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Note and Comment

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MICHIGAN LAW REVIEW

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NOTE AND COMMENT

THE LAW SCHOOL.—In common with all other law schools requiring college work for admission, this school has suffered a very heavy loss in attendance because of war conditions. This, however, is a matter for pride and not for discouragement for it means that our students have gone into the army or navy or other branches of the national service in very high ratio to their total number. And this is by no means due only to the effect of the Selective Service Act for from the very beginning our men have volunteered in great spirit and promptness. In 1917 fewer than two-thirds of the then senior class were present at the Commencement exercises to receive their degrees. Most of them had gone by the middle of May. All this indicates that the profession is living up to one of its high traditions of patriotic service.

The University is one of the institutions at which the Government has established a branch of the Students' Army Training Corps, and it was early decided that the Law School should admit members of the Corps who meet the entrance requirements of the school. This decision necessitated the adoption of the four quarters or term plan of organization instead of the two semesters and summer session. Except for the S. A. T. C. students, however, this has made little difference in the actual giving of the courses. With the exception of one or two minor and special topics, such as Mining and Irrigation Law and the law of Public Officers, the faculty is offering the regular curriculum in its entirety. Therefore, those students who are not in the S. A. T. C. are taking their work in substantially the usual way. The requirements for admission to and the standards of work in the School, and

the requirements for graduation have not been and will not be lowered in any degree whatever. Sixty-five students have enrolled in the School. Of this number three who are members of the S. A. T. C. have not passed their physical examinations and may therefore withdraw. The students are classified as follows:

Graduate students	2
Third year students	18
Second year students	15
First year students	29
Special student	1
Total	65

Small as this number is it makes up, so far as is known, the second largest law school in the United States requiring college work for admission. Harvard is reported to have 69 students. At least eight law schools have suspended entirely and others are giving only one or two years of work during the period of the war.

There has been some redistribution of courses among the faculty. Dean Bates has returned after a year's leave of absence and is giving the courses in Constitutional Law and International Law. Professor Wilgus, besides his regular work, is giving a course in Military Law in accordance with the requirements of the War Department. The subject is being intensively developed upon strictly professional standards of work. Professor Goddard has taken over the courses in Wills and Property II; Professor Aigler has taken the course in Contracts; Professor Durfee has taken the course in Suretyship; Professor Barbour has taken the course in Future and Conditional Interests in Property; and Professor Waite has taken the course in Bills and Notes. Otherwise the members of the faculty are offering the same courses as those given by them last year. Professor Bunker retired at the end of last year and has been made Professor Emeritus upon the Carnegie retiring salary and has resumed the practice of law at Muskegon. Professor Rood has indefinite leave of absence. Professor Stoner is serving in the army with the rank of Captain in the Motor Transport service. Assistant Professor Grismore is in the army, serving at Camp Custer. During the summer, Dean Bates was engaged in a study for the Government of certain phases of international relations, and Professor Aigler was engaged in legal and administrative work in the War Trade Board at Washington. The Law School has been glad to be able to serve its sister institution, the University of California, whose law faculty was seriously depleted because several of its men had gone into the national service, by loaning to it for one year Professor Evans Holbrook, who has leave of absence for that period. The faculty is thus reduced to ten men, but that number of men of professorial rank giving their entire time to the teaching of law is as great as is engaged in any law school for the present year.

Despite the almost complete loss of the student editorial board, the LAW REVIEW will continue publication as usual under charge of the faculty. The

number of leading articles upon legal problems of current interest and permanent importance assures us in some respects at least the best volume in the history of the REVIEW.

Chicago, Ill., May 15, 1918.

Editor of MICHIGAN LAW REVIEW.

SIR:

In an article upon "German Legal Philosophy" in the REVIEW for March, 1918, Mr. John M. Zane, after referring, as pro-German propaganda, to what he considers an attempt to commit our law schools to a serious study of legal philosophy, partly in translations from the German, says in a footnote at page 290:

"I suppose we may acquit the persons, who have been misled, of any consciousness that they were being used as tools of the propaganda, but I hardly know what to say of Dean Hall of the Law School of the University of Chicago, who was not ashamed to enter on a warm defence of German submarine methods against merchant vessels. He doubtless has now seen the error of his ways."

In correspondence with the REVIEW I understand that Mr. Zane admits that in making this assertion he relied upon newspaper reports, and that the only actual statements of mine to which the above note could be applicable were made in a lecture given in Chicago in February, 1916, in which I said that, while it was doubtless a proper defensive measure for an armed merchantman to fire at sight upon an approaching submarine, the latter, in dealing with vessels known to be so armed and instructed, ought not to be required to give them an opportunity for the first shot; also stating that in my opinion this conclusion did not require us to treat defensively armed merchantmen like belligerent war vessels in our ports, inasmuch as the former did not go to sea for the purpose of attacking enemy vessels, but only used their guns when necessary to prevent an attack upon themselves.

As applied to this expression of views, Mr. Zane's note seems to me so misleading that I ask you to publish this explanation of it.

Very truly yours,

JAMES P. HALL.

CHILD LABOR LAW CASE—COMMERCE POWER OF CONGRESS AND RESERVED POWERS OF THE STATES.—The decision in the Child Labor Law case, *Hammer* v. *Dagenhart*, — U. S. —, 62 L. ed. —, decided June 3, 1918, would have caused much less surprise twenty-five years ago than it did when announced last June, for it is based upon two constitutional provisions concerning which the much wider and more varied experience of the last quarter century had developed theories, better defined and sounder than those of the earlier period. Those two provisions are the Tenth Amendment regarding the powers reserved to the States and the Commerce Clause. There has been an astonishing amount of faulty reasoning about the Tenth Amendment in its relation

to Federal powers. Over and over again courts and writers have argued as if certain powers, or powers of certain kinds had been reserved to the States and therefore that the Federal Government could not possibly have or exercise powers that touched those fields; or, to put it otherwise, that the Federal Government could not exercise even its granted powers, as those over commerce or to make treaties, if such exercise would affect matters concerning which the States also possessed power. But this is a diametrically wrong way to approach the distribution of powers between the Federal and the State Governments. Certain powers have been given to the Federal Government. In the nature of the case, and as the Supreme Court has declared repeatedly, these powers, many of them stated only in geenral outline, are and must be capable of indefinite expansion, or more accurately their application is and must be to a changing and always increasing number of objects and situations.

As this process of extending the application of the commerce power to new subjects proceeds, it will necessarily follow in a great many cases that powers of the States, the exercise of which would conflict with these exertions of Federal power, must be suspended *pro tanto* during the life of the Federal law. There are many familiar examples of this. The States may in general adopt and administer their own laws of quarantine, of pilotage, of the regulation of internal traffic, and the sale of goods, but if Congress should enact a law, as unquestionably it has the power to do, regulating quarantine at all ports, all State laws in conflict therewith would necessarily be suspended at least during the life of the Federal quarantine statute. *Morgan S. S. Co.* v. *La. Board of Health,* 118 U. S. 455, 463. The same results would follow the enactment of a Federal pilotage scheme. *Cooley* v. *Board of Wardens of Philadelphia,* 12 How. 299; *Anderson* v. *Pac. S. S. Co.,* 225 U. S. 187.

Congressional regulations of interstate commerce as to subjects of transportation and as to methods of transportation have caused innumerable restrictions upon the power of the States in regard to these matters. *Gibbons* v. *Ogden,* 9 Wheat. 1; *Brown* v. *Maryland,* 12 Wheat. 419; *The Daniel Ball,* 10 Wall. 557; *Northern Pac. Ry.* v. *Washington,* 222 U. S. 370; *Wabash, etc. Ry. Co.* v. *Illinois,* 118 U. S. 557; *Mich. Cent. Ry.* v. *Vreeland,* 227 U. S. 59; *Second Employers' Liability Cases,* 223 U. S. 1.

To come still nearer to the case in hand, when Congress enacted the Pure Food Law, it of course prevented the transportation into other states of food made or put up in violation of its terms, thus diminishing the market and hence indirectly affecting manufacture of goods even though made in complete conformity with the State law. *Seven Cases of Eckman's Alterative* v. *U. S.,* 239 U. S. 510. When Congress prohibited the carrying of lottery tickets in interstate commerce, even though the lottery as an institution were legally recognized by the State, it necessarily diminished the importance and value which the institution would have had except for this restriction. *Lottery Case,* 188 U. S. 321.

The Webb-Kenyon Act, Act of March 1, 1913, 37 Stat. 669, c. 90, by which Congress authorized the States to exercise their police power in regard to the importation and use of liquor from other states has been held to be an exercise of the Congressional power over commerce whereby the law of one

State may effectively restrict the market for goods manufactured in another State, though the manufacture in such other State were entirely lawful. *Clark Distilling Co.* v. *Western Md. Ry. Co.*, 242 U. S. 311. Unless the proposed Federal prohibition amendment shall be adopted, undoubtedly each state may prohibit or permit by license or otherwise the sale and use of liquor. Nevertheless by the Congressional act a partial prohibition in interstate commerce is in effect produced, and that prohibition limits the powers of States quite as effectively as the Supreme Court says it was sought to be limited by the Child Labor Law.

The same problem may be approached from the point of view of the exercise of aother power and with the same results. The President is given the power to make treaties by and with the advice and consent of the Senate. (Art. II, § 1, Cl. 2.) Treaties may concern any subject proper for international treatment not prohibited by the Constitution. They may then and commonly do relate to many matters of great importance to the State internally, such as the purchase, sale, holding, and descent of real property, the right of the nationals of other powers to engage in business in the United States, and an indefinite number of matters more or less associated with these. The United States has repeatedly executed treaties affecting these matters, which are of course subject in general to the powers of the States, and yet when the paramount power of the national government is properly exercised the power of the State government is necessarily correspondingly restricted or suspended. *Fairfax's Devisees*, 7 Cranch 627; *Ware* v. *Hylton*, 3 Dall. 242; *Hauenstein* v. *Lynham*, 100 U. S. 483.

The restricting effect which the exercise of the treaty making power has upon State authority over matters which would ordinarily be regarded as within the so-called powers of the States has been admirably discussed in Corwin's "The Treaty Making Power and National Supremacy." The contrary view, but one which seems indefensible is ably presented in Tucker's "Limitations Upon the Treaty Making Power."

It is submitted that the theoretically correct mode of determining what powers are reserved to the State or the people under the Tenth Amendment is to first ascertain what powers are expressly or impliedly granted to the Federal Government or prohibited to the States by the Federal Constitution and to subtract these from the totality of governmental powers. And this is the mode actually taken by the Supreme Court in the great majority of cases, some of which have been cited above.

If this reasoning be sound, it follows that there were not two but only one real question to be asked and answered by the Supreme Court in deciding the Child Labor case, and that question was: Is the Child Labor Law within the scope of the authority conferred upon Congress by the Commerce Clause? With entire deference we believe that the answer to this question should have been in the affirmative and that is the view taken by the four dissenting Justices of the Supreme Court and convincingly presented in the opinion by Mr. Justice HOLMES. In other words, if this is a proper regulation of interstate commerce, the law does not infringe at all upon the so-called reserved powers of the States. In taking up this question the Supreme

Court seems to us to have fallen into a logical fallacy at the very outset of the majority opinion, and then to have put an interpretation upon several of its former decisions which is not tenable. Mr. Justice DAY, who has delivered many opinions showing an enlightened and forward looking view concerning legislation dealing with social problems, quotes from *Gibbons* v. *Ogden,* as follows:

> "It is the power to regulate, that is to prescribe the rule by which commerce is to be governed."

about which he remarks:

> "In other words, the power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroying it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open for discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate."

But is it not quite clear that the power "to prescribe the rule by which commerce is to be governed", which is Chief Justice MARSHALL'S formula, is very much more comprehensive than "the power to control the means by which commerce is carried on", which is Mr. Justice DAY'S statement? To prescribe rules by which commerce is to be governed is obviously to control the whole life of commerce including dealing not only with the instrumentalities of commerce but with commerce itself and its subject matter. Perhaps it is the narrower interpretation that the power includes only the right to control the *means* of commerce which led the majority of the court in the present case to the conclusion that Congress has no power to prohibit commerce except where the subject matter of such commerce is in and of itself pernicious and productive of injury *after* the act of commerce is closed. With great respect it is submitted that this cannot be the correct view. That a power to regulate includes the power to prohibit in proper cases has been established in many kinds of regulation. It is sufficient here to refer to prohibitions of commerce of which well known examples may be found in the following cases. *In re Rahrer,* 140 U. S. 545 (liquor); the *Lottery* case, 188 321; *Hipolite Egg Co.* v. *U. S.,* 220 U. S. 45 (food); *U. S.* v. *Lexington Mill & Elevator Co.,* 232 U. S. 399; *Hoke* v. *U. S.,* 227 U. S. 308 (white slave); *Caminetti* v. *U. S.,* 242 U. S. 470 (white slave).

The court, in seeking to distinguish these cases from the one before it in order to establish its proposition that prohibition is permissible under the commerce clause only when the subject matter of such commerce may be productive of injury arising *after* the commerce is completed, falls into what

seems to us an error which perhaps may be traced to a sentence in *U. S.* v. *E. C. Knight Co.*, 156 U. S. 1, to the effect that manufacture precedes commerce. This is of course true. But it is an obvious non-sequitur to say that therefore Congress cannot exert its power over commerce merely because such exercise would through commerce indirectly affect manufacture. Certainly the commerce power was not given to Congress for the sole purpose of regulating and promoting commerce as an end in and of itself. There is abundant evidence that it was given not only to prevent the abuses of which some of the states had been guilty in dealing with commerce under the Articles of Confederation and of promoting commerce as a means of promotion of the general welfare, but also for the purpose of securing that general welfare by any regulation of commerce productive of such effect and not forbidden by other clauses in the constitution. What possible difference can it make whether the evil aimed at may have been caused before the particular act of transportation has taken place or after it? If the privilege of such interstate transportation and commerce be greatly enlarged the market for the goods transported thus increases the scale of manufacture and the evil which such manufacture produces. That evil in this case includes of course the injury to the child's health, moral and spiritual welfare, and the cutting off of its opportunity for a reasonable amount of education.

The dissenting opinion makes it clear that the real and substantial infraction of the powers of the state governments is caused by denying to Congress the power to regulate this matter and thus putting it within the power of the several states to ship their goods into other states, not only without the consent of the latter but contrary to their established public policy in regard to child labor or whatever else may be involved. Of course the states did not have such extraterritorial power before the adoption of the constitution, and it is absurd to suppose that it was intended to be given to them by that instrument. In the argument of the present case, the government showed very clearly that one effect of the existence of legislation forbidding child labor in some states and the non-existence of such legislation in others is to drive the greedy and conscienceless manufacturers from the states with this enlightened legislation to those which have it not. Not only that, but the goods made in the latter class of states must now be received and may be sold in the other states and to consumers who may have conscientious scruples against the use of such goods and who have no means of knowing whether in fact child labor has been employed in the manufacture.

The scientific and popular opinion is so strong for the prohibition of child labor in this country that it is certain to be obtained sooner or later. It would seem clear that this object may be obtained by an exercise of the taxing power of Congress under the doctrine laid down in *McCray* v. *U. S.*, 195 U. S. 27. H. M. B.

THE STATUTE OF USES AND ACTIVE TRUSTS.—To explain the survival of uses, *alias* trusts, after the Statute of Uses, one is probably justified in assuming a sympathetic attitude toward this Equitable institution on the part

of the Common Law Judges. Maitland, Equity, 29. But, however predisposed the Judges might be, they would have to satisfy themselves, perhaps others as well, that they were interpreting rather than nullifying the Statute. Only such uses could be saved as could be "distinguished." The case of the use raised upon a chattel interest is clear enough, as it was without the letter, and fairly without the mischief, of the Statute. The case of the use upon a use, while obscure at an earlier day, was elucidated by Mr. Ames, who found the key to the riddle in the fact that, at the time of the enactment and for a century thereafter, there was no such thing as a use upon a use, the declaration of a second use being void for repugnancy, in Equity as well as at Law. Lectures on Legal History, 243. The case of the active use, however, seems to the writer to need further explanation than it has yet received.

The reason usually assigned today for the saving of active trusts is that this is necessary in order to carry out the purpose of the trust—that otherwise the intent of the creator of the trust would be defeated. Since intention was allowed to go by the board in the case of the passive use, this argument involves an implied term: that the reprehensible intent in the one case, to avoid feudal burdens *et cetera,* the very mischief recited in the Statute, merited no consideration; while the legitimate intent in the other case, to provide superior management *et cetera,* did merit consideration, even though the abuses of uses were inseparable from it. At a later period, when the interests which the Statute was designed to protect (viz., the King's feudal revenues; Maitland, Equity, 34, 35) had disappeared, and when, on the other hand, concern for the intention of donors had increased, this might well pass as the rationale of the established doctrine of active uses. But, as an explanation of the origin of that doctrine, it is open to the objection that the judges of Henry's time, who were never much concerned with intention, could hardly have brought themselves to consciously place the purposes of trustors above the interests the invasion of which was so vehemently denounced in the Statute. It is notable that the older authorities on the active use give no hint of this purpose theory.

Mr. Ames said, in a passing remark, that the "special or active trust—was always distinct from a use, and therefore neither executed as such by the Statute of Uses nor forgeitable by Stat. 33 Henry VIII." Lectures on Legal History, 245. Of his three authorities, Bacon fairly supports his position; Sanders merely quotes Bacon, while in another passage not cited by Mr. Ames (Sanders, Uses, 5th ed. 253) he puts forward the purpose theory; and the passage from Chudleigh's case is very obscure. Mr. Ames is, however, supported by the well known Note in Brooke's Abridgement, apparently our oldest authority on the doctrine of the active trust, "Otherwise if he says that the feoffees shall take the profits and deliver them to J. N., this does not make a use in J. N., for he never has them unless by the hands of the feoffees. Bro. Ab. Feoff, al Uses, 52; I Gray's Cases, 410. Mr. Ames must not be understood as asserting a mere distinction in nomenclature, for the terms "use" and "trust", together with "confidence", were always used more or less interchangeably until after the Statute, and, if a distinction in

terms had been clearly recognized, it would have operated to bring the active trust within the Statute by virtue of specification, since the Statute consistently uses the phrase, "use, confidence or trust". The distinction, then, must be between the passive use, confidence or trust, later specified as "use", and the active use, confidence or trust, later specified as "trust", or "special trust", and the distinction must be more fundamental than that which exists in the professional mind today, between the passive and the active trust.

The Note of Brooke's, supra, is susceptible of this interpretation: that, in the case he puts, J. N. had no enforcible right, either at law or in equity. If this were true, the case of the special trust would stand on the same footing as the use upon a use. The writer has been unable to find any authority, except that of unendorsed petitions, to indicate that the Chancellor did enforce this sort of confidence prior to the Statute. But, on the other hand, he finds no authority that he did not, and it seems unlikely that he would have hesitated at this case in view of the fact that he was already dealing with accounting of fiduciaries. I Ames Cases on Equity, 446, n. 1.

It is submitted, with diffidence, that the solution of this puzzle must run something like this. At the time of the Statute, English land was so largely held to uses, (passive uses, of course) that property in land was thought of as a duality—seisin and use. Even when the equitable relation of feoffee and cestui did not obtain, when the legal estate was unencumbered by an outstanding use, the idea of duality remained and the tenant was said to be seised to his own use, the use being characterized as "conjoined" to the seisin. When the use was "divided" from the seisin, the cestui usually had possession, that tangible element of property which at that day, even more than now, approximated ownership. Holmes, Early Equity, II Sel. Essays, 712. Whether the Chancellor would protect the cestui's possession by enjoining interference by the feoffee does not appear, but he would protect it by requiring the feoffee to transfer the seisin to cestui. Contemporary theoretical discussion of the nature of the use we have not, but how can we doubt that the passive use, the common use, was regarded as property—the better part of property? On the other hand, the uncommon active, or special, confidence would almost of necessity be thought of as distinct. In the one case, there was possession; in the other, a mere right to an accounting. On one side, is the common use, an indispensable element of ownership, whether conjoined with the seisin or divided from it; on the other, the special trust, neither an indispensable nor a common feature of ownership. Then comes the Statute. It contemplates, in terms, a use, confidence or trust which is an estate in the land, for the cestui shall "stand and be seised in lawful seisin, estate and possession of and in the same lands, tenements and hereditaments, of and in such like estates as they had or shall have in use, trust or confidence of or in the same." Again, if we may believe Bacon, the clumsy frame of sections I and II, providing in parallel clauses for the cases of seisin of one or more to the use of "others", and that of the seisin of several to the use of "any of them", was dictated by the necessity of avoiding the third parallel case of the conjoined use. Bacon, Law Tracts, 2d ed., 336. The Statute, then, contemplated the common passive use, confidence or trust,

and not the special active use, confidence or trust. Brooke's Note, then, should be read thus: "If he says that the feoffees shall take the profits and deliver them to J. N., this does not make a use in J. N." (meaning a use executed by the Statute, for that is undoubtedly what Brooke was talking about), because J. N. had not the common use, with the right of possession, but a mere right to an accounting, "for he never has them [the profits] unless by the hands of the feoffees". And we may believe that Brooke, if he had been pressed, would have said, as Spence said at a later day, (I Spence, Eq. Jur., 466), that the common use was in the feoffees, since it was not in J. N. and did not result to the feoffer, and since they were to have possession and take the profits in the first instance. He would not have felt that there was repugnancy here, as in Tyrrel's Case, for the common use in the feoffees was a different thing from the special use declared to J. N.

The attempt here is merely to explain the genesis of the doctrine of the active trust in the case of the direction to collect and pay over the profits. Undoubtedly, at a later time, with the advent of the purpose theory, and aided by the lapse of many of the interests which were infringed by the use, the doctrine comes to have a scope which cannot be explained in the foregoing manner.

If these conjectures be correct, then the story of the development of equitable interests from merely personal rights to property rights must be told in two chapters, first of the passive use which in the fullness of its development was struck down, as an equitable institution, by the Statute, and second of the active use which, by reason of its immaturity, was saved from the Statute and pursued its more gradual growth. When the passive use was re-established, under the name of trust, the conditions which had favored the "reifying" of the passive trust in the earlier period had so far disappeared that it partook of the nature of the active trust. E. N. D.

FULL FAITH AND CREDIT AND JURISDICTION.—The judgment of a sister state, when assailed by collateral attack, is often said to occupy a position intermediate between foreign and domestic judgments. Though the older American cases were inclined to examine into the merits of any foreign judgment, the present tendency is toward the adoption of the English view according to which a foreign judgment may be attacked collaterally only for want of jurisdiction or fraud. Dicey, Conflict of Laws (ed. 2) Ch. XVII; see note to *Tremblay* v. *Aetna Life Insurance Co.*, 97 Me. 547, in 94 Am. St. Rep. 521, 538. But whereas any statement of jurisdictional facts in a foreign judgment is presumptive only, a domestic judgment is free from collateral attack on the ground of jurisdiction, except where lack of jurisdiction appears upon the face of the record. 1 BLACK, JUDGMENTS (ed. 2), § 274. The courts of New York have declined to accord this favoured position to domestic judgments and apparently make no distinction between domestic judgments and those of a sister state in this matter. *Ferguson* v. *Crawford*, 70 N. Y. 253, 26 Am. Rep. 589. In view of the so-called 'full faith and credit clause' of the constitution (Art. IV, §1), it is difficult to see why the judg-

ment of a sister state should be open to any form of collateral attack to which it is not open in the state where the judgment is rendered. This would seem to follow from the familiar statement of Chief Justice Marshall in *Hampton* v. *McConnel,* 3 Wheat. 234 (affirming the doctrine of *Mills* v. *Duryee,* 7 Cranch 481), which in the opinion of Justice Holmes is still a correct exposition of the law. *Fauntleroy* v. *Lum,* 210 U. S. 230, 236-7.

At all events it is clear that the judgment of a sister state may not be attacked collaterally upon the merits, and accordingly it becomes important to determine what matters are jurisdictional. Ordinarily the line of demarcation between the two is easily drawn, but when the judgment is rendered by a court of general jurisdiction in pursuance of a statutory or constitutional provision, the problem of delimiting jurisdiction becomes acute. Justice Holmes in *Fauntleroy* v. *Lum, supra,* has stated this very neatly: "No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty of the court. *** Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. When it affects a court of general jurisdiction and deals with a matter upon which that court must pass, we naturally are slow to read ambiguous words, as meaning to leave the judgment open to dispute, or as intended to do more than fix the rule by which the courts should decide." Any reasonable doubt, then, should be resolved in favour of jurisdiction, and it is encouraging to find that in the most recent case in which this question has been presented to the Supreme Court the majority of the justices took this view.

Under the law of Minnesota, if execution on a judgment against a domestic corporation is returned unsatisfied, the court at the suit of a judgment creditor may sequestrate the property and appoint a receiver for the same. If in such suit the receiver presents a petition asserting that any constitutional or statutory liability of the stockholders exists and that resort thereto is necessary, the court may upon proper hearing make an order ratably assessing the stockholders on account of such liability and direct that the assessment be paid to the receiver. The court's order is made "conclusive as to all matters relating to the amount, propriety and necessity of the assessment" (Rev. Laws 1905, §§ 3173, 3184-3187), and if payment is not made the duty devolves upon the receiver of enforcing the court's order against defaulting stockholders wherever found. The order which produced the present controversy was made by the Minnesota court in a sequestration suit against the American Biscuit Company of Crookston, a Minnesota corporation. The receiver brought suit upon this order against a defaulting stockholder in North Dakota. The defendant contended that under the terms of the provision of the constitution of Minnesota (Art. X, § 3), which imposed a liability upon stockholders of corporations "except those organized for the purpose of carrying on manufacturing or mechanical business", the American Biscuit Company belonged to the class whose stockholders were excepted from liability, and that hence the Minnesota court was without

jurisdiction to make the order in question. This argument prevailed in North Dakota (32 N. D. 536); upon appeal to the Supreme Court of the United States it was held (Justices Clarke, Pitney and Brandeis, dissenting), that the court of North Dakota did not give to the proceeding in Minnesota the full faith and credit to which it was entitled under the constitution and laws of the United States. *Marin* v. *Augedahl* (1918), 38 Sup. Ct. 452.

This decision seems eminently sound. The Minnesota court, by the law of its organization, was empowered to take cognizance of, hear and determine the sequestration suit and the receiver's petition for an assessment. Clearly it had jurisdiction of the subject-matter of the suit. *Cooper* v. *Reynolds,* 10 Wall. 308, 316. Whether or not the stockholder against whom the order was sought to be enforced in North Dakota was personally a party to the original suit in Minnesota does not appear, but it is a matter of no consequence. The rule in Minnesota, which is also the general rule, is that, as a stockholder, he was sufficiently represented by the corporation to be bound by the order so far as that order determined the character and insolvency of the corporation and the propriety of the assessment. *Hawkins* v. *Glenn,* 131 U. S. 319; *Bernheimer* v. *Converse,* 206 U. S. 516. See also *Royal Arcanum* v. *Green,* 237 U. S. 531. It follows that the Minnesota court had jurisdiction of the subject-matter and the person. The defendant, therefore, was driven to the contention that Article X, § 3 (quoted *supra*) of the Constitution of Minnesota was directed to the jurisdiction of the court and not to the merits of the decision. He was able to show by several Minnesota cases; *e.g., Hastings Malting Co.* v. *Iron Range Brewing Co.,* 65 Minn. 28 (manufacture and brewing of lager beer); *Vencedor Investment Co.* v. *Highland C. and P. Co.,* 125 Minn. 20 (generating electricity), that the original order in Minnesota was incorrect. If the brewing of beer or generating of electricity entitles a corporation, as a manufacturing concern, to exemption from the constitutional provision, it requires some hardihood to deny the "manufacture" of biscuits. Such a finding was, of course, implicit in the order. But if the order was erroneous, it should have been corrected by application to the court which made it, or by appeal. The constitutional proivison does not aim to deal directly with the jurisdiction of courts; rather does it declare a general rule of liability for stockholders of corporations, excepting therefrom corporations of a certain class. So far as mere words go, the Statute of Frauds might seem to apply to jurisdiction; yet it is doubtful if any court ever regarded that statute as affecting aught save the merits. Only by a strange distortion of language can the constitutional provision be regarded as jurisdictional. The effort of Justice Clarke in his dissenting opinion to support such a proposition is far from convincing. He laid great stress upon a number of Minnesota cases, of which *Dwinnel* v. *Kramer,* 87 Minn. 392, is typical. It was there held that a policy holder in an insolvent mutual insurance company, against whom a general assessment on the policy holders was sought to be enforced, might successfully defend upon the ground that his policy was an "ordinary contract of insurance" issued on receipt of a cash premium and did not conform to the general plan. In other words he was allowed to put forward a personal defense. So too an alleged stockholder

might show that in fact he was not a stockholder or that he had paid the assessment. Such decisions do not call in question the jurisdiction of the court which ordered the assessment. They do not involve the problem of the principal case.

The effect of this decision appears to be that the judgment of a state court is conclusive throughout the Union as to all questions upon which it would be conclusive in the state where it is rendered. It affords consequently an interesting commentary upon a common interpretation put upon two much discussed cases: *Thompson* v. *Whitman,* 18 Wall. 457, and *National Exchange Bank* v. *Wiley,* 195 U. S. 257. W. T. B.

THE CONTENT OF COVENANTS IN LEASES.—Among the many troublesome problems in law those arising out of "covenants running with the land" are not the least. It is quite clear that in order for a covenant to "run" there must be an intimacy of relationship between it and the land, or, more properly, the estate, with which it passes. It is, then, vitally important to consider in each case the subject matter, the content of the covenant, and this matter of relationship.

Until recently courts and writers have with unfortunate unanimity contented themselves with laying down the familiar formula, "The covenant must touch and concern the land". Not until Professor Bigelow published his article on "The Content of Covenants in Leases", 12 MICH. L. REV. 639, 30 LAW QUART. REV. 319, did the subject receive in print the analysis and careful consideration it deserved.

A recent English case, *Barnes* v. *City of London Real Property Co.* (1918), 2 Ch. 18, however fully one may agree with the conclusion arrived at, is a good example of the lack of intelligent analysis so common in these cases. The lessee there sued the assignee of the lessor for breach of a covenant by the lessor to provide a housekeeper to keep the demised office in order. Sargent, J., said, "Then there comes the question whether the obligation ran with the land. The Conveyancing Act of 1881, s. 11, enacts that the obligation of a covenant entered into by a lessor with reference to 'the subject-matter of the lease' shall bind the reversionary interest. Was this an obligation with reference to the subject-matter of the lease? I do not think the law was intended to be altered at all by that enactment as regards the character of the obligation. I think the words of the statute expressed the same idea as that conveyed by the old phrase 'touching the land.' After considering the various authorities which have been cited, and particularly the case of *Clegg* v. *Hands* (44 Ch. D. 503), I cannot entertain a doubt that this obligation to clean, or to clean and dust by means of the provision of a housekeeper for the purpose, is something with reference to the subject-matter of the lease; certainly it has at least as close reference to the subject-matter of the lease as an obligation not to sell any beer on the property except beer provided by the lessor. In my judgment this is clearly something that touches the subject-matter. It affects the value of the rooms for the purpose for which they were let while in the occupation of the lessees. It seems to me

to be a very valuable right of the lessees to have the cleaning and dusting performed by some one who is appointed for the purpose by the landlords for all the tenants." *Clegg* v. *Hands*, it should be observed, was in equity and the court there pointed out that whatever might be the plaintiff's position as assignee of the reversion to enforce the defendant's covenant as lessee to sell on the premises only ale, etc. bought of the lessors, at any rate plaintiff *as assignee of the benefit of such covenant* should succeed on the principle of *Tulk* v. *Moxhay*.

It may be said that generally, though not necessarily (See 12 MICH. L. REV. 645, 646), covenants that are beneficial to the lessee or lessor as such and only so long as he occupies such position have the necessary intimacy of relationship. See *Vyvyan* v. *Arthur*, 1 B. & C. 410. Such test, however, is of value only when it is the benefit side of the covenant that is under consideration. It seems clear that assignees of the lessee in the principal case would have been entitled to enforce the covenant as one running with the estate of the lessee. The question before the court, however, was whether the burden of the covenant was binding upon the defendant by virtue of his being assignee of the reversion. The covenantor's totality of rights, privileges, and powers as owner of the reversion was unaffected by the obligation of the covenant, hence the problem cannot be settled by the application of such test.

In 12 MICH. L. REV. 656, Professor Bigelow has said, "Whether the burden of a covenant by the lessor that benefits the lessee as such should merely for that reason follow the reversion into the hands of an assignee is more difficult of decision. It is arguable that the second section of 32 H. 8, ch. 34, which gives the lessee and his assigns the same rights against the assignee of the lessor as against the lessor will produce the same result that follows from the subordinate nature of the lessee's estate in the situation just considered, and that since the covenant is made by the lessor for the purpose of benefiting the lessee's estate it is for this reason alone within the purview of the statute. So far as the decisions go those that deal with the liability of the assignee of the lessor under these circumstances hold him to be bound." Citing *Mansel* v. *Norton*, L. R. 22, Ch. D. 769; *Gerzebek* v. *Lord*, 33 N. J. L. 240; *Myers* v. *Burns*, 35 N. Y. 269; *Storandt* v. *Vogel & Binder Co.*, 140 App. Div. (N. Y.) 671. The principal case in its conclusion lends support to the view expressed. R. W. A.