedy to enforce a contract without impairing its obligation, provided an effectual remedy is left for its enforcement.

the constitution and from the language used in the decision it is reasonable to infer that had the Supreme Court decided *Home Bld'g & Loan Ass'n v. Blaisdell* in 1841, it would have decided it in an entirely different manner. This alone should be enough to show the change in constitutional constructions.

If any general rule can be formulated it is that a mere change in remedy does not violate Art. 1, Section 10, of the Constitution, unless it amounts to an impairment of the obligation of contract. In all cases resembling the one under discussion it has been variously argued as to what amounts to a mere remedy and what is an impairment of the obligation. No set rule has ever been laid down as the question is generally one peculiar to the case under discussion. However, there are cases holding that war legislation in the nature of a dilatory law which suspends any creditor's right, when that right is based upon a contract, is unconstitutional.<sup>11</sup>

The above cases are absolute and no deviation from this rule has ever been recorded until 1920, when the New York and Washington *lease* cases were decided.<sup>12</sup> These cases appear to be in direct parallel with the present case. At the time these cases were decided there was a shortage of housing both in New York City and in the city of Washington following the World War due to a sudden influx of immigrants. The fact that a property owner is deprived of occupation and re-leasing, perhaps at even better rents, after a lease has run its contracted course, is certainly an impairment of a contractual obligation. Yet these cases were held not to violate the impairment clause in the Constitution purely on the grounds that there was an *emergency* which had to be met by emergency measures.<sup>13</sup> In *People v. La Fetra*,<sup>14</sup> the leading New York *lease* case, the court sounded the opening note of the present tendency when it was said: "Although an emergency cannot become a source of power and though the constitution cannot be suspended in any complication of war or peace, an emergency may afford a reason for putting forth a latent governmental power already

<sup>11</sup> Note, 9 A. L. R. 9; *Hudspeth v. Davis*, 41 Ala. 389 (1866); *Burt v. Williams*, 24 Ark. 91 (1863); *Stevens v. Andrews*, 31 Mo. 205 (1860); *Jones v. Crittenden*, 4 N. C. 385 (1814).

<sup>12</sup> *Horn v. Klugman*, 112 Misc. 171, 183 N. Y. S. 150 (1920); *Shanik v. Eckhardt*, 112 Misc. 86, 183 N. Y. S. 155 (1920); *Guttag v. Shatzkin*, 113 Misc. 362, 185 N. Y. S. 71 (1920); *William Brandt & Co. v. Weil*, 113 Misc. 320, 185 N. Y. S. 497 (1920).

<sup>13</sup> *Paterno Investment Co. v. Katz*, 112 Misc. 282, 184 N. Y. 737 (1920): "If in fact an emergency exists and conditions have arisen 'which seriously affected the public welfare, health and morals in the city of New York' it was not only the right but the duty of the legislature to pass statutes which would reasonably tend to correct the conditions and remove the danger to the public welfare, health and morals." See also *Blek v. Davis*, 193 App. Div. 215, 183 N. Y. S. 737 (1920).

<sup>14</sup> 130 N. E. 601, 16 A. L. R. 152 (N. Y. 1921).

enjoyed but previously unexercised." The statement in itself is not new since it has been propounded before, notably in *Ex Parte Milligan*,<sup>15</sup> which is often cited as holding just what the New York court decided in the *La Fetra* case. However, the startling fact remains that both the New York and the Washington lease cases mark the first holding that carried the above generalization into decisions where finding the so-called "latent governmental power" was a difficult thing to do.

*Block v. Hirsh*,<sup>16</sup> the leading Washington lease case, marks the initial step of the Supreme Court of the United States into the realm of uncertainty as to constitutional interpretation. It likewise shows the leaning away from precedent which would not allow such flexibility in interpreting the Constitution. Chief Justice Holmes said, in this case: "Circumstances may so change in time or so differ in space as to clothe with a public interest so great as to justify regulation by law an interest which at other times, or in other places, would be a matter of private concern." Whether such a blanket statement in favor of flexibility would have seemed heresy to Marshall,—a matter of conjecture,—we are not prepared to answer. In the light of *Sturges v. Crowninshield*<sup>17</sup> it would not seem that Marshall could have assented to such a novel view. The fact that it shows a marked and surprising reversal of form is sufficient.

The next case notable in the history of this question is the *Blaisdell* case now under consideration. The Supreme Court of Minnesota perhaps more openly gave the real reason for the decision than did the Supreme Court of the United States. The Minnesota Court held the statute constitutional and said: "The only ground upon which chapter 339, Laws of 1933, can be sustained is that it is legislation in virtue of the police power called into existence because of the public economic emergency which the act declares exists in this state."<sup>18</sup> This plain statement is exactly the ground upon which the Minnesota Court decided the case, which was only recently upheld by the Supreme Court of the United States. The United States Supreme Court, though interspersing their opinion with other considerations, finally evolved the rule which, in the final analysis, is the same as laid down by the Minnesota Court quoted above. Chief Justice Hughes, in his opinion, goes into the history of the making of the constitution and of the forces which prompted the insertion of the "contract clause" of Art. 1, Sec. 10.<sup>19</sup> The times immediately following the Revolution were fraught with much financial distress. There were many attempts at

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<sup>15</sup> 18 Law. Ed. 28 (1861).

<sup>16</sup> 256 U. S. 196 (1921).

<sup>17</sup> 4 Wheat. 118, 4 Law. Ed. 529 (1819).

<sup>18</sup> *Blaisdell v. Home Building & Loan Ass'n.*, *op. cit. supra* note 1.

<sup>19</sup> Citing Fiske, *The Critical Period of American History* (8th Ed.) 168 *et seq.*

legislation to defeat the claims of creditors and the ends of justice. So numerous were these attempts that contractual relations were virtually at a standstill and the constitution fathers, seeing the need for some sort of check on legislative power along this line, inserted the article on impairment. Whether this was meant to be merely a check to help inspire confidence and trust in business, or whether it was an absolute provision which was to be construed strictly and without variation, is a question which has been answered with many and conflicting opinions. Marshall ascribed to the latter view, while our present Court tends in the opposite direction.

The decision no doubt will be far reaching in its results. Already numerous states have enacted similar statutes<sup>20</sup> and some have been declared unconstitutional by the state courts. Other measures of debtor relief and similar legislation will receive heretofore unheard of consideration in the light of the recent view on *emergency* construction.<sup>21</sup> What results the decision will have upon other questions of constitutionality that will come up in the future cannot now be answered. Will the Court carry its newly elucidated interpretation to new heights, or will it, after the present *emergency* lapses, renew the old construction of Marshall? How far will the court go in declaring even *emergency* legislation constitutional? These questions only time can answer.

The Constitution has been the guiding light in 150 successful years of model constitutional government. It has been the supreme law ever ready to check over-zealous legislators and a strict adherence to it has kept the principles of democracy intact. Our tendency of late has been to enlarge the meaning of its makers and to give broader interpretations to its prohibitions. The Supreme Court of Minnesota declared their statute to be "not a violation but a vindication of our form of constitutional government." Chief Justice Hughes further substantiates this statement when he says: "The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very basis of individual opportunity."

*Paul Kempter.*

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<sup>20</sup> Arizona, Arkansas, California, Idaho, Illinois, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, West Virginia, and Wisconsin.

<sup>21</sup> *People v. Nebbia*, 186 N. E. 183 (N. Y. 1933); *Russel v. Battle Creek Lumber Co.*, 252 N. W. 561 (Mich. 1934).



CONVERSION—WHAT CONSTITUTES POSSESSION—RELATIVE RIGHTS OF PROPERTY OWNERS.—The Appellate Court of Indiana has just handed down a decision which, with respect, the writer believes is not sustainable by principle or authority. The case is titled *Chicago, I. & L. Ry. Co. v. Pope*.<sup>1</sup> Because of a wreck an amount of coal was thrown upon the defendant's land. The plaintiff requested the defendant's permission to remove the coal, but this the defendant refused until the plaintiff should pay the sum of thirty-five dollars. An agent of the plaintiff began to remove the coal, but after part of it had been removed the defendant forbade him to take any more. The plaintiff thereupon sued in conversion. The lower court held for the defendant and the Appellate Court affirmed the decision.

Let us first examine the reasoning whereby the learned judge arrived at his decision. He based his decision upon a North Carolina case.<sup>2</sup> In this case the plaintiff had purchased a quantity of lightwood at a sheriff's sale of the defendant's property. Upon the plaintiff's attempt to obtain the wood he was refused admission to the defendant's land, and informed that directly he made an attempt to enter for that purpose the defendant would sue him. The plaintiff sued for conversion. The question of whether or not the defendant had exercised such dominion over the wood as to constitute conversion was deemed one for the jury.

However, the learned judge, with fitting wisdom, chose to base his present decision not on the holding but on the dissenting opinions of two equally learned Carolina judges. The first of these held that conversion is an act, and that where no act has been done there is no conversion. Further, that the defendant's threat to sue the plaintiff was without legal foundation and that, therefore, in fearing it the plaintiff was "stupid." He then asks, "What has the Plaintiff to complain of? Has the Defendant injured his property? Has he used it in any way, or exercised any act of ownership inconsistent with the Plaintiff's right? He has not. He has merely threatened to sue the Plaintiff if he took the lightwood away, or entered upon his premises for that purpose and it is admitted that no such action would lie."

The second judge's dissenting opinion agrees essentially with that of his confrère. He says further, however, that the plaintiff had a right to remove the wood, that this right was not impaired by the defendant's threat to sue, and that ". . . his physical power to do himself justice still remained. Had that been opposed, then there would have been a conversion . . . The threats . . . ought to have been disregarded by the plaintiff."

I have been at pains to quote these two dissenting opinions in the Carolina case because the learned judge here placed so much weight

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<sup>1</sup> 188 N. E. 594 (Ind. 1934).

<sup>2</sup> *Nichols v. Newsom*, 6 N. C. 302 (1813).

on them. "The reasoning of said dissenting opinions," he said, "is so peculiarly applicable to the instant case, and so convincing, that we think we can best express our views on the question . . . by applying said reasoning to the facts in this case." However, he made two exceptions to their case. Learning from experience he excluded all chance of becoming a dissenter by ruling that the question of whether or not this was conversion was not for the jury, but for the court to decide, as being one of law, rather than of fact. He also ruled that in the Indiana case "there would be no basis for such implied right of seizure." And, repeating the rhetorical questions of the Carolina judge, he added some of his own: "Are we forced to say that appellee had done anything which, in legal effect, amounts to more than an exercise of his right to keep appellant off his premises? Is the mere exercise of such right a wrongful invasion of appellant's right? The answers to all these questions lead to the conclusion that appellee had done nothing which was wrongful." And, in conclusion: "The evidence in the instant case does not conclusively show that there was a 'wrongful invasion of appellant's right to, and dominion over,' the coal."

So much for the reasoning. Now let us interpret the ruling. Upon the facts of this case a landowner has an absolute right to his property, subject, apparently, to no privileges. A "right to keep appellant off premises" would seem to extend to all circumstances; and as long as one does not injure another's property by anything he does on his own property, or by anything that escapes from his property, he has an absolute right to the possession and enjoyment of it according to this decision. And whatever arrives on his land may not be removed. Not by an action for conversion, as we have seen by this case. Not by replevin, for according to Indiana statute<sup>3</sup> and decisions<sup>4</sup> the defendant must have possession of the plaintiff's goods before this action is maintainable and under the learned judge's ruling in the principal case the defendant has no such possession. Not by entry and removal of the goods, for the land owner, under the general rule,<sup>5</sup> may repel the trespasser from breaking the close—unless the entry be privileged. And the instant case has held that the plaintiff has no privilege here.

The effect of such a rule should be an interesting development to watch. For example: Without negligence on the owner's part, his car gets out of control, enters the land of another and there suffers a breakdown. The land owner may eject the trespasser<sup>6</sup> but under the

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<sup>3</sup> Burns Ann. Ind. Stats. (1926) § 1314.

<sup>4</sup> Loutham v. Fitzer, 78 Ind. 449 (1881); West v. Goff, 55 N. E. 506 (Ind. 1899).

<sup>5</sup> Newcome v. Russell, 133 Ky. 29, 117 S. W. 305 (1808); Morgan v. Durfee, 69 Mo. 469 (1879).

<sup>6</sup> See cases in note 5, *supra*.

ruling in point, the proprietor of the car may not recover the car as long as the landowner does not injure the car or use it in any way. To extend the example — if the car contained poultry, the owner could not return to care for them. Or if, without negligence, cattle being driven along the highway escape control and enter another's property, the farmer may not feed or milk his beasts. If the aforementioned car were a hearse, containing a corpse, "Let the dead bury their dead" would no doubt be considered applicable. Unless the learned judge has found a method of restraining human impulses, will men stand by and endure such deprivation of property? Obviously not.

With all due reluctance then we must conclude that there is error in the court's reasoning. Let us analyze it. The learned judge has held that unless an act be done, unless the defendant make some positive assertion of control, he has attained no possession; and secondly, that the entry of the plaintiff to remove his property is not privileged and therefore may be prevented.

First to consider the question of possession. The plaintiff obviously does not have possession of the property. It is here ruled that the defendant does not have possession of it. Would the learned judge have us believe that possession of material objects can hang suspended in air — halfway between heaven and earth, perhaps, like Mahomet's coffin? This cannot be anything but the merest casuistry. Wherein lies the difference as to whether I use a man's goods or keep him from using them? Is it any more deleterious if I use them—"in a manner inconsistent with his ownership"—or keep him from attending to their care, so that he may have the delicious pleasure of seeing them rot or die before his eyes? This last being, no doubt, in the court's opinion, one of the possible shortcomings of ownership with which it is entirely consistent.

Secondly, as to the privilege of entry. To hold that there is no such privilege is to grant a landowner an absolute right to his land. In Indiana, and elsewhere, a landowner's enjoyment of his property is *relative*, not absolute, and *sic utere tuo ut non alienum laedas* is a phrase noted for more than its antiquity. A landowner may not conduct a business, however lawful, that will "interfere with the comfortable enjoyment of life or property of adjoining owners."<sup>7</sup> Nor may he construct a nuisance thereon,<sup>8</sup> or allow a dangerous condition to prevail where a reasonable man would say that the probability of danger to others was strong.<sup>9</sup> Furthermore, though a landowner has a right to eject a trespasser he may not use unnecessary force<sup>10</sup> in so doing. Nor may he use a dangerous instrument to repel possible tres-

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<sup>7</sup> Ft. Wayne Cooperage Co. v. Page, 170 Ind. 585, 82 N. E. 83 (1907).

<sup>8</sup> Wolf v. DesMoines Elevator Co., 126 Iowa 659, 98 N. W. 301 (1904).

<sup>9</sup> Young v. Harvey, 16 Ind. 314 (1861).

<sup>10</sup> Wabash Ry. Co. v. Savage, 110 Ind. 314, 9 N. E. 85 (1886).

passers.<sup>11</sup> It has even been held that a landowner has a duty of care to an invitee who has become ill upon his property, and may not expel the latter when he is apparently in a helpless condition.<sup>12</sup> An Indiana case<sup>13</sup> has held that one may not kill a dog who is trespassing on his property under the presumption that the beast will create damages, even though such presumption is based on past material damage done by the same dog. In the light of this ruling one might ask with pertinence whether there is a substantial difference in effect between destroying property and allowing it to be destroyed by nature?

From these rulings it is obvious that a landowner's right in his land is far from *absolute*. Now as to the question of privileged entry. This question was raised in the two famous cases of *Ploof v. Putman*<sup>14</sup> and *Vincent v. Lake Erie Trans. Co.*<sup>15</sup> In the former case the plaintiff moored his boat to the defendant's dock during a terrific storm which was imperilling his own life and those of his wife, children and servants. Because of the bumping of the boat the wharf was being damaged and the defendant cast loose the mooring ropes. The boat was violently grounded and all aboard injured; whereupon the plaintiff sued for damages. The court held that an entry upon another's land is *privileged* in order to save one's own life or property, subject to liability for any actual damage he may cause in so doing. In the *Vincent* case the defendant owned the ship. The plaintiff sued for damages caused by the defendant's failure to cast loose from the plaintiff's dock during a storm which threw the boat continually against the dock. Here again it was held that although one is liable for actual damages caused, he is privileged to trespass upon another's property to save his own life or property.

Now as to the rule in Indiana. It was held in *Conwell v. Emrie*<sup>16</sup> that one is privileged to tear down another's building "to save it from being consumed and consuming other buildings adjoining." This is substantially the ruling of 21 Henry VII 27, and it was upon this that the decision in *Ploof v. Putman* was largely based. It is difficult to make any distinction between allowing one the privilege of entry to save goods which are in danger of *destruction by fire* and allowing one the same privilege to save goods from *destruction by deterioration*.

Therefore we suggest that the case of *Chicago, I. & L. Ry. C. v. Pope* be reconsidered both in the light of the ruling of the *Ploof* and *Vincent* cases, and in the interest of persons using adjoining property or highways.

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11 Bird v. Holbrook, 4 Bing. 628, 130 Eng. Rep. 911 (1828).

12 Depue v. Flatau, 100 Minn. 299, 111 N. W. 1 (1907).

13 Sosat v. The State, 2 Ind. App. 586, 28 N. E. 1017 (1891).

14 81 Vt. 471, 71 Atl. 188 (1908).

15 109 Minn. 456, 124 N. W. 221 (1910).

16 2 Ind. 35 (1850).

The learned judge omitted all discussion of the ability of the defendant to set a sum in damages before allowing the plaintiff entry. There seems to have been no evidence as to whether or not thirty-five dollars was a reasonable figure for the damages that might have been caused by removal of the coal. If no such evidence were offered it would seem to us to be laxity on the part of the plaintiff. In any case the defendant should not be granted a right to estimate his damages before they occur; the evils of such a situation may easily be foreseen, in view of the pecuniary spirit of the times. Nor should there be any necessity for an arbitration before removal of the property; for while the arbiters haggled the goods might very well become valueless—particularly if they are perishable.

In conclusion, with all due deference to the learned judge, we proffer this as a ruling in those cases where personal property arrives on land without negligence of the property owner: that the property owner shall be privileged to enter immediately and remove his property subject to liability for whatever actual damages he may cause by such removal.

*Joseph A. McCabe.*

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GRAND JURIES—NUMBER SUMMONED—METHOD OF IMPANELLING.—With the handing down of the decision in the case of *People of the State of Illinois v. Jack Lieber, otherwise called Charles Liber*<sup>1</sup> the Supreme Court of Illinois cast an ominous doubt over the validity of the method of selecting grand jurors which has been followed in Cook County, home of the City of Chicago, since the passage of the Jury Commissioners Act Amendment in 1897,<sup>2</sup> as amended by act approved July 2, 1931.<sup>3</sup>

The case upon which these momentous questions hinge was the case of Jack Lieber, who was convicted of robbery with a gun and is serving a sentence of one year to life in the penitentiary. Lieber's appeal was based on the ground that the sheriff had summoned *sixty* persons for grand jury duty on the body which indicted him (the regular practice in Cook County) rather than *twenty-three*, the number of jurors which, he says, the statute provides should be called. The court, in an opinion by Chief Justice Orr, supported his contention. Dissenting opinions were entered by Justices Clyde E. Stone and Frederic R. DeYoung. A rehearing is to be granted.

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<sup>1</sup> Complete text of majority opinion is found in Chicago Daily News, Feb. 24, 1934.

<sup>2</sup> 4 J. & A. Ill. Stat. Ann. (1913) § 6856 *et seq.*

<sup>3</sup> Smith-Hurd Ill. Rev. Stat. (1931) C. 78, § 24 *et seq.*

Though exact statistics as to the effect of the decision, if it is made final on the rehearing which is to take place shortly, are of course not yet available, newspaper surveys conducted amongst the judges and bar of Cook County point out very serious possible consequences.

The newspapers report that there are approximately 700 indictments in Cook County awaiting trial,<sup>4</sup> and in these cases the counsel for the defense will surely interpose the properly specific objections, based on the *Lieber* case, to the validity of the indictment. It is, of course, impossible to prophesy the rulings of the courts on these motions, especially since there appears to be some conflict as to the propriety of the motion when entered after indictment found.<sup>5</sup>

The better view appears to be that these 700 odd defendants will have to be re-indicted before they can properly be tried, and the resultant confusion and delay in an already over-crowded system are too plain to need further comment.

The decision will not affect those cases where the defendant did not properly take advantage of the alleged defect in summoning jurors before verdict, as the cases unanimously hold that the objection comes too late after verdict found.<sup>6</sup> In many cases in the past few years, however, it is known the proper objections were made at the proper time. Jurists and counsel set the number of convictions which depend for their validity upon the express point raised in the *Lieber* case at at least *twenty-five*. The more famous cases include these defendants: Ernest J. Stevens, Roger Touhy, and Dr. Wynekoop.<sup>7</sup>

In the *Lieber* case, to quote the majority opinion:<sup>8</sup> "The sole issue is whether the trial judge erred in refusing to quash the indictment because, as alleged, the grand jury was illegally impanelled."

The method followed in summoning and impanelling the grand jury in question is fully set out in the opinion. The judge ordered the clerk to repair to the office of the jury commissioners and draw sixty names of persons to appear as grand jurors for the July term, 1933. These names were so drawn and summoned by the sheriff, he on his return

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<sup>4</sup> Chicago Tribune, Feb. 24, 1934; Chicago Daily News, Feb. 24, 1934.

<sup>5</sup> See *Stone v. People*, 2 Scam. (Ill.) 326 (1840), wherein the court says, at p. 334: "After indictment found, no objection of irregularity of impanelling a grand jury can be received as a plea to the indictment." But in the *Lieber* case, *op. cit. supra* note 1, *Lieber*, after arraignment and plea of not guilty, was allowed on his motion to withdraw the plea with leave to file a written motion to quash the alleged indictment. See, also: *Hagenow v. People*, 188 Ill. 545, 59 N. E. 242 (1900); *Gitchell v. People*, 146 Ill. 175, 33 N. E. 757 (1893); *Williams v. People*, 54 Ill. 422 (1870). These cases and the *Lieber* case hold the error can be taken after indictment found, if before the plea to the indictment.

<sup>6</sup> See cases cited in note 5, *supra*.

<sup>7</sup> Chicago Tribune, Feb. 25, 1934.

<sup>8</sup> *Op. cit. supra* note 1.

showing three not found and one dead, and service had on fifty-six. Twenty-five of the fifty-six jurors summoned were excused before the beginning of the term. During the interrogation of the thirty-one remaining grand jurors present, six more were excused by the chief justice, leaving twenty-five. The judge then said, as shown on the record quoted by the majority opinion: "Now I have to take one of these four men that asked to be excused. I have to have twenty-four . . . the reason I must do this is that I have to choose twenty-three and I don't want to select them myself. I want them to be chosen at random and that is why I must have at least twenty-four." The clerk then put twenty-four names in a hat, pulled out *twenty-three*, and they thereupon sat as the grand jury.

The objections, in the majority opinions, to the method followed may be divided into three main sections: First, they objected to the number of grand jurors summoned, claiming that the statute requires only twenty-three be summoned, and hence the summoning of sixty was illegal. Second, the manner of their selection for service was illegal, in that the judge exercised powers of selection which he did not possess. Third, the irregularities in summoning and selection resulted in actual and substantial injustice to the defendant Lieber.

These objections of the Supreme Court will be considered in that order, with an aim to present a partial picture of the difficult questions facing the court on rehearing.

As to the number to be summoned, it will be well to first consult the Illinois statutes, which, it may be observed, are far from clear on this point. To aid in understanding the statutes, a brief outline of their history is essential. The Act of 1874<sup>9</sup> provides in section 1 for the selection of jury lists by the county board "of each county." Nothing here indicates any intention to make special provision for the larger counties, such as Cook.

Section 2 relates to petit jurors (not grand jurors) when it provides for selection of 100 persons from the jury list for each trial term, "to serve as petit jurors." Then follows the first distinction made as to the size of counties concerned. In counties of less than 250,000 the board itself selects this distinct list of 100 from the larger jury list. In counties of over 250,000 population "the persons to serve as petit jurors shall be selected by the jury commissioners, as provided by law." This distinction, it is to be noted again, applies only to the culling of names for petit jury service. Section 8 provides for the method of drawing petit jurors.

Section 9 regulates the drawing of the grand jury. "If a grand jury shall be required . . . it shall be the duty of the county board in each

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<sup>9</sup> J. & A. Ill. Stat. Ann. (1913) p. 3741; Rev. Stat. (1874) p. 60.

of the counties in this State . . . at least twenty days before the sitting of such court, to select twenty-three persons . . . to serve as grand jurors at such term; and to cause their clerk . . . to certify the names of . . . the grand jurors to the clerk of the court . . . who shall issue and deliver to the sheriff . . . a summons commanding him to summon the persons so selected."

Thus it is seen that the 1874 Statute leaves the entire matter of selecting the grand jury, from the first selection of a general jury list down to the order of their own clerk to the sheriff as to just what men shall be summoned, up to the county boards, "of each of the counties." No mention is made of jury commissioners for counties over 250,000 population at any time. This statute is still on the books.<sup>10</sup> It is in this statute of 1874 that the expression is found which is thus interpreted by Chief Justice Orr: "Section 9 of the Juror's Act (Cahill's 1931 Stat. Ch. 78, p. 1752) provides that whenever a grand jury 'shall be required by law or by the order of the judge' the county board shall 'select twenty-three persons . . . to serve as grand jurors at such terms.'" From this the Chief Justice concludes: "It is apparent that . . . only twenty-three persons shall be selected — and they are to be selected . . . by the *county board*." (Italics mine.)

This, then, would seem to be a holding that the Act of 1874, providing for sole authority of selecting in the county board, is still the controlling law.

We come to a realization of the seriousness of the inference of this interpretation when we realize that following the sections of the statute thus far construed is found the Jury Commissioners Act. This act was passed in 1887, thirteen years after the foregoing statute, and was amended throughout by the Jury Commissioners Act of 1897.<sup>11</sup> The act applies only to counties of over 250,000 population — Cook County. The act provides for selection by the judges of three jury commissioners. Section 2 of the act orders these commissioners to "prepare a list of all electors between the ages of twenty-one and sixty years, possessing the necessary legal qualifications for jury duty, to be known as the jury list."<sup>12</sup> Section 1 of the Act of 1874 (quoted *supra*) gives power of selecting the jury list to the county board. This later act purports to take the power out of their hands in all cases, in counties of over 250,000 population, and vest the power in the jury

<sup>10</sup> Smith-Hurd Ill. Rev. Stat. (1933) C. 78, § 9, p. 1745. Minor amendments have been made, including the one in effect Jan. 1, 1934, which, without changing the power of the county boards to select, does make a specific reference to "the circuit courts and the criminal court of Cook County" as to the time a grand jury so summoned shall sit.

<sup>11</sup> J. & A. Ill. Stat. Ann. (1913) p. 3758.

<sup>12</sup> J. & A. Ill. Stat. Ann. (1913) p. 6857.



commissioners. There is a clear field which it would seem cannot be occupied by the two bodies.

Not only is the general jury list to be drawn up by the commissioners, but they are also given power in regards to selecting of names for grand and petit jurors.<sup>13</sup> At the time the *Lieber* jury was called, in July, 1933, the statute in force read as follows:

“Drawing of Grand and Petit Jurors:

“One or more of the judges of each court of record . . . shall certify to the clerk of the court the number of petit jurors required each month. The clerk shall then repair to the office of the jury commissioners and there, . . . proceed to draw by the lot the necessary number of names from those made available for such drawing as in section 8 of this act provided.<sup>14</sup> The clerk shall thereupon certify to the sheriff the electors whose names are so drawn, to be summoned according to law. If more jurors are needed during the month, a judge of the court shall so certify, and they shall be drawn and certified forthwith in the manner above provided. *Whenever a grand jury is required by law or by an order of the court, it shall be drawn and certified in like manner.*”<sup>15</sup> (Italics mine.)

In regards to the section just quoted the majority opinion in the *Lieber* case says: “This section relates only to the manner of drawing and certifying the grand jury and makes no reference to the number of grand jurors to be drawn and certified.”

Therefore it is respectfully submitted that since it “makes no reference to the number of grand jurors to be drawn and certified” it *does not restrict* the number to be drawn and certified to *twenty-three*. The restriction in drawing to twenty-three was made in the Act of 1874. The Jury Commissioners Act, as amended in 1931, would seem to repeal by implication the Act of 1874, as it clearly contradicts the earlier act as to *who* shall select and *how* this selection shall be made, in counties of over 250,000 population. As far as Cook County is concerned, the acts are mutually exclusive throughout, and it is believed the later act in time repeals by implication, for Cook County, all provisions of the Act of 1874 relating to the selection and summon-

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<sup>13</sup> The Jurors Act of 1874, it will be recalled, left selection of grand juries entirely up to the county boards.

<sup>14</sup> Section 8 empowers jury commissioners to select active jury lists.

<sup>15</sup> Smith-Hurd Ill. Rev. Stat. (1933) C. 78, § 32, being § 9 of the Jury Commissioners Act. All of section 9 was added by an “Act Approved July 2, 1931.” (Laws, 1931, p. 655.) Prior to 1931 there was no provision in the Jury Commissioners Act in regards to the drawing of grand and petit jurors, except the provisions in sections 4 and 5 providing for selection and placing of names in a “jury” and in a “grand jury” box. Sections 4 and 5 were expressly repealed by Laws, 1931, p. 655.

ing of grand jurors, including the restriction upon the number to be drawn to twenty-three.<sup>16</sup>

Immediately following the last quotation follows this further observation of the court: "As above noted, section 16 of the Jurors Act provides that a panel of a grand jury must contain twenty-three persons. That requirement is not changed by any provision of the Jury Commissioners Act."

Again it is submitted that the fact that a panel of a grand jury must contain twenty-three persons does not forbid the summoning of more than twenty-three from which the panel may be filled. So long as only twenty-three are impanelled, the statute in question would seem to be satisfied, irrespective of how many were summoned. The number returned has always been recognized as different from the number impanelled. As was said in *Stone v. The People*,<sup>17</sup> in referring to the common law methods in England: "A precept was directed to the sheriff . . . upon which he returned twenty-four or more persons . . . from whom the grand jurors were selected, who were qualified as jurors."

All that can be said with finality of section 16 is that it limits the number of grand jurors that may be impanelled to twenty-three. In modern times, this has been the usual rule, as it was the rule in earlier times in England. However, at common law the practice of summoning more than twenty-three existed side by side with the rule in question. Therefore, it is submitted, the fact that twenty-three are to be impanelled does not imply that but twenty-three should be summoned. The limitation to twenty-three on the jury has always prevailed, for the reason that "The bill also must be found by a majority of jurors, and that majority must consist of twelve at least: 2 Hale 161; for which reason it is, that the number of persons on a grand jury cannot exceed twenty-three nor be less than twelve."<sup>18</sup>

Coexistent with the limitation of the number actually on the grand jury to twenty-three, the common law allowed more than twenty-three to be summoned. In 1 *Chitty, Criminal Law*, 310, 311, it is said: "Upon the summons of any sessions of the peace, and in case of com-

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<sup>16</sup> All prior laws that are conflicting, or parts of laws that are conflicting, are repealed by later law by implication, without need of express repealing clause. *Hayne v. Danisch*, 264 Ill. 467, 106 N. E. 341 (1914); *People v. City of Rock Island*, 271 Ill. 412, 111 N. E. 291 (1915); *Ayres v. City of Chicago*, 239 Ill. 237, 87 N. E. 1073 (1909). Where a new statute covers the subject completely, and embraces new provisions, it repeals all former statutes on the subject, though former statutes are not in all respects repugnant to later statutes. *City of Buffalo v. Lewis*, 192 N. Y. 193, 84 N. E. 809 (1908); *Brigham v. City of New York*, 227 N. Y. 575, 124 N. E. 209 (1919).

<sup>17</sup> 2 Scam. (Ill.) 326 (1840).

<sup>18</sup> Archbold, *Crim. Pl. and Ev.* (3rd. Am. Ed. 1835), at p. 66.

missions of oyer and terminer and gaol delivery, there issues a precept, either in the name of the king or of two or more justices, directed to the sheriff, upon which he is to return twenty-four or more out of the whole county, namely, a sufficient number out of every hundred, from which the grand jury is selected. Upon this precept, although it generally specifies only 24, the sheriff usually returns 48 . . . Though the number of jurymen thus returned to the court amount to 48 or more, not more than 23 are to be sworn . . .”

There is a Federal statute similar to section 16 of the Illinois act. Yet the Federal courts uniformly hold that that does not restrict the number that may be summoned to twenty-three, but rather that the common law powers of the judges have been retained, and they may summon more than twenty-three. “The conclusion reached is that Congress intended to leave the number of persons that should be summoned for grand jury service, as at common law, to the discretion of the trial judges . . . In order to find in section 808 [providing for impanelling of twenty-three] an implied intent to limit the number to be summoned to 23, we must unnecessarily so construe the statute as to create public inconvenience, and must, in defiance of an elementary canon of construction, assume an intent to change the common law which is not expressed and is neither necessarily nor clearly implied. The chief argument for an implied intent to restrict the number that may be summoned is found in the fact that the statute restricts the maximum number that may be impanelled. At common law only 23 persons could act as grand jurors, but this fact did not forbid summoning more than 23 persons. By parity of reason the statute, in forbidding that more than 23 persons be impanelled as grand jurors, does not impliedly forbid that more be summoned.”<sup>19</sup>

It is believed that a practice which is followed in so many other jurisdictions, which often obviates great public inconvenience, which is fortified by sound rules of statutory construction and a very considerable weight of authority, should not be lightly abandoned.

To briefly recapitulate: The court in this case expressly holds that the provisions of the Jury Commissioners Act, under which procedure Lieber was indicted “makes no reference to the number of grand jurors to be drawn and certified.” Therefore, the fact that over twenty-

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<sup>19</sup> *United States v. Breeding*, 207 Fed. 645 (1913). This is an excellent case and cites fully many ancient and modern authorities in support of the position taken by Judge McDowell. Also, there is included a list of the number of jurors summoned in the various federal districts. The numbers summoned in the thirty-eight districts polled were: “over 23,” called in 5 districts; 23-30, called in 15 districts; 30-40, called in 13 districts; over 40, five districts, including the Southern District of New York (New York City district), where from 50 to 75 were called. In the Northern District of Illinois the practice under Judge Landis was to summon 45 to 50 men; and under Judge Carpenter 30-35 men were called.

three were summoned does not violate the Jury Commissioners Act, *which act applies here*. But it is said that section 16 "provides that a panel of a grand jury must contain twenty-three persons. That requirement is not changed by any provision of the Jury Commissioners Act." It hardly appears just why the Jury Commissioners Act would have to change the number impanelled in order to permit a certain number to be summoned,—a wholly different thing.

To sustain their contention, the court cites *People v. Onahan*.<sup>20</sup> Quoting from that case: "Both grand jury and petit jurors must be summoned and impanelled in such counties, so far as regulated by law, as before the passage of the act in question." That case was decided in 1897. And at that time sections 4 and 5 of the Jury Commissioners Act were in effect.<sup>21</sup> Those sections did not relate to "summoning and impanelling"; nor did any other sections of the act construed in *People v. Onahan*. These sections have been repealed, however, by the very section 9 of the Jury Commissioners Act quoted in full earlier in this note. And section 9 clearly relates to "summoning and impanelling." However, if this construction be true, the court in the *Lieber* case says "the act would be clearly invalid." It would be invalid because "It was only because the act was construed as not conferring additional powers upon the courts or judges in counties of over 250,000 and because the practice of such courts was not changed that the court sustained the act."<sup>22</sup>

The decision in *People v. Onahan* could be construed, it is believed, to hold, that since the clerk still selects out of the jury box, and the same officer, the sheriff, still summons the jurors, no change is made in the practice of the courts by the addition of Section 9 of the Jury Commissioners Act, and hence the construction urged by the people could be correct, and still be constitutional. It is held in *Miller*

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<sup>20</sup> 171 Ill. 449, 48 N. E. 1003 (1897).

<sup>21</sup> J. & A. Ill. Stat. Ann. (1913), §§ 6859, 6860.

<sup>22</sup> The court, in *People v. Onahan*, *op. cit. supra* note 20, said: "Section 22 (of the Constitution), so far as is claimed to apply here provides: 'The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For . . . regulating the practice in courts of justice . . . summoning and impanelling grand or petit jurors.'" As to this, the court said: "We are of opinion that this statute is not a local or special law, within the meaning of the Constitution. 48 N. E. 1003, 1006. Another constitutional provision was discussed in *People v. Onahan*: 'Section 29 provides that 'all laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade . . . shall be uniform.'" The court held that the only additional power was that of appointment of commissioners, and no substantial change was really made: "The same officer, the clerk of the court, draws the names of the jurors from the jury box, and they are summoned . . . in the same manner as under the previous law," that is, by the sheriff.

*v. The People*<sup>23</sup> that the selection of a grand jury is not a matter affecting the jurisdiction of the court.

To conclude this first section, then, it would seem that the statutes do not place a restriction on the number to be ordered for a grand jury, though the number to be impanelled is fixed. This may be unfortunate, but it appears to be statutory. As is said in *People v. Monday*,<sup>24</sup> a case where the presiding judge ordered fifty names to be drawn by the jury commissioner for a special grand jury: "The proceeding was under the Jury Commissioners Act, applicable to Cook County . . . There is no express direction in the statute as to the number to be ordered."

A second ground of objection to the procedure followed in the *Lieber* case was based by the majority opinion upon the power which the judge exercised in selecting, from those called, those who were to sit on the grand jury. No question is made as to motives of the judge; the point is solely that his conduct was in error. It will be recalled that when the list came before the Chief Justice of the Criminal Court thirty-one prospective jurors were on hand. After interrogation, the Chief Justice excused six of these men. Then followed the colloquy quoted earlier in this note whereby the names were drawn out of a hat by the clerk, and the men whose names the clerk drew became the grand jurors.

The objections made by the majority opinion in the principal case to this procedure follows: "Section 9 of the Jurors Act (Cahill's 1931 Stat. ch. 78, p. 1752) provides that whenever a grand jury 'shall be required by law or by the order of the judge' the county board shall 'select twenty-three persons . . . to serve as grand jurors at such terms' . . . It is apparent that whether the grand jury is required 'by law' or by order of the judge . . . they are to be 'selected' not by the judge but by the county board. Under this act the court or the judge therefore has nothing to do with selecting the grand jury, by lot or otherwise . . . Nothing in any part of the Jury Commissioners Act authorizes the judge, upon the appearance of grand jurors before him, to draw from them, by lot or otherwise, a grand jury, as section 9 thereof makes that the exclusive duty of the clerk, to be performed only in the office of the jury commissioners 'in the presence of the persons named in section 8 of this act.'"

Section 9 of the Jurors Act and section 9 of the Jury Commissioners Act are the sections which it was sought to show earlier in this note as mutually conflicting so far as Cook County is concerned;

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<sup>23</sup> 183 Ill. 423, 56 N. E. 60 (1899).

<sup>24</sup> 204 Ill. App. 24 (1919).

and it will be remembered that they both provide for the mechanics of selecting men from the general jury lists to be summoned for jury service.

The only limitation found upon the character of the men to be so summoned is found in section 9 of the Jurors Act,<sup>25</sup> where it is required that men be selected "possessing the qualifications as provided in section 2 of this act . . ." The statutory qualifications referred to are that the jurors selected be a proportionate number from the residents of each town, or precinct, and: "First—Inhabitants of the town, or precinct, not exempt from serving on juries. Second—Of the age of twenty-one years, or upwards, and under sixty-five years old. Third—In the possession of their natural faculties, and not infirm or decrepit. Fourth—Free from all legal exceptions, of fair character, of approved integrity, of sound judgment, well informed, and who understand the English language."

These are the only restrictions placed upon the jurors selected by the boards or commissioners. When we reflect that in the *Lieber* case one of the men so "selected" was, it developed, dead, it must be apparent that this selection by the boards or commissioners, is, especially in Cook County, a mere blind drawing.<sup>26</sup> Nevertheless, the real contention of the majority opinion here seems to be that the court had no power to excuse a grand juror for any cause whatever. In other words, the court had no authority to excuse any juror, of its own motion, even though the man upon appearance was quite apparently one of the type barred by the statutes as being unqualified to serve, as the jurors "are to be 'selected' not by the judge but by the county board . . . the judge therefore has nothing to do with selecting the grand jury." If this contention is correct, then it would follow that if twelve of the grand jurors had testified that they had formed and expressed opinions that the defendant was guilty, and that they should vote in favor of an indictment without any regard to the evidence, the court would have no power to excuse them of its own motion. Suppose it was brought to the attention of the court that twelve of the jurors had been bribed to free a certain accused, the court would have no power, authority, or jurisdiction to excuse the culprits. These illustrations are merely interposed to show by an appeal to logic that the judge must have *some* power to excuse jurors called.

Not only logic, but authority, supports the view that while the actual selecting of the names to be called is up to some one other than

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<sup>25</sup> Smith-Hurd Ill. Rev. Stat. (1931) C. 78, § 9.

<sup>26</sup> See "Selection of Grand Jurors" in the Illinois Crime Survey (Chicago, 1929) at p. 231, where it is said that "the grand juries frequently have been mediocre and have not had the mental capacity required for satisfactory service of this kind."

the judge, the judge has the power on his own motion, to excuse a man appearing for jury service, for cause shown.

Corpus Juris says on this point:<sup>27</sup> "The rule is generally laid down apart from statute for any good cause shown and in furtherance of justice the court has the right, in the exercise of its sound discretion on its own motion, without challenge from either party, to discharge or excuse a grand juror at any time before he is sworn. In the absence of a showing that the complaining party has been prejudiced thereby, the exercise of this discretion is not reviewable . . . . In the absence of evidence to the contrary, it will be presumed that the court acted with sufficient and legal cause in excusing or discharging one called to serve as a juror."

The Illinois case of *Stone v. The People*<sup>28</sup> asserts that the judges of the Illinois courts have common law powers, one of which, as shown above, is the right to excuse jurors on their own motion. There the court said that the statutes have not "taken away the common law powers of the circuit courts, which, as we have by express statute adopted the common law of England, they undoubtedly possess."<sup>29</sup>

The court in the *Lieber* case seems to hold, however, that the provisions of the Jurors Act, section 9, and of a similar section of the Jury Commissioners Act, have deprived these courts of their powers in this regard. This, it is respectfully suggested, violates a fundamental rule of statutory construction, namely that statutes in derogation of the common law are to be strictly construed,<sup>30</sup> especially, it would seem, when to give the statutes an unnecessarily broad interpretation would lead to the undesirable results pointed out in the hypothetical cases mentioned.

The third point of the majority opinion in the *Lieber* case was that the irregularities in summoning and selection resulted in actual and substantial injustice to the defendant Lieber, and therefore he was entitled to a reversal.

In effect at the time of the trial was a curative section applicable to the Jury Commissioners Act under which the jury in the *Lieber* case was summoned. This statute provides:<sup>31</sup> "No objection, exception, or challenge to any petit juror or grand juror or to any panel of petit or grand jurors shall be allowed at any time because of any failure to comply with the provisions of this act or of the said rules, unless the party urging the same shall show to the court that actual

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<sup>27</sup> "Grand Juries," 28 C. J., p. 794.

<sup>28</sup> *Op. cit. supra* note 17.

<sup>29</sup> The statute adopting the common law is a typical one. See Smith-Hurd Ill. Rev. Stat. (1931) C. 28.

<sup>30</sup> *People v. Taylor*, 342 Ill. 88, 174 N. E. 59 (1930).

<sup>31</sup> Smith-Hurd Ill. Rev. Stat. (1933) C. 78, § 35.

and substantial injustice has resulted or will result to him, because of the error or defect charged."

The majority opinion in the principal case refers to this Act and then says: "But the record here shows that plaintiff in error has been tried and convicted under an illegal indictment. This in itself, if allowed to stand, would amount to actual and substantial injustice to him and be a denial to him of the equal protection of the law guaranteed by the state and federal constitutions."

The dissenting opinion, written by Justice Clyde E. Stone, with Justice Frederic R. DeYoung concurring, says in regard to this reasoning:<sup>32</sup> "The majority opinion states that the plaintiff in error has shown substantial injury. It says he was injured because the indictment was not according to law and because he was indicted by this grand jury, which it said was not a legal grand jury. Ordinary rules of logic will scarcely afford the privilege, however, of using the conclusion sought to be established as proof of the contention made. There is no showing that the jury was prejudiced or that it did not fairly consider the evidence . . ."

With the dissenting judges' view the remedial statute would seem to accord, for the act quite clearly contemplates the possibility of non-compliance with the rules set out for the summoning of the jurors, without such irregularity being a substantial injury to the defendant. With all due respect to the majority opinion, it must be admitted that it is hard to see how the indictment can be illegal and void because of an irregularity in the summoning and impanelling the grand jury which returned the indictment, unless it is shown that the irregularities worked substantial harm to the defendant, or at least shown that the grand jury, when impanelled, was completely without power to act, and hence all of its acts were void.

Delaying the question of substantial injury for a moment, was this jury completely without power to act because of a defect in the method of impanelling and summoning the jurors? If it was completely without power to act, then the indictment must be admitted to be simply a nullity, and hence even pleading to it would not waive its defects.<sup>33</sup>

Thus we come squarely to the question of the legality of a grand jury which is not selected in accordance with the statute. We will forget for the time being what has previously been said in an attempt

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<sup>32</sup> See partial report in Chicago Tribune, Feb. 24, 1934.

<sup>33</sup> Waiver of defects does not apply to cases where, because of a fundamental defect, the grand jury is without jurisdiction to act. *People v. Gray*, 261 Ill. 140, 103 N. E. 552, 49 L. R. A. (N. S.) 1215 (1913); *People v. Munday*, 293 Ill. 191, 127 N. E. 364 (1920); *People v. Jones*, 263 Ill. 564, 105 N. E. 744 (1914); *People v. Strauch*, 247 Ill. 220, 93 N. E. 126 (1910).



to show this grand jury was not improperly selected, since the procedure was apparently in accord with the statutes and common law applicable to the particular jurisdiction involved, and we will assume that the Act of 1874 still applies to Cook County when it says in section 9: "It shall be the duty of the county board . . . to select twenty-three persons . . . to serve as grand jurors."

As is said in 10 American and English Annotated Cases, at page 964, in a note on this subject: "The numerous decisions passing upon the legality of a grand jury not selected according to the statute, though they are not uniform in upholding the legality of such a grand jury, are not necessarily conflicting. Each case turns upon the extent to which a particular statutory provision may be departed from without affecting the legality of the grand jury. *State v. Beckley*, 79 Iowa, 368, 44 N. W. 679. This is determined chiefly by the character of the statute, that is, whether it is mandatory or directory, which in this instance depends more upon the purpose of the statute than upon its language."

In the *Lieber* case the majority opinion holds: "This court has held that the statutory method of securing a grand jury is mandatory. (*Marsh v. People*, 236 Ill. 464.) No mandatory provision of the statute can be waived or disregarded on grounds of expediency."

A distinction may be found in the cases, both in Illinois and in other jurisdictions, between the binding force of various parts of the one statute, holding that while one provision is mandatory, another may be merely directory. For instance, in the case of *U. S. v. Ambrose*<sup>34</sup> it is held that while the general statute as to the formation of a grand jury is "mandatory," still "all that is required is an honest intention to conform to the statute. . . . Beyond that it is merely directory." In the case before the court the venire had been issued by the wrong judge; the district attorney had not made application for the venire; the jury box did not contain 300 names as required by statute; all grand jurors called were not qualified to serve; the venire was not signed by the clerk as required by law; and all of the jurors were not drawn from the body of the district, but came from a nearby section. Yet the court held that the various provisions that had been violated were merely directory. The court, in holding the indictment valid, said: "Whatever occurs in regard to the constitution of a grand jury, is really a matter of very little importance to the defendant. . . I therefore regard any defect in the organization, summoning, and impanelling . . . in a very different light."

In the *Ambrose* case it was specifically decided that the statute was mandatory when viewed as a whole, and in so holding it reflected the

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<sup>34</sup> 3 Fed. 283 (1880).

general Federal rule.<sup>35</sup> Yet, the court held, parts of the statute were directory merely, and if an honest attempt was made to follow the statute, that was sufficient. This is likewise the general Federal rule.<sup>36</sup>

It will be recalled that the majority opinion quoted the Illinois case of *Marsh v. People*<sup>37</sup> as holding that the statutory method of securing a jury was mandatory. That case presented the question whether an indictment found by a grand jury that had not been selected at a regular or special meeting of the county board was a valid indictment, and it was held that it was not. In a later case, *People v. Donaldson*,<sup>38</sup> the *Marsh* case was relied on to support an objection to the indictment where the grand jury that returned the indictment was selected by the county board 19 days before the first day of the term of court, when the statute expressly provides: "It shall be the duty of the county board, at least twenty days before the sitting of the court, to select twenty-three persons . . . to serve as grand jurors."<sup>39</sup> The court in the *Donaldson* case held that the statutory "duty" imposed was directory merely, and since this "duty" is the very "duty" which is undergoing construction in the *Lieber* case, it would seem the "duty" imposed as to number of jurors can be viewed as directory likewise.

The *Marsh* case, relied on in the majority opinion in the principal case, is very fully considered by Judge Vickers in the *Donaldson* case, and the proper interpretation of the case is presented in these words by the learned judge: "That case is distinguishable from the one at bar in that in the *Marsh* case the grand jury had been selected by the county board when it was not convened in regular session, and therefore had not power to select a grand jury. In the present case, the county board was regularly convened and had full power to exercise the function of a county board, and the most that can be said against the validity of its act in selecting the grand jury is that the power was irregularly or erroneously exercised. The holding in the *Marsh* case is based on a total want of power in the county board to select a grand jury or do or perform any other official act. There a portion of the members of the county board came together, not in a regular or special meeting, but as individual members of the board, and assumed to perform the official work of the county board, which could only be performed when the board was in session. That case is not like the case at bar. There is some language in the *Marsh* case which, if not construed in connection

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<sup>35</sup> Sharp v. U. S., 138 Fed. 878, 71 C. C. A. 258 (1905).

<sup>36</sup> "In the federal courts it has been decided that the fact that more than the common law number were summoned is immaterial, and does not affect the validity of an indictment." "Grand Juries," 28 C. J., p. 781.

<sup>37</sup> 226 Ill. 464, 80 N. E. 1006 (1907).

<sup>38</sup> 255 Ill. 19, 99 N. E. 62 (1912).

<sup>39</sup> J. & A. Ill. Stat. Ann. (1913), C. 78, Par. 6839.

with the matter then before the court, might lead to some support to the plaintiff in error's conclusion. It is said in that case at page 472 of 226 Ill., at page 1009 of 80 N. E.: 'It would be the adoption of a dangerous policy, and one liable to be productive of much evil, to lay down the rule that public officers may disregard the plain provision of the statute directing them as to the manner of discharging their official duties, and hold that their acts performed in disregard of the statutory requirements would be as valid as if those requirements had been observed.' The language above quoted was not intended to apply to every possible omission of public officials to follow the letter of the statute. If so understood and applied, all statutes imposing duties upon public officers would be held to be mandatory . . . it was not intended in that case to hold that every statutory requirement concerning public officers is a matter *stricti juris* and to be obeyed to the very letter, under no less penalty than having the entire action of such officers declared void. The general rule is that, where a statute specifies the time within which a public officer is to perform an official act regarding the rights and duties of others, it will be considered as directory, merely, unless the nature of the act to be performed or the language used shows that the designation of time was intended as a limitation of the power of the officer." Later in the decision the court in the *Donaldson* case quotes with approval *Hughes v. State*,<sup>40</sup> where it is said: "If a grand jury regularly selected, without any notice whatever, were returned into court, impanelled, sworn, and charged, then the subsequent proceedings would not be irregular merely because they had not been summoned according to a directory statute. The object of the statute is to get the grand jury into court. When that purpose is accomplished, its force is at an end."

Looking at both the *Marsh* case and the *Donaldson* case, one would be led to believe that the statutes in Illinois in regards to selection of jurors and their impanelling are mandatory in regards to some provisions, and directory merely as to others, and this would seem to be a rule commended by sound reason and good authority. The test as to what provisions are mandatory and what ones are directory is based on what was intended by the statute, not merely what words are used;<sup>41</sup> and statutory intention may be drawn from a consideration of the purposes for which the statute was enacted;<sup>42</sup> and particularly

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<sup>40</sup> 54 Ind. 95 (1876).

<sup>41</sup> Note, 10 Am. and Eng. Ann. Cases 964. Also, see *Turner v. State*, 78 Ga. 174 (1886), where a statute saying "not less than 18 nor more than 30 names" is held to be *directory* merely.

<sup>42</sup> *People v. Donaldson*, *op. cit. supra* note 38; *Hughes v. State*, *op. cit. supra* note 40; *Dolan v. People*, 64 N. Y. 494 (1876); *Yunker and Marshall v. Daly*, 65 Ill. App. 667 (1895); 10 Ency. of Pl. and Pr., p. 362.

what injury will result to the defendant if the provision in question be disregarded.<sup>43</sup>

A review of the decided cases in Illinois will, it is believed, show that if there is a restriction in the statute to calling but twenty-three persons which is applicable to Cook County, that provision is directory merely, not mandatory, and that when it is simply a question of irregularity in proceedings, the party aggrieved must show substantial injury or complete disregard of a provision designed for his protection, before he will be entitled to a new trial.

The first type of non-compliance with the statute that will be considered is found in that class of cases which deal with situations where the effect of the non-compliance is to deprive the actors of all power to act. In this class the *Marsh* case is the leading case. There the fact that the county board did not meet as a board deprived it of all authority to act at all. In the case of *People v. Boston*<sup>44</sup> the jury list was not selected by the board at all, but by individual members not acting as a board. The court held that the action so had was a nullity, and all acts done by a jury selected without authority were void, if the lack of authority be as complete as was shown here. Substantially the same was the case of *People v. Cochran*.<sup>45</sup> In that case a committee of the county board, not the board at all, purported to act without any control over their actions by the board as a body, and the acts so done were held to be without authority. In both of the last two cases it was specifically held by the court that mere irregularities do not invalidate the jury list, but substantial compliance with the statute was necessary. Obviously, there was not even a shadow of compliance in any of the cases, and, as is very pointedly remarked in the case of *People v. Donaldson*, the holding in these cases is based upon a total want of power, and not upon an irregularity in the exercise of power, as was the fact in the *Lieber* case.

A second type of noncompliance with the statute includes those cases where the provision disregarded was one inserted in the statute for the protection of the accused, and it is held that a disregard of

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<sup>43</sup> *People v. Donaldson*, *op. cit. supra* note 38; *People v. Wallace*, 303 Ill. 504, 135 N. E. 723 (1922); *Wistrand v. People*, 213 Ill. 72, 72 N. E. 748 (1904); *Yunker and Marshall v. Daly*, *op. cit. supra* note 42; *Matthews v. Granger*, 96 Ill. App. 536 (1900); *Weir v. Sanitary District*, 160 Ill. App. 174 (1911); *People v. Coffman*, 338 Ill. 367, 170 N. E. 227 (1930); *Barron v. People*, 73 Ill. 256 (1874); *Com. v. Brown*, 121 Mass. 69 (1876); *People v. Boston*, 309 Ill. 77, 139 N. E. 880 (1923); *People v. Cochran*, 313 Ill. 508, 145 N. E. 207 (1924); *People v. Colegrove*, 342 Ill. 430, 174 N. E. 536 (1930); *People v. Stevens*, 335 Ill. 415, 167 N. E. 49 (1929); *People v. Corder*, 306 Ill. 264, 137 N. E. 845 (1922); *Siebert v. People*, 143 Ill. 571, 32 N. E. 431 (1892).

<sup>44</sup> *Op. cit. supra* note 43.

<sup>45</sup> *Op. cit. supra* note 43.

such a statute is reversible error. In *People v. Green*<sup>46</sup> the jury was selected solely from the city of Alton, and not from the body of the County of Madison, as required by statute, and the court held that the provision violated was meant for the protection of the accused and was important, so it was error to deny him the wider distribution. In *People v. Lembke*<sup>47</sup> there was a complete disregard of the provisions of the statute in two particulars. No attempt was made by the county board to make a selected list of 100 persons for each term, and the practice was followed of selecting 6% instead of the 10% required by statute.

Apart from the fact that historically the locality from which one's grand jurors were called has always been of far more importance than the number that were to be summoned, since the original jury, as introduced into England by the Normans, was a "body of neighbors" convened to give their decision, not on the evidence placed before them, but "upon their knowledge of the person, the circumstances, and the locality,"<sup>48</sup> it should be noted that the court in both of the last two cases clearly stated that not *all* noncompliance with the statute would make a grand jury's acts illegal. In the *Lembke* case it is said: "When all of the substantial provisions of sections 1 and 2 of the statute on jurors are violated, and it is clearly shown that such violations are substantial and amount to a denial of trial by jury according to the law of the land, such denial to a defendant is reversible error." Thus it is clear that the court would not condemn a mere irregularity in the number summoned, without it being shown that the violation was substantially harmful to the defendant. In the *Green* case the court refers to the case of *Barron v. The People*<sup>49</sup> a case in which only 19 were returned, instead of 23, and quotes with approval the decision that this was a defect "more formal than real, not affecting the real merits" and not a sufficient defense.

The two classes of cases exemplified by the *Marsh* case and the *Lembke* case, respectively, do not include the principal case, where the defect in summoning is not a case of a total lack of power to act,<sup>50</sup> nor a violation of a substantial provision designed for the protection of the accused.<sup>51</sup>

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<sup>46</sup> 329 Ill. 576, 161 N. E. 83 (1928).

<sup>47</sup> 320 Ill. 553, 151 N. E. 535 (1926).

<sup>48</sup> Complete Statutes of England, Vol. 10, p. 45.

<sup>49</sup> *Op. cit. supra* note 43.

<sup>50</sup> *People v. Donaldson, op. cit. supra* note 38.

<sup>51</sup> *Barron v. The People, op. cit. supra* note 43. Also see 1 Bishop's New Criminal Procedure, § 875: "A qualified and competent grand juror, if irregularly drawn, may with his fellows find an indictment to which the defendant cannot object, for he has no interest in the manner of drawing."

Therefore, it is submitted that the error, if it be such, made in the *Lieber* case falls into that large class of cases where the defect alleged is a defect of *form* rather than of *substance*. There is no doubt but that such a class does exist, and by the very fact of their existence they negative the idea that letter-perfect compliance with the statute in every detail is mandatory.

In *Beasley v. People*,<sup>52</sup> a murder case, only twenty-two persons answered, and the court went on to hearing without ordering another one to be summoned, though the statute provides that "if for any reason, the panel of the grand jury shall not be full at the opening of such court, the judge shall direct the sheriff to summon . . . a sufficient number of persons . . . to fill the panel."<sup>53</sup> The statute was clearly not followed to the letter, as no attempt whatsoever was made to fill the panel. As to the effect of noncompliance, the court said: "That depends upon the construction that shall be given to this clause of the statute—whether it shall be held to be mandatory or only directory. Reading the word *shall* as *may*, as is allowable from the context, it is simply directory. That is plainly its meaning."

*People v. Birger*<sup>54</sup> was a case where the grand jurors were not summoned by the sheriff in the proper manner, as he is enjoined to do by Section 9 of the Jurors Act. The court said: "Mere irregularities in impanelling a grand jury, not affecting the competency of any of the members, will not vitiate their action."

In *Barron v. The People*,<sup>55</sup> a case decided under Section 9 of the Jurors Act, only 19 jurors were returned. The court said: "The proper practice doubtless is, and such is the requirement of the statute, and of this special venire, that 23 persons shall be summoned." Yet the court held that this provision was directory merely, not mandatory, and that the defect, "At best, is more formal than real, and section 9 of the Criminal Code provides that no motion in arrest of judgment, or writ of error, shall be sustained for any matter not affecting the real merits of the offense charged in the indictment."

Thus it appears that the provisions of section 9 of the Jurors Act which relate solely to the number, manner, and time of summoning the jurors have uniformly been held to be directory merely, and it is respectfully submitted that the duty violated in the *Lieber* case, if it be held that section 9 still applies to Cook County, in spite of the Jury Commissioners Act, was a directory duty merely, and, as said in the *Beasley* case, the "*shall*" really amounts to no more than "*may*."

<sup>52</sup> 89 Ill. 571 (1878).

<sup>53</sup> Smith-Hurd Ill. Rev. Stat. (1931) C. 78, § 9. It is in this same section 9 that the provision for drawing twenty-three (the issue in the *Lieber* case) is found.

<sup>54</sup> 329 Ill. 352, 160 N. E. 564 (1928).

<sup>55</sup> *Op. cit. supra* note 43.

That statutes as to the number to be summoned are directory merely is supported by the numerical weight of authority in the United States.<sup>56</sup>

In a Massachusetts case, *Commonwealth v. Brown*,<sup>57</sup> it is said that the general rule is that mere irregularity in the proceedings by which a juror gets on the panel does not affect the validity of his action. There the court said: "Nearly all the cases in which verdicts or indictments have been set aside rest upon an absolute disqualification of a juror."<sup>58</sup>

In *Dolan v. People*,<sup>59</sup> a New York case, Judge Earl said: "The precise number is fixed by statute for no purpose of benefit or advantage to the person who may be presented for indictment. The sole object of requiring this number is to secure the attendance at court of a sufficient number to constitute a grand jury. If more or less should be drawn no harm would be done any accused person, provided a sufficient number of qualified jurors were drawn and impanelled."

In *State v. Knight*<sup>60</sup> eighty-five were drawn instead of seventy-five, as provided by statute. The court said: "There is here no error, nor semblance of any."

*Huling v. State*<sup>61</sup> presented the case of a drawing of forty more than were required by statute. The court said: "The provisions of law for the selection, distribution, and drawing of jurors should be regarded as directory, rather than as mandatory and indispensable."

In *State v. Watson*<sup>62</sup> more than the statutory number were drawn. The court reviewed prior decisions which said that "The plain commands of a statute should never be neglected," and that "These details should be strictly followed," and the court itself said: "We desire to express our decided disapprobation of the too frequent non-observance of the regulations in respect to the preparation and revision of the jury list and the drawing of jurors." Yet the court plainly held that "The regulation in question is only directory" and it was proper to refuse a motion to quash.

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<sup>56</sup> The following cases hold the statutes to be directory merely: *Middleton v. State*, 183 Pac. 626 (Okla. 1919); *Atkinson v. State*, 137 Miss. 42, 101 So. 490 (1924); *Parus v. District Court*, 42 Nev. 229, 174 Pac. 706, 4 A. L. R. 140 (1918); *State v. Mallard*, 184 N. C. 667, 114 S. E. 17 (1922); *King v. State*, 90 Tex. Cr. Rep. 289, 234 S. W. 1107 (1922); *State v. Leatherwood*, 26 N. Mex. 506, 194 Pac. 600 (1922); *State v. Price*, 92 W. Va. 542, 115 S. E. 393 (1922).

<sup>57</sup> 147 Mass. 585, 18 N. E. 587, 9 Am. St. Rep. 736 (1888).

<sup>58</sup> Citing *Doyle v. State*, 17 Ohio 222 (1848); *State v. Cole*, 17 Wis. 674 (1864).

<sup>59</sup> 64 N. Y. 485 (1876).

<sup>60</sup> 19 Iowa 94 (1865).

<sup>61</sup> 17 Ohio St. 583 (1848).

<sup>62</sup> 104 N. C. 735, 10 S. E. 705.

In *Corpus Juris*<sup>63</sup> the effect of calling more than the required number is considered, and cases are cited holding the statutes to be directory.<sup>64</sup> One case, *Leathers v. State*,<sup>65</sup> is cited, which holds that the statute in this regard is mandatory. However, as is shown in *Turner v. State*,<sup>66</sup> the Mississippi statute, under which the *Leathers* case was decided, is expressly mandatory, and thus it occupies a peculiar position not applicable to the Illinois statute. In the *Turner* case the court held a Georgia statute providing for "not less than 18 nor more than 30 names" to be directory merely, as "the makers of it never dreamed that the prisoner should quash a charge against him because the judge drew a few more than thirty and thus expedited the rotation of service."

From a consideration of the Illinois cases, and those from other jurisdictions, it appears that the court could, with all justification in logic and authority, hold the requirement for selection of twenty-three men to be *directory*.

It is uniformly held in the cases cited that violation of a *directory* statute is not to be considered ground for reversal unless substantial injury be done the accused by the violation. The Illinois cases clearly support this rule.

In the case of *Weir v. Sanitary District of Chicago*<sup>67</sup> it was held that the fact that the jury list was not in strict compliance with the law, also the failure to draw the panel at the proper time, also the failure to summon a second panel from the body of the county, will not reverse (challenges to the arrays having been overruled) in the absence of a showing that the challenger was compelled to accept objectionable jurors. It was said: "A challenge to the array will not be sustained where it is not also shown that an injury has resulted in consequence of the refusal of the court to quash the panel."<sup>68</sup>

Failure to serve summons on those selected for grand jury service in the proper manner was held, in *People v. Wallace*,<sup>69</sup> not to subject the indictment to attack in the absence of any attempt to show that the substantial rights of the accused were prejudiced thereby.

<sup>63</sup> "Grand Juries," Vol. 28, at p. 779.

<sup>64</sup> *Logan v. State*, 50 Miss. 269 (1874); *Bloom v. Price*, 44 Miss. 73 (1870); *State v. Connell*, 49 Mo. 282, (1872); *State v. Welch*, 33 Mo. 33 (1862); *State v. Bleekley*, 18 Mo. 428 (1853).

<sup>65</sup> 26 Miss. 73 (1853).

<sup>66</sup> *Op. cit. supra* note 41.

<sup>67</sup> 160 Ill. App. 174 (1911).

<sup>68</sup> Citing *Wilhelm v. People*, 72 Ill. 468 (1874); *Mapes v. People* 69 Ill. 523 (1873); *People v. Madison County*, 125 Ill. 334, 17 N. E. 802 (1888); *Siebert v. People*, 143 Ill. 571 (1892).

<sup>69</sup> 303 Ill. 504, 135 N. E. 723 (1922).



The fact of failure to copy the list into the record, as required by law, was held not to be fatal in *People v. Colegrove*,<sup>70</sup> the court saying: "Mere irregularities in failing to comply strictly with statutory provisions, if not prejudicial, will not invalidate the list of jurors. *People v. Cochran*, 313 Ill. 508, 145 N. E. 207; *People v. Boston*, 309 Ill. 77, 139 N. E. 880. A verdict will not be set aside because a challenge to the array of jurors is overruled unless the record shows that substantial rights of the defendant were thereby impaired. *People v. Stevens*, 335 Ill. 415; 167 N. E. 49; *People v. Corder*, 306 Ill. 264, 137 N. E. 845; *Siebert v. People*, 143 Ill. 571, 32 N. E. 431."

*Siebert v. People*<sup>71</sup> was a case where the regular panel of petit jurors had been exhausted, and the court ordered the clerk to draw the names of 100 additional jurors, instead of having the sheriff summon talesmen, as required by Revised Statutes of 1891.<sup>72</sup> Proper motions were made to quash on each of the three successive days upon which the court committed this same error. The Supreme Court, on review, held the act of court was "irregular, and not in strict conformity with the statute"; yet it did not amount to reversible error, in the absence of any showing that the defendant was prejudiced thereby.

Another petit jury case, *People v. Madison County*,<sup>73</sup> presented this question: The array was challenged on the ground that they had not been drawn by the clerk as required by the statute, but had been drawn by the sheriff. There it was held that even if it be assumed that the jury was obtained irregularly, a challenge to the array will not be sustained where it is not also shown that a positive injury had been sustained in consequence of the refusal of the court to quash the panel. It is to be noted that no stricter rule, surely, should be applied to a grand jury case than to a petit jury case.<sup>74</sup>

As a final case in point, mention must be made of the case of *People v. Munday*.<sup>75</sup> There the head-note asserts the rule that a general order of the criminal court to the clerk to draw from the grand jury box the names of 50 persons to serve as grand jurors, and the compliance of the clerk therewith, do not render the grand jury so drawn illegal.

Therefore, because the error, if it be conceded to be such, in drawing more than the statutory number would seem to be a violation of a directory statute merely, and not such a violation as would make the indictment illegal in the absence of proof of substantial injury to the

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<sup>70</sup> 342 Ill. 430, 174 N. E. 723 (1930).

<sup>71</sup> 143 Ill. 571, 32 N. E. 431 (1892).

<sup>72</sup> C. 78, § 13.

<sup>73</sup> 125 Ill. 339, 17 N. E. 802 (1888).

<sup>74</sup> U. S. v. Ambrose, 3 Fed. 283 (1880).

<sup>75</sup> *Op. cit. supra* note 33.

plaintiff in error, Lieber, it is respectfully submitted that the fact of substantial injury is the thing to be proved, and since no such actual proof was shown, Lieber neglected to justify his appeal, especially in view of the two curative statutes in Illinois aimed to prevent reversals on the ground of error which was without prejudice.<sup>76</sup>

Justice Stone of Illinois, in his dissent to the majority opinion in the *Lieber* case, says: "In my opinion a decision so fraught with disastrous consequence should be based upon law and compelling reason. There is no reason or basis in the law of criminal jurisprudence nor justice to say that an indictment returned in the regular manner by this jury should be declared null and void."

*William T. Kirby.*

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NEGLIGENCE—LIABILITY OF MANUFACTURERS AND VENDORS OF CHATTELS.—The general rule, established in the case of *Winterbottom v. Wright*,<sup>1</sup> is that the manufacturer, vendor or contractor is not liable to third persons who have no contractual relation with him for negligence in the construction, manufacture or sale of articles he handles. Judge Sanborn, in *Huset v. Case Threshing Machine Co.*,<sup>2</sup> recognizes the general rule and classifies three exceptions. The first is "that an act of negligence of a manufacturer or vendor which is eminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy or effect human life, is actionable by third parties who suffer from the negligence." The leading case in support of this exception is *Thomas v. Winchester*.<sup>3</sup> The plaintiff recovered from a wholesale druggist who negligently labeled Belladonna, a deadly poison, "extract of dandelion," so that the plaintiff took the poison by mistake. Cases in accord stand on the well established principles that (a) everyone is bound to avoid acts or omissions imminently dangerous to the lives of others and (b) an injury which is the natural and probable result of negligence is actionable.

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<sup>76</sup> Smith-Hurd Ill. Rev. Stat. (1931) C. 78, § 35, and C. 38, § 719. The first curative statute is quoted in full earlier in this note (see note 31); and the second curative statute was applied to a case similar to the Lieber case in *Barron v. People*, *op. cit. supra* note 43.

<sup>1</sup> 10 M. & W. 109 (1842).

<sup>2</sup> 120 Fed. 865 (1903).

<sup>3</sup> 6 N. Y. 397, 57 Am. Dec. 455 (1852). In referring to this and similar cases, Professor Harper says: "It will be noticed that . . . the vendor or manufacturer is not only failing to warn those liable to be harmed by the dangerous article sold, but he is affirmatively misleading them by causing them to believe that the article is safer than it actually is." Harper, *Law of Torts* 106.

Another exception to the general rule is "that an owner's act of negligence which causes injury to one invited by him to use the defective appliance upon the owner's premises may form the basis of an action against the owner."<sup>4</sup> *Bright v. Barnett & Record Co.*<sup>5</sup> was an action for damages for the death of a workman caused by a fall from defective staging. It appeared that the defendant company had agreed to put up a suitable staging for the employees of another company to work on. The court held that, while the contract was not made with deceased, the defendant was liable on its implied invitation to him to walk on such defective staging while at work.

The third exception to the rule is "that one who sells or delivers an article which he knows to be imminently dangerous to life or limb to another without notice of its qualities, is liable to any person who suffers an injury therefrom which might have been reasonably anticipated, whether there were any contractual relations between the parties or not." This exception is illustrated by the case of *Lewis v. Terry*<sup>6</sup> where a folding bed represented as safe, but known to be otherwise, caused an injury to a guest of the purchaser. The guest was allowed to recover. So where a threshing machine was sold with a defective cylinder which was necessarily used by those operating it to walk upon and an employee of the purchaser was injured thereby he was allowed recovery from the manufacturer.<sup>7</sup>

In *MacPherson v. Buick Motor Co.*<sup>8</sup> the principle was laid down that the manufacturer owes a duty to employ reasonable care in manufacturing or assembling chattels which, while not necessarily dangerous if properly constructed, constitute a menace or danger to life and limb if not carefully made, and this duty is owed not only to his immediate vendees but to any person likely to be harmed by the defective article, while the same is being lawfully used for the purpose intended. In the *MacPherson* case plaintiff was injured when an automobile which he had purchased from a retail dealer collapsed as a result of a defective wheel. The defendant was the manufacturer of the automobile but not of the defective wheel. It appeared that if the defendant had used due care in inspecting the wheel before the car was assembled the defect would have been discovered. The New York Court of Appeals affirmed the judgment for the plaintiff. Prior to this case, "it had usually been held that an affirmative obligation

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<sup>4</sup> *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124 (1874). The basis of this rule seems to be the fact that the supplier has a pecuniary beneficial interest in the use of the chattel by the third person.

<sup>5</sup> 88 Wis. 299, 60 N. W. 418 (1894).

<sup>6</sup> 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146 (1896).

<sup>7</sup> *Huset v. Case Threshing Machine Co.*, 120 Fed. 865 (1903).

<sup>8</sup> 217 N. Y. 383, 111 N. E. 1050, L. R. A. 1916F, 696 Ann. Cas. 1916C, 440 (1916).

to use care in manufacturing an article applied, so far as persons other than the immediate vendee were concerned, only to manufacturers of articles which were 'inherently dangerous' to or which were designed to 'affect' life and limb. This limitation, never supported by any rational considerations, has been definitely abandoned by the more liberal courts."<sup>9</sup>

The principle of the *MacPherson* case has been applied by some courts in favor of anyone likely to be harmed by a defective automobile.<sup>10</sup>

In referring to the *MacPherson* case, Professor Harper says: "The test is not whether the article is dangerous when carefully constructed but, whether it is likely to cause serious bodily harm if carelessly made."<sup>11</sup> But in *Parsier v. Wappler Electric Co.*<sup>12</sup> the complaint alleged that the defendant manufactured and sold to one Geiser a machine which they knew was to be used by him in treating persons for the removal of superfluous hair, and the defendants knew that the machine when so used would cause injuries, severe pain and distress. A motion was made under the rules of Civil Practice to dismiss the complaint for failure to state facts sufficient to constitute a cause of action. The Supreme Court of New York denied the motion, the court saying, after referring to the *MacPherson* case: "It cannot be that the defendants would be liable, if the dangerous character of the machines were due to negligence in their construction, and yet would not be liable if the machine were to their knowledge dangerous though constructed with due care and without negligence." So the test, in such cases, is not only whether the article is dangerous when carefully constructed but also whether it is likely, to the manufacturer's knowledge, to cause serious bodily harm, *even if carefully made*.

In the recent case of *Cohen v. Brockway Motor Truck Corporation*<sup>13</sup> an interesting distinction was made with respect to the principle laid down in the *MacPherson* case. Here defendants, manufacturers of trucks, had sold one to plaintiff's employer. While the plaintiff was on the truck one of the door handles gave way causing a door

<sup>9</sup> Harper, Law of Torts, § 106; *Heckel v. Ford Motor Co.*, 101 N. J. L. 385, 28 Atl. 322, 39 A. L. R. 989 (1925); *Johnson v. Cadillac Motor Car Co.*, 216 Fed. 878, 8 A. L. R. 1033 (1919). Contra: *Ford Motor v. Liberty*, 160 Pac. 901 (Okla. 1916); *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 53 Am. St. Rep. 146 (1896); *Burkett v. Studebaker Bros. Mfg. Co.*, 126 Tenn. 467, 150 S. W. 421 (1912); *Standard Oil Co. v. Munary*, 119 Fed. 572 (1902).

<sup>10</sup> *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N. W. 855, 60 A. L. R. 357 (1928) (Holding that the seller of a second hand automobile who represented it to be in proper operating condition was held liable to pedestrian injured by the automobile while it was being operated with defective brakes.)

<sup>11</sup> Harper, *op. cit. supra* note 9.

<sup>12</sup> 260 N. Y. S. 35 (1932).

<sup>13</sup> 268 N. Y. S. 545 (1933).

to open suddenly and, as a result the plaintiff was thrown under the truck. The plaintiff's complaint was dismissed, on appeal to the Supreme Court. The tendency of the modern decisions is to enlarge, especially the liability of the manufacturer of automobiles while this case seems to restrict it. It is difficult to see any difference in principle between an automobile with a defective wheel and one with a defective door latch for each one is likely to produce serious harm to the occupants of the car when being lawfully used for the purpose intended. The dissenting opinion by Justice O'Malley seems to follow the modern trend in regard to hidden defects.

*Granville P. Ziegler.*

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WILLS—EXECUTORS AND ADMINISTRATORS—ORAL CONTRACTS TO DEVISE—LEGAL AND EQUITABLE REMEDIES.—The Court of Appeals of Ohio, in the recent case of *Struble v. Struble*,<sup>1</sup> held that where an oral contract to devise property by will has been made, and the devise not made, that the remedy of the injured party is an action at law for damages, and that remedy only. The petitioner alleged that his father entered into a verbal agreement with him, by the terms of which, it was provided that if the son would move into his father's home, live with him, care for him, and furnish and provide his father with a comfortable home as long as his father lived, Clarence, the son, upon the death of his father, should have all of the property he had left. Clarence fully performed his side of the agreement, but his father died without doing anything to cause Clarence to receive the property. The petitioner asserted that his services were reasonably worth \$7,200, for which amount he prayed judgment. The court rendered judgment for the plaintiff for the amount stated after a deduction of \$2,000 as a remittur. No doubt was entertained by the court as to the plaintiff's right to recover damages, since that right had been established by the Supreme Court of Ohio in the case of *Newbold v. Michael*.<sup>2</sup> But the court unequivocally stated that the petitioner had only his remedy at law to recover his just compensation for his services, and that the services rendered were not of such peculiar character and nature that they could not be measured by pecuniary standards, and that specific performance could not be decreed.

Admittedly the plaintiff made a gross error, unless he had a reason for so doing not deducible from the report, in assessing his damages, for by so doing he admitted that the services rendered could be measured monetarily. But even considering this admission it is hard to understand how the court could have stated that this was the only

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<sup>1</sup> 182 N. E. 48 (Ohio 1932).

<sup>2</sup> 144 N. E. 715 (Ohio 1924).

remedy that the plaintiff had. We are constrained to the view that the plaintiff could have brought specific performance of the oral contract, and that such a prayer should have been answered in the affirmative.

Of course the plaintiff's right to specific performance would be in grave danger of becoming ensnared in the Statute of Frauds. But powerful and just as that statute may be it must yield to the equitable rights of the parties when such rights might be impaired by a too rigid construction of the statute.

The problem involves a consideration of oral contracts to devise and written contracts to devise. Where the contract is in writing there is no difficulty as far as the Statute of Frauds is concerned, as has been held in the case of *Emery v. Darling*.<sup>3</sup> But the matter of specific performance and a decree for such is one that is discretionary with the court since the one who prays for such a decree addresses himself to the "judicial discretion" of the court.<sup>4</sup> But this discretion must be within settled rules of equity and cannot depend upon the whim or caprice of the judge.<sup>5</sup> "Discretionary within the settled rules of equity"—that proposition leads to a necessary minor premise that when equitable rights would be thwarted by a failure to decree specific performance such a decree should be rendered. And so the case of *Allen v. Hayes*<sup>6</sup> has held that where the contract is in writing, is certain and just in its terms, and is for a valuable consideration, and there is not an adequate remedy at law, and its enforcement will not injure either party, a decree of specific performance is a matter of right.

The first section of the Statute of Frauds that must be dealt with is section 4, which states that a contract which is not to be performed within a year must be in writing. Our case seems to, on the surface, fall into that category in that it may appear that the contract in question was one not to be performed within a year, but it is stated in *Snyder v. French*,<sup>7</sup> and it is universally held, that an agreement to devise or bequeath property is not within that clause of the statute which requires an agreement not to be performed within one year from the making thereof to be in writing, as the death of the person specified may occur within that year.

A more serious and difficult question is presented in that section of the Statute of Frauds which mandatorily asserts that any contract for the sale or transfer of real property must be in writing. The contract

<sup>3</sup> 33 N. E. 715 (Ohio 1893).

<sup>4</sup> Note, 65 A. L. R. 7, 8.

<sup>5</sup> Note, 65 A. L. R. 7, 9.

<sup>6</sup> 309 Ill. 374 (1923). See also: *Port Clinton Ry. Co. v. Cleveland R. Co.*, 13 Ohio St. 544 (1862); 65 A. L. R. 28, and cases cited.

<sup>7</sup> 111 N. E. 489 (Ill. 1916). See also: *Frost v. Tarr*, 53 Ind. 390 (1876); *Ewing v. Richards*, 8 Ohio Dec. (Reprint) 357 (1882); *Kent v. Kent*, 62 N. Y. 560 (1875).

made by the deceased with his son, in the principal case, specified "all my property"; so no other conclusion can be reached than that both real and personal property were meant by this stipulation. In the case of *Sleeth v. Sampson*<sup>8</sup> it was held that a contract to give a mortgage is a contract for the sale of "interest in real property," and is therefore within the Statute of Frauds. Working from that premise, established by the highest court of New York, one must necessarily come to the conclusion that our contract falls into the same category. And it has been held in *Preston v. Casner*<sup>9</sup> that a contract to make a testamentary disposition is a contract for the sale of land and hence must be in writing to conform to the Statute of Frauds.

The only remaining section of the Statute that must be considered is section 17, which makes it necessary for contracts for the sale of goods, wares, and merchandises to be in writing. But, as stated in the *Michigan Law Review*,<sup>10</sup> a contract to bequeath personalty is not a contract for the sale of goods, wares, and merchandises. Thus our problem is one wrapped up in the transfer or realty since personalty and realty are treated alike in testamentary devises.

Confronted with this situation we now have to find a way to take this contract out of the statute. It has been held that where a person has rendered services for his father for several years upon the faith of a promise to devise and bequeath property to him, there was a sufficient part performance as to take the case out of the Statute of Frauds.<sup>11</sup> Statutes in a few jurisdictions provide that an agreement to make a will must be in writing to be valid.<sup>12</sup>

Just what will constitute sufficient part performance is a question upon which there is a diversity of opinion, but a long line of cases hold that where the consideration for a promise to devise land is the rendition of services of such a nature or peculiar character that it is impossible to estimate their value to the promisor by any pecuniary standard, the rendition of such services is a sufficient part performance to take the contract out of the operation of the statute. The case of *Dalby v. Maxwell*<sup>13</sup> says that to refuse specific performance in such

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<sup>8</sup> 142 N. E. 355 (N. Y. 1923).

<sup>9</sup> 104 Ill. 262 (1882). See also: *Flowers v. Poorman*, 87 N. E. 1107 (Ind. 1909); *Russell v. Briggs*, 165 N. Y. 500 (1901); *Knoch v. Williams*, 52 N. W. 257 (Wis. 1892).

<sup>10</sup> 24 Mich. L. Rev. 749, and cases cited.

<sup>11</sup> *Davison v. Davison*, 13 N. J. Eq. 246 (N. J. 1861). See also: *Sharkey v. McDermott*, 4 S. W. 107 (Mo. 1887); *Carney v. Varney*, 8 S. W. 729 (Mo. 1888).

<sup>12</sup> See: *Barlow v. Barlow*, 124 N. E. 285 (Mass. 1919); *Howe v. Watson*, 60 N. E. 415 (Mass. 1901); *Trout v. Ogilvie*, 182 Pac. 333 (Cal. 1919).

<sup>13</sup> 91 N. E. 420 (Ill. 1910) (In this case the defendant and the deceased had entered into an oral contract whereby the defendant was to live with, care for, etc., the deceased, and the latter was to leave by will to the defendant all his property both real and personal. The will was never made. The court held that

a case and leave the promisee to such relief as can be obtained by him in an action at law would enable the promisor thereby to perpetrate a fraud under the protection of the Statute of Frauds. Pomeroy, in his work on Equity Jurisprudence,<sup>14</sup> says that if equitable fraud be taken as the basis of the doctrine of part performance and the impossibility of restoring the complainant to the situation in which he was before the contract was made, the rendering of services, for a long term of years, the value of which cannot be estimated by any pecuniary standard, must be considered an act of part performance of the highest standard.

In the case of *Lovett v. Lovett*,<sup>15</sup> where one party had contracted to execute and leave at her death a will devising all property she should then own to a second party and not to revoke the will, and so executed the will, but later threatened to revoke it, the court granted an injunction to restrain the defendant from breaking the contract. If an injunction can be granted for a threatened breach of such a contract, is it not consistent that specific performance of the contract will be decreed when the breach does occur? We think it is.

The case of *Newbold v. Micheal*<sup>16</sup> which the Ohio court relies on to establish their right to award damages to the plaintiff, has in it a suggestion of the principles which we have tried to emphasize, but yet the court refused to recognize that specific performance would lie for the breach of the contract made by the deceased with the present petitioner. Not unmindful, therefore, that the court was right in awarding the plaintiff damages in this case since he had estimated them and thus estopped himself from praying for a decree of specific performance, we cannot accede to the proposition intimated in the decision that such would be the only remedy in cases falling into the same category.

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specific performance of the contract should be decreed, saying that specific performance of a contract to will all the decedent's property in consideration of the defendant's assistance will not be withheld because the contract is oral. The Statute of Frauds cannot be resorted to, to perpetrate a fraud.). See also: *Purcell v. Corder*, 33 Okla. 68 (1912); *Coughanour v. Grayson*, 19 Idaho 255 (1911); *Owens v. McNally*, 45 Pac. 710 (Cal. 1896); *Laird v. Vila*, 100 N. W. 656 (Minn. 1904); *Berg v. Moreau*, 97 S. W. 901 (Mo. 1906); *Bryson v. McShane*, 35 S. E. 848 (W. Va. 1900); *Best v. Gralapp*, 96 N. W. 641 (Neb. 1903); *Quinn v. Quinn*, 58 N. W. 808 (S. D. 1894).

<sup>14</sup> § 1409 b.

<sup>15</sup> 157 Ind. 104 (1927).

<sup>16</sup> *Op. cit. supra* note 2. It was held, in this case, that equity will not enforce specific performance of a verbal agreement to leave an estate including real and personal property to another by will, in consideration of personal services, unless the character of the services were not intended to be and not susceptible of being measured by pecuniary standard, or *unless the contract has been so far executed that a refusal would operate as a fraud upon the party who has performed and would result in a denial of just compensation.*