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## Note and Comment

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# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT

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WILLARD TITUS BARBOUR.—Legal scholarship in America suffered a grievous loss in the death of Willard T. Barbour, Charles F. Southmayd Professor of Law in the Yale Law School on March 2, 1920. Indeed it is not too much to say that his loss will be felt wherever the English Common Law holds its sway, for he had dipped deep into the obscured origins of Equity Jurisdiction during his study at Oxford and in London, and was but at the beginning of a series of studies and lectures which would ultimately have developed into a comprehensive book, throwing light not only upon the beginnings of equity, but explaining much that has remained obscure in the doctrines derived from an earlier day.

Professor Barbour had been called to Yale in the fall of 1919 and had already won a place for himself there. He had just begun his series of lectures on the Carpentier foundation on the History of English Law at Columbia University when his untimely end came. As has been said in the memorial adopted by the faculty of the Michigan Law School "he stood upon the threshold of his career but the door was thrown wide open before him."

Professor Barbour held the degrees of A.B., A.M., and LL.B. from the

University of Michigan. He had won distinction as an undergraduate and as a graduate in history and a career was open to him in that field. He decided, however, to study law and in our Law School won the respect and affection of all who knew him well. After an unusually fruitful period of study at Oxford, where he laid the foundations for his work "THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY" under Sir Paul Vinogradoff, he was called in 1912 to an assistant professorship in this Law School. Here his work was interrupted for two years by illness, but in 1914 he resumed teaching and in 1915 began carrying a full program, including the courses in Equity and the History of English Law. His unusually broad foundation, a mind acting with lightning-like rapidity and a passion for accuracy and thoroughness, together with an appealing personality, brought to him marked success from the outset. Besides the courses mentioned, he at one time gave that in Criminal Law and had been teaching Future and Conditional Interests in Property for two years before he left this School.

It will be seen that Professor Barbour's experience was almost exclusively academic in character; but it is a remarkable fact, well recognized by his colleagues, that he showed a really extraordinary aptitude for and understanding of practice and procedure and of the practical considerations in litigation. This capacity, surprising in view of the fact that he had not practiced at the bar, grew probably out of his unusually keen perceptive faculties and from his arduous experience in the Records Office in London in working out the procedure in hundreds of early English cases which none but himself had examined for centuries. This unusual combination of qualities assured for him a constantly growing measure of influence and reputation.

We sorely regretted his leaving us in the fall of 1919 to accept the flattering call from Yale University, but we rejoice that another group of law teachers besides our own had had the opportunity to know him intimately. We would not have been content to leave our good friends at Yale in easy possession of him, but wherever he might have been he would have added constantly to the achievements of legal scholarship and to the prestige and serviceableness of our profession.

This is perhaps not the place for the most intimate expression of our personal affection for the man who has gone nor an estimate of his purely personal qualities, and yet we cannot refrain utterly, for Willard Barbour possessed qualities which made him unusually interesting and stimulating as a colleague and gave to the quality of his friendship a strength and an appeal and fineness which it is not given to men to meet often in life. A very wide circle of friends among colleagues and students in three law schools mourn the loss of a brilliant scholar and teacher and a friend of unswerving loyalty, and unselfish affection.

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CONDEMNATION OF PROPERTY AGAINST USE FOR APARTMENT BUILDING.—The General Statutes of Minnesota, Supplement 1917, secs. 1639-10 to 1639-16 (Laws of 1915, c. 128) provide for the creation of restricted residence districts in cities of the first class on petition of 50 per cent of the owners of real estate therein. The City Council is given the power of eminent

domain to enforce its provisions. The City of Minneapolis passed an ordinance pursuant thereto forbidding, *inter alia*, the erection of apartment buildings in certain districts. In a mandamus proceeding by the relator to compel the issuance of a building permit for an apartment house it was held, Hallam and Holt, JJ. dissenting, condemnation cannot be had for a use which is not public and the condemnation against the use of property for an apartment house is not a public use. *State ex rel Twin City Building and Investment Co. v. Houghton* (Minn., 1919) 174 N. W. 885. On rehearing, the decision was reversed on the ground that the act contemplated would come within the scope of the police power. *State v. Houghton* (Minn., 1920) 176 N. W. 159.

The right of a municipality by ordinances and by-laws under state authority to regulate the mode of living and provide for the public health, morals, safety, welfare and comfort are classified primarily into three groups: those of Police Power, Eminent Domain and Taxation. These powers do not spring from any delegation of constitutional power but "underlie the constitution and rest upon necessity, because there can be no effective government without them." "They exist as a necessary attribute of sovereignty." *People v. Adirondack Ry. Co.* (1899), 160 N. Y. 225, 236-238. Prima facie, they are unlimited. That government may not become despotic the fundamental law—the constitution—has placed restrictions on their use. In determining therefore, the appropriate length to which their exercise may be carried, it is necessary to look rather to these restrictions than to the inherent scope of the powers. Through a period of judicial construction the meaning of such phrases as "private property shall not be taken for a public use without just compensation," (U. S. Constitution, Art. V, Amendments), or "shall not be destroyed for public use without just compensation therefor first paid or secured." (Art. I, Sec. 13, Constitution of Minnesota), have received something like definite and fixed meanings. Due to the intense practicality and the variety of conditions under which the questions arise no specific definition can hope to more than imply the nature of the powers. In *C. B. & Q. Ry. Co. v. Illinois*, 200 U. S. 561, at p. 592, the Court in discussing the first of the powers enumerated, says, "The police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals or the public safety." In *Mutual Loan Co. v. Martell*, 222 U. S. 225, these words were cited with approval. Of the second of these powers in *Trenton Water Power Co. v. Raff*, 36 N. J. L. 355, the Court says, "The destruction of private property either total or partial or the diminution of its value by an act of the government directly and not merely incidentally affecting it, which deprives the owner of the ordinary use of it, is a taking within the meaning of the constitutional provision and the power can only be exercised under the right of eminent domain subject to the constitutional limitation of making just compensation." The third power, that of taxation, is very generally said to rest on the same consideration as the power of eminent domain on the question of the purposes for which it may be resorted to. In *Lowell v. Boston*, 111 Mass. 454, where taxpayers objected to taxation to provide the payment of bonds issued to assist by loans, owners of land burned over in the Boston fire, the Court,

in holding the taxation not for a public purpose and therefore void, says, "So far as it concerns the question of what constitutes a public use or service that will justify the exercise of these sovereign powers over rights of property this identity renders it unnecessary to distinguish between the two forms of exercise as the same test must apply to and control in each." This limitation does not apply, however, to the subject matter of taxation nor the motive but only the disposition of the proceeds.

A resumé of some of the cases in which the aid of these powers has been invoked will serve to clarify their meaning. In *Mutual Loan Co. v. Martell*, 225 U. S. 232, the Court passed upon an act of the Massachusetts legislature invalidating the assignment of future wages without the consent of the wage-earner's wife and employer. Against an objection that the exercise of the police power, as this was admitted to be, must have for its purpose "some clear, real and substantial connection with the preservation of the public health, safety, morals or general welfare" the Court, in sustaining the statute, said that the power "extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people." In *Barbier v. Connolly* (1885), 113 U. S. 27, 30-32, an ordinance of the City of San Francisco prohibited the carrying on of washing and ironing of clothes in public laundries and wash-houses within certain prescribed limits of the city and county from 10 P. M. until 6 A. M. It was claimed that this amounted to a deprivation of property under the Fourteenth Amendment. Field, J., says "the provision is purely a police regulation \* \* \* It may be a necessary measure of protection in a city composed largely of wooden buildings \* \* \* and of the necessity of such regulation the municipal body is the exclusive judge."<sup>1</sup> In *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, the legislature had passed a law allowing a reasonable attorney fee to successful plaintiffs in actions against railroad companies for damage due to negligent escape of fire. It was upheld on the ground that it was primarily for the purpose of securing the utmost care on the part of the companies in the performance of their duties.<sup>2</sup> In *Jacobson v. Massachusetts*, 197 U. S. 11, the Court upheld a statute requiring compulsory vaccination against smallpox, in the discretion of the health authorities.<sup>3</sup> In the *Loan Company case*, *supra*, the right of property was not directly involved even if one could be said to have a property right in unearned wages. It was a straight question

<sup>1</sup> *Ex parte Quong Wo.* 161 Cal. 220.

<sup>2</sup> Accord: *Seaboard Air Line v. Seegers*, (1907) 207 U. S. 73, 77-79. *Chicago, M. & St. P. Ry. Co. v. Polt*, 232 U. S. 165, *contra*. See also *Henning v. Georgia*, 163 U. S. 299, prohibiting running of freight trains on Sunday; *Gilman v. Philadelphia*, 3 Wall. 713 and *Cardwell v. American Bridge Co.*, 113 U. S. 205, where the legislature was sustained in its attempt to foster one public use at the expense of another; *Charlotte C. & A. R. Co. v. Gibbs*, (1892) 142 U. S. 386, imposing on railway corporations alone the expense of the State Railway Commission; *Noble State Bank v. Haskell*, 219 U. S. 104, levy of assessment on banks to provide reserve fund in case of bankruptcy of any bank; *State ex rel Yable v. Creamer*, 85 Ohio St. 394, providing for Workmen's Compensation by general assessment of employees.

<sup>3</sup> *Laurel Hill Cemetery v. City and County of San Francisco*, 216 U. S. 358, prohibiting burial of dead within city limits; *People ex rel Barone v. Fox*, 144 App. Div. 611, medical treatment of prostitutes.

of public morals and welfare. In the *Connolly* and *Quong Wo* cases, the decision clearly rested on the ground of public safety. The *Atchison case*, conceding the purpose to be as stated by the Court, finds like justification. The *Jacobson case* is based on the right to legislate with a view to the public health. These cases are essentially different from such cases as *City of Passaic v. Patterson Bill Posting, Advertising and Sign Painting Co.*, 72 N. J. L. 285, in that the former involve primarily, regulations of conduct while the latter are aimed more directly against private property rights. In the *Patterson case*, an ordinance provided that no sign or billboard should be more than eight feet above the surface of the ground and not less than ten feet from the street line. The Court says, "the fact that this ordinance is directed against signs and billboards only and not against fences indicates that some consideration other than the public safety led to its passage. It is probable that the enactment was due rather to aesthetic considerations than to considerations of public safety. \* \* \* Aesthetic considerations are a matter of luxury and it is necessity alone which justifies the exercise of the police power to take private property without compensation." The Supreme Court of the United States in *Thomas Cusack Co. v. City of Chicago*, 242 U. S. 526, apparently found a way to circumvent this objection. A statute prohibited the erection of any billboard on any lot in any street in which one-half the buildings were used exclusively for residence purposes unless permission was obtained in writing from a majority of the owners. The Court found that such billboards were hiding places for criminals and upheld the law on the ground that it came within the purview of the police power as a regulation for the public safety. It is difficult to see why the same objection would not apply in this case as served to restrain the court in the *Passaic case, supra*. No reason is apparent why billboards should be any better for this purpose than fences or other similar structures. As said in *Crawford v. Topeka*, 51 Kan. 756, where an ordinance provided that no person should erect any billboard or other structure for advertising purposes unless placed at least a distance exceeding five feet of the height of such signs from the sidewalk, "All statutory restrictions of the use of property are imposed upon the theory that they are necessary for the safety, health, or comfort. \* \* \* In what way can the erection of a safe structure for advertising purposes near the front of a lot endanger public safety any more than a like structure for some other lawful purpose." Equally good shelter is afforded by a fence without a poster on it as one so decorated.

In all of these cases the real legislative intent as seen by the courts was not the apparent or express intent. An interesting case arose in Massachusetts, *Commonwealth v. Boston Adv. Co.*, 188 Mass. 348, in which the legislature had passed a law prohibiting the display of signs so that they might be seen from Revere Beach Park Way in Boston. Here, avowedly, the purpose was to cater to the aesthetic. In declaring this statute invalid, the Court says, "We agree that the promotion of the pleasure of the people is a public purpose for which public money may be used and taxes laid even if the pleasure is secured merely by delighting one of the senses \* \* \* The question here is not of the power of the state to expend money or to lay taxes, to

promote aesthetic ends or to regulate the use of property with a view to promote such ends. It is of the right of the state by such regulations to deprive the owner of property of a natural use of that property without giving compensation for the resulting loss to the owner."<sup>4</sup> A rather broad distinction is taken between the powers of taxation and eminent domain and the police power in that the latter cannot be used to infringe on property rights unless a clear necessity exists, while taxation and eminent domain need only be for a public use. One way of eliminating this rather artificial distinction would be to concede the right to exercise the police power with compensation in those border line cases where any real distinction is well nigh impossible. Again in *Bostick v. Sams* (1902), 95 Md. 402, the question came before the courts. The City of Baltimore, by an ordinance provided that no permits should be granted for buildings in certain portions of the city unless they should in the judgment of the Judge of the Appeal Tax Court, conform to the general character of the buildings previously erected in the same locality and did not impair the value of surrounding property. A permit was requested for a building to house a circus. The Court held that, aside from the use to which the building was to be put, an independent question, a general grant of municipal police power and charter provisions authorizing regulations to guard against constructions of buildings so as to be unsafe, inflammable, offensive, deleterious to health, dangerous to life, limb or

<sup>4</sup> Accord: *People v. Green*, 83 N. Y. S. 460.

Attempts to regulate billboard and other advertising have been made by the following states:

*Conn.* 1915, c. 314, p. 2179. Licenses for advertisements. Held constitutional in *State v. Murphy*, 98 Atl. 343.

*Ill.* 1909, p. 139. Cities, villages and towns to license and regulate advertising, billboards, etc.

*Md.* 1914, c. 824, p. 1554, at 1557, (Roadside Tree Law) Prohibits advertisements and billboards along public roads.

*Mass.* 1903, c. 158, p. 121. Metropolitan Park Commission given power to prohibit erection of any advertising device which should be plainly visible to persons passing along the parkway. See *Commonwealth v. Boston Advertising Co.*, 188 Mass. 348.

*Id.* 1915, c. 176, p. 157. Regulating signs, awnings and other projections in public ways.

*Mass.* Constitution, Article of Amendment, No. 3. "Advertising on public ways, in public places and on private property within public view may be regulated and restricted by law," Ratified Nov. 5, 1918.

*N. J.* 1898, p. 836, sec. 152. Misdemeanor to place advertisement on Hudson River Palisades. Held unconstitutional in *State v. Lamb*, 98 Atl. 459.

*Ohio.* Constitutional Amendment, Art. XV, sec. 11, regulating use of billboards. Defeated September 3, 1912. Ohio is said to be the first state to attempt billboard regulation by constitutional provision.

*R. I.* 1910, c. 542. Cities and towns to regulate out-door advertising. Held valid in *Gilmartin v. Standish-Barnes*, 40 R. I. 219.

*Id.* 1914, c. 1075, p. 133. Forbids billboards near railroad crossings and intersections of highways.

*Great Britain.* 1907, c. 27, p. 116. (Advertisements Regulation Act). "2. (2) Any local authority may make byelaws \* \* \* For regulating, restricting or preventing the exhibition of advertisements in such places and in such manner, or by such means, as to affect injuriously the amenities of a public park or pleasure promenade, or to disfigure the natural beauty of a landscape."

property did not authorize such provisions as the above. These so-called zoning laws have been enacted by a number of states.<sup>5</sup> The outstanding feature of these cases seems to be that no court has yet accorded to any state or local government the right to impair private property rights by the use of the police power for aesthetic purposes. In the field of eminent domain a greater latitude is allowed. Such cases as *United States v. Gettysburg El. R. Co.*, 160 U. S. 668 and *Attorney General v. Williams*, 174 Mass. 476, have now firmly established the right of the government to condemn land for public parks. 20 HARV. L. REV. 35. Not every public purpose, however, will warrant its use. In *Opinion of the Justices*, 211 Mass. 624, the Court held unconstitutional a law providing in effect that the state might purchase, develop, build upon, rent, manage, sell and repurchase land. Nor in the *Opinion of the Justices*, 204 Mass. 607 could the City of Boston, under a general power of eminent domain, acquire property for the purpose of replatting certain portions of the city though this would undoubtedly facilitate traffic and was the only feasible method. The difficulty here was the absence of any real public use. No direct benefit accrued to the public as in the case of *Attorney General v. Williams*, *supra*, where the actual enjoyment of the park was greatly enhanced by restricting the height of surrounding buildings. In his zeal to sustain the Minnesota law, a reviewer of the instant case in the MINNESOTA LAW REVIEW, suggests that the streets in the restricted district be put under the jurisdiction of the park board and thereby bring the case within the decision of *Attorney General v. Williams*. However it is doubtful if the courts would consider such a proceeding anything more than a mere subterfuge except in those cases where the streets really merited such classification as in the case of public drives and boulevards and even then the *Williams* case would hardly apply since the real objection in the instant case is not so much to the character and style of the building as to the fact that it is an apartment house. Such courts as tend toward a liberal interpretation of the law with possibly a greater regard for progressive welfare than a strict adherence to judicial precedent and functions can find justification for such decisions as this one in the field of eminent domain but it can hardly be successfully disputed that it is a distinct departure from any previously decided case and inaugurates the rather broad and general principle that a public purpose as distinguished from a public use may serve as a basis for the exercise of the right of eminent domain.<sup>6</sup>

A. B. T.

<sup>5</sup> Zoning laws: *Calif.*, 1917, c. 734, p. 1419; *Ill.*, 1919, p. 262; *La.*, 1918, act. 27, p. 35; *Mass. Const.*, Art. of Amendment No. 13, approved Nov. 5, 1918, *Minn.*, 1915, c. 128, p. 180; *Neb.*, 1919, c. 185, p. 417; *N. J.*, 1917, c. 54, p. 94; *N. Y.*, 1917, c. 483, p. 1463; *Oreg.*, 1919, c. 300, p. 539. Reprinted by permission, from LOOSE LEAF INDEX TO LEGISLATION. October, 1919.

<sup>6</sup> As to the analogous subject of Excess Condemnation see the following laws: *Calif.*, *Const.*, Art. XI, Proposed amendment by adding sec. 20. See 1913, c. 65, p. 1704. Rejected Nov. 3, 1914; 1915, c. 45, p. 1864. Rejected Oct. 26, 1915; 1917, c. 49, p. 1938. Rejected Nov. 5, 1918. *Conn.*, 1907, Special laws, p. 44, sec. 7. (Hartford). *Haw.*, 1919, act 170, p. 230. *Ind.*, 1919, c. 144, p. 639. See secs. 8 and 10. *Mass.*, 1904, c. 443, p. 434. *Const.*, Art. X, Pt. I, amended by Art. XXXIX. See 1910, p. 875; 1911, c. 91, p.



ATTORNEY'S LIEN FOR SERVICES—SET-OFF OF JUDGMENTS.—Anglo-Saxon judges, as members of the legal profession, have shown an admirable freedom from professional bias and class selfishness in dealing with questions involving the rights and privileges of members of their profession. With every opportunity offered for treating lawyers as a favored class, they have been able to maintain a detached and objective attitude toward them. Indeed, the courts seem to have preferred to be charged with excessive severity in dealing with their brethren of the bar rather than give the slightest ground for suspicion that they were capitalizing their power in the interest of the legal fraternity.

A familiar example of the struggle to do absolute justice in regard to professional claims occurs in connection with the attorney's charging lien for services, and a recent case in the New York Court of Appeals presents an interesting application of the problem. *Beecher v. Peter A. Vogt Mfg. Co.* (N. Y., 1920) 125 N. E. 831. In this case the Vogt Company recovered a judgment against Beecher and Smith, and thereupon Beecher and Smith undertook to use a judgment against the Vogt Company which they had obtained by assignment, as a set-off against this obligation. The Vogt Company was insolvent, and the attorneys for that company, who had not been paid for their services in obtaining the judgment, claimed a lien on the judgment superior to the set-off. And the question was, whether the whole of the Vogt judgment against Beecher and Smith could be neutralized by the set-off of the cross judgment, or only the balance over and above the lien held by the attorneys who obtained it for the Vogt Company.

As an abstract question of right, it seems unreasonable to hold that the lien of the attorney should depend, and more than other liens depend, upon the subsequent conduct of other persons. If the attorney has a valid claim upon a judgment for his fees and expenses, why should this claim be destroyed without his consent or participation? This view was stated and adopted by the Court of King's Bench in 1791 in the case of *Mitchell v.*

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1076. Approved Nov. 7, 1911, 1912, c. 715, sec. 10, p. 792, declared unconstitutional in *Salisbury L. & I. Co. v. Massachusetts*, 215 Mass. 371, 46 L. R. A. (N. S.) 1196. *Ibid.*, 1914, p. 1057, resolution to amend passed senate and house 1914. To be submitted to legislature of 1915. (No further record). N. J., Const., Art. IV, sec. 9, amendment rejected Oct. 19, 1914. 1915 sp. c. 2, p. 894. N. Y., Const., Art. I, amendment secs. 6 and 7. Sec. 1910, v. 2, p. 2049; 1911, v. 3, appendix p. 4; 1912, v. 2, p. 1381; 1913, v. 3, p. 2224; 1913, v. 4, p. 2491. Adopted Nov. 4, 1913. See 1914, v. 3, p. 2371. Proposed amendment to the same section, 1917, v. 3, p. 2783; 1918, v. 3, p. 2083; 1919 v. 2, p. 1789. To be submitted to people at general election, 1919. *Ibid.*, 1914, v. 2, c. 300, p. 864 (Syracuse); 1915, v. 3, c. 593, p. 1825 (New York City). Repealed by 1915, v. 3, c. 606. Re-enacted 1916, c. 112, p. 268. *Ohio*, 1904, p. 333. (See sec. 10-12th). Const., Art., XVIII, sec. 10, amendment adopted Sept. 3, 1912. *Pa.*, 1907, No. 315, p. 466. Unconstitutional. See *Pennsylvania Mut. L. Ins. Co. v. Philadelphia*, 242 Pa. 47. Const., Art. XVIII, sec. 16. 1915, p. 1105. To be submitted to the legislature of 1917. *Oreg.*, 1913, c. 269, p. 508. *R. I.*, Const., Art. XVII, sec. 1, amendment adopted Nov. 7, 1916. *Va.*, 1906, c. 194, p. 317. Code Supp. 1910, p. 661. *Wash.*, 1919, c. 135, p. 382, [Park (Metropolitan) Districts Act.] *Wis.*, Const., Art. XI, amendment sec. 3a; 1909 p. 831; 1911, p. 1121, *id.*, c. 665, p. 1090. Adopted Nov. 5, 1912. Const., Art. XI, amendment sec. 3b; 1911, p. 1114; 1913, p. 1374; *id.* c. 770, p. 1209, at 1213. Defeated Nov. 3, 1914. Reprinted by permission from LOOSE LEAF INDEX TO LEGISLATION, October, 1919.

*Oldfield*, 4 T. R. 123. But in 1795, the Court of Common Pleas, in *Vaughan v. Davies*, 2 H. Bl. 440, without any discussion, held that the attorney's lien could not be allowed to prevent a party from having the full benefit of his set-off. Four years later, in *Hall v. Ody*, 2 Bos. & Pul. 28, the *Vaughan Case* was followed with evident reluctance as the "settled practice" of the court, Lord Eldon remarking, "I find it to be the settled practice with much surprise, since it stands in a direct contradiction to the practice of every other court as well as to the principles of justice." But Rook. J., steeling his heart against his legal brethren, thought it was fair enough, since "the attorney looks in the first instance to the personal security of his client, and if beyond that he can get any further security into his hands, it is a mere casual advantage." Lord Eldon was wrong, however, in the statement just quoted, as applied to the Court of Chancery, which, while not free from inconsistencies, seemed to follow the rule of the Common Pleas rather than that of the King's Bench. *Wright v. Mudie*, 1 Sim. & S. 226; *Mohawk Bank v. Burrows*, 6 John C. (N.Y.) 317. The same difficulty arose in the Court of Exchequer, and it was pointed out in *Lane v. Pearse*, 12 Price 742, that the practice of that court had been confused with contradictory decisions, but on the merits the judges were inclined to follow the hard rule of the Common Pleas.

The controversy was finally settled by the Rules of Hilary Term, 1832, (Rule 93) providing that the attorney's lien should not be prejudiced by the set-off of a judgment in a different suit, and this doctrine is still followed under the current English Rules and Orders. *David v. Rees*, [1904] 2 K. B. 435.

Some of this English judicial history is referred to by the New York Court of Appeals in the case above cited, and the further history of the controversy as it persisted in the early New York decisions, is presented; with the result, however, that the court was able to absolve itself from responsibility for choosing the true rule to be followed by concluding that the attorney's lien had been given the same standing by statute as an equitable assignment of the cause of action or judgment, and as such it was superior to the claim of the set-off.

The prevailing rule in the United States, where the matter is not regulated by statute, recognizes the superior claim of the attorney's lien, thus following the present English practice: *Leavenson v. Lafontane*, 3 Kan. 523; *Ward v. Watson*, 27 Neb. 768; *Phillips v. MacKay*, 54 N. J. L. 319 (fully discussing the history and the merits of the question); *Diehl v. Friester*, 37 Ohio St. 473; *Pirie v. Harkness*, 3 S. D. 178; *Roberts v. Mitchell*, 94 Tenn. 277 (a well considered case); *Currier v. Boston & Maine RR. Co.*, 37 N. H. 223; *Renick v. Ludington*, 16 W. Va. 378; *Carter v. Davis*, 8 Fla. 183; *Stanley v. Bouck*, 107 Wis. 225. In many jurisdictions the legislature has come to the assistance of the attorney and expressly given his lien for services priority over executions issued on judgments employed by way of set-off: *Brent v. Brent*, 24 Ill. App. 448; *Adams v. Lec*, 82 Ind. 587; *Stone v. Hyde*, 22 Me. 318. But the old rule of the English Common Pleas is still adhered to in some states,—in a few as a principle appealing to the conscience or conservatism of the court, as in *McDonald v. Smith*, 57 Vt. 502, but more

commonly because the legislature has taken the view that the attorney who secured the judgment is entitled to no equity superior to that of his client, and if his client's interest in the judgment is subject to the set-off of another judgment, then the lien of the attorney falls with it: *Lindholm v. Itasca Lumber Co.*, 64 Minn. 46; *Langston v. Roby*, 68 Ga. 406; *Hurst v. Sheets*, 21 Ia. 501; *Ex parte Lehman*, 59 Ala. 631. E. R. S.

INTERNATIONAL RECOGNITION AND THE NATIONAL COURTS.—In the law of nations everything depends upon recognition. A newly organized state may possess all the requisites of *de facto* existence, but it can gain admission to the community of international law only as it is recognized by other states. Even after it has been admitted to the international community it may be virtually outlawed by the refusal of other states to recognize a change in its government. It is through recognition and recognition alone that a *de facto* state becomes and continues an international person and a subject of international law. See BONFILS, MANUEL, [5th ed.], sec. 199; OPPENHEIM, INT. LAW, 2 ed., I, sec. 71; WHEATON, INT. LAW, [Lawrence's 2 ed.], p. 38. Theoretically, perhaps, it may be said that as soon as a *de facto* state comes into existence it enters *ipso facto* into the international community. See HALL, INT. LAW, [7th ed.] secs. 2, 26; RIVIER, PRINCIPES, I, 57; ULLMANN, VOLKERRECHT, sec. 30. But practically it is everywhere admitted that recognition is a prerequisite to the normal and effective exercise of international rights. Moreover, the granting or denial of recognition is within the discretion of each state. Theoretically, it may be urged that a new state or government has a legal right to be recognized and consequently that there is a legal duty of recognition. See BLUNTSCHLI, VOLKERRECHT, secs. 3, 35; HALL, INT. LAW, [7th ed.], secs. 2, 26. But as a practical matter it is generally conceded that there is nothing in the custom of nations which supports the affirmation of such a duty. See BONFILS, MANUEL, [5th ed.], secs. 200, 201; OPPENHEIM, INT. LAW, [2 ed.], I, 71. Cf. NYS, in REVUE DE DROIT INTERNATIONAL, 2e, sér., V, 294; PRADIER-FODERE, TRAITÉ, I, sec. III4. "The decision of each individual state, on the vital point of recognition, is thus not only technically and formally, but in the majority of cases, really final. It cannot be called in question even diplomatically, as may be done with the judgment of a prize court; because, previous to recognition, there are no diplomatic relations between political communities. The judgment of the individual state can thus be disputed only *vi et armis*; and this judgment, be it remarked, extends not only to the facts, but to the law by which these facts are to be measured. Each state is to say, not only whether or not a given community fulfills the requirements of international existence, but is, moreover, left to determine what these requirements are." LORIMER, INSTITUTES OF LAW OF NATIONS, I, 107.

The principle that international personality depends upon recognition has important consequences in our national law. "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, (1900)

175 U. S. 677, 700. Sec. 17 MICH. L. REV. 169. If the case turns upon the existence of a foreign community, government, or state, the international rule will be ascertained and applied by the courts only when the community, government, or state in question has been recognized by the appropriate department of our government. Thus, if the application of the rule depends upon the insurgency of a foreign community, the rule will be applied only if insurgency has been recognized. *The Three Friends*, (1897) 116 U. S. 1. See also *The Happy Couple*, (1805) Stewart 65; *The Manilla*, (1808) Edw. Adm. 1; *The Pelican*, (1809) Edw. Adm., App. D. Similarly, if the application of the rule depends upon the belligerency of a foreign community, the status of belligerency must have been recognized. See *United States v. Palmer*, (1818) 3 Wh. 610, 634; *The Divina Pastora*, (1819) 4 Wh. 52, 63; *The Neuva Anna*, (1821) 6 Wh. 193. If the case turns upon the existence of a foreign government recognition will be decisive. See *Thompson v. Powles*, (1828) 2 Sim. 194, 212; *Taylor v. Barclay*, (1828) 2 Sim. 213; *Republic of Peru v. Dreyfus Brothers*, (1888) L. R. 38 Ch. D. 348. For illustration, injuries to citizens or subjects by acts done in a foreign country became *damnum absque injuria* after recognition has conceded retroactively that the acts were done in the exercise of governmental authority. *Underhill v. Hernandez*, (1897) 168 U. S. 250. And the seizure of property in a foreign country cannot be questioned in the courts after recognition has conceded retroactively that the seizure was done in the exercise of governmental authority. *Oetjen v. Central Leather Co.*, (1918) 246 U. S. 297; *Ricaud v. American Metal Co.*, (1918) 246 U. S. 304. A foreign state may maintain an action in the courts. *The Sapphire*, (1870) 11 Wall. 164; *United States of America v. Wagner*, (1867) L. R. 2 Ch. App. 582. But of course no action can be maintained if the government of the state has not been recognized. *City of Berne v. Bank of England*, (1804) 9 Ves. 347; *Dolder v. Bank of England*, (1805) 10 Ves. 352. Extensive immunities from jurisdiction are accorded the agents and instrumentalities of a foreign state, such as the immunity of a foreign sovereign, *De Haber v. Queen of Portugal*, (1851) 20 L. J. Q. B. 488; *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; the immunity of diplomatic representatives, *Parkinson v. Potter*, (1885) L. R. 16 Q. B. 152; *Macartney v. Garbutt*, (1890) L. R. 24 Q. B. 368; *Wilson v. Blanco*, (1889) 556 N. Y. 582; 17 MICH. L. REV. 424; the immunity of public agents in respect of acts done under the authority of their own state, *Duke of Brunswick v. King of Hanover*, (1848) 2 H. L. C. 1; *Hatch v. Baez*, (1876) 7 Hun. 596; *Underhill v. Hernandez*, *supra*; the immunity of ships of war, *The Constitution*, (1879) 4 P. D. 39; *Schooner Exchange v. McFaddon*, (1812) 7 Cr. 116; the immunity of other ships in the service of the state, *The Parliament Belge*, (1880) L. R. 5 P. D. 197; *The Jassy*, L. R. [1906] P. 270; 17 MICH. L. REV. 425; and the immunity of property of the state, *Vavasour v. Krupp*, (1878) L. R. 9 Ch. D. 351; *Mason v. Intercolonial Railway of Canada*, (1908) 197 Mass. 349. Recognition is of course a prerequisite to the enjoyment of the above immunities. It is unnecessary to multiply illustrations. The rules of international law will be administered by our courts in a great variety of circumstances if the foreign community or state involved

has been invested with international personality by the magic act of recognition.

Since the act of recognition is essentially an act of discretion or policy it belongs naturally to the political departments of government and particularly to the department in charge of foreign affairs. It belongs exclusively to the political departments of government. "And if we undertook to inquire whether she (Texas) had not in fact become an independent sovereign state before she was recognized as such by the treaty-making power, we would take upon ourselves the exercise of political authority, for which a judicial tribunal is wholly unfit, and which the Constitution has conferred exclusively upon another department." *Kennett v. Chambers*, (1852) 14 How. 38, 50. It is primarily an executive function. See PENFIELD, in 32 AM. L. REV. 390, 392. The decision of the political department is conclusive for the courts. "So soon as it is shewn that a *de facto* government of a foreign state has been recognized by the government of this country, no further inquiry is permitted in a Court of Justice here. The Court declines to investigate, and indeed has no proper means of investigating, the title of actual government of a foreign state which has been thus recognized." *Republic of Peru v. Peruvian Guano Co.*, (1887) L. R. 36 Ch. D. 489, 497. See also *Emperor of Austria v. Day*, (1861) 3 De G., F., & J. 217, 221, 233; *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149, 158, 160, 161; *Clark v. United States*, (1811) 5 Fed. Cas. 932; *Williams v. Suffolk Insurance Co.*, (1839) 13 Pet. 415, 420; *The Hornet*, (1870) 12 Fed. Cas. 529; *Oetjen v. Central Leather Co.*, 246 U. S. 297, 302; *Ricaud v. American Metal Co.*, 246 U. S. 304, 308. The courts simply do not take cognizance of an unrecognized state or government. See *Thompson v. Powles*, *supra*; *Taylor v. Barclay*, *supra*; *City of Berne v. Bank of England*, *supra*; *Jones v. Garcia del Rio*, (1823) Tur. & Rus. 297, 299; *Rose v. Himely*, (1808) 4 Cr. 241, 272; *Gelston v. Hoyt*, (1818) 3 Wh. 246, 324; *United States v. Palmer*, *supra*; *The Divina Pastora*, *supra*; *Kennett v. Chambers*, *supra*; PHILLIMORE, COMMENTARIES UPON INT. LAW, [3 ed.], II, 37; PIEDÉLIEVRE, PRECIS, I, sec. 122. If it becomes necessary for the court to know whether or not an alleged community, government, or state has been recognized by the political department, and there is no controlling proclamation, treaty, or executive action of which the court may take judicial notice, the appropriate method of ascertaining the fact is by direct communication with the political department. There are a few *dicta* which suggest that it might be permissible to prove the existence of an unrecognized community, government, or state in certain circumstances. See *Yrisarri v. Clement*, (1826) 3 Bing. 432, 438; *Consul of Spain v. The Conception*, (1819) 6 Fed. Cas. 359. And in the case of *The Charieh*, (1873) L. R. 4 A. & E. 59, the court entered into an exhaustive inquiry into the status of the Khedive of Egypt, although informed by the Foreign Office that the Khedive had not been recognized. This method was emphatically disapproved, however, in *Mighell v. Sultan of Johore*, *supra*, and it may be taken for granted in England today that when in doubt the court will always communicate with the political department and will treat that department's reply as conclusive. See also *Taylor v. Barclay*, *supra*; *Foster v. Globe Venture Syndicate*, (1900) 69 L. J. Ch. 375; *The Gagara*,

(1919) 88 L. J. P. 101; *The Annette*, (1919) 88 L. J. P. 107. It is thought that a similar method would be followed in the United States. See *Ex parte Hütz*, (1884) 111 U. S. 766; *In re Bais*, (1889) 135 U. S. 403, 431; *Underhill v. Hernandez*, *supra*; U. S. FOR. REL., 1892, p. 644.

The complete subordination of the judiciary to the political departments in the matter of international recognition is well illustrated by two recent cases in the English Court of Admiralty. In the case of *The Gagara*, a Russian merchant ship was taken over by the Bolshevik Government under a decree declaring the mercantile fleet national property, repaired and loaded with a cargo of wood, and sent on a commercial voyage to Copenhagen. It was seized and condemned by the Esthonian Government as prize of war. It was then registered as belonging to the Esthonian Republic, placed in charge of a master and crew appointed by the Provisional Government of Esthonia, and directed to London, where it was arrested on behalf of the former Russian owners. In the case of *The Annette* and *The Dora*, Russian merchant ships were requisitioned by the Provisional Government of Northern Russia, with headquarters at Archangel, and were turned over to a Russian Co-operative Association to be used in trading under the control of the Provisional Government's Director of Naval Transports. The vessels were sent with cargoes of tar to Liverpool, where they were arrested on behalf of former Russian owners. In each case an appearance was entered under protest and a motion made to set aside the writ on the ground that the vessel was immune from arrest because it belonged to and was in the service of the government of a friendly state. In each case the Court addressed an inquiry to the Foreign Office in regard to the status of the provisional government concerned. As regards Esthonia, it was replied that Great Britain had "for the time being, provisionally and with all necessary reservations as to the future, recognized the Esthonian National Council as a *de facto* independent body," and accordingly had "received certain gentlemen as informal diplomatic representatives of the Esthonian Provisional Government." It was also stated on behalf of the Attorney General that "in the present view of His Majesty's Government, and without in any way binding itself as to the future, the Esthonian Government is such a Government as could, if it thought fit, set up a Prize Court." As regards the Provisional Government at Archangel, the Foreign Office replied in part as follows: "the Provisional Government of Northern Russia is composed of Russian groups who do not recognize the authority of the Russian Central Soviet Government established at Moscow. The seat of the government is Archangel, and it extends its authority over the territory surrounding that port, and to the west of the White Sea up to the Finnish frontier. As the title assumed by that government indicates, it is merely provisional in nature, and has not been formally recognized either by His Majesty's Government or by the Allied Powers as the government of a sovereign independent state. His Majesty's Government and the Allied Powers are, however, at the present moment co-operating with the Provisional Government in the opposition which that government is making to the forces of the Russian Soviet Government, who are engaged in aggressive military operations against it, and are represented at Archangel by a British

commissioner. The representative of the Provisional Government in London is Monsieur Nabokoff, through whom His Majesty's Government conduct communication with the Archangel Provisional Government." In the case of *The Garaga*, it was held that the Esthonian National Council had been recognized and that the writ should be set aside. Affirmed in the Court of Appeal, (1919) 88 L. J. P. 101. In the case of *The Annette* and *The Dora*, it was held that the Provisional Government at Archangel had not been recognized, that in any event it was not in possession of the vessels, and accordingly that the writs should not be set aside. Admiralty, (1919) 88 L. J. P. 107.

It may well be regretted that in such a vital matter as international recognition the courts are restricted to the trivial function of construing communications solicited from the department in charge of foreign affairs. The restriction can hardly be escaped, however, as governments are now constituted. The courts themselves have indicated at least three reasons for this conclusion: in the first place, the courts are not equipped to decide a question of this nature, *Republic of Peru v. Peruvian Guano Co.*, *supra*; *Kennett v. Chambers*, *supra*; PENFIELD, in 32 AM. L. REV. 390, 406; secondly, sound policy requires that the courts act in unison with the other departments of government in matters involving foreign relations, *Foster v. Globe Venture Syndicate*, *supra*; *The Hornet*, *supra*; and thirdly, the conduct of foreign relations is vested exclusively under the Constitution in other departments of the government, *United States v. Palmer*, *supra*; *Williams v. Suffolk Insurance Co.*, *supra*; *Kennett v. Chambers*, *supra*; *Oetjen v. Central Leather Co.*, *supra*.

It would seem, nevertheless, that international recognition ought on principle to be determined in a proceeding of a judicial nature. International law may properly define the elements essential to international personality; but if the existence of these elements can be established, recognition ought to follow as a matter of course. Moreover, it would be a great advantage if recognition could be of general effect for all members of the international community. The national courts are not available. Why not an international jurisdiction? Why not make it possible for each community claiming recognition to have its rights determined by a tribunal constituted at The Hague from the panel of the so-called Permanent Court of Arbitration? If a real permanent court should be established under the League of Nations, why not invest it with jurisdiction to hear and determine claims to recognition? The suggestion may be regarded as somewhat utopian, but no more so, certainly, than many another that has received serious consideration of late. Such a reform, if it could be achieved, would be a great advance in the struggle to rescue international law from the confusion and intrigue of diplomacy.

E. D. D.

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CONSTITUTIONALITY OF SOLDIERS' BONUS LAW.—The recent case of *State ex rel Atwood v. Johnson*, 175 N. W. 589, decided by the Supreme Court of Wisconsin November 17, 1919, presents a question of peculiar interest at the present time.

On July 30, 1919, the legislature of Wisconsin passed the Soldiers' Bonus

Act, which was approved by a majority of the electors of the state on September 2, 1919. (Laws of 1919, sec. 667). The act provides for the payment of a "bonus" as a token "of the appreciation of the character and spirit of the patriotic services of the soldiers, sailors, marines and nurses who served in the armed forces of the United States during the war with Germany and Austria." The bonus is payable only to those of the classes named who were residents of Wisconsin at the time of induction into service. The act is applicable to drafted as well as enlisted men. The amount of benefits to each is determined largely by the length of service, there being a payment of ten dollars for each month's service, with a minimum of fifty dollars. The act provides that the money is to be raised by a surtax on incomes and by a special tax on property. The amount of the property tax, within prescribed limits is left to the determination of the service recognition board, provided for by the act. In proceedings brought to test the constitutionality of the act it was held that the act was valid.

Several objections were urged against the validity of this act. The main ground relied upon by the contestants was that the taxation provided for is for a purpose not public. It is a well recognized principle of the law that the purpose of a tax must be public. The leading case on this subject is *Loan Association v. Topeka*, 20 Wall. 655, decided by the United States Supreme Court in 1874. See also *Perry v. Keene*, 56 N. H. 514. "A tax being in the eyes of the law an enforced contribution upon persons or property to raise money for a public purpose it follows that where this public purpose is absent, the contribution sought to be enforced cannot be justified as a tax but amounts to an attempt to take property without due process of law." 1 WILLOUGHBY, CONSTITUTIONS, 585.

There seems to be a distinction, in considering what is a public purpose, between Federal, State and Municipal laws. This distinction is recognized in 5 HAR. L. REV. 336. The distinction is also noted by Judge Cooley in his work on TAXATION, [2nd ed.] page 108, in which he says, "There may, therefore, be a public purpose, as regards the Federal Union, which may not be such as a basis for state taxation, and there may be a public purpose which upholds state taxation but not taxes which its municipalities would be at liberty to vote and collect." As the principal case confines itself necessarily to state taxation, no consideration will be noticed here concerning any similar federal taxation.

There are certain purposes for which taxes are levied which are clearly and manifestly public, as for example, taxation for highways. There are also cases in which there is a public expenditure with incidental private advantages. Taxation for assistance in constructing railroads presents a case of this type. *Perry v. Keene*, supra. But all taxation is not as free from the alloy of private interest as the railroad cases. The difficult case is that of an expenditure for the direct benefit of individuals with an incidental public gain. Can we say that the Soldier's Bonus Law falls into this class? Is a token "of appreciation of the character and spirit of patriotic services" a public purpose?

When this question is considered in view of the previous cases involving



"bounties" it appears that the purpose is manifestly private and not public. Judge Cooley in *People v. Salem*, 20 Mich. 452, said, "A bounty law of which this is the *real nature* is void, whatever may be the pretence on which it may be enacted"—This is undoubtedly the weight of authority on questions involving bounties, or as Judge Cooley said—"of which this is the real nature." See *Feldman v. City Council*, 23 S. C. 57; *Weismer v. Douglas*, 64 N. Y. 91; *People v. Salem*, *supra*; *Attorney General v. Eau Claire*, 37 Wis. 400. It will be noticed that the case of *Attorney General v. Eau Claire*, *supra*, was decided by the same court that decided the principal case. This court immediately after the close of the Civil War expressly held that raising money to pay bounties to volunteers was a public purpose. *Broadhead v. Milwaukee*, 19 Wis. 658. The Wisconsin court therefore has recognized a clear distinction between the ordinary case of a "bounty" and "a bounty to soldiers." If there is such distinction to what can it be due? Can it be said that the court had in mind a consideration of public policy? This is hardly a satisfactory legal explanation. Possibly we might say that the "real nature" of such a purpose is not that of a bounty. That raising money as a bonus for soldiers is a public purpose has been recognized in other cases. *Trustees of Cass Township v. Dillon*, 16 Ohio St. 38; *State ex rel Garrett v. Froelich*, 118 Wis. 129; *McCurdy v. Tappan*, 29 Wis. 664; *United States v. Hosmer*, 9 Wall. 432; *Opinion of the Justices*, 211 Mass. 608. See also 14 L. R. A. 474.

It is to be noticed in the case mentioned above that the bounties were paid to volunteers. In that respect those cases differ from the principal case. Some of the decisions make a distinction between future and past enlistments, holding that the payment of bounties to persons who have already enlisted in the service, without any contract for such bounties is not use of money for public purposes as there is no consideration therefor—*Fowler v. Danver*, 8 Allen 80; *Shackford v. Newington*, 46 N. H. 415; *Crowde v. Hopkinton*, 45 N. H. 9. However the bounties were held applicable to past as well as future enlistments in *Trustees of Cass Township v. Dillon*, *supra*; *United States v. Hosmer*, *supra*; *Opinion of the Justices*, *supra*. The basis of such distinction seems to rest upon the supposed contract relation between the state and the one who enlists in the service with the bonus in view. But this difference can hardly be said to affect the validity of the legislative act for if the act was unconstitutional no contract existed. The distinction therefore seems to be without foundation.

The purpose for which taxes are levied must be primarily and directly for the public good. *Lowell v. Boston*, 111 Mass. 454. It can not be doubted that whether the object of a law is public or private is a judicial question and not within legislative discretion. However every presumption is in favor of the validity of such law. As the Wisconsin court expressed it in *Broadhead v. Milwaukee*, *supra*, "To justify the court in arresting the proceedings and declaring the tax void the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable to every reasonable mind." Is there an absence of "all public interest" in a question such as is presented in the principal case? Such a statute may encourage greatly the volunteer spirit, or the spirit of service in the future. It may

lead to truer patriotism in the future. The "general welfare" of the state and the country may be greatly secured and advanced. As the act declares "of the appreciation of the character and spirit of the patriotic service." Clearly this means the appreciation of the people of Wisconsin. The legislature must have intended that the showing of such "appreciation" would promote the general public good of the state. Surely it can not be said that there is an "absence of all possible public interest." On the contrary the public interest is apparent. Furthermore it would seem to be within the power of the Wisconsin legislature to determine whether claims upon the state are founded upon moral and honorable obligation and upon principles of right and justice. See *United States v. Realty Co.*, 163 U. S. 427. In other words, this act may be viewed in the light of a payment for past services done for and in behalf of the state. Is a definite, binding contract necessary in the first instance for the legislative body to provide ways for meeting such obligations? Clearly not. There are numerous acts of the legislature validating unenforceable contracts with the state or providing for payment of services previously rendered. Can it not then be said that the state of Wisconsin merely determined that these claims, if such they can be called, are founded "upon moral and honorable obligation and upon principles of right and justice?" Given a public object for which to tax the extent and circumstances of any particular expenditures are matters of legislative discretion, and if exercised to the undue benefit of private persons the remedy is political. *Lowell v. Boston*, *supra*; *People v. Salem*, *supra*. It seems, then, that the court in the principal case were correct in holding that upon authority and principle the object of this tax was public and not private.

It will be noticed that most of the cases cited above refer expressly to volunteers and do not include drafted men. However in Kentucky it was held that an act authorizing money to be raised as bounties for volunteers in anticipation of a draft was not constitutional as to those whom a draft would not affect. *Ferguson v. Laudram*, 1 Bush 548, 5 Bush 230. Furthermore in view of the immediate policy of our government in inaugurating the selective draft system without depending upon volunteers, the similar treatment of all forces, regardless of the manner in which they entered the service, the mingling in the same units of enlisted and drafted men, the same remunerations in salaries and the Federal bonus, it can hardly be understood how, in the face of such a definite military policy, a discrimination could be made against the drafted man.

Another objection raised to the validity of this act was that legislative power was unlawfully delegated to the board, in violation of the Constitution. The Court was undoubtedly justified in ruling that such was not a delegation of legislative powers, as the duties of the board are purely ministerial. *United States v. Grimaud*, 220 U. S. 506, 55 L. Ed. 563; *Trustees of Saratoga Springs v. Saratoga Gas Co.*, 191 N. Y. 123, 18 L. R. A. (N.S.) 713.

For a recent case in accord with the principal case see *Gustafson v. Rhinow*, 175 N. W. 903, decided by the Supreme Court of Minnesota, January 9, 1920.

B. B. M.

## LIABILITY OF CHARITABLE HOSPITALS FOR NEGLIGENCE OF THEIR EMPLOYEES.

—Recent decisions in a few jurisdictions have cast some doubt upon the doctrine, supported by the great weight of authority in this country, which exempts a charitable hospital from liability for the negligent acts of its doctors and nurses, if it has not been negligent in selecting them and does not retain them after it has knowledge of their incapacity. In the case of *Mulliner v. Evangelischer Diakonissenverein of Minnesota District of German Evangelical Synod of North America*, (Minn., 1920) 175 N. W. 699, a pay patient in a charitable hospital was killed due to the negligence of one of the nurses. Although it was not shown that the defendant had negligently hired or knowingly kept in its employ an incompetent person, nevertheless, held, the corporation was liable in damages for the negligence of its employee.

The first American case to announce this view was *Glavin v. Rhode Island Hospital*, 12 R. I. 411; but shortly after that decision was handed down, it was negated by the Rhode Island legislature. See General Laws of Rhode Island (1896), pp. 538, 539. In 1915, the Supreme Court of Alabama arrived at the same result in *Tucker v. Mobile Infirmary Ass'n.*, 191 Ala. 572, which case now stands as the law in that jurisdiction.

One of the earliest United States decisions upon the question is *McDonald v. Mass. General Hospital*, 120 Mass. 432. The authority depended upon is the English case of *Holliday v. St. Leonard*, 11 C. B. (N.S.) 191. But it is to be noted that the principle of the *Holliday* case was overruled by *Mersey Docks v. Gibbs*, L. R., 1 H. L. 93. And, in accord with the latter case, the modern English decisions have established the liability of charitable corporations in these cases. *Gilbert v. Trinity House*, L. R., 17 Q. B. D. 795; *Hillyer v. Governors of St. Bartholomew's Hospital*, L. R. 1909, 2 K. B. 820. The same rule is laid down by the Ontario Supreme Court in *Lavere v. Hospital*, 35 Ont. L. Rep. 98. In this country, the *McDonald* case has been generally followed, and is repeatedly referred to as the leading case upon the question. 6 Cyc. 975; *Taylor v. Hospital*, 85 Ohio St. 90, 39 L. R. A. (N.S.) 427. See 5 MICH L. REV. 552.

Although the very great weight of American authority favors the rule of exemption, the reasons given in support of the rule are by no means harmonious. There are three bases, upon one or more of which all the decisions rest. These we may call the "trust fund theory," the "public policy theory," and the "implied assent theory." They will be discussed in order.

The "trust fund theory" is to the effect that all funds of a charitable institution are held in trust for the particular charitable purpose, and that the payment of damages for injuries to patients and inmates due to the negligence of the employees of the institution is not a purpose contemplated by the trust, and that therefore the funds cannot be diverted to the payment thereof. The objection to this reasoning is that it proves too much. Followed to its logical conclusion, it would result in exempting such corporations from the payment of damages upon any claim. But a recovery for injuries is allowed by one not an inmate. *Basabo v. Salvation Army*, 35 R. I. 22, 42 L. R. A. (N.S.) 1144; *Van Ingen v. Jewish Hospital of Brooklyn*, 164 N. Y. Supp. 832; *Thomas v. German General Benevolent Society*, 168 Cal. 183; 5 RULING

CASE LAW 378. Also, many courts which exempt hospitals from liability for the negligent acts of their employees nevertheless hold them liable for negligence in hiring incompetent servants. *Hearns v. Waterbury Hospital*, 66 Conn. 98; *Van Tassell v. Manhattan Eye and Ear Hospital*, 15 N. Y. Supp. 620; *U. P. Ry. Co. v. Artist*, 60 Fed. 365; *Plant System, etc. v. Dickerson*, 118 Ga. 647; *Ry. Co. v. Buchanan*, 126 Ky. 288; *McDonald v. Mass. General Hospital, supra*; *Thornton v. Franklin Square House*, 200 Mass. 465. Such holdings are absolutely inconsistent with the trust fund theory. A number of the courts, although supporting the majority rule, nevertheless disapprove the trust fund theory as a basis for the exemption. *Bruce v. Central Methodist Episcopal Church*, 147 Mich. 230; *Hewitt v. Woman's Hospital Ass'n.*, 73 N. H. 556; *Horde v. Salvation Army*, 199 N. Y. 233, 32 L. R. A. (N.S.) 62. This doctrine is open to such serious doubt that it would seem to furnish no solid foundation for the rule.

The second theory relied upon is that public policy is opposed to applying the doctrine of *respondeat superior* to charitable hospitals. It is argued that the public has an interest in the maintenance of these institutions which minister to the sick and needy, and that therefore they should not be discouraged by subjecting them to claims for damages by those who seek their aid. The public is indeed interested in the continuance of these charities, "but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully." *Glavin v. Rhode Island Hospital, supra*. It is further urged that the doctrine of *respondeat superior* does not apply because the servant or agent is not acting for the profit of the master. It seems clear, however, that the liability for negligence of either a natural or an artificial person, by its own act or by agent, depends upon a failure to properly perform a duty imposed by law, regardless of whether money is made in the performance of that duty. *Gilbert v. Trinity House, supra*. If the public policy theory of exemption is sound, no reason appears why it should not be applied in cases where the person injured is not a patient or an inmate of the institution. And yet such persons have been allowed to recover for injuries received from negligent employees. *Basabo v. Salvation Army, supra*; *Van Ingen v. Jewish Hospital of Brooklyn, supra*; *Thomas v. German General Benevolent Society, supra*; 5 RULING CASE LAW 378. This theory, like the trust fund theory, is open to so much criticism that it can hardly be said to offer a satisfactory basis for the exemption.

The "implied assent theory" announces that the one who accepts the benefit of a charity impliedly assumes the risk of injuries due to negligence of his benefactor's agents. As stated in *Powers v. Mass. Homeopathic Hospital*, 109 Fed. 294; 65 L. R. A. 372, the beneficiary of such a charitable trust enters into a contract whereby he assumes the risk of the kind of torts under discussion. This theory is adopted in *Bruce v. Central Methodist Episcopal Church, supra*; *Adams v. University Hospital*, 122 Mo. App. 675; *Schloendorff v. Society of N. Y. Hospital*, 211 N. Y. 125, 52 L. R. A. (N.S.) 505. A view of the more recent cases shows that this is coming to be the prevailing basis of decision, and it is believed that when it is not unduly extended in its application it is sound. It is only when this theory is applied to those

who actually paid full compensation for the services received that the reasoning breaks down, for the plaintiff is not then the recipient of charity and cannot be logically said to have waived any right. The California court has apparently failed to distinguish between the cases of pay and charity patients. In *Burdell et ux. v. St. Luke's Hospital*, (Cal., 1918), 173 Pac. 1008, the decision is based upon the implied assent theory, but the court goes on to say, "The fact that plaintiff paid the regular rates charged by the hospital for paying patients does not take the case out of the operation of this rule, for it is apparent that the rates were not charged with a view of making a profit from her." Also, in *Duncan v. Nebraska Sanitarium*, 92 Neb. 162, 41 L. R. A. (N.S.) 973, the court says, by way of *dictum*, that the rule applies equally to those who have paid full compensation. The Georgia Court takes the opposite view, but limits the recovery to funds derived strictly from non-charitable pay patients. *Morton v. Savannah Hospital*, (Ga., 1918), 96 S. E. 887. In *Tucker v. Mobile Infirmary Ass'n.*, *supra*, the patient paid full rates, and the court expressly reserved the question of a charity patient until it should arise. In the *Diakonniessenverein Case*, the court used language broad enough to include charity patients, but as that question was not before the court, its remarks in this regard are simply *dictum*. Modern tendency seems to lean toward basing the exemption upon the contractual relation which arises by reason of the giving and receiving of charity, and this, it is submitted, represents the correct logical basis for the decisions.

L. H. M.