

Michigan Law Review

Volume 15 | Issue 4

1917

Note and Comment

Edson R. Sunderland
University of Michigan Law School

John R. Rood
University of Michigan Law School

Harry G. Gault
University of Michigan Law School

William L. Owen
University of Michigan Law School

Melville C. Mason
University of Michigan Law School

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Recommended Citation

Edson R. Sunderland, John R. Rood, Harry G. Gault, William L. Owen & Melville C. Mason, *Note and Comment*, 15 MICH. L. REV. 325 (1917).

Available at: <https://repository.law.umich.edu/mlr/vol15/iss4/4>

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MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE \$2.50 PER YEAR.

35 CENTS PER NUMBER

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NOTE AND COMMENT

SIMPLIFICATION OF JUDICIAL PROCEDURE IN FEDERAL COURTS.—In 1914 the Judiciary Committee of the House of Representatives unanimously reported favorably upon a bill (H. R. 133) authorizing the Supreme Court of the United States to prescribe by rule the forms, kind and character of the entire pleading, practice and procedure to be used in all actions and proceedings at law in the federal courts, with a view to their simplification, which rules should, when promulgated, take precedence of any law in conflict therewith. On January 2, 1917, a similar bill (S. 4551) was favorably reported from the Senate Judiciary Committee by a distinguished graduate of this Law School, Senator SUTHERLAND. The concurrence of the Judiciary Committees of the two houses of Congress gives promise of an early enactment of this legislation.

While many other activities of Congress have attracted more attention than this effort to promote uniformity in federal court procedure, it is doubtful whether any will have more far-reaching beneficent consequences. The purpose of the so-called "UNIFORMITY Act" of 1872 (R. S. 914), was to save the bar from the double burden of two systems of procedure in law cases, one State and the other federal. Such an eventuality was one which the profession might well hope to escape. But in practice it was found that real uniformity was impossible. The loophole provided by the language "as near as may be" was more and more resorted to by the federal courts

to avoid conformity with local rules of practice which did not seem just and reasonable, with the result that an immense number of precedents for non-conformity have been established, destroying to a large extent the very uniformity in procedure which it was the purpose of the ACR to establish.

On the surface, the proposed regulation of federal procedure by the Supreme Court aims only to recognize the actual divergence between State and federal practice and to improve the latter in a systematic fashion. This would be a great gain in itself, for the present hybrid practice in the federal courts is intrinsically unsatisfactory and creates confusion as between the various federal districts.

But the real effect of a uniform system of federal practice would almost certainly be far greater than this. The States have been groping about more or less blindly for seventy years trying to reform procedure. The early promise of the FIELD CODE has not been fulfilled. The "CODE" is in large measure a failure. Statutory modifications of the common law system have been tried again and again with indifferent success. They all failed in the most vital place,—they were fixed and mandatory legislative enactments imposed upon the courts, instead of rules by which the courts guided their own efforts to do justice to litigants. In a few conspicuous instances, such as New Jersey in 1912, Colorado in 1913, and Virginia in 1916, the States themselves have taken up the court-rule system of procedure, but progress has been exceedingly slow.

If, now, the Congress of the United States approves the court-rule plan, and it is put into effect with the wisdom and ability which we have the right to expect from the United States Supreme Court, the movement for reform along this line, so successfully pursued in England and Canada, will gain enormous force and prestige, and it will very likely become the dominant system among our States. But more than that may confidently be expected. An effective system of court rules will be put into operation in the federal courts sitting in each State, and that system will undoubtedly tend to become the model for the systems which may be looked for in the several States. The merit of the federal Supreme Court rules ought to be enough to commend them generally, but the great additional advantage to accrue from identity of procedure in the State and federal courts will exert a still more powerful influence.

Procedure thus seems to enjoy a unique position in the United States. It is the only subject of legislation over which the federal authorities have full coordinate jurisdiction with the States, and it offers the only opportunity for a federal system to serve as a model for State adoption. So that procedure, which has lagged so long and suffered so many vicissitudes, bids fair to become one of the pioneers of uniformity.

E. R. S.

WHAT WORDS CREATE A POWER?—As the right to sell may exist either as a result of ownership, or by virtue of a power without or independent of ownership, it is sometimes a question whether words indicating a right to sell, contained in an instrument granting an estate, are intended to give a power, or are merely descriptive of the rights incident to the estate given.

When property is devised without any designation of the estate given, and the devise is followed by words indicating that the devisee is to have the right of absolute disposal in fee, or to sell in fee, it has often been held that the words indicating an absolute power of disposal show that the devisee was intended by the testator to have an estate in fee, not a life estate with a testamentary power of appointing the reversion. (See note 18 L. R. A. N. S. 463.) If the devise were expressly of an estate for life, no such inference could be indulged; and it would have to be held that the right of disposal given was merely a testamentary power to appoint the reversion.

Again, it has happened that testators have given estates expressly for life only, with vague words as to the right of disposal, putting the court into a quandary as to whether the testator was speaking of a testamentary power or of the right of disposal incidental to ownership of a life estate. Thus in the case of *Bradly v. Westcott* (1807), 13 Ves. 445, it was held by Sir WM. GRANT, M. R., that the following words indicated not a testamentary power in addition to the life estate, but merely freedom from bond and accountability for use: After minor bequests and direction to pay debts, the testator gave all his moneys, stocks, household goods, and other personal property to his wife, Elizabeth, "for and during the term of her natural life; to be at her full, free, and absolute disposal and disposition during her natural life, without being in any wise liable to be called to account of or concerning the amount, value, or particulars thereof, by any person or persons whomsoever; and from and after her decease" he gave what she should be possessed of at the time of her death to others. Many cases of this sort are to be found in the books.

A similar conclusion was reached by the Supreme Court of the United States in the case of *Brant v. Virginia Coal & Iron Co.* (1876), 93 U. S. 326, on the following words: "I give and bequeath to my beloved wife, Nancy Sinclair, all my estate, both real and personal, to have and to hold during her natural life, and to do with as she sees proper before her death." But in rendering the opinion, Mr. Justice FIELD, after reviewing *Bradly v. Westcott*, and similar cases, declared: "Numerous other cases to the same purport might be cited. They all show, that where a power of disposal accompanies a bequest or devise of a life-estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended." In other words, that a power of disposal given to a life tenant is no power at all, unless the words used indicate that the life-tenant was to have greater powers of disposal over the property than a life estate gives. With deference to this great judge, it is submitted that the cases cited show nothing of the sort. It may be true that the fact that the person claiming the power is by the same instrument given an estate, from which a certain right of disposal results, may require clearer words to create a power to him than if no estate were given him. But the books are full of cases in which an estate expressly for life, with power of sale or disposal, have been held to give power to sell in fee, indeed, that is the only rational as well as the usual construc-

tion.¹ Powers to life tenants have often been implied merely from gift over of "what remains."

¹ Lewis v. Palmer (1878), 46 Conn. 454, was a devise to a sister "during her natural life, and for her to dispose of as she may think proper, right or just; and I do hereby give power and authority to my executrix to sell real or personal property as she may think best to make my estate clear from debt." Who was executrix does not appear, nor that the life tenant sold to pay debts; but the court after discussing several cases as to construction of powers of disposal to life tenants held that the right to sell in fee was to be presumed.

In Bouton v. Doty (1897), 69 Conn. 531, 39 Atl. 1064, a power to mortgage the fee was held to be included in a reservation by deed to the grantor of a life estate "with full power to mortgage said premises to raise money for my own personal benefit at any time I may desire for and during my natural life." To the same effect is Security Co. v. Pratt (1894), 65 Conn. 167.

Wood v. Owen (1910) 133 Ga. 751, 66 S. E. 951 holds that a power to sell in fee was given by a devise to a wife "without limitation or reserve, for her to do as she thinks best" for herself and his children, "and I make Archa M. Wood equal with the rest of my heirs."

Simpkins v. Bales (1904), 123 Iowa 62, 98 N. W. 580, holds that title in fee simple passed by the deed of the widow to whom testator devised property "to be used and enjoyed and disposed of as seemeth the best to her, during her natural life or so long as she remains my widow," and after her death to his children.

Hamilton v. Hamilton (1910), 149 Iowa 321, 128 N. W. 380.

In Fink v. Leisman (1896), 18 Ky. L. Rep. 710, 38 S. W. 6, a power to sell in fee was held given by a gift by will to testator's wife of all his "personal, mixed, and real estate property during her lifetime, with full power and authority to sell property if she sees proper."

Bodfish v. Bodfish (1909), 105 Me. 166, 73 Atl. 1033, discusses the implication of a power to sell in fee to the widow to whom the estate expressly for life was given in the absence of any declaration that she might sell, holding there was no warrant for such implication on the facts. But such a power was found in Young v. Hillier (1907), 103 Me. 17, 67 Atl. 571.

Cummings v. Shaw (1871), 108 Mass. 159, holds that power to pass a fee was given by a devise "for and during his natural, with right to dispose of the same."

Woodbridge v. Jones (1903), 183 Mass. 553, 67 N. E. 879, was a devise and bequest of residue real and personal "to my wife during her life, to use and dispose of the same as she may think proper, with remainder thereof on her decease, one-third to the heirs of my brother," &c.; and the court held a power to sell in fee was given the wife.

In Hoxie v. Finney (1888), 147 Mass. 616, 18 N. E. 593, a sale in fee reserving to herself a life estate was held authorized by the words: "I do give and bequeath to her the use and improvement of my whole estate, both real and personal, with liberty to use and appropriate so much of the principal, in addition to the income as she may deem necessary for her comfort and support; and I authorize her to sell and dispose of the whole or any part of my real and person estate at her discretion."

Gaven v. Allen (1889), 100 Mo. 293, 13 S. W. 501, was a devise and bequeath of residue to a wife without words of limitation, making her and another executors, and adding: "My will is that my said wife shall or will not dispose of my aforementioned fee simple and leasehold property without the written consent to the same of my brother"; and it was held she had a power to sell in fee.

Griffin v. Nicholas (1909), 224 Mo. 275, 123 S. W. 1063, was a devise to a wife "to have and to hold and enjoy for and during her natural life, with full power to make such disposal thereof as may be necessary for her own comfort and support"; and the court held it was a power to sell in fee, saying: "The words conferring the power would be idle if they only meant that she could sell her life estate."

Parks v. Robinson (1905), 138 N. C. 269, 50 S. E. 649, holds that the objection that plaintiff could not convey title in fee according to the contract sued on was not

well taken, plaintiff claiming under a devise by her husband "to my beloved wife, Ann Parks, during her natural life and at her disposal"; and after reviewing several cases the court mentioned *Brant v. Virginia Coal Co.*, saying, "We are of opinion that the more reasonable view, certainly where there is no limitation over, is found in the decisions of this and other courts which we have cited."

Bishop v. Remple (1860), 11 Ohio St. 277, was a decision that a power to sell in fee was given by the words: "I give, devise, and bequeath to my beloved wife, Elizabeth, all and singular my goods and property as may remain after all claims against my estate are satisfied, with full power to have and to hold, to sell and convey the same during the term of her natural life," and "after her death any moneys or effects of my estate that may remain," etc.

Forsythe v. Forsythe (1884), 108 Pa. St. 129, was a devise of all property real and personal to wife "during her natural life, with power to dispose of the same as she may think best"; and it was held that her absolute disposition by will was authorized.

Shields v. Netherland (1880), 73 Tenn. (5 Lea) 193, was a devise of land to a daughter and her husband "to dispose of as they may think proper," followed by a codicil declaring, "it is not my intention to make the estate a fee simple" if the husband survives; but they "shall have power during their joint lives, to dispose of the lands devised to them, by deed executed by them jointly," etc.; and this was held to be a power to sell in fee absolute.

White v. White (1849), 21 Vt. 250, holds that power to sell in fee was given by a devise to the wife "to have at her disposal during her natural life or so long as she remains my widow."

Englerth v. Keller (1901), 50 W. Va. 266, 40 S. E. 468, was a devise of residue after paying debts, to wife "to be enjoyed by her during her natural life, but if at any time she may wish she shall be at liberty of selling a portion of the real estate that she may think to her interest, and in that case her conveyance shall be valid"; and the court after reviewing the decisions declared that a power to a life tenant to sell, means in fee, wherefore her deed in fee was good.

Wood v. Amidon (1875), 2 MacArthur (D. C.) 224, holding a life estate and power to sell in fee passed by devise to wife for life, she to pay debts, raise children, and to give them portions on becoming of age, and to do with the estate as she may think best for herself and the children.

Schreiner v. Smith (1889), 38 Fed. 897, was a devise of all property real and personal to a wife, "to have and to hold during her natural life unless she marry. * * * The personal estate, before such marriage she may dispose of as her necessities may require." This was held to enable the widow to dispose of the personal property absolutely without liability to account for the proceeds.

² A gift of "what may remain" after the death of the life tenant does not imply a power in the life tenant if any of the property given is perishable or liable to diminish by use: *Bramell v. Cole* (1896), 136 Mo. 201, 37 S. W. 924, 58 Am. St. 619; *Thompson v. Adams* (1903), 205 Ill. 552, 69 N. E. 1; *Hunter v. Hunter* (1900), 58 S. C. 382, 36 S. E. 734, 79 Am. St. 845; *Herring v. Williams* (1911), 158 N. C. 1, 73 S. E. 218, reviewing numerous cases.

In *Clark v. Middlesworth* (1882), 82 Ind. 240, a power to sell in fee was held implied by a devise to testator's wife "during her life, and at her death if anything should remain, the same to be divided among my heirs-at-law." Approved in *Downie v. Buennagel* (1883), 94 Ind. 228, 234; *Cushman's Estate* (1890), 134 Ill. 88, 24 N. E. 963; *Foudray v. Foudray* (1909), 44 Ind. App. 444, 89 N. E. 499.

To the same effect: *Harris v. Knapp* (1839), 39 Mass. (21 Pick.), 412; *Ramsdell v. Ramsdell* (1842), 21 Me. 288.

Wenger v. Thompson (1905), 128 Iowa 750, 105 N. W. 333, holds a gift to wife for her own use for life and to educate and maintain his children, and after her death all the property then remaining in her possession, or the proceeds to be divided, gives her a power to sell in fee.

Young v. Hillier (1907), 103 Me. 17, 67 Atl. 571, holds that a gift over of what may remain on the death of the tenant for life, implied such a power in the life tenant as enabled her to sell in fee whereby the remainder was defeated.

That Mr. Justice FIELD's doctrine has no acceptance in the older cases and is unknown in England, is vouched from never noticing it in a considerable reading, failure to discover it by careful search of texts that should mention such a doctrine if there be one, and by the very explicit recognition of the opposite and more sensible rule, as illustrated in the case of *Vivian v. Jegon* (1868), L. R. 3 House of Lords Rep. 285. In this case the testator gave certain property to trustees to pay debts, &c., and other real estate to his daughter during the term of her life without impeachment for waste, declaring "it shall be lawful for my said daughter to work, or contract for, lease, or set out to be worked" mines then known or later discovered, the net proceeds therefrom to be paid to the trustees and invested, the income to be paid to the daughter for life. The daughter made a mining lease for twenty-one years and died a few months later. For the lessee it was argued: "It could not have been intended to be restricted to the granting of a lease for life. That would be contrary to the practice of law and the object of the testator. A gift of an estate for life carries with it the power to make a lease for life, and the addition to the gift of the estate of a power of leasing, if intended to be restricted in this way would be perfectly needless, for every tenant for life may aliene the estate for his own life. When, therefore, the power is added to the gift of the estate, the fair construction is that the power is something different from and in excess of that which would have arisen as a mere accessory to the gift of an estate for life. *Hele v. Green* (1651), 2 Roll. Abr. 261, pl. 10, expressly recognized the principle, and declared that where there was a general power to a tenant for life to grant a term, the grant of a term beyond this life was good, though it might defeat the remainders over." In rendering his opinion in the case, Lord Chancellor CAIRNS said in part: "It is quite obvious that the power to the daughter to work the mines is a power which cannot be exercised after her death. It must be a power co-extensive with her own life. It would be somewhat singular, therefore, to find that one of the verbs here used should point to a benefit terminating so far as the daughter is concerned with her life; whereas another, the verb 'lease' should extend beyond her life to an indefinite period of time. But beyond these observations, I think there are in the latter part of this sentence, matters which indicate, beyond all doubt that what was here provided for was to take place in the lifetime of the daughter. The circumstances which, to my mind, are quite conclusive, are these: In the first place there is the provision that 'all the issues and neat proceeds and profits arising therefrom shall from time to time, as the same shall arise, be paid over by my said daughter to my said trustees and their heirs.' * * * And the only force, in fact which I myself felt in the argument of the appellant at your Lordship's bar, was this: It was contended that if you give an estate to A for life, and then give a general undefined power of leasing to A, inasmuch as the gift of the life estate would carry with it a power of leasing limited to the life of the tenant for life, the donee of the power; therefore, it was said it must be a necessary inference that in giving to the tenant for life a power to lease, a lease was meant going beyond the life incumbency." Lord CRANWORTH followed, saying in part: "My

Lords, I entirely concur in what my noble and learned friend has said, and I have very little to add. Had this power been simply a power to lease and work the mines there would have been (as my noble and learned friend has suggested) great force in the argument that something must have been intended more than the daughter would have had by virtue of her life interest. But that is not the object of this power. It is not so much a power as a restriction. What the testator says is this: If by virtue of your life interest you work these mines, mind I do not mean that you are to have the profits; whatever you get by so doing must be invested for the benefit of the fee simple of the estate. I think this is clearly what was meant. Without going the length of saying that, if the power of leasing the mines had been given *simpliciter*, without saying for how long, no case could arise in which you might say that it meant for ninety-nine years, at all events it must be an extreme case to enable you to come to such a result, and put such a construction on the words. But there is no necessity at all for it here."

Nevertheless, this dictum of Mr. Justice FIELD, wholly uncalled for by the facts of the case before the court, has in a number of later cases been accepted and acted on where the application of such a rule defeated the clearly expressed intention of the testator, illustrating how unnecessary dicta often produce bad law. The dictum is quoted in the following cases: *Giles v. Little* (1881), 104 U. S. 291, holding "to be and remain hers, with full power, right, and authority to dispose of the same as to her shall seem meet and proper so long as she shall remain³ my widow," did not give a

³ This doctrine is recognized in *Kaufman v. Bredkenridge* (1886), 117 Ill. 305, 7 N. E. 666, but power to sell in fee was found in the context: *Dickinson v. Griggsville Nat. Bk.*, 111 Ill. App. 183, affirmed, 209 Ill. 350; *Wardner v. Seventh Day Baptist, etc.* (1908), 232 Ill. 606, 83 N. E. 1080, 122 Am. St. 138.

Smith v. Bell (1832), 31 U. S. (6 Peters) 68, cited and relied on by Mr. Justice Field in *Brant v. Virginia Coal Co.*, and from which he probably got the idea stated in his proposition was a bequest of all personal estate, principally five slaves, to a wife "to and for her own use and disposal absolutely; the remainder after her decease to be for the use" of an only son. The only question discussed was whether the gift over to the son was void as repugnant to the absolute gift to the wife. No idea of a power was suggested: Marshall, C. J., in giving the opinion of the court said: "There were trifling and perishable articles, such as the stock on the farm, and the crops of the year, which would be consumed in the use, and over which the exercise of absolute ownership was necessary to a full enjoyment. These may have been in the mind of the testator, when he employed the strong words of the bequest to her. But be that as it may, we think the limitation to the son on the death of the wife restrains and limits the preceding words so as to confine the absolute power of disposition which they purport to confer of the slaves, to such a disposition of them as may be made by a person having only a life estate."

Smith v. McIntyre (1899), 95 Fed. 585, 37 C. C. A. 177, was a devise of the homestead to the wife for life in lieu of dower, and the personalty to the wife for life, "she, however, first disposing of sufficient thereof to pay my just debts"; and it was held the power was not confined to the personalty; and that she could sell the home in fee.

Cowell v. South Denver Real Est. Co. (1901), 16 Col. App. 118, 63 Pac. 994, merely holds that an explicit power to convey in fee given to the widow made tenant for life and executrix was not well exercised because no purpose of the will required

power to the widow; *Henderson v. Blackburn* (1882), 104 Ill. 227, 44 Am. Rep. 780, holding "to have and to hold or to dispose of so much of the same as she may need or wish to use during her life time" and "after her death if there is anything left" gave her no power beyond her express life estate; *Patty v. Goolsby* (1888), 51 Ark. 61, 9 S. W. 846, holding the power extended only to the personal property, under the gift of "all my negroes, lands, stock" (&c.) "to have and to hold during her natural life, or until she may think proper to marry, with full power to sell and dispose of such property as she may think proper"; *Miller v. Porterfield* (1890), 86 Va. 876, 11 S. E. 486, 19 Am. St. 919, holding that no power was given by the words "to have and to hold the same for her own use and benefit, and also to make such disposition of the same that she in her judgment may deem best, should it become necessary that a part or all should become necessary for the support of herself" and "After the death of the said Elizabeth, I will and devise that any and all property remaining unused shall be given" &c.; and now comes the Supreme Court of South Carolina to add to the list of fatalities created by this dictum by deciding, after quoting it as above, and without even mentioning numerous prior decisions of the South Carolina court, including *Fronty v. Fronty* (1833), 1 Bailey Eq. 517, to the contrary on like facts, that no power is given by the words: "My wife, Jane, to have the right to dispose of any property as she may think best for the purpose of paying all just debts and supporting herself and children while she remains my widow"; and this merely because a previous clause of the will gave her a life estate in all his property. *Sheffield v. Graig* (1916), — S. C. —, 89 S. E. 664.

J. R. R.

WHAT OBLIGATIONS ARE INCLUDED IN THE DESCRIPTION OF "IMPLIED CONTRACTS?"—This question arose in the case of *People v. Dummer*, 113 N. W. 934, recently decided by the Supreme Court of Illinois. The state had brought suit in debt in the Municipal Court of Chicago against the defendant for taxes alleged to be due from him. By statute the municipal court was given jurisdiction over all actions on contracts, express or im-

it (payment of debts or the like), but the court does cite the case of *Brant v. Virginia Coal Co.* with apparent approval.

Whittemore v. Russell (1888), 80 Me. 297, 14 Atl. 197, holds that a power is not given anyone by the following words because it is not said who shall sell: "I give to my wife the use of the remainder * * * during her natural lifetime, and after her decease it is to be equally divided between my children; the real estate may be sold if thought advisable."

Russell v. Wertz (1898), 88 Md. 210, 44 Atl. 219, sheds no light on the present discussion because the court and counsel discussed only the question as to whether the devisee took an estate in fee by a devise to her "to hold and dispose of as he may see fit while she remains single." But very strict interpretation of language giving powers in this state is indicated in the later case of *Bauernschmidt's Est.* (1903), 97 Md. 35, 54 Atl. 637, and *Meister v. Meister* (1913), 121 Md. 440, 88 Atl. 225.

Winchester v. Hoover (1902), 42 Ore. 313, 70 Pac. 1036, contains no power to the life tenant; it is "to have and to hold during her life, or while she shall remain unmarried, to pay my debts, to support herself, and to maintain and educate minor children"; but the court does quote and approve the dictum of Mr. Justice Field above quoted.

plied, when the amount claimed by the plaintiff, exclusive of costs, exceeded \$1,000.00. Judgment for the plaintiff was reversed on the ground that the court had no jurisdiction, inasmuch as the cause of action was deemed not to be based on a contract express or implied.

It is plain that if the court was entitled to jurisdiction over the case, it was for the reason that the cause of action was based on implied contract, for it could hardly be said that the obligation to pay a tax arises out of an express contract. It is also clear that the contract, if implied at all, must have been implied in law and not in fact, for there were no acts or words of the taxpayer from which an actual intention to pay could have been presumed. The intention of the legislature must govern in determining what is included in the term "implied contract." That intention can be gathered by considering what is generally meant by the term as used by writers and courts. Does it mean a contract in fact, that is, one based on consent implied from words or acts, or does it include, in addition to the above, all non-contractual obligations which are treated for the purpose of affording a remedy as if they were contracts? Or does the term include, besides contracts in fact, only that group of non-contractual obligations founded on "unjust enrichment," technically called quasi-contracts?

On the precise point involved in the suit for taxes in the principal case, there seems to have been little, if any, adjudication. However, some light may be thrown on the problem by considering the same question as it has arisen in connection with the jurisdiction of the United States Court of Claims. By the Act of Congress of February, 1855, that court was given jurisdiction over "* * * all claims founded * * * upon any contract, express or implied, with the government of the United States * * *" It has been held quite precisely that the "implied contract" of the statute includes only those in fact, that is, those implied from the acts or words of the parties, the mutual consent being presumed from conduct rather than expressed. *Schillinger's Case*, 24 C. C. Rep. 278; *Russell v. United States*, 35 C. C. Rep. 154; *Harley v. United States*, 39 C. C. Rep. 105; *Knapp v. United States*, 46 C. C. Rep. 601. These decisions hold conclusively that "implied contract" does not include contracts implied in law, that is, neither quasi-contracts nor any other obligations which are contractual only from the viewpoint of the remedy available for their enforcement.

The preceding discussion would seem to support absolutely the ruling in the principal case but for one consideration. The Illinois court in interpreting the statute, stated that the term in question had been extended to include "a class of obligations which are created by law without regard to the assent of the party upon whom the obligation is imposed, on the ground that they are dictated by reason and justice." Yet the court refused to extend it to the case of an obligation to pay a tax. The term as defined so as to include quasi-contracts in the narrow sense, that is, "unjust enrichment" cases, is supported by authorities. *Chudnovski v. Eckels*, 232 Ill. 312; *Harty Bros. v. Polakow*, 237 Ill. 559; *Pache v. Oppenheim*, 87 N. Y. Supp. 704; *Devery v. Winton Motor Carriage Co.*, 97 N. Y. Supp. 392. Two things are of interest in connection with the Illinois cases, cited *supra*, allowing this

form of jurisdiction over quasi-contracts. In *Chudnovski v. Eckels*, the court quotes BLACKSTONE, 3 COMM. 158, to show that the term "implied contract" includes what is called a contract implied in law. However, the court seems to have overlooked the fact that the learned writer in that very portion of his work included a tax in the same category, as is evidenced by the fact that he used a statutory obligation as one example of implied contract. In the case of *Harty Bros. v. Polakow*, the action was based on a statutory lien, a mere duty or obligation, as it were, and jurisdiction was taken with implied contract as the basis. Several well considered cases outside of Illinois have held that a tax is an obligation based on an implied contract. *State of Nevada v. Y. J. M. Co.*, 14 Nev. 220; *City of Dubuque v. Ill. Cent. R. R. Co.*, 39 Iowa 56.

It is evident, then, that the Illinois court defines "implied contract" as more extensive than contract implied in fact, but not so extensive as to include all non-contractual obligations termed contract for the sake of the remedy only. Why should there be a middle course? "The term 'quasi-contracts' may with propriety be applied to all non-contractual obligations which are treated for the purpose of affording a remedy as if they were contracts. So interpreted, the subject includes: (1) judgments and other so-called contracts of record; (2) a number of official and statutory obligations * * * ; (3) obligations arising from 'unjust enrichment,'—that is, the receipt by one person from another of a benefit the retention of which is unjust. But in view of the fact that nearly all of the obligations included in the first two classes are commonly known and treated under more specific designations, or as parts of other clearly defined topics, while those of the third class have no other distinctive name whatever, it is believed that the term 'quasi-contracts,' for the sake of convenience, should ordinarily be applied to obligations of the third class only." WOODWARD, LAW OF QUASI-CONTRACTS, I. There is a great deal to be said in making the criterion of jurisdiction one of remedy or form rather than one of substance, for then a court can determine whether it has jurisdiction by merely examining the most general pleadings. And this in spite of the position taken by the United States Court of Claims. However, there can be little justification for taking jurisdiction over one obligation which is contractual only for remedy's sake, and refusing to take jurisdiction over another similar non-contractual obligation which can be enforced by a contractual remedy. The Illinois court, in order to be thoroughly consistent with its rulings in previous cases, which carried jurisdiction over contracts into the realm of quasi-contractual obligations, should have held that the Chicago Municipal Court had jurisdiction of the cause of action in the principal case.

H. G. G.

CONSTITUTIONAL AMENDMENTS, SELF-EXECUTING AND OTHERWISE, PROVIDING FOR THE INITIATIVE AND REFERENDUM.—The question of whether or not a provision of a state constitution, which provided that amendments thereto might be made by initiative petition, was self-executing, was presented to the Supreme Court of North Dakota in the recent case of *State*

ex rel. Linde, Atty. Gen. et al. v. Hall, Secretary of State, 159 N. W. 281. North Dakota, at the same time it adopted the initiative for constitutional amendments, also changed its constitution so as to permit of the initiative and referendum upon questions of general legislation; but the constitutional provision pertaining to this expressly stated that it was intended to be self-executing and thus the question here presented did not arise in the construction of the amendment pertaining to the initiative and referendum upon general legislation. Oregon, Oklahoma, Missouri, Arkansas, Washington, California, Colorado, Arizona, South Dakota, New Mexico, and Nevada have also at different times provided for the initiative and referendum through constitutional provisions. Of these constitutional provisions, some were clearly stated to be self-executing; while others were so worded as to make it evident that it was not intended that they should be self-executing, but rather that they should be construed as mandates to the legislatures of the respective states, who, acting thereunder, should pass laws effectuating and putting into force the principles thus set forth. However, there is a third class, of which *Hall v. State* is typical, wherein the constitutional provision was so worded as to throw doubt upon its purpose and render a judicial determination necessary.

A terse way of summing up the distinction between self-executing provisions and those which are not, is to say that self-executing provisions are addressed to the courts while those that are not are addressed to the legislatures. *Willis v. Mabon*, 48 Minn. 140, 50 N. W. 1110, 16 L. R. A. 281, 31 Am. St. Rep. 626; *State v. Kyle*, 166 Mo. 287, 65 S. W. 763, 56 L. R. A. 115. Constitutional provisions are "self-executing where it is the manifest intention that they should go into effect and no ancillary legislation is necessary to the enjoyment of a right given or the enforcement of a duty or liability imposed." *State v. Harris*, 74 Ore. 573, 144 Pac. 109; *State v. Swan*, 1 N. D. 5, 13, 44 N. W. 492. In other words, the constitutional provision must be regarded as self-executing if an examination and construction of the provision itself will disclose the rights conferred or the duties imposed. However, if merely general principles are laid down, and the legislature must supplement the constitutional provision by passing laws to effectuate its purpose, then it is not self-executing.

Oregon in 1902 amended its constitution so as to permit the initiative and referendum, providing for a general reservation by the people of the power to propose laws and amendments to the constitution and to enact or reject the same at the polls, and also the power to approve or reject at the polls any act of the legislative assembly. It not being evident whether or not the amendment was intended to be self-executing, the court was called upon to construe the following portion: "Petitions and orders for the initiative and referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment until legislation shall be especially provided for." The court construed the provision to be self-executing, considering that the purpose was to insure the enforcement of the provision through its own strength and not to make its efficacy depend-

ent upon some future action on the part of the legislature, lest its effect be thwarted by the refusal by the legislature to obey its mandates. The court considered that the reference to future legislation was an acknowledgment that it might be advisable to enact laws to facilitate the enforcement of this constitutional provision, but that a provision may still be self-executing though not so complete as to render supplemental legislation unnecessary. *Stevens v. Benson*, 50 Ore. 269, 91 Pac. 577. The initiative and referendum were still further extended in Oregon by a constitutional provision which provided for the initiative and referendum as to municipal legislation, the amendment reading that "the manner of exercising said powers shall be prescribed by general laws." In construing this amendment, the court came to the opinion that it was not self-executing, as "it only declares or reserves the right, without laying down rules by means of which this right may be given the force of law." *Long v. City of Portland*, 53 Ore. 92, 98 Pac. 149.

The Oklahoma provision as to the initiative and referendum had provided that "the legislature shall make suitable provisions for carrying into effect the provisions of this article." The court had no difficulty in determining that the intention of the constitutional convention had been that this should be construed only as a mandate to the Legislature, and giving effect to this intention, it was declared not to be self-executing. *Ex parte Wagner*, 21 Okla. 33, 95 Pac. 435.

The provision in the Missouri constitution was very similar to that one discussed in *Stevens v. Benson*, 50 Ore. 269, *supra*, and the Missouri court assumed the same to be self-executing. *Edwards v. Lesneur*, 132 Mo. 410, 31 L. R. A. 815. The Arkansas provision upon the subject was borrowed from the Oregon constitution, and the Oregon court in *Stevens v. Benson*, *supra*, having determined the same to be self-executing, the Arkansas court did likewise, (*State v. Moore*, 103 Ark. 48, 145 S. W. 199) doubtless having regard for the general rule that where one state borrows a constitutional provision from another state that has previously been construed by the courts of such state, such construction is presumed to be adopted along with the provision. *McGrew v. Mo. Pac. R. Co.*, 231 Mo. 496, 132 S. W. 1077.

The Colorado provision is very similar to the one adopted in Oregon. However, it does not expressly state that it is intended to be self-executing, nor does it make reference to future legislation as indicating that it was not presumed to be self-executing. It provides the percentage of voters necessary to propose a measure, to whom the petition should be addressed, the time previous to election within which it must be filed, and that a majority vote is sufficient to enact the petition into law. It appears that the court has construed this to be self-executing by upholding a constitutional amendment which was initiated and passed by force of this constitutional provision. The court stated: "Whenever a constitutional amendment is attacked because of alleged violation of the Constitution in its submission, it must appear beyond a reasonable doubt, both as to law and fact, that the Constitution has been violated before the amendment would be overthrown." *People v. Prevost*, 55 Colo. 199, 134 Pac. 129.

The provisions in the constitutions of Nevada, California, South Dakota, and New Mexico will need no attention in this connection, as the former two state expressly that they are intended to be self-executing, while the latter two clearly indicate that they were not expected to be self-executing.

As previously stated, North Dakota has provided for the initiative and referendum upon general legislation by a constitutional amendment which had affirmatively provided that the same was to be self-executing. This provision was proposed and passed by the 1911 legislature and again passed by the 1913 legislature (Senate bill No. 32, chapter 101, 1913 Session Laws), and having been ratified by a vote of the people, it became incorporated as a part of the constitution. The constitutional provision construed in the case of *State v. Hall, supra*, granted the privilege of amending the constitution through initiative petition. This constitutional amendment was adopted through much the same procedure as that followed in changing the constitution so as to permit the initiative and referendum upon general legislation. It was introduced and passed by the 1911 legislature (Senate Bill 153, chapter 89, Session Laws 1911), and having been ratified by a vote of the people, this provision permitting the constitution to be amended through initiative petition had now become a part of the state constitution (§202). A petition fulfilling the requisites so far as set forth in the constitutional amendment was now filed with the Secretary of State which sought to amend §215 of the state constitution so as to remove the capitol from Bismarck to New Rockford. Relators insisted that the petition was void, inasmuch as the constitutional amendment under which petitioners were proceeding was not self-executing and no supplemental legislation had been passed thereunder to put the same into effect. Therefore, they sought to enjoin the Secretary of State from submitting the question contained in the petition to a vote of the people. That part of the constitutional amendment which bore upon the question of whether or not the same was self-executing (sub-division 2, §202) read as follows:

"Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the Secretary of State, at least six months previous to a general election, of an initiative petition containing the signatures of at least twenty-five per cent of the legal voters in each of not less than one-half of the counties of the state. When such petition has been properly filed, the proposed amendment or amendments shall be published as the Legislature may provide, for three months previous to the general election, and shall be placed upon the ballot to be voted upon by the people at the next general election."

The court construed the phrase "as the Legislature may provide" to be indicative of future legislation as to the manner of publishing the proposed amendment, but inasmuch as there was a general provision in force as to the manner in which proposed constitutional amendments should be given publicity (§979 of Political Code of 1913) it was argued that this phrase, "as the Legislature may provide," referred to the method already in use for advertising proposed constitutional amendments. Surely the omission to state expressly the manner of publication would not have in itself defeated the

self-execution of the amendment. The court, not finding it evident from an examination of the amendment itself that the same was self-executing or the contrary, proceeded to determine the question from the intention of the framers, and to determine that intention a resort to extrinsic matters was found necessary. *Fuzz v. Spaunhorst*, 67 Mo. 256.

It was discovered that the wording of the constitutional provision in question was taken from the section bearing on the same subject in the Oregon constitution, the similarity of the language employed indicating that one was patterned after the other. However, the North Dakota legislature failed to adopt the last clause of the Oregon provision, "Petitions and orders for the initiative and referendum shall be filed with the Secretary of State, and in submitting the same to the people he, and all other officers, shall be guided by the general laws and the act submitting this amendment until legislation is especially provided for." As the Oregon courts, previous to the adoption by North Dakota of the former state's constitutional provision on the question of amendment of constitution by initiative petition, had decided that the insertion of this particular clause determined the constitutional amendment to be self-executing (*Stevens v. Benson*, supra), then it would seem, from the fact that the North Dakota legislature had in its adoption eliminated this clause, that the legislature did not intend that the amendment which it was framing was to be considered self-executing. *McGrew v. Mo. Pac. R. Co.*, 230 Mo. 496, 132 S. W. 1077; *Fitzmaurice v. Willis*, 20 N. D. 372, 127 N. W. 95; *Commonwealth v. Harnett*, 3 Gray (Mass.) 450; *Pennock v. Dialogue*, 2 Pet. 1, 7 L. Ed. 327; *Hogg v. Emerson*, 6 How. 482, 12 L. Ed. 505.

Inasmuch as the court will look to the words of the constitutional amendment itself for a determination of whether or not the same is self-executing, why would it not be wise for the Legislature to insert in every such provision some clause indicating the intent? "This section shall be self-executing," or, if it is thought necessary, add, "but legislation may be enacted especially to facilitate its operation." On the other hand, if it is the intention that the amendment should not be construed as self-executing, let a clause be inserted which would clearly and unequivocally state that the same was not self-executing, or plainly indicate that it was to be considered only as a mandate to succeeding legislatures,—“The Legislature shall make suitable provisions for carrying into effect the provisions of this amendment.” Let some express provision be inserted wherever there is the slightest possibility of the question arising. Those who frame the law can best state whether or not it is intended to be full and complete in itself, or merely an outline of a general policy for the guidance of future legislation. To neglect to insert some such clause will often give rise to the necessity of a judicial determination of the question,—a possibility which may not occur to the framer of the amendment because of his own familiarity with its intention. Not only are cost and delay saved, but also the disappointment of those who have relied on a construction of the provision opposite to that determined upon by the court.

W. L. O.

WHEN IS DEATH INSTANTANEOUS?—The existence, side by side, in the same jurisdiction at the same time of the two statutes which have come to be generally known as the "DEATH ACT" (modelled after LORD CAMPBELL'S ACT), and the "SURVIVAL ACT," has led to many curious twists and turns of the law and has resulted in a decided conflict of authority as to their proper interpretation. It would almost seem as if the cases were in conflict upon every point upon which there could possibly be a difference of opinion. It is even difficult to reconcile some of the cases decided by the same court. For the different interpretations which have been given these statutes and the resulting conflict in authority see 15 HARV. L. REV. 854, 14 MICH. L. REV. 408, and for a full discussion of the Michigan cases an article on "CONSTRUCTION OF 'SURVIVAL ACT' AND 'DEATH ACT' IN MICHIGAN" in 9 MICH. L. REV. 205.

Upon one point the cases are fairly well agreed, that when death is "instantaneous" there can be but one recovery and that under the "DEATH ACT." Therefore, as pointed out in the note in 14 MICH. L. REV. 408, the question whether or not death is "instantaneous" is a vital one, and out of the decisions on that point there has sprung one of the most serious conflicts of the whole question, viz: when is death instantaneous? The inquiry in this note will concern only that particular phase of the general question.

In the recent case of *Great Northern Railway Co. v. Capital Trust Co., Adms.*, 37 Sup. Ct. 41, the Supreme Court of the United States was called upon to pass upon the point under discussion. An employee of the railway company was accidentally killed and suit was brought under the Federal EMPLOYER'S LIABILITY ACT for the benefit of his father and mother seeking to recover their pecuniary loss and also damages suffered by him prior to his death. Some evidence tended to show that after being run over by one or more cars, although wholly unconscious, the deceased continued to breathe for perhaps ten minutes. Testimony of other witnesses supported a claim that there was no appreciable continuation of life. The court held that death was instantaneous and that the circumstances afforded no basis for an estimation or award of damages in addition to the beneficiaries' pecuniary loss. In a former case, *St. Louis, I. M. & S. R. Co. v. Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. Ed. 1160, the Supreme Court held that as the decedent had survived his injuries more than a half hour, the injuries being such as to cause him extreme pain and suffering if he remained conscious, the administrator might recover the beneficiary's pecuniary loss and also for the pain and suffering endured by the deceased. That is, death was not instantaneous, and a cause of action had vested in the injured employee which survived to his personal representative. In that case the rule was stated as follows: "Such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." The facts in *Great Northern Ry. Co. v. Capital Trust Co.*, supra, were deemed to bring it squarely within the rule as laid down in *St. Louis, etc., Ry. Co. v. Craft*. Therefore we may safely say that we have

a fairly, definite workable rule for guidance in future cases arising under the federal statute.

In Michigan the cases are confusing and fail to give a definite and certain test as to when death is instantaneous. See 9 MICH. L. REV. 205, 214. In *Olivier v. St. Ry. Co.*, 134 Mich. 367, 96 N. W. 434, 104 Am. St. Rep. 607, 3 Ann. Cas. 53, the court said: "There is no occasion for saying that one dies instantly, because such survival is accompanied by a comatose condition, or unconsciousness, or insanity or idiocy," and cited *Keilow v. Railway Co.*, 68 Iowa 470, "where it was held that survival of the injury for a moment is sufficient to permit the cause of action to vest and survive." However, in the case of *West v. Detroit United Railway Co.*, 159 Mich. 269, 123 N. W. 1101, where decedent was struck by a street car, carried under the car and crushed, and was heard to groan for about fifteen minutes after the accident, though he was dead when taken from beneath the car, the court held that death was instantaneous and laid down the following rule: "Where there is a continuing injury resulting in death within a few moments, it is 'instantaneous'." Following this came the case of *Ely v. D. U. R.*, 162 Mich. 287, where the deceased was struck on the head by a trolley pole and lived about ten minutes, though never recovering consciousness, and it was held that the action was properly brought under the "SURVIVAL ACT." A still later Michigan case is *Lobenstein v. Whitehead & Kales Iron Co.*, 179 Mich. 279, 146 N. W. 293. In that case the deceased fell down a flue in a building under construction, and never recovered consciousness after he struck, although there were some signs of life about the body fifteen minutes after the fall, and it was held that death was instantaneous. For the latest Michigan case on the question see *Beach v. St. Joseph*, 158 N. W. 1045. This brief review of the Michigan cases alone serves to illustrate the confusion in the authorities and the inherent difficulties of the problem.

The results in other jurisdictions are equally as unsatisfactory. In *Moyer v. Oshkosh*, 151 Wis. 586, 139 N. W. 378, the decedent while riding a bicycle fell through an open draw in a bridge and was drowned. Death was held to be instantaneous, the court at the same time saying that the proper test is: "Was there a substantial period of conscious suffering between the injury and the death?" But evidently the court determined that there is no conscious suffering in death by drowning. It would almost seem as if our common knowledge would show this to be untrue, for it would be rare indeed where the first contact with the water would result in instant death or unconsciousness. On the contrary, would it not be more in accord with the circumstances generally accompanying such tragedies to say that while the deceased was struggling in the water and drowning there was a substantial period of conscious suffering? But see *The Corsair*, 145 U. S. 335; *Cheatham v. Red River Line*, 56 Fed. 248. In *Klann v. Minn.*, 161 Wis. 517, 154 N. W. 996, in applying the rule the same court came to the conclusion that there was a substantial period of conscious suffering where the decedent was caught and burned in a building in which he was working. In other words, the court has decided that while the first flame which reached the deceased would not cause instant death or unconsciousness, nevertheless such would be the re-

sult from the first contact of the water in case of death by drowning. See also *Perkins v. Oxford Paper Co.*, 104 Me. 109, 71 Atl. 476, where the same rule is applied.

In Massachusetts we find still another variation of the rule. There the accruing right of action to the person injured and which will survive to his personal representative does not depend upon intelligence, consciousness, or mental capacity of any kind upon the part of the person injured. *Hollenbeck v. Berkshire R. Co.*, 9 Cush. (Mass.) 478. In the earlier case of *Kearney v. Boston & W. R. Co.*, 9 Cush. 108, it had been held by Chief Justice SHAW that where "there was only a momentary, spasmodic struggle" death was instantaneous. See also *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *Mears v. Boston & M. R. Co.*, 163 Mass. 150, 39 N. E. 997. In a later Massachusetts case (*Martin v. Boston & M. R. Co.*, 175 Mass. 502, 56 N. E. 719) where a brakeman in descending from a train caught his foot, fell, and was dragged over two hundred feet before he was finally killed, the court held that there was no conscious suffering and so death was instantaneous. In *St. Louis, etc. Ry. Co. v. Stamps*, 84 Ark. 241, 104 S. W. 114, the Supreme Court of Arkansas on facts which indicated much more clearly that death had been instant reached an exactly opposite conclusion. The Massachusetts rule was applied in the principal case under discussion, *Great Northern Ry. Co. v. Capital Trust Co.*, supra, when it was before the Supreme Court of Minnesota (reported in 127 Minn. 144, 149 N. W. 14), and a different conclusion reached from that by the Supreme Court of the United States, viz: that death had been instantaneous.

Perhaps the rule announced by the Supreme Court will do much to clarify a problem which has been so troublesome. It will at least furnish a more definite test for solving these perplexing situations than any of the rules hitherto announced.

M. C. M.