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Note and Comment

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NOTE AND COMMENT

PUBLIC UTILITY VALUATIONS AND RATES.—In comparing the reports of the public utility commissions with the decisions of the courts on questions of valuation of public utilities, nothing is more striking than this—that as time goes on the commissions are growingly impatient of the cost of reproduction theory, while the courts still insist there is no inflexible method of fixing value, but continue to prefer largely figures as to supposed reproduction cost. This attitude of the commissions is remarkable in view of the fact that every finding may be carried to the courts for review and possible reversal. The Illinois Commission reluctantly obeyed the direct orders of the Supreme Court to consider cost of reproduction, but refuses to treat that as the only basis. *Re Springfield Consol. Ry. Co.*, P. U. R. 1920 E. 474, 480. The Interstate Commerce Commission ruled that it was practically impossible for it to find such value in the appraisal of lands of railroads as ordered by Congress in 1912. But the Supreme Court said it must do so because Congress had ordered it. *U. S.* v. *Interstate Com. Com.*, 252 U. S. 178. This was taken by many as an approval by the Supreme Court of the

Cost of Reproduction as the base of value, but that question was not involved.

The North Dakota Commission believes that wherever possible in cases involving a rate basis original cost data should be considered in finding present value, but finds the facts as to original cost not usually available. *Fargo* v. *Union Light Co.*, P. U. R. 1920 A 764. It therefore falls back on the broad generalizations of *Smyth* v. *Ames*, 169 U. S. 466. Those generalizations were doubtless wise in 1898, but in 1921, valuation should be on a much more definite basis. The Vermont Commission regarded estimated cost of reproduction new as defective, even if allowance be made for depreciation, first, because based on abnormally high costs of labor and materials, and second, because security holders should be entitled to a reasonable return upon investment. Therefore effort should be made to determine actual cost. *Re Colonial Power & L. Co.*, P. U. R. 1920 A 215. However, original cost alone, even if known, cannot be taken as a proper basis, says the Commission in *Milne* v. *Montpelier & Barre L. & P. Co.*, P. U. R. 1920 E 558. This is the attitude of many courts. It does not seem logical to the Michigan Commission that the customers of a public utility should be required to pay a higher rate merely to enable a utility, without the expenditure of a single dollar towards an increase of its capital investment, to profit from a high level of prices. *Holland* v. *Maguire*, P. U. R. 1920 B 149. It might be added that it is very logical to ask the users to pay the utility a return on capital that is invested at present high prices in order to furnish proper service, even though prices later may fall to a far lower level. The Tennessee Commission based rates upon a fair and adequate return upon the capital which had been invested in the property. Where the books did not show this, it was determined by cost of reproduction at the dates of installation, i. e., by the historical, and not the present, cost of reproduction. *Re Receivers Memphis St. R. Co.*, P. U. R. 1920 C 277. Fortunately in this case the books furnished reliable information as to actual cost in most instances. To the same effect is *Re Roanoke Waterworks Co.*, (Va.), P. U. R. 1920 C 745, quoting the opinion of Hon. Chas. E. Hughes in the *Brooklyn Borough Gas Co. Case*, P. U. R. 1918 F 335, an opinion that has been more often approved in recent cases before the Commissions than the decision of any court. It is quoted in nearly all the Commission cases herein referred to, e. g., by the Utah Commission in *Re Utah Gas and Coke Co.*, P. U. R. 1920 C 854, holding that there cannot be a disturbing of valuations theretofore fixed every time a change occurs in unit prices. See also *Re Southern Pac. Co.*, (Nev.), P. U. R. 1920 F 725, 775, and *Re Douglas Co. L. & W. Co.*, (Oreg.), P. U. R. 1920 E 667, 674, showing the effect of the cost of reproduction method in placing public utilities on the plane of private speculative enterprises. Preference for the original cost method, if a single test is to be applied, is expressed by the New Hampshire Commission in *Concord G. L. Co.* referred to in P. U. R. Mar. 3, 1921, vi.

In *Maires* v. *Flatbush Co.*, P. U. R. 1920 E 930, the New York Commission, First District, gives a long and careful discussion of bases of rate

regulation, especially as affected "in the present juncture of universal upheaval." It points out that "value" of property as a rate base is not "value" as applied to private property, and denies the deductions made from the decisions as to the reproduction cost. That basis was resorted to because actual expenditures could not be determined, or had not been prudently made. It was a mere "rule of convenience", and "original cost of property as a controlling factor in a rate base has been approved" by certain New York courts. The advantages of the "Actual Cost" method under the uniform system of accounts are pointed out, and the trend of decisions by regulatory commissions in favor of giving controlling weight to that method is dwelt upon, with many citations. The Commission for the Second District also approves, especially under the New York statute, the capital actually invested as the basis of return. *Re Sea Cliff, etc. Gas Co.*, P. U. R. 1921 A 211.

In *Re York County Water Co.*, P. U. R. 1921 A 439, the Maine Commission claims that a very substantial number of commissions now believe that "the money actually invested in an honest and prudent manner" is "a better basis for the ascertainment of fair value" than "an attempt to apply the reproduction less depreciation theory", which in many instances results "in ridiculous exaggerations of actual or probable conditions". This idea was further elaborated and insisted upon by the same Commission in *Re Lewiston Gas L. Co.*, P. U. R. 1921 A 561, 571. In *Re La Porte Gas & E. Co.*, (Ind.), P. U. R. 1920 F 586, 594-8, the Commission objected to giving much weight to cost of reproduction at present abnormal prices, the weight to vary with the degree of departure from normal cost, the greater the departure the less the weight. Many of the mental processes in fixing going value are described as "whimsical adventure in an unblazed forest of speculation." In *Re La Porte Gas & E. Co.*, (Ind.), P. U. R. 1921 A 824, 843, 859, the Commission regards with concern, as inconsistent, unsound, uneconomic, and inequitable, the New Jersey case of *Elizabethtown Gas L. Co.* v. *Pub. Utility Comm.*, 111 Atl. 729, *post*. See also *Re Central Union Tel. Co.*, (Ind.), P. U. R. 1921 B 813, 825. Present cost investment was used as a base on the facts of the case in *Re Houghton County Traction Co.*, (Mich.), P. U. R. 1920 E 350, was regarded as worthy of serious consideration in *Re Chesapeake & Potomac Tel. Co.*, (Va.), P. U. R. 1920 F 49, 88, recognizing the wide disagreement between courts and commissions, and was considered the most equitable basis in *Re Chesapeake & Potomac Tel. Co.*, (W. Va.), P. U. R. 1921 B 97, 108. The Illinois Commission, while compelled under the decision of the Supreme Court to consider cost of reproduction, refused to base a value on that without a showing of original cost. The Supreme Court has taken a similar stand, flatly refusing to take cost of reproduction as the sole basis of value. *State Pub. Utilities Com.* v. *Springfield G. & E. Co.*, (Ill.), 125 N. E. 891. An interesting history of the cost of reproduction method, at first advocated by the public and repudiated by the utilities, now insisted upon by the utilities and decried by the public, is found in *Re St. Joseph Ry. L. H. & P. Co.*, (Mo.), P. U. R. 1920 A 542. In

Whitehead v. *Niagara Falls G. & E. Co.*, P. U. R. 1920 C 265, the New York Commission, Second District, refused to add to the investment actually made an increase based on advanced costs of present day construction.

It must be admitted, however, that there is very little in recent decisions of the courts to show any considerable judicial trend in this same direction, though present conditions often compel the courts to restrict severely the use of cost of reproduction. In *Consolidated Gas Co.* v. *Newton*, 267 Fed. 231, Learned Hand, J., does not hesitate to take the burr in his firm grasp. He scorns the statement that cost of reproduction and original cost are each elements to be considered, as meaning nothing unless that the two are to be averaged, which no one will support. He seems right about this, but he does not shrink from the full acceptance of cost of reproduction as a rate base, with a continued, but not quite continuous, reappraisal of plants, and rising and falling of rates. That present value is hard to prove is no answer. He is prepared to allow the "fallen dollar", by which "the company gains nothing, the customers lose nothing."

In *Elizabethtown Gas L. Co.* v. *Pub. Util. Com.*, 111 Atl. 729, Justice Swayze, quoting *Lincoln Gas & E. Co.* v. *Lincoln*, 250 U. S. 256, plants the New Jersey court squarely for allowing present values, and considers that the dollar has depreciated one half, while interest rates have practically doubled. Does he approve doubling the fair value, and then doubling the rate on this doubled base value? The decision is cited with approval in *St. Joseph R. L. H. & P. Co.* v. *Pub. Serv. Com.*, 268 Fed. 267, which disapproved the method of valuation adopted by the Commission relying on original cost when obtainable. But see the severe criticisms by the Indiana Commission in *Re La Porte Gas & E. Co.*, P. U. R. 1921 A 824, 250-260. In *Houston Elec. Co.* v. *Houston*, 265 Fed. 360, the court disapproved confining the plaintiff to the cost basis, and the Michigan court in *Detroit* v. *Michigan R. Co.*, 177 N. W. 306, approved the cost of reproduction less depreciation method of appraisal for rate purposes. The actual cost was shown to be $7,299,148, and estimates of present value were $8,000,000, $10,913,191 and $12,974,937! There was a record of over two thousand pages. Valuation methods with such results at such cost leave something to be desired. In *Kings County L. Co.* v. *Lewis*, 180 N. Y. Suppl. 570, the New York Supreme Court, New York County, refused to agree with the contention of the utility for cost of reproduction, or of the city for actual original cost, as the proper basis, or to admit that there could be any hard and fast rule. To the same effect is *People* v. *Pub. Serv. Comm.*, 186 N. Y. Suppl. 177. But in *Winona* v. *Wisconsin-Minnesota L. & P. Co.*, (Fed.), P. U. R. 1921 A 146, the court flatly holds a rate ordinance must be considered with reference to present day, and not pre-war values.

The conclusion of this review of recent cases is that the Commissions, working at first hand with the practical problems of valuation generally lean more and more decidedly toward fixing value—so-called—of public utilities on prudent investment, largely, and in not a few cases wholly. The courts, on the other hand, still wallow in the uncertainties of the rule, which is

scarcely a rule at all, of *Smyth* v. *Ames,* making value a question of judgment. In the cases, judgments continue to vary as widely as ever. The courts are probably too firmly committed to a consideration of various elements to expect them to adopt the definite rule of fixing base values on prudent investment. Whether legislatures will step in here, and whether a legislative act making prudent investment the basis would be held to be constitutional is for the future to reveal. For a fuller discussion of these methods of valuation see 15 MICH. L. REV. 205. E. C. G.

DUE PROCESS OF LAW IN PROCEDURE. — There are two classes of cases which may arise under the "due process" provisions of the 5th and 14th Amendments of the United States Constitution, so far as rules of procedure are concerned. One embraces cases of new remedial processes which may be criticized as too radical. The other consists of cases of old processes which may be criticized as obsolete and out of harmony with prevailing conceptions of justice. Due process may thus be said to fill the wide space between those innovations which carry us so far away from established methods as to remove the safeguards which are deemed essential to the protection of person and property, and those ancient remedies which enlightened modern opinion condemns as barbarous.

Most of the cases which have come before the courts belong to the first class, and in dealing with them the problem has been how to determine the point at which departure from settled usage becomes so great as to undermine what are considered the fundamental principles of judicial procedure. Certainly the procedure in England at the time of the emigration cannot be "fastened upon the American jurisprudence like a straight-jacket only to be unloosed by constitutional amendment". *Twining* v. *New Jersey,* 211 U. S. 78, 101.

But the cases falling into the second class are much less numerous. It has been said that a process is due process of law if it can show the sanction of settled usage both in England and this country. *Hurtado* v. *California,* 110 U. S. 516. It would seem reasonable, however, to assume that the settled usage might become so remote in point of time and so out of harmony with contemporary ideas, as to cease to enjoy the quality of due process.

This argument was made in *Miedreich* v. *Lauenstein,* 232 U. S. 236, against the ancient rule that a sheriff's return cannot be falsified in the action in which it is made, and that a party not served with process, who is thereby deprived of his day in court, may nevertheless lose his property by judicial sale on a default judgment based on a false return, without being allowed to show that he was never in fact served. It appeared, however, that this rule of the ancient common law was still currently adhered to in a number of American states, and the Supreme Court of the United States felt itself unable to say that the rule was inconsistent with the due process clause of the 14th Amendment.

A more striking case of the same type has just come before the Supreme Court. In *Ownbey* v. *John Pierpont Morgan, et al.,* U. S. Sup. Ct., April

11, 1921, No. 99, an action was commenced by attachment in Delaware against a non-resident. The defendant attempted to appear, but was refused the right to do so unless he put in special bail to the amount of the value of the property held under the attachment. This was the statutory rule in Delaware, and the defendant, who was unable to put in the special bail, attacked the rule as operating to deprive him of property without due process of law.

It appeared that this harsh rule was derived from the Custom of London in foreign attachment, and had been brought over to America by the colonists, and that in Delaware it could show statutory continuity down to the present time. The court cites a number of cases from other seaboard states where the Custom of London also obtained a foothold, but an investigation of the statutory history of the rule in those states seems to indicate that in every one of them the rule long since succumbed to the progress of enlightened civilization and passed over the Styx into the shadowy land of legal tradition where the ghosts of ancient laws wander restlessly forever. Sodom was thought worthy of being saved if but ten righteous men could be found there, and it is possible that our constitution should be equally charitable toward any medieval custom which could show the endorsement of even a single modern jurisdiction. But the court took a rather cheerless view of the purpose of the constitution, saying that, "However desirable it is that the old forms of procedure be improved with the progress of time, it cannot rightly be said that the Fourteenth Amendment furnishes a universal and self-executing remedy. Its function is negative, not affirmative, and it carries no mandate for particular measures of reform." This sounds like the exclusion from the purview of the constitution of practically all cases of outgrown processes, and would probably justify the current use of trial by battle. But the court may not have intended to take such broad ground against rising standards of justice. Its decision is probably correct, but its reasons seem to accord too high a degree of respectability to the lingering relics of a ruder age. E. R. S.

PROFITS FROM SALE OF CAPITAL ASSETS AS INCOME: TAXABLE UNDER SIXTEENTH AMENDMENT.—The Supreme Court of the United States has taken another step in clearing up the legal concept of income. In four cases, decided March 28, 1921, the troublesome problem of whether or not profits arising from the sale of capital assets shall be considered as income for the purposes of the Income Tax was settled. These cases all arose under the Income Tax act of 1916, as amended in 1917, 39 Stat., ch. 463, p. 756, 40 Stat., ch. 63, p. 300, and were all suits to recover taxes assessed, and paid under protest. All involved the question of the constitutionality of the assessment under the 16th Amendment, the contention of the taxpayer in each case being that the fund taxed was not "income" within the meaning of the Amendment. In *Merchants' Loan & Trust Co.* v. *Smietanka*, the plaintiff was trustee under a will of property, the net income of which was to be paid to the testator's widow for life, and after her death, to the children until each

should become twenty-five years of age, when each was to receive his share of the trust fund. Stock dividends and accretions of selling values, under the will, were to be considered as principal, and not income, and the trustee was given full dominion over the estate. Certain stock, worth $561,798 on March 1, 1913, the effective date of the Amendment, was sold in 1917 for $1,280,996.64, and the difference was taxed as income. The Supreme Court held that it was taxable, although it was not in a course of dealing with stocks, but a mere isolated sale. In *Eldorado Coal Co.* v. *Mager*, the plaintiff corporation sold its plant for cash in 1917, distributing the cash among the stockholders, the corporation not being dissolved, because of unsettled liabilities outstanding. Adding to the market value of March 1, 1913, the cost of additions, and subtracting the depreciation, the appreciation in value after that date was some $6,000, on which assessment was made, and the tax paid. It was held that this was taxable, as in *Merchant's Loan & Trust Co.* v. *Smietanka*. In *Goodrich* v. *Edwards*, the plaintiff bought stock in 1912 for $500, which was worth $695 on March 1, 1913, and sold it in 1916 for $13,-931.22. He was taxed on the difference between the value on March 1, 1913, and the selling price, and the Court sustained the tax. He also exchanged stock in 1912 for other stock then worth $291,600. On March 1, 1913, it had gone down to $148,000 and he sold it in 1916 for $269,000. He was taxed on the difference between the value of March 1, 1913, and the selling value, but the Court held that the Income Tax covered only actual gains, and here was a loss. In *Walsh* v. *Brewster*, the plaintiff, who occasionally bought and sold stocks to change his investments, bought some stock in 1909 which fell in value by March 1, 1913. He sold it for what he paid for it, and the Court held that there having been no actual gain, there was nothing to tax. He also had bought some stock in 1902 for $231,300, the value of which on March 1, 1913, was $164,480, and sold it in 1916 for $276,150. He was taxed on the difference between the value on March 1, 1913, and the selling price. The lower court held that it was, in any event, a conversion of capital assets, and not taxable income, but the Supreme Court held that the actual gain to the seller was income; i. e., the difference, here, between the purchase price and selling price.

The Court in these cases followed its own *dictum* in *Eisner* v. *Macomber*, 252 U. S. 189, 207, where it gave a definition of income, saying "Income may be defined as a gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets." That profit from the sale of capital assets was taxable as income was specifically held under the corporation excise tax of 1909. *Hays* v. *Gauley Mountain Coal Co.*, 247 U. S. 189. The Court felt bound by the interpretation of income given in the cases under the excise tax, although it is arguable that the word "income" might have a broader meaning under a corporation excise tax than under an income tax calculated to apply to private individuals as well as to corporations. As Justice Holmes says in *Towne* v. *Eisner*, 245 U. S. 418, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in

coloı and content according to the circumstances and the time in which it is used." It seems clear that the Court would decide that what was income for the tax-collector is not income for a life tenant under a trust. See *Jordan* v. *Jordan*, 192 Mass. 337; *Thayer* v. *Burr*, 201 N. Y. 155; and see *Tax Commissioner* v. *Putnam*, 227 Mass. 522, at page 529.

Gray v. *Darlington*, 15 Wall. 63, was a case which came up under the income tax of 1867. The act provided for levying annually a tax on gains, profits and income for the year derived from any source, and provided that in estimating the gains and profits, there should be included gains realized within the year preceding the collection of the tax. The plaintiff exchanged some notes for United States bonds in 1865, and sold them in 1869, at a profit, and paid the tax on this profit, under protest. He was allowed to recover the amount paid, because the increase in value developed over a series of years, and so, according to the Act, could not be considered as income for any one year. According to the terms of that Act, it was perhaps, not necessary to decide that increase of capital assets, converted into cash, was not income, but the court in that case, nevertheless, took the view that such conversion could not be considered as income. The lower court, in *Walsh* v. *Brewster*,—*Brewster* v. *Walsh*, 268 Fed. 207—took the view that the meaning of income in the 16th Amendment was no broader than in the Act of 1867. Similarity in wording would indicate that Congress at least had that act in mind.

Pollock v. *Farmers' Loan and Trust Co.*, 158 U. S. 601, decided that taxes on income from real or personal property were direct taxes; as being in reality the same as a tax on the source itself. Other sorts of income, such as salaries, were considered to be subject only to an excise tax, to which the rule of uniformity applies. The 16th Amendment did not give Congress power to lay any new kind of tax, but simply removed the necessity of apportionment, and considering the source from which income is derived. Uniformity is still necessary, where applicable. *Brushaber* v. *Union Pacific Rd. Co.*, 240 U. S. 1, 17-19. In *Towne* v. *Eisner*, 245 U. S. 418, Justice Holmes gave the opinion of the court, holding that under the 16th Amendment "stock dividends" were not taxable as income, since the shareholder continued to have the same interest in the capital assets of the corporation that he had before. In *Eisner* v. *Macomber*, 252, U. S. 189, under an act of Congress making stock dividends taxable, it was held that they could not be considered as income, the court saying that Congress cannot by any definition it may adopt conclude the matter, since it cannot alter the Constitution. The court said that it was essential to distinguish between what is and what is not income, as the term is used in the 16th Amendment, and apply the distinction with regard to substance, and not form. Justice Holmes dissented here, reiterating that, soundly considered, stock dividends were not income, but said that the 16th Amendment was broad enough to cover it, so that it could be made income under the Amendment. Hence, the problem, according to the court, is simply to ascertain just what the term "income" legally defined can include.

It was decided in *Lynch* v. *Turrish,* 247 U. S. 221, that where a corporation sells out to another corporation, and distributes the proceeds among stockholders, if the value on the effective date of the Amendment, is the same as the value when liquidated, after the date, there is no taxable income, even though the stockholders get double the value of their stock. On the other hand, in *Lynch* v. *Hornby,* 247 U. S. 339, where the corporation declared a dividend on surplus earnings, all of which had accrued before March 1, 1913, the dividend declared after that date was taxable, even though made up of capital assets, for the dividends were, to the individual, a tangible return on his stock. And if this dividend were made up partly of stock in another corporation, under the same circumstances, it is taxable; *Peabody* v. *Eisner,* 247 U. S. 347. See *Southern Pacific Co.* v. *Lowe,* 247 U. S. 330, 335, where it was assumed that the meaning of "income" was the same as in the corporation tax of 1909.

Had there been no corporation excise tax, it seems doubtful if the Supreme Court would have included this liquidated increment of value in capital assets under income. That it may be desirable to tax it as income, so as to save it from the necessity of apportionment, is, of course, of no interest to the court. And there can be no problem of double taxation, if one pays taxes on dividends, and then again pays taxes on profits from the sale of the same stock, perhaps increased in value simply because it regularly paid dividends. The court simply wants to find what is income in the commonly accepted meaning of that term; yet what is commonly accepted as income is itself a well-nigh impossible thing to define. Although the court must find an act constitutional if by any reasonable meaning given to it, it can, yet in the very nature of the problem, it must differentiate clearly between what is and what is not income.

The court dealt in a high-handed manner with *Gray* v. *Darlington,* in distinguishing it. The distinction made in *Hays* v. *Gauley Mountain Coal Co.* was followed, where it was said that the Act of 1867 did not apply to such sales of stock unless the whole transaction was made within the year in which the tax was sought to be collected; but the two Acts are much alike, save that in the Act of 1916, the tax is levied on income "received" in the year, while in the Act of 1867, it is on income "derived." Inasmuch as there can be no income at all until the act of conversion, it would seem that it is both "derived" and "received" at that time, so the Acts can hardly be distinguished on that ground. In the *Darlington* case, the court let in profits from sales in the course of trade and commerce, although the transactions did not begin and end during the year, but did not let in a sale from an isolated transaction. It would seem that it considered that such profit was not income, and so the court in the principal cases is virtually overruling *Gray* v. *Darlington,* in calling such profit "income." It hardly seems that the Act of 1916 is different enough in its wording from the Act of 1867 to warrant saying that Congress has made that income which was not income under the former Act, in accordance with the reasoning of Justice Holmes in his dis-

senting opinion in *Eisner* v. *Macomber, supra,* so as to drag it in under the Sixteenth Amendment. It seems, rather, that the Supreme Court has, in a doubtful situation, redefined income, and has thus made a distinct advance in the legal interpretation of the term. If the law as it stands works unjustly, it is up to Congress to change it. G. D. C.

NEGLIGENCE OF DRIVER NOT IMPUTED TO GUEST.—With the decision of the Wisconsin court in *Reiter* v. *Grober, et al.,* (Wis., 1921), 181 N. W. 739, there fell the last stronghold of the doctrine which imputed the negligence of the driver of a vehicle to a guest riding with him. The first American state to adopt the doctrine first enunciated in *Thorogood* v. *Bryan,* 8 C. B. 115, was the last to throw it overboard.

To impute the negligence of one person to another the relation between them must be one invoking the principles of agency, or the parties must be co-operating in a common or joint enterprise, or the relation between the parties must have been such that the person to whom the negligence is imputed must have had the legal right to control the action of the person actually negligent. I SHEARMAN & REDFIELD, LAW OF NEGLIGENCE, [6th Ed.], Sec. 65a, et seq.

In *Thorogood* v. *Bryan* (*supra*), an English court first held that a passenger in a public vehicle, though having no control over the driver, must be held to be so identified with the vehicle as to be chargeable with any negligence on the part of the driver which contributed to an injury inflicted upon such passenger by the negligence of a third party. This was but an attempted extended application of the old Roman doctrine of identification, and has been practically unanimously refused and denied in the United States. *Little* v. *Hackett,* 116 U. S. 366, 29 L. Ed. 652. In England, too, it was early recognized that the *Thorogood* decision rested "upon reasons inconclusive and unsatisfactory" and the case was over-ruled in *The Bernina,* 12 Prob. Div. 58, 13 App. Cas. 1.

While the doctrine was thus met with opposition upon all sides when applied to public conveyances, a remnant of it remained, when the Wisconsin court in *Houfe* v. *Fulton,* 29 Wis. 296, 9 Am. Rep. 568, and in *Priedeaux* v. *Mineral Point,* 43 Wis. 513, 28 Am. Rep. 558, adopted it in the case of passengers riding in *private* vehicles. This new theory, attacked when first enunciated and since as "resting upon no sound legal basis either as to agency or identity", *Reiter* v. *Grober* (*supra*), was repudiated by most courts, yet followed for a time in Montana and Nebraska. *Whittaker* v. *Helena,* 14 Mont. 124, 35 Pac. 904; *Omaha, etc., R. Co.* v. *Talbot,* 48 Neb. 627, 67 N. W. 569. But Montana repudiated the doctrine in 1908 in *Sherris* v. *Northern Pac. R. Co.,* 55 Mont. 189, 175 Pac. 269, and Nebraska dropped even earlier in *Loso* v. *Lancaster County,* 77 Neb. 466, where the court pointed out that the doctrine of imputed negligence cannot be logically applied unless there is some privity between driver and guest. Wisconsin stood by the principle for which it had become sponsor for more than fifty years, following the

Priedeaux case steadily either by a reaffirmance thereof or under the rule of stare decisis. See numerous cases cited in *Reiter* v. *Grober,* (*supra*).

In support of the imputed negligence doctrine it was argued that he who voluntarily enters the private conveyance of another voluntarily trusts his personal safety in the conveyance to the person in control of it. The voluntary acceptance of transportation or carriage, it was reasoned, caused an adoption of the conveyance as one's own for the time being, and an assumption of the risk of the skill and care of the person guiding it. To sanction this line of argument in the case where the driver is not controlled by or is in any sense the agent of the guest is "unauthorized by law and repugnant to reason." *Union P. R. Co.* v. *Lapsley,* 51 Fed. 174. When a driver invites a stranger to ride with him, and the stranger accepts, upon what basis can it be said that there has by this transaction been established a relation of master and servant, or of principal and agent? Unless the guest is given control of the machine no such relation is created. *Dale* v. *Denver City Tramway Co.,* 173 Fed. 787. As one court puts it, "to create the imputation of negligence, the passenger or guest must have assumed such control and direction of the vehicle as to be considered in superior possession of it." *Duvall* v. *Atlantic Coast Line R. Co.,* 134 N. C. 331, 46 S. E. 750. It has even been held that merely making suggestions to the driver as to the route to be taken, or warning the driver of the conveyance of some danger does not amount to sufficient authority or control. *Zimmerman* v. *Union R. Co.,* 28 N. Y. App. Div. 445, 51 N. Y. S. 1; *Bergold* v. *Nassau Electric R. Co.,* 30 N. Y. App. Div. 438, 52 N. Y. S. 11. By the trend of authority it is also true that the doctrine of imputed negligence will not be applied although driver and guest are fellow-servants, *St. Louis, etc., R. Co.* v. *McFall,* 75 Ark. 30, 86 S. W. 824, or are relatives by blood or marriage. *Southern R. Co.* v. *King,* 128 Ga. 383, 57 S. E. 687; *Lake Shore, etc. R. Co.* v. *McIntosh,* 140 Ind. 261, 38 N. E. 476. *Contra*: *Vinton* v. *Plainfield Tp.,* 208 Mich. 179, 175 N. W. 403, (father and son).

It is interesting to note that a statute imputing the negligence of the operator of a motor vehicle to his guest, where the guest had no control over the operator, was held unconstitutional, as repugnant to the State and Federal Constitutions, because discriminative against persons riding in motor vehicles, and denying the equal protection of the law to persons similarly situated. *Birmingham-Tuscaloosa Ry. & U. Co.* v. *Carpenter,* 194 Ala. 141, 69 So. 626.

There are cases, though, where the guest is held guilty of negligence independently of imputation. Cases involving situations in which driver and guest are engaged in a joint undertaking or where the guest is lacking in ordinary care either in his choice of driver or in his conduct while being driven are often treated as exceptions to the rule against imputing negligence of a driver to his guest. In truth they are hardly exceptions, but really instances of independent acts of contributory negligence on the part of the guest which preclude a recovery on his part for injuries inflicted upon because of the negligence of the driver.

Thus it has been held in one case which says that the negligence of the driver is imputed to the guest where both are engaged in a joint enterprise, in which the transportation is a factor, that to establish a joint adventure "the passenger must have either express or implied right to direct the movement of the vehicle used." *Robison* v. *Oregon-Washington R. & Nav. Co.*, 90 Ore. 490, 176 Pac. 594.

The repudiation of the doctrine of imputed negligence, it must be understood, does not excuse the passenger or guest from exercising any care. If he does not exercise such care as a reasonably prudent man would exercise under the circumstances he cannot recover for injuries occasioned thereby. *Brommer* v. *Pa. R. Co.*, 179 Fed. 577, 103 C. C. A. 135. For a discussion of the meaning of "due care" see 19 MICH. L. REV. 433. In the principal Wisconsin case the guest was being sued, and the court finding him guilty of no active contributory negligence, absolved him from blame, even though he happened in this case to be a part owner of the machine driven by the negligent driver. In the earlier Wisconsin cases the court had imputed the driver's negligence to the guest on the theory of agency; and if such agency view was really sound, the conclusion would be almost inevitable in the principal case that the guest was liable. When the agency theory was thus really put to the test, the court had to upset some of its earlier doctrine. Most generally cases involving the contributory negligence of the guest are those in which a guest sues a third person whose negligence, the guest alleges, caused the injuries sued upon, and the third party interposes the contributory negligence of driver and guest.

A guest has been precluded from recovery where the negligent driver operated the vehicle at excessive speed at the suggestion and direction of the guest who wanted to arrive at a depot in time to meet a train, *Langley* v. *Southern Ry. Co.*, 113 S. C. 45, 101 S. E. 286; where the guest continued to ride with full knowledge of the fact that there were no lights on a car which was being driven on unfamiliar roads, *Rebillard* v. *Railroad Co.*, 216 Fed. 503; and where the guest remained in the machine with full knowledge of the fact that the driver was so intoxicated as to be unable to operate the machine properly. *Lynn* v. *Goodwin*, (Cal., 1915), 148 Pac. 927.

All these are really examples of independent negligence on the part of the guest. The old doctrine of imputed negligence must now be regarded as thoroughly exploded. H. A. A.

THE NEWBERRY CASE.—Senator Newberry of Michigan and sixteen others were convicted in the United States District Court on the charge that they "unlawfully and feloniously did conspire, combine, confederate, and agree together to commit the offense [in the Newberry indictment] on his part of wilfully violating the act of Congress approved June 25, 1910, as amended, by giving, contributing, expending, and using and by causing to be given, contributed, expended and used in procuring his nomination and election at said primary and general elections, a greater sum than the laws of Michigan

permitted and above ten thousand dollars," etc. The Act of Congress referred to (c. 392, 36 Stat. 822-824, amended c. 33, 37 Stat. 25-29) commonly known as the Federal Corrupt Practices Act, provides: "No candidate for Representative in Congress or for Senator of the United States shall give, contribute, expend, use, or promise, or cause to be given, contributed, expended, used, or promised, in procuring his nomination and election, any sum, in the aggregate, in excess of the amount which he may lawfully give, contribute, expend, or promise under the laws of the state in which he resides," etc. This Act read in connection with the Michigan statute fixed the maximum sum so allowed to be expended by a candidate for the United States Senate at $3,750. The trial court overruled a demurrer challenging the constitutionality of the Act of Congress.

On the trial the court (Judge Sessions) charged the jury *inter alia* as follows:

> (c) "To apply these rules to this case: If you are satisfied from the evidence that the defendant, Truman H. Newberry at or about the time that he became a candidate for United States Senator was informed and knew that his campaign for the nomination and election would require the expenditure and use of more money than is permitted by law and with such knowledge became a candidate, and thereafter by advice, by conduct, by his acts, by his direction, by his counsel, or by his procurement he actively participated and took part in the expenditure and use of an excessive sum of money, of an unlawful sum of money, you will be warranted in finding that he did violate this statute known as the Corrupt Practices Act."

In the Supreme Court the Justices were unanimously of the opinion that the judgment should be reversed for error in the charge quoted, Chief Justice White referring to the charge of the trial court as a "grave misapprehension and grievous misapplication of the statute." Five members of the Court (McReynolds, Day, McKenna, VanDevanter, and Holmes) were of the opinion that the Act of Congress was unconstitutional. The concurrence of Mr. Justice McKenna, however, was with the reservation of a possible contrary conclusion if the Seventeenth Amendment could be taken into account. Mr. Justice Pitney delivered an opinion in which Brandeis and Clark, J. J., concurred upholding the power of Congress, while the Chief Justice in a separate opinion arrived at the same conclusion. *Truman H. Newberry et al* v. *United States,* U. S. Sup. Ct., No. 559, May 2, 1921.

The fault found in the charge above quoted is succinctly stated by Mr. Justice Pitney as follows:

> "However this may be regarded when considered in the abstract, the difficulty with it, when viewed in connection with the evidence in the case to which the jury was called upon to apply it, is that it permitted and perhaps encouraged the jury to find the defendants guilty of a conspiracy to violate the Corrupt Practices Act if they merely con-

templated a campaign requiring the expenditure of money beyond the statutory limit even though Mr. Newberry, the candidate, had not, and it was not contemplated that he should have, any part in causing or procuring such expenditure beyond his mere standing voluntarily as a candidate and participating in the campaign with knowledge that moneys contributed and expended by others without his participation were to be expended. * * *

"A reading of the entire Act makes it plain that Congress did not intend to limit spontaneous contributions of money by others than a candidate, nor expenditures of such money except as he should participate therein. * * * Spontaneous expenditures by others being without the scope of the prohibition, neither he nor anybody else can be held criminally responsible for merely abetting such expenditures.

"It follows that one's entry upon a candidacy for nomination and election as a Senator with knowledge that such candidacy will come to naught unless supported by expenditure of money beyond the specified limit, is not within the inhibition of the Act unless it is contemplated that the candidate shall have a part in procuring the excessive expenditures beyond the effect of his mere candidacy in evoking spontaneous contributions and expenditures by his supporters; and that his remaining in the field and participating in the ordinary activities furnish in a general sense the 'occasion' for the expenditure is not to be regarded as a 'causing' by the candidate of such expenditure within the meaning of the statute."

The Court's conclusion on the interpretation of the Corrupt Practices Act and the propriety of the charge to the jury are of course interesting and important, but by far the most vital part of the case is that dealing with the power of Congress to legislate regarding primary elections of candidates for the National Legislature. In many of the cases involving constitutional questions decided by a divided court the differences are due to varying views as to economic and social policies and theories. As to these one may agree or disagree, but it is pretty difficult to say with assurance that either position is *wrong*. The *Newberry* case, however, turns on a question which is purely one of construction of the Constitution, and it is believed that one is warranted in saying, with all deference, that the majority conclusion is unsound.

By the Constitution it is provided: "All legislative Power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives" (Art. I, Sec. 1); "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places for chusing Senators" (Art. I, Sec. 4); "The Congress shall have power * * * to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Offi-

cer thereof" (Art. I, Sec. 8, Cl. 18). Since Senators are officers of the United States and the office exists solely by virtue of the Constitution we assume that it would not be seriously questioned, if there were no other provisions therein regarding the manner of their selection or limiting the legislative power of the Federal Government in respect thereof, that Congress would have plenary power over all matters relating to their choice. It has long been settled that Congress may provide for the conduct of the election proper. *Ex parte Siebold,* 100 U. S. 371; *United States* v. *Gradwell,* 243 U. S. 476. Regulation of primaries, admittedly of no other purpose than to determine whose names shall go on the ballots in the general election, surely would be no farther removed from the end to be accomplished than was the creation of the bank upheld in *McCulloch* v. *Maryland,* 4 Wheat. 316. The classic statement by Chief Justice Marshall in that case (p. 421) seems entirely applicable: "We think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."

Many cases might be referred to in which Congressional action has been upheld where the immediate subject of the legislation was as far or farther removed from the subject control over which was vested by the Constitution in federal hands, as regulation of primaries is removed from a Constitutional provision by which is created the office to be filled. See *Second Employers Liability Cases,* 223 U. S. 1 (relations between common carriers and their employes); *Selective Draft Law Cases,* 245 U. S. 366 (registration of man power and imposition of compulsory military service); *United States* v. *Ferger,* 250 U. S. 199 (punishment of the fraudulent making of spurious interstate bills of lading); *Ruppert* v. *Caffey,* 251 U. S. 254 (prohibition of manufacture of *non-intoxicating* beer). And in *In Re Neagle,* 135 U. S. 1, the provision of section three Article two, that the President "shall take care that the laws be faithfully executed" was deemed sufficiently close to the matter of protection of United States judges to support the assignment of a deputy marshal to protect Mr. Justice Field from the Terrys.

Is there anything in the Constitution that denies or limits such power of Congress? It may be argued that Sec. 4 of Art. I, above quoted, does so. Surely there is nothing else that can be relied upon as even tending to uphold such a claim. It would seem perfectly apparent, however, that the section referred to is a constitutional delegation of power to the states, and even that has a string tied to it. Were it not for the fact that five of the members of the Supreme Court are of the opinion that Art. I, Sec. 4, is a *grant of power to Congress,* in fact the only basis for any claim by Congress to control even elections of Senators and Representatives, one would

feel almost warranted in saying that it was absurd to contend that the section was anything other than as above stated. It is the *States*, not the *Federal Government*, that get their power from that section.

The inherent reasonableness of the view of the minority is apparent when it is realized that in truth in a large percentage of the states it is the primary election, not the general election, that determines who the officers shall be. The decision of the majority means that in those states Congress is virtually helpless in the control of the selection of its own members. To be sure seats may be denied, but at best that is an uncertain remedy, and so far as punishment is concerned there can be none—at least so far as Congress is concerned—except in such denial of a seat.