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Note and Comment

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NOTE AND COMMENT

WHEN THE DESCENDANTS OF A PREDECEASED LEGATEE WILL NOT TAKE UNDER A STATUTE OF SUBSTITUTION.—There are in most states statutes declaring that if a person named as legatee dies before the testator, his descendants shall take his share. *Downing* v. *Nicholson,* 115 Ia. 493; *Strong* v. *Smith,* 84 Mich. 567; 18 A. & E. ENCYC. OF LAW, 2d Ed. 755. A common type is such as is found in the Civil Code of California, sec. 1310, viz.: "When any estate is devised or bequeathed to any child or other relation of the testator and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator." Under this statute the Supreme Court of California has just held (two judges dissenting) that descendants of a legatee dying after the will was made, but before a codicil confirming it do not take because (1) the statute is one of distribution having reference only to conditions existing at the time of death of the maker of the will and not to the time of the decease of the original legatee, (2) because the republication subsequent to the death of the legatee made the lapsed legacy a void legacy, and (3) because the statute applied only to lapsed and not to void legacies. *In re Matthews' Estate,* (Calif. 1918), 169 Pac. 233.

We shall consider these points in their order. Notwithstanding the terms

of many of the statutes that gifts shall not lapse, it seems settled in most jurisdictions that they do, and that the legatee takes an independent gift by force of the statute. ROOD ON WILLS, sec. 675; *Fisher* v. *Hill*, 7 Mass. 86; *Mann* v. *Hyde*, 71 Mich. 278; *Thompson* v. *Myer*, 95 Ky. 597, and the subject of the bequest forms no part of the primary legatee's estate; *Cook* v. *Munn*, 12 Abb. N. C. 344; *Jones* v. *Jones*, 37 Ala. 646; *Re Hafner*, 45 App. Div 549; *Smith* v. *Smith*, 5 Jones Eq. (N. C.) 305; *Glenn* v. *Belt* 7 G. & J. (Md.) 362; nor is the gift subject to the debt of the primary legatee or devisee to the testator; *Hemsley* v. *Hollingsworth*, 119 Md. 431; *Wattenbarger* v. *Payne*, 162 Mo. App. 434; *Carson* v. *Carson*, 1 Metc. (Ky.), 300. But see *Baker* v. *Carpenter*, 69 Ohio St. 15, *Denise* v. *Denise*, 37 N. J. Eq. 163; *Tilton et al.* v. *Tilton* (Mass. 1907), 82 N. E. 704; *Smith* v. *Williams*, 89 Ga. 9, 32 Am. St. Rep. 67; *Cook* v. *Munn* (*supra*); *Harris* v. *Harris*, 12 Gill and J. (Md.) 474; *Vogel* v. *Turnt*, 110 Md. 192. This is not true of the English statute. The English courts have interpreted their statute literally to the effect that the deceased legatee is deemed alive until after the death of the testator. The descendants then take as heirs of the legatee subject to all the incidents of the original gift. *Johnson* v. *Johnson*, 3 Hare, 156; *Eager* v. *Furivall*, 17 Ch. D. 115, and the same is true in Canada. *Re. Carter*, 20 O. L. R. 127. The effect given these statutes by the American authorities shows that they are by no means placed on the same footing by the courts as substitution by words of the testator in the will by which the substituted legatee takes subject to all the incidents of the original gift. ROOD ON WILLS, secs. 699-702.

While it is often said in the American cases that these statutes enter into and become a part of the testator's will, the courts were not attempting to determine whether the beneficiary took by virtue of the will or by virtue of the statute alone, or when and in what way the statute took effect. Yet the cases are so numerous in which these statements are made and the language is so explicit that they are entitled to some weight. For instance, in *Carson* v. *Carson* (*supra*), the Court said: "The surviving issue take the estate devised not as heirs at law or distributees of the deceased devisee but as legatees directly and immediately under and by virtue of the will." In *Wattenbarger* v. *Payne* (*supra*) it was said "The legislature enacted a law that, in the contingency of the father's death, made his child an *original legatee* of the grandfather. It is everywhere agreed that an applicable statute enters into and becomes a part of the testator's will. Therefore, should it not be said that the grandfather willed the legacy to his son, if he be alive at the grandfather's decease, but if he be dead then to the children of the son?" Many similar statements are to be found in the cases. The doctrine of the principal case is inconsistent with all this. It has been held that the statute applies to a will made before its passage where the legatee died subsequent to its passage. *Bishop* v. *Bishop*, 4 Hill (N. Y.) 138; *Dozey* v. *Killam*, 1 Duv. (Ky.) 403, but that if the legatee died before the statute was passed, his descendant would not take under the statute, but that the legacy would lapse. *Murphy* v. *McKeon*, 53 N. J. Eq. 406; *Harrison's Estate*, 10 Pa. Dist. 45.

A more serious question arises in the second conclusion reached by the court. That republication makes a lapsed legacy a void legacy seems never

to have been the subject of an actual decision before, though there are *dicta* stating as much in some English cases. See *Winter* v. *Winter,* 5 Hare 306; *In re Fraser* (1904), 1 Ch. 726. The former case was identical in facts with the present in so far as they are pertinent to our question. The court cited no authorities and held that legacies to persons dead when the will was made were within the purview of the English statute. This effect of republication seems hardly tenable under the English statute where, by its very terms, the legatee is deemed to be alive until after the death of the testator. See *Johnson* v. *Johnson* (*supra*); *Eager* v. *Furnivall* (*supra*). The statute does not seem to be involved in the latter case and in all the authorities cited by the court the will was given an operative effect. In most of the cases in which the courts have mentioned republication it has been to give the will an operative effect that it would not have had without republication,—to make it valid if the prior execution was defective or revoked, to pass after acquired property, etc. *Rood on Wills,* Sec. 396-7, and rarely if every as in *In re Matthew's Estate* (*supra*) to prevent a will operating which would have had an operative effect without republication. See *Mann* v. *Hyde* (*supra*) and *Harrison's Estate* (*supra*). The very same court that decided the principal case held a gift to charity which the statute declared void if made within thirty days of the testator's death was not invalidated by republication within that period. *McCauley's Estate,* 138 Calif. 432, 546.

Admitting that the republication deprived the will of all benefit from prior publication only, does it follow that the descendants of a legatee dead when the will was made cannot take? Several courts have held the descendants of legatees dead when the will was made take by force of the statute. *Lewis* v. *Corbin,* 195 Mass. 520; *Nutter* v. *Vickery,* 64 Me. 490, 498; *Wildberger* v. *Cheek,* 94 Va. 517; *Mower* v. *Orr,* 7 Hare 472; *Minter's Appeal,* 40 Pa. St. 111. Other courts have held they do not take. *Pegues* v. *Pegues,* 70 S. C. 544; *Lindsay* v. *Pleasants,* 39 N. C. 320; *Scales* v. *Scales,* 6 Jones Eq. (N. C.) 163; *Moss* v. *Heisley,* 60 Tex. 426; *Billingsly* 1. *Tongue,* 9 Md. 575; *Almy* v. *Jones,* 17 R. I. 265, 270. The phrasing of the statutes may reconcile some of the apparent conflict. In *Lindsay* v. *Pleasants, Scales* v. *Scales, Moss* v. *Helsley,* the statutes referred specifically to lapsed legacies. In *Billingsly* v. *Tongue,* the statute read "no devise shall lapse or fail of taking effect by reason of the death of the devisee in the lifetime of the testator." In *Almy* v. *Jones* the statute applied only when a person "having a devise or bequest shall die before the testator." This language was held inapplicable to one who was dead before the devise or bequest was made. It is to be noted that the language of the Civil Code of California, sec. 1310 (*supra*) is broad enough to include both cases before and after the making of the will. Statutes of this latter type have been held to include both. See cases cited *supra.* Statutes of more restricted wording have been held to extend to legatees dead when the will was made. See *Mower* v. *Orr* (*supra*), *Minter's Appeal* (*supra*). *Pegues* v. *Pegues* (*supra*), however, is in accord with the principal case. The cases of *Doe on the Demise of Hearn* v. *Roe,* 4 Houst. (Del.) 20, and *Stennett* v. *Hall,* 74 Ia. 279, cited by the court, do not involve the statutes. R. A. F.

CONTINGENT GIFTS AND INCORPORATION BY REFERENCE.—The courts have had great difficulty in reconciling certain contingent gifts with the statutes requiring wills to be in writing duly executed. At first glance there appears no inconsistency, but in practice troubles accumulate.

Before there were any statutes concerning wills the validity of contingent devises and bequests was admitted; also the validity of a provision the effect of which was to depend on a writing to be drawn later, and even by one other than the testator. Robt. Crody, being about to die, called his friends John and Thomas, saying: "Ye be the men in whom I have great trust, especially that the will which I now declare you will faithfully perform, and therefore (inasmuch as a devise of land would be void for violation of the law of tenures) I now make livery to you of the house in which I now lie and all my land in this town, to hold to you and your heirs, in full confidence that you will make a good estate to my wife Alice for life, then to my daughter Margaret and the heirs of her body, but if she be dead without issue, then to my heirs." And the chancellor decreed accordingly. About 1438, 1 Calendar of Proceedings in Chancery (Hen. VI), xliii. This was a mere trust; but lands being devisable by special custom, a testator devised that on a certain event his executors should sell; and though the lands were not devised, but descended to the heir, all the judges of England in the Exchequer Chamber assembled agreed that the executors might sell, for descent-cast takes away entry on a disseizor, but not powers, conditions, etc. 4 Jenk. Cent. case 75, A. D. 1498. In 1431, Babington, C. J., said: "The nature of a devise where lands are devisable is that one may devise that the land shall be sold by the executors, and this is good, as has been said, and it is marvelous law; but this is the nature of a devise, and devises have been used at all times in this form; and so one may have lawful freehold from another who had nothing, just as one may have fire from flint and yet there is no fire in the flint." *Farington* v. *Darrel,* (1431), Y. B. 9 Hen. 6, 23b. A man devised land to his wife for life, remainder to B in fee, and that the wife might make leases for six years; and a lease made by the wife after she had married again was held good against B. *Harris* v. *Graham,* (1638), 1 Roll Abr. 329. A testator directed his executors to select one of his nephews as his beneficiary, and the chancellor ordered them to do it. *Mosely* v. *Mosely,* (1673), Finch Ch. 53.

In this state of the law it was declared by statute that devises would be void unless in writing signed by the testator, and subscribed in his presence by three credible witnesses. 29 Car. II, c. 3, sec. 5, (1677). Under this statute it was held that a man might by devise charge his land with the payment of his debts, and such charge would include subsequent debts; that he might by devise duly executed charge his land with payment of his legacies, and that such charge bound his land to pay legacies created by a later will not executed in such form as to be valid as a devise of land. *Inchiquin* v. *O'Brien,* (1744), not reported, *Hannis* v. *Packer,* (1752), Ambl. 556.

But when a man later devised his lands to trustees upon trusts to be declared by him by any deed executed by him before his death, the Lord Chancellor Loughborough, on the advice of Wilson and Buller, JJ., held the

trusts declared by such deed were void; because the deed was intended to operate only in conjunction with the previously executed devise, was therefore testamentary in character, and did not comply with the statute prescribing how devises should be executed. *Habergham* v. *Vincent,* (1793), 2 Ves. Jr. 204.

The result of this decision was that a man who had duly executed a devise charging his land with the payment of debts and legacies, could add new charges without any formality at all, by merely contracting debts or declaring legacies by word of mouth only; but he could not do so by a duly executed deed even though he had in his formally executed devise expressly provided for that event. He could by his devise authorize another to do for him after his death what he could not reserve to himself the power to do while he lived. He could not by his devise reserve to himself the power to do that by deed which he could have done by deed without making any devise at all. He could not reserve to himself the power to do by deed what he might authorize another to do without deed. He might by devise charge his land with specialty debts which would include those incurred afterwards; but he could not by devise charge his lands with such sums as he should by deed later specify even though the later charges turned out to be only these very debts. He might by devise charge his land with a legacy of £100 to each servant in his employ at the time of his death; but he could not charge his land by devise with £100 to such of his servants at his death as he should by deed specify. But he could do that very thing by charging his land by devise with payment of his specialty debts, and later giving to such of his servants as he pleased a bond for £100 payable at his death, if they should then be in his employ. It is submitted that the decision cannot possibly be reconciled with the accepted law of that day; and that the difficulties of the courts in endeavoring to follow that decision since are due to that fact.

The logic on which the court proceeded in *Habergham* v. *Vincent* sounds very plausible. It was said that the testator cannot reserve to himself the power to devise his property in a manner which the statute declares to be void; and that he cannot by his devise which does not take effect till he is dead give himself a power to arise before the instrument creating it becomes operative. The difficulty with this logic is that it assumes that he is attempting to do so, that the result can be reached in no other way, that a devise which is duly executed cannot deal with future events—a thing that is permitted in all dispositions by will. It is not confined to contingent devises and bequests. A devise to my brother Thomas, although on its face absolute, is contingent on Thomas surviving me. A devise of Blackacre is contingent on not disposing of the land before death. If I bequeath my bonds to A and my bank deposits to B, I may at will, without any legal formality at all, vary, revoke, and renew these bequests as many times as I please. All I need do is to sell a bond and deposit the proceeds, buy a bond and draw a check on the account for the amount. These propositions have never been doubted in any court. Devising my lands to such uses as I shall hereafter by deed declare is not in substance distinguishable from a devise

to my executors to pay my debts, or to such wife as shall survive me. It is submitted that the power to make a testamentary instrument at all necessarily includes the power to make the effect of the disposition depend on the contingencies arising between the making of the will and the death of the testator. Inasmuch as the result must depend on the contingencies not mentioned, expressly mentioning the contingencies does not hurt the devise; and as devises have always been sustained in which the testator expressly made the effect depend on contingencies happening between the time he made the devise and his death, it cannot be material that the contingency he mentions is a writing made by him instead of any other act. To hold otherwise is to sustain a disposition expressly made contingent on a future act, and to defeat a disposition made dependent on a future writing, and yet a writing is an act. The distinction requires us to deny effect to a writing made by the testator while alive and give effect against his heir to a similar writing made by another after the testator is dead, if the testator authorized him to make it.

The New York Court of Appeals some years ago held that a power given by will to a daughter to dispose by will, with a gift to her executors if she predecease the testator, entitled the legatees under the daughter's will made after that of the parent to take, though the power to the daughter lapsed by her death before the death of the parent. "While, therefore, it may not be possible to sustain the power of appointment as such, and so enable Sarah's devisees and legatees to take the one-fifth by force of her will, it is possible to see in the will of the father a clear intent to prevent a lapse, and avoid a partial intestacy by carrying over the one-fifth which she did not take, through her executors, to those whom she should name as devisees and legatees of her property, and in the proportions by her directed." *Piffard's Estate,* (1888), 111 N. Y. 410. The same court has just followed that decision in *Fowles's Will,* (1918).

If a testator may make the disposition of his property under his will depend on a writing to be made by someone else later and not effective as an appointment under a power, why may he not make the disposition depend on a writing to be made by himself later? J. R. R.

SUBSTITUTIONAL GIFTS TO CLASSES.—In some recent cases we have fresh reminder of the futility of Sir William Grant's distinction between original and substitutional gifts, a rule over which courts have quarreled and disagreed ever since it was promulgated, and which never was applied to the exclusion of anyone without disappointing the wish of the testator. In speaking of this rule in *Re Hickey,* [1917], 1 Ch. D. 601, 604, Neville, J., says: "The alleged principle seems to be that the meaning of the word 'substitute' involves the idea of replacing one thing by another. One cannot 'substitute' something for nothing. The proposition appears to me axiomatic but not very illuminating. If the testator uses the word its meaning must affect the construction of his will; but where the court uses it, it is merely a mode of expressing a view of the construction already formed."

In view of the endless variety of expression and the hopeless confusion

of decisions, it has been said that the means of distinguishing the original from the substitutional legacy is the length of the chancellor's foot, and the liveliness of his imagination, per Barrows, J., in *Wheeler* v. *Allan,* (1866), 54 Me. 232, 234.

The case in which the rule was first announced was this: an immediate gift to "each and every the child and children of my brother and sisters which shall be living at the time of my death; but if any child or children of my said brother and sister or any of them shall happen to die in my lifetime and leave any issue, the legacy or legacies hereby intended for such child or children so dying shall be for his, her, or their issue;" which Sir William Grant, M. R. held did not give a right to take to the children of one dead when the will was made, because "the nephews and nieces here are the primary legatees; nothing whatever is given to their issue except by way of substitution; in order to claim, therefore, under the will, these substituted legatees must point out the original legatees in whose place they demand to stand; but of the nephews and nieces of the testator, none could have taken besides those who were living at the date of the will." *Christopherson* v. *Naylor,* (1816), 1 Meriv. 319.

If we correct his honor's baseless assumption that the legatees are ascertained at the date of the will instead of at the death of the testator, the whole fabric of his argument is destroyed. Moreover, no rule was ever worse applied than this one in the very case in which it originated. Taking his honor's view of the case, the original legatees are "children of my brother and sisters that shall be living at the time of my death", which would exclude children of a brother dying after the date of the will but before the death of the testator, and leave no possibility of anyone being a substituted legatee. Further, to impute to the testator an intention that the right of issue of a nephew or niece to take shall depend on the inconsequential fact that the nephew or niece died the day before or the day after the will was written, is to read into the will an intention so capricious and fantastic, that it is doubtful if ever a testator entertained it. Testators always have in mind the time when their wills will take effect whatever be the form of expression; but here that is the form of expression.

If the testator had said he gave to the nephews living at his death and the issue of those then dead, it is clear that the issue would take as primary donees, and not by way of substitution for anyone. It would be an original gift to a composite class; living nephews and the issue of dead nephews. It is claimed that the meaning is different if the testator says: "I give Blackacre to my nephews, and if any nephew shall die before me, his issue shall take his share." This is about as strong as any of the cases; but who would suspect that the testator intended to make a point of the future tense "shall die"?

In *Morrison's Est.,* (1891), 139 Pa. 306, the words were: "I have a number of nephews and nieces living in different parts of the country, and whose names and places of residence I am not able to state accurately; to each of them I bequeath the sum of $10,000; if any of them should die before me, the legacy of those so dying to be paid to their children." The

court held children of nephews dead when the will was written were not entitled; yet no one could doubt that the testator intended to include them.

In *Cochran's Est.*, (1913), 10 Del. Ch. 134, 85 Atl. 1070, the court went so far as to impute such an intent to exclude grandchildren of the testator on the words "shall be dead", which certainly is equally and strictly true of those dead at the writing of the will. The words were "unto such of my children as may survive me, and if any of my said children shall be dead leaving a child or children, then to such child or children the share the parent would have taken if living." It is not possible to make children of a child dying before the testator substituted legatees under this will; for the persons in whose place they are supposed to take are "such of my children as may survive me." If the supposed original legatees survive the testator they themselves take. Those who do not survive the testator do not fall within the class at all, and therefore no one can stand in their stead.

A more rational interpretation was made in holding children of a brother who was dead when the will was written to take under the words: "to be divided equally between my brothers and sister of the full and half blood equally, but if any be then deceased such share to go to his or her children equally." *Anderson* v. *Wilson,* (1912), 155 Iowa 415, in which the decisions English and American are reviewed at considerable length.

Re Hickey, (1917), 1 Ch. D. 601, was a legacy to "the descendants of A or their descendants living at my death"; in which the court held that children of a descendant dead when the will was written were entitled to take.

While *Christopherson* v. *Naylor,* (1816), 1 Meriv. 319, is now too firmly established in England to be overruled there, and can only be distinguished to avoid its operation (*Musther, in re,* (1890), 43 Ch. D. 569, C. A.); courts here cannot consistently follow it after holding that the statutes declaring that legacies to descendants "who *shall die* before the testator shall be paid to their issue if any," entitle issue of members of a class dying before the will was made. See *Chenault* v. *Chenault,* (1888), 88 Ky. 83; *Bray* v. *Pullen,* (1892), 84 Me. 185; *Jamison* v. *Hay,* (1870), 46 Mo. 546. J. R. R.

ACQUIREMENT OF TITLE BY A WILLFUL TRESPASSER AND COMPENSATION FOR THE TRESPASSEE.—The interaction of the basic maxim of substantive law, that no man may be deprived of his property without his consent, and the correlative maxim of adjective law, that the courts will give exact compensation for property taken or destroyed, together with the more or less mechanical rules of damages depending upon the form of action used, have in their outcome gone far toward justifying the somewhat grandiloquent utterance of our legal forbears of the seventeenth and eighteenth centuries, that the "Common Law is the perfection of human wisdom." The final stage in this development is shown in the late cases of *Polk County* v. *Parker,* (Iowa, Dec., 1916), 160 N. W. 320 and *Warren Stove Co.* v. *Hardy, et al.,* (Ark., Oct., 1917), 198 S. W. 99.

Since the decision in *Wetherbee* v. *Green* has domesticated the relative value rule in English law there has been much controversy and litigation over the ratio of disparity which will effect a transfer of title. The ratio

in this case was twenty-eight to one. Judge Cooley afterwards, in *Isle Royale Mining Co* v. *Hertin,* (1877), 37 Mich. 332, said that a ratio of three to two was not sufficient. In *Eaton* v. *Langley,* (1898), 65 Ark. 448, a ratio of six to two was held inadequate, while in *Louis Werner Stave Co.* v. *Pickerif,* (1909), 55 Tex. C. A. 632, a ratio of three to one did effect a transfer of title. We may conclude from this that the disparity must be so great that it will "shock the conscience of the court" to apply the old common law rule for the protection of the original holder of title, though the exact point at which this will occur seems not very well determined.

When the bulwark of title yields for the benefit of the innocent trespasser, it does not leave the original holder of title without a remedy. He is to be made whole by adequate compensation for what he has lost and, in case the thing converted has increased in value for any reason, the amount of compensation is affected by the form of action that may be used in the suit for recovery. If trover or trespass is used, the recovery should logically be the value at the time and place of conversion. If detinue or replevin is used with the alternative recovery in damages, the amount should be the value at the time of the suit. In case the property appropriated has not been increased in value enough to effect a change of title and the suit is brought under the formless action of the code, these several conflicting principles are reconciled by allowing an inadvertent trespasser to keep all that has been added to the finished product by his own efforts, while the trespassee gets back the value of his title at the time of the conversion plus any increment of the market, if such there be. *Eaton* v. *Langley,* (1898), 65 Ark. 448. It is to the credit of the courts in some of our non-code states that the same equitable result is reached whether the form of action be trover, as in *Winchester* v. *Craig,* (1876), 33 Mich. 205, or replevin, as in *Gustin* v. *Embury-Clark Lumber Co.,* (1906), 145 Mich. 101.

All of this equitable relaxation of strict maxims of law and rules of practice has, however, been made for the benefit of the inadvertent trespasser, but in the first of the instant cases there enters that *nefandissimus Germanus* of the Common Law, the willful trespasser. In *Polk County* v. *Parker, supra,* a city assessor took pages from a discarded county plat book and, outside of office hours, put on this paper valuable maps and plats. When he left the office he took away the book with the maps and plats. The county sued out a writ of replevin and secured possession of them. They were worth about $1,500. It was held that title had passed to the willful trespasser, thus answering in the affirmative the question that has been asked ever since the decision in *Wetherbee* v. *Green,* namely, will the rule in that case apply if the trespass is intentional, the very great disparity between the title converted and the labor and skill added being sufficient to "shock the conscience of the court into a decision favorable to the wicked trespasser? This, of course, reverses the acknowledged principle of the civil law, adopted in the case of *Silsbury* v. *M'Coon,* (1850), 3 Comst. (N. Y.) 379, that "a willful wrong doer acquires no property in the goods of another, either by the wrongful taking or by any change wrought in them by his labor or skill, however great the change may be." By a natural exten-

sion in the principle of this last mentioned case even the *bona fide* purchaser for value from the willful trespasser cannot convey what he himself does not have. *Wooden Ware Company* v. *United States,* (1882), 106 U. S. 432, represents the weight of authority on this point, though *Railway Co.* v. *Hutchins,* (1877), 32 Ohio St. 584, protests strongly against this on the ground that "the estoppel, so to call it, being created by fraud or wrong, exists only against the one guilty of that fraud or wrong, which the purchaser is not."

In the Arkansas case of *Warren Stave Co.* v. *Hardy, supra,* the facts bring before the court all of the conflicting principles rehearsed above. The agent of the appellant had bought stave bolts from one Jolly. Jolly had bought the standing oak timber out of which the bolts were made from one Turner, who claimed to own the land on which the timber was growing, but refused to tell how he got title thereto. Jolly had cut and removed the trees and sold the bolts to the appellant's agent. The title to the land on which the timber stood was not in Turner, as he claimed, but belonged to Hardy, the appellee. The standing timber was worth between $2.50 and $3 a cord. The stave bolts from $25 to $50 a cord, depending on the sort of staves for which they were used. It was *held,* that Jolly was a willful trespasser. As such he should, according to rule, acquire no right or interest in the timber, and the purchaser from him, though innocent, should acquire no greater right than the trespasser had. It was further *held* that the defendant was liable for the value of the stave bolts on the market less the charges of transportation, and not merely for the value of the logs before being worked up. Since the question of damages had arisen as an incident of the suit to quiet title to the land, the question of the transfer of title of the timber after its conversion into personalty did not come up, but the result of the decision is that while the injured party has received full compensation for his title, as though sold on the best market, the willful trespasser has acquired title to the chattel converted, when the ratio between the value of the chattel taken and the finished product is about ten to one, and has succeeded in transferring this right to the innocent purchaser who is allowed to keep this title on payment to the trespassee of the value of the chattel at the time of conversion, plus such a sum as may have been added to the converted property by any increment in the market for staves or from any "other causes independent of the acts of the defendant", cf. *Weymouth* v. *Chi and N. W. Ry. Co.,* (1863), 17 Wis. 572. Everybody has received his just dues, the various maxims of law act in unison and lawyers' law is in harmony with justice. J. H. D.

PUBLIC UTILITY VALUATION—GOING-CONCERN VALUE IN RATE MAKING.—What is the effect of a city ordinance which proposes to a public utility company the terms on which it may dispose of its product to the users, but which is rejected by the company? As to a company not yet doing business it is clear that the ordinance when rejected becomes a mere legal nullity. It never was more than an offer that might ripen into a binding contract by acceptance. That it is by no means a nullity as to a utility actually oper-

ating in the city after the expiration of its franchise and as a mere tenant by sufferance of the streets, is held in *City and County of Denver* v. *Denver Union Water Co.* Supreme Court of the U. S. Nos. 294 and 295, decided March 4, 1918. The city of Denver may well be surprised to learn that by passing an ordinance which the company rejected it was considerably worse off than if it had done nothing. In effect, by passing an ordinance fixing the maximum charges permitted to be made by the company "during the time it shall furthe. act as a water carrier and tenant by sufferance of said streets", the city gave to the plant a value that made the rates illegal and defeated the ordinance. That any unaccepted ordinance should have such an effect is indeed startling, the more so that in this case the city was careful to expressly recite in the preamble that the company had for four years been without a franchise and a mere tenant by sufferance of the streets and that this enactment was made without recognizing the right of the company to occupy the streets or to continue its service.

In *Detroit United Railway* v. *City of Detroit,* 229 U. S., 39, 46, it was held that a street railroad authorized to operate in the streets of a city for a definite time, within a reasonable time after the expiration of such term may be required to remove its tracks and other property from the streets. This of course would apply equally to the mains and other property of a water company after the expiration of its franchise. The city of Denver had the undoubted legal right upon the expiration of the franchise in 1910, or at any time thereafter, upon reasonable notice (90 days in the case of the Detroit United Railway) to require the water company to remove itself and its property from the streets. In such case the property value would be mere junk value, and the rates in the ordinance in question would be a much more favorable option to the company than an order to vacate.

Legally this seems clear, but practically it is very uncertain what are the rights that may be realized. To require this vacation would ruin the company. Equally it would ruin the city. It would require the city three years to install new works, even if not delayed by legal battles and elections. Meantime the city must have water. The city is under no legal obligation to purchase the works even if it has an option to do so. *Denver* v. *New York Trust Co.,* 229 U. S. 123, 142. No more is the company under legal obligation to furnish water. If it does do so it is entitled to a reasonable return on "fair value of the property being used by it for the public convenience". *Smyth* v. *Ames,* 169 U. S. 466. But what is the fair value of a plant that may at any moment be ordered out? Is it junk value? The court holds that the point is not properly raised by the pleadings, the master's report, the exceptions, or the assignments of error, but supposing it were properly raised then by the true intent and meaning of the ordinance (which the company was fighting and had not in any respect accepted) "new rights were conferred upon the company of such a nature that in considering the effect of the provisions limiting rates, the plant must be valued not as junk but as property useful and in use in the public service." This new right the court construes as "the grant of a new franchise of indefinite duration, terminable either by the city or by the company at such time and under such circum-

stances as may be consistent with the duty that both owe to the inhabitants of Denver". We may agree with the court that to regard the plant as a mere junk heap is "highly penal and destructive in its effect". This perhaps justifies basing rates on the fair value of the plant as in active service. It may be that if its value is to be fixed on the cost-of-production-less-depreciation theory an allowance should be made for that uncertain and highly speculative element, going-concern value. See 15 MICH. L. REV. 205. But that this rejected ordinance should have any such effect or any effect seems wholly unnatural, and contrary to every legal principle. The court seems to have caught at this straw to work out the equitable result of "preserving the substantial rights of both parties". It is extraordinary that an ordinance held to be ineffectual for every purpose for which it was passed becomes effectual for the very purpose for which it expressly states it was not passed. This is indeed a legal boomerang that injures not the opponent and spends all its force on the hurler. Possibly the city of Denver deserved the blow.

The explanation probably is this. The position of the public and the public utility after the expiration of the franchise is a difficult one. The utility has no further right in the streets, the city has no right to use the property, *Detroit United Railway* v. *Detroit*, 229 U. S. 39. But neither can let go the other and the courts naturally look for a settlement to work out substantial justice. This case indicates a strong inclination of the court to hold that so long as the city continues the use the rate should be based on the same valuation (with the exception of a possible allowance for franchise value) that would be the base in fixing rates before the expiration of the franchise. In this division the court catches at this ineffective ordinance as an excuse for avoiding what would otherwise amount to a forfeiture. Whether the same conclusion will be reached in future cases where no such excuse exists remains to be seen.

Three justices are unable to agree to such reasoning. Justice Holmes writing the dissenting opinion admitted that perhaps an instrument could be framed that granted while it said that it did not. He thought the ordinance meant no more than that the company must accept the city's rates or stop. As it could be stopped by the city out and out, it could be stopped unless a certain price was paid. *Ashley* v. *Ryan*, 153 U. S. 436, 443, 444, citing *Paul* v. *Virginia*, 8 Wall. 168. However ruinous it might be to both parties to stop service, the law knows nothing but legal rights, and the relations of these parties after the expiration of the franchise are independent of legal rights. Under the circumstances of the case he thought it hard to see how property could be confiscated by the establishment of almost any rate, and therefore the ordinances can hardly violate the due process clause of the 14th Amendment *Appleton Water Works Co.* v. *Railroad Com.*, 154 Wis. 121.

The case throws no light on the proper theory of valuation of public utilities. All parties accepted the cost-of-reproduction-less-depreciation theory and no issue was made on that. Why going-concern value was fixed at $800,000 instead of $700,000, or $1,500,000, or more or less, is, as nearly always happens in such cases, quite unexplained. *Appleton Water Works Co.* v. *Railroad Com.*, 154 Wis. 121, 148, 15 MICH. L. REV. 205, 218. E. C. G.