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Note and Comment

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NOTE AND COMMENT

THE BASIS OF RELIEF FROM PENALTIES AND FORFEITURES.—The equitable principle of relief from penalties and forfeitures is so far elementary as almost to defy analysis. Many, perhaps most, of the judicial explanations of the principle have based it upon interpretation or construction, appealing to the doctrine that equity regards intent rather than form. Yet a logical application of this doctrine would lead to results very different from those which have actually been arrived at in the decisions. Thus, a stipulation in a mortgage that the mortgagor waives his equity of redemption can hardly be interpreted as meaning that he does not waive it, yet all such stipulations are ignored and redemption granted, nevertheless. Again, a penalty for breach of contract cannot be saved by the most solemn declaration that it is intended as liquidated damages. It must be conceded that many cases have actually been decided on the interpretation theory, producing such enormities as *Iowa Land Co.* v. *Mickel*, 41 Ia. 402 (sale of land, $150 out of $600 paid, $4000 in improvements, second instalment of $150 one day late due to a misunderstanding; held forfeited), and *Doctorman* v. *Schroeder*, 114 Atl. 810 (N. J., 1921; sale of land, $1000 paid, last instalment of $1000 thirty minutes late; held forfeited). But such cases represent the minority view,

and one applicable only to instalment sales, no court pursuing this course in mortgage or liquidated damage cases.

In truth, relief from penalties and forfeitures involves a nullification of the intent of the parties, a refusal to give legal effect to their solemn agreements, and constitutes a glaring exception (not, of course, the only one) to the general rule that parties of full capacity are bound by their agreements. And this exception must be referred to "conscience," the principle of natural justice upon which equity has relieved from a great variety of unconscionable transactions, and with which, more recently, the common law has fallen in love.

But we have only cleared the ground when we have referred the problem to the head of conscience, for conscience embraces a multitude of principles. Can we identify more precisely the principles governing relief from forfeiture? Analyzing the Chancellor's conscience may be unscrewing the inscrutable, but let us press on.

It has been suggested by high authority that equitable interference in the mortgage case is based upon duress of circumstances. "Necessitous men are not free men." *Vernon* v. *Bethell,* 2 Eden 110. "Debtors, under the force of pressing necessities, will submit to almost any exactions." *Pierce* v. *Robinson,* 13 Cal. 116, 126.

But this will not explain relief from the stipulation for forfeiture in a land contract, nor relief of the lessee from forfeiture for non-payment of rent, nor relief from penalty for breach of an ordinary contract. Cases of this sort may indeed occur in which the party submitting himself to forfeiture does so because of pressing necessity, just as cases may occur in which a mortgagor is not under such pressure, but this element may be considered normal in the mortgage cases and abnormal in the others. What is typical of these last is an element of misreliance. It is not mistake of present fact, and therefore not mistake in the technical legal sense. It is mistake or error as to future developments. Yet it is a mistake which all mankind is prone to make, that of overconfidence in one's own capacities and faith in a special providence. Hope springs eternal. For this all thanks, but it leads us to over-sanguine commitments. This being human nature, the courts cannot but take account of it and relieve from its consequences, so far as this can be done without undue invasion of other interests. That this is the basic principle in these cases seems to be borne out by the fact that the judicial attitude toward an agreement for "liquidated damages" is so different from that toward an accord. An agreement to pay "liquidated damages" for a future breach of contract will not be enforced unless it bears a reasonable relation to actual damage. WILLISTON, CONTRACTS, §§ 777-779. But an accord after breach can only be impeached for duress or fraud or mistake (in the ordinary sense of those terms), and even mistake will be unavailing if the accord involves a settlement of a dispute upon the very matter which is mistaken. *Ib.,* §§ 780, 1543. Again, a surrender by a defaulting lessee or purchaser is on a very different footing from forfeiture

by proviso in the lease or contract. Do not these distinctions turn upon the presence or absence of misreliance upon airy hope?

And the element of misreliance is present in the typical mortgage case. That it has been a vital element is borne out by the state of the cases. Stipulations providing for *future* forfeiture of the equity of redemption, if the debt is not paid at a certain day, are held absolutely void. But when the mortgagor by *present conveyance* releases his equity of redemption to the mortgagee, the transaction is not necessarily void, the most liberal doctrine being that it will be scrutinized in much the same way as transactions between trustee and *cestui que trust,* to see that no undue advantage is taken of the necessities of the mortgagor. Yet the mortgagor is, presumably, at least as necessitous in the latter case as in the former. It has been said that the distinction is between stipulations *contemporaneous* with the mortgage and those *subsequent* to it. 21 HARV. L. REV. 466. But in the few cases involving *subsequent* agreements for *future* forfeiture, the transaction has, by all but unanimous authority, been held absolutely void. *Batty* v. *Snook,* 5 Mich. 231; *Holden Co.* v. *Interstate Co.,* 87 Kas. 221; *Cohn* v. *Bridgeport Co.,* 115 Atl. 328 (Conn., 1921). Contra, *Bradbury* v. *Davenport,* 120 Cal. 152. It would seem that the distinctions among the mortgage cases turn upon the presence or absence of the mirage of hope.

Yet it can hardly be said that the other element, duress of circumstances, is not material in the mortgage cases. There is nothing else to support the "scrutiny" of the release (by present conveyance) of the equity of redemption. Furthermore, the fixed rule of mortgage law by virtue of which all executory stipulations waiving the equity of redemption are void, regardless of the equities of the particular case, stands in marked contrast to the doctrines of the other cases under discussion, which (characteristic in this respect of equity at large) are flexible and take account of the particular circumstances. Would it not seem that this might be explained by the fact that in the former the elements of duress and misreliance combine, while in the latter only one of these elements appears? Justice Field said of the former rule: "Its maintenance is deemed essential to the protection of the debtor, who, under *pressing necessities,* will often submit to ruinous conditions, *expecting or hoping* to be able to repay the loan at its maturity." *Peugh* v. *Davis,* 96 U. S. 332. (Italics ours.)

Of course, the rigid rule of mortgage law serves the social interest in legal certainty, but this interest would be likewise served by a like rigid rule in the other cases. This interest being substantially constant throughout, and the results being diverse, it would seem that this social interest has not controlled. Eliminating that, there is left, on the one side, the "equity" of duress or misreliance (or both in combination), and on the other side and opposed to them, the social and individual interests in freedom of contract and security of transactions, plus (especially in the liquidated damage cases) a social interest in settlement by private agreement of questions which would otherwise present a judicial problem of considerable difficulty. And in this struggle of conflicting interests it would seem that, when duress of circum-

stance and mistaken self-confidence combine they have won complete recognition in a rigid rule of nullification, while either of these elements standing alone has won but partial recognition, in the rule of particular equities.

It must be conceded that the problems herein discussed are somewhat more complex than this analysis would indicate. There are elements in them other than those discussed. See the article on "Penalties and Forfeitures," by William H. Lloyd, in 29 HARV. L. REV. 117. And there are certain features of the law which seem not to fit into the scheme at all. For example, the transactions which, upon lines of distinction none too well settled (see the little note of some six hundred pages in L. R. A. 1916 B, 18 ff.), are held to be conditional sales rather than equitable mortgages, these always involve the fool's paradise, and very often involve duress of circumstance, yet the letter of the agreement is enforced. And we only partially remove the inconsistency when we say that substantially all the hard cases are taken care of by throwing them, on one ground or another, into the mortgage category. All these difficulties are admitted, yet it is hoped that the foregoing analysis throws a little light into a dark corner.

E. N. D.

CONSIDERATION AS SOMETHING NOT GIVEN STRICTLY IN EXCHANGE FOR THE PROMISE.—In discussing the requirements for an enforceable promise, Justice Holmes said: "But the other elements are that the promise and the detriment are the conventional inducement each for the other. No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must be the motive each for the other in whole or at least in part. It is not enough that the promise induces the detriment or the detriment induces the promise if the other half is wanting." *Wisconsin & Michigan Ry. Co.* v. *Powers,* 191 U. S. 379, 386. This statement was not necessary to the decision of the case, but was subsequently approved in *Banning Co.* v. *California,* 240 U. S. 142, 153, and similar views had been expressed previously. *Philpot* v. *Gruninger,* 14 Wall. 570; *Fire Insurance Assn.* v. *Wickham,* 141 U. S. 564.

An early case which pointedly illustrates this theory of consideration is *Kirksey* v. *Kirksey,* 8 Ala. 131. The defendant had written the plaintiff that if she would come to live on his farm he would furnish a place for her to reside. The plaintiff made the change of residence at considerable expense and inconvenience, but it was held that her acts could not provide consideration for the defendant's promise, which was purely gratuitous and revocable. The theory was that while the promisor requested the promisee to give up her home and make the journey for her own good, he did not intend her compliance as the equivalent for his promise. The requested change was simply what has been called "a condition of a gratuitous promise," and it is said that the performance of the condition does not make the promise any less gratuitous. See WILLISTON, CONTRACTS, § 112. A similar case is

reported from Australia. The promisor wrote his brother in England promising to make him a present of 500 pounds upon his arrival in the colonies. The promise was held unenforceable, and the court said that, whatever obligation might be imputed from the plaintiff having made the trip to Australia, was casuistic merely and not legal. *Boord* v. *Boord,* Pelham (So. Aust.) 58. Where the testator had advised the plaintiff to purchase a farm in Pennsylvania and assured him that he would make up the balance of the purchase money which the plaintiff lacked, it was held that the plaintiff's acts in abandoning a journey west and purchasing a farm were not consideration for the promise. The court said: "Conformance to advice is never intended to stand as legal consideration for the kind assurances that accompany the advice, though it is a motive for their fulfillment." *Richard's Executors* v. *Richards,* 46 Pa. 78. See also *Dougherty* v. *Torrence,* 25 Pa. C. C. Rep. 317.

In the recent case of *Briggs* v. *Miller* (Wis., 1922), 186 N. W. 163, the appellant, a public lecturer on applied psychology, advertised that he would pay the amount of loss which was shown to have accrued to anyone as a result of any of appellant's previous business ventures. The appellee produced an upaid note signed by appellant, and claimed payment as advertised. The court held that the promise to pay the loss was without consideration, because the appellant had done no more than accept the offer, suffering no detriment and conferring no benefit; and that such benefit as the appellant would receive through increased public confidence in him would be created by his own act in making the payment. It is submitted that if the promisor expects to receive public favor through paying his old debts, the opportunity of making such payments furnished by the promisee would be of the nature of genuine or real consideration, and the court erred in inquiring as to the reality of the benefit and the detriment involved. If the consideration is genuine the court should not inquire whether it is adequate to the promise. EDWARD JENKS, HIST. DOCT. CONSID. 12. "On the plea of want of consideration the law does not measure, but only ascertains existence." *Bell* v. *Cooper* (Iowa, 1920), 180 N. W. 642. It seems, therefore, that this case can be justified only upon the theory that the benefit derived from the advertising was the motive for the promise, and the increased public confidence as a result of payment of old claims was not contemplated as something to be received in exchange for the promise to pay. The case well illustrates the considerations of policy which should prompt the courts to enforce contracts. It seems that one should be required to perform his contract obligations, when the public belief in his readiness to perform his obligations has adduced to his benefit. In such a case, the court should search diligently to discover a consideration.

It has also been said: "There is the strongest reason for interpreting a business agreement in the sense which will give it a legal support." *Martin* v. *Meles,* 179 Mass. 114. In that case the defendant with other leather manufacturers signed a subscription agreement to contribute $500 to $2000 to a fund to be used by the committee in defraying the legal expenses incurred in defending suits against members of the association. The defend-

ant was held liable, the work undertaken by the committee subsequently to the agreement furnishing the consideration, although it was admitted that this work might have been undertaken without defendant's participation The court said: "When an act has been done which purports expressly to invite certain conduct on his part, and that conduct follows, it is only under exceptional and peculiar circumstances that it will be inquired how far the act in truth was the motive for the conduct." While stating as a general rule that the acts done in reliance upon the promise must have been contemplated by the form of the transaction, as the "conventional inducement, motive and equivalent for the promise," the courts "have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise." This court had previously held that the effort and expenditures of trustees appointed subsequently to the defendant's subscription furnished consideration for the defendant's promise to contribute to the building of a church. *Sherwin* v. *Fletcher,* 168 Mass. 413. It is seen that the invited consequences of the promise in these cases differ from those in *Briggs* v. *Miller, supra,* only in the fact that the results were actual detriments to the promisees, while in that case there was a benefit to the promisor and only a technical detriment to the promisee. Where an English school district council issued a circular announcing a resolution that all teachers who should enlist would be paid their civil salaries while in the service, it was held that a teacher who enlisted could recover. *Davies* v. *Rhondda District Urban Council,* 87 L. J. R. (K. B.) 166, 16 MICH. L. REV. 640. In such a case it is clear that the promisor's primary object was one of patriotism, and the case is analogous to *Kirksey* v. *Kirksey, supra,* concerning which it was said that the promise was one to make a gift upon condition. While the case of *Devecmon* v. *Shaw & Devries,* 69 Md. 199, has been questioned as an authority because it was decided by default, the court therein committed itself to the declaration that expense undergone in reliance upon an offer prompted probably by a gratuitous impulse would furnish consideration for the promise to pay for a trip to Europe. Where an intestate had promised to pay his niece $5000 toward the purchase of a farm in the state, it was held that the purchase of the farm in reliance upon this promise provided consideration to make the promise enforceable. *Berry* v. *Graddy,* 1 Metcalf (Ky.) 553. It was held that the acts of a man in giving up his employment in a mill and moving upon a farm were consideration to support the promise of his son to purchase the farm for him, conditioned upon these acts. *Bigelow* v. *Bigelow,* 95 Me. 17. Where the defendants, advertising the efficacy of their smoke ball to prevent influenza, offered to pay 100 pounds to any person who contracted influenza after purchasing a smoke ball and using it as directed for two weeks, and the plaintiff complied with the terms of the offer, it was held that the plaintiff could recover. *Carlill* v. *Carbolic Smoke Ball Co.,* [1893] 1 Q. B. 256. It is probable, however, that the advertising received from the published offer was the motive for the offer to pay the

100 pounds, and purchasing the smoke ball, using it for two weeks, and contracting influenza were not contemplated as furnishing a *quid pro quo* in exchange for the promise. Where the defendant entered into a written agreement to pay his daughter $2500 a year upon her marriage to her fiance, the promise was held enforceable over the contention that only a gift was intended. The fact that the promise was in writing was held to be an indication that the marriage was regarded as consideration for the promise, and the court said that it was induced to find a consideration in this case because the policy of the law favored marriage settlements. *De Cicco* v. *Schweizer,* 221 N. Y. 431. In *Schoenmann* v. *Whitt,* 136 Wis. 332, the plaintiff was given the exclusive right to sell real estate, with no consideration stated in the agreement. The defendant himself sold the property during the period stipulated, and it was held the plaintiff could not recover a commission only because he had failed to furnish consideration for the exclusive agreement by not endeavoring to sell the property. But in a recent case with very similar facts, in which the plaintiff did exploit the property for sale, a recovery was granted. Although the agreement expressed no consideration, and was said by the court to have been purely unilateral and to have imposed no obligations upon the plaintiff when made, still the plaintiff by performing services which were only impliedly contemplated converted that unilateral agreement into a binding contract. *Hughes* v. *Bickley,* 205 Ala. 619. It is thus seen that many courts, in the interest of the sanctity of promises, indicate a laudable effort to modify the rule that consideration must be something given strictly in exchange for the promise. C. E. B.

DELEGATION OF LEGISLATIVE POWER—ADOPTION BY STATE OF FEDERAL PROHIBITION LAWS.—A bill was proposed in the Massachusetts General Court by the operation of which all laws made and to be made by Congress concerning the enforcement of the Eighteenth Amendment would be incorporated automatically into the law of Massachusetts. An opinion on the bill was requested. *Held,* that it would be contrary to the constitution of the commonwealth, that the legislative power is vested exclusively in the General Court except so far as it is retained in the people by the initiative and referendum provisions, and that it could not be delegated or surrendered as proposed. *In re Opinion of Justices* (Mass., 1921), 133 N. E. 453.

One of the established maxims of the law is that those to whom a power to exercise an authority has been given may not delegate it to others unless the power to delegate it has also been conferred. This legal principle is based upon the implied intention of the one who confers the power that it shall be exercised only by the person or body of persons to whom it is primarily delegated. It should be noticed that when the doctrine is applied as a restriction upon legislative bodies it rests upon implication only, for nowhere is it expressly commanded by the organic law that delegated powers shall not be re-delegated. It is well to observe, moreover, that the power to re-delegate, though it may be given expressly, as in the case of the initiative and referendum amendments, may also be implied. This is

done, in fact, in the case of permitted delegations of the powers of local self-government to local municipal bodies.

Some courts have adopted a strict and almost inflexible attitude whenever the issue of the delegation of legislative power has been presented. Among the decisions which illustrate this view is *Dowling* v. *Lancashire Insurance Co.*, 92 Wis. 63. A statute authorized the state insurance commissioner to prepare a standard form of fire insurance policy, such form to conform as nearly as possible to that of New York. The court held this procedure to be an unconstitutional delegation of legislative power, saying in the course of the opinion: "The result of all the cases on this subject is that a law must be complete, in all its terms and provisions, when it leaves the legislative branch of the government, and nothing must be left to the judgment of the electors, or other appointee or delegate of the legislature, so that, in form and substance, it is a law in all its details *in praesenti*, but which may be left to take effect *in futuro*, if necessary, upon the ascertainment of any prescribed fact or event."

But it is a demonstrable fact, and it will appear from the decisions hereafter to be cited, that the legislature has not always found it possible to stay within the limits thus prescribed and at the same time properly to provide the machinery of government. Modern economic conditions demand legislation of a quite different character from that of the day when the above principle was first applied to legislative power. Rate regulation cannot be satisfactorily accomplished by direct legislative enactment. Increased congestion in the centers of population has demanded vastly increased powers for municipal bodies. Interstate and international relations have demanded reciprocal legislation of a kind which looks suspiciously like delegation of power. And the fact of the matter is that, whenever the exigencies have demanded with sufficient persuasiveness a delegation of some small fraction of legislative power it has been delegated, and the procedure has been duly approved by the courts. It is true that the courts have been reluctant to call the act a delegation of *legislative* power. In fact, they have been unusually astute to discover some other name by which to call it. But the fact remains that power has been delegated, by whatever name it may have been called. Mr. J. D. Barnett, in the conclusion of an article in which he reviewed a number of cases of the delegation of congressional power to the state legislatures, phrased the matter as follows: "It appears from this discussion that although the accepted doctrine in regard to the unconstitutionality of the delegation of legislative power has never been expressly denied in this connection, but at times has been clearly stated and strictly applied, more often there have been attempts to avoid a conflict with the theory by indirect legislation *or forced construction, or the theory has been utterly ignored.*" 2 AMERICAN POLITICAL SCIENCE REVIEW, p. 347.

A study of the decisions allowing and disallowing fractional delegations of power will impress one with the truth of the above statement and also with the fact that the keynote in each case where the delegation has been permitted has been the practical necessity for it. Prominent among these

decisions are those upholding delegations of power to commissions to fix the rates of common carriers. In *State* v. *C., M. & St. P. Ry.,* 38 Minn. 281, the court held that a statute declaring that railroad rates should be equal and reasonable, and delegating the rate-fixing power to a commission, was not invalid because of unconstitutional delegation of legislative power. It said: "They (the legislators) have not delegated to the commission any discretion as to what the law shall be—which would not be allowable—but have merely conferred upon it an authority and discretion to be exercised in the execution of the law, and under and in pursuance of it. * * * It (the commission) is merely charged with the administration of the law, and with no other power." According to Justice Timlin, Wisconsin supreme court, in an address given before the Wisconsin State Bar on "The Delegation of Legislative Power," "When the commission acts on its own initiative and investigates and decides, fixing either a maximum of reasonableness or the exact amount of the rate which alone will answer the requirement of reasonableness, the commission exercises a power precisely similar to that exercised by the legislative body when the legislative body performs the same function." Vol. 9, REPORTS OF WISCONSIN STATE BAR ASSOCIATION, p. 215. The legislature fixed the rates of common carriers in the early days and thought it was performing a legislative act. But obviously modern rate schedules cannot be successfully fixed in legislative halls. Practical necessity, therefore, demands a different procedure, and the delegation is justified by calling it a different name. Again, one finds cases of mutually reciprocal legislation between states. In the leading case of *People* v. *Philadelphia Fire Assn.,* 92 N. Y. 311, the court upheld a law which provided that insurance corporations of foreign states should pay the same taxes and fines as those imposed in the state of origin by "existing or future laws" upon foreign corporations of like kind. The objection was offered that this law gave power to the foreign legislature to change the domestic tax rate by its future enactments. The court answered that it did not do so, but rather made the domestic rate contingent upon an extrinsic fact, namely, the attitude of the foreign state in like matters. Legislation contingent upon future events is, of course, valid. Interstate amenity in these days of free and extensive intercourse is highly desirable and might even be called a practical necessity. Again, one finds decisions holding valid state-wide laws which are to take effect only in case of a favorable popular vote, and again the courts rely upon the contingency theory, saying that a favorable popular vote is a proper contingency. *Smith* v. *City of Janesville,* 26 Wis. 291. It has, however, been denied that such a proceeding is free from the objection of unconstitutional delegation of power. *In re Opinion of Justices,* 160 Mass. 586.

There are many apparent instances of the delegation of power by Congress to the state legislatures, but in these cases, too, the courts decline to call them delegations of *legislative* power, but, instead, either they discover some other name or reasoning by which to avoid the issue or they totally ignore it. The differences between the powers of Congress and of the legis-

latures of the states under the controlling constitutions probably do not affect the application of the principle of law raised by implication that forbids the delegation of legislative powers. A type of legislation which has caused considerable difficulty is that similar to the act of Congress of 1789, which, in spite of the fact that the Constitution gave Congress the power to regulate commerce and hence navigation, provided that "all pilots shall continue to be regulated in conformity with the existing laws of the state wherein such pilots may be, or with such laws as the states may respectively hereafter enact for the purpose." In the leading case of *Cooley* v. *Board of Wardens,* 12 How. (U. S.) 299, the court held that the future enactments of the states could not be given the force of federal laws because this would amount to an unconstitutional delegation of legislative power, but they could derive force from the inherent power of the states; yet the "then existing state laws" were given the force of an act of Congress by adoption *"so long as they should continue unrepealed by the state which enacted them."* Thus the states were given power to repeal an act of Congress. Clearly this is a delegation of legislative power in its strictest sense. However, the court recognized the necessity for diverse legislation to meet local conditions in the several states. Again, the Wilson Act of 1890 provided that all intoxicating liquors transported into any state should, upon arrival in such state, "be subject to the operation and effect of the laws of such state." This act was held free from the objection of delegation of legislative power over goods in interstate commerce by the circuitous argument that, instead of delegating such power, it simply provided that certain designated articles of interstate commerce should be governed by a rule which divested them of their interstate character at an earlier period of time than would otherwise have been the case. *In re Rahrer,* 140 U. S. 545. In the language of the court, "Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no new power to the states not then possessed, but allowed imported property to fall at once upon the arrival within the local jurisdiction." The court was certainly influenced to some degree, just as Congress had been, by the inability of "dry" states to enforce prohibition laws so long as the "original package" doctrine permitted practically unrestricted importation. This inability supplied the element of "practical necessity" under the influence of which the courts usually find some way to avoid conflict with the doctrine forbidding delegation of legislative power. Again, Section 9150, U. S. COMPILED STATUTES, 1913, provides: "The quarantines and other restraints established by the health laws of any state, respecting any vessels arriving in or bound to any port or district thereof, shall be duly observed by the officers of the customs revenue of the United States * * * *and all such officers of the United States shall faithfully aid in the execution of such quarantines and health laws."* The courts apparently have never even questioned this act as an unconstitutional delegation of power. The analogy is extremely

close between this and the proposed legislation in the principal case, which in effect would result in state officers being ordered to "faithfully aid in the execution of" federal prohibition laws.

It must be clear that a rigid adherence to the doctrine forbidding delegation is far from satisfactory. It hampers legislatures in the conduct of governmental affairs. It forces courts to doubtful expedients to justify legislative acts. The prime purpose of the doctrine is to promote the general welfare by compelling the legislators who are responsible to the people to determine state policies, but a strict adherence to it will cause it to defeat its very end. It is a doctrine which is implied from the clause of the Constitution which vests the legislative power in a legislature, but in applying the provisions of a constitution the guiding star should be, so far as possible, to effectuate its primary purpose, namely, the welfare of the people.

With this in mind, it is not unreasonable to attach considerable significance to the observations occasionally made by the courts with reference to the necessity of delegating some fraction of the legislative power under special circumstances. The Wisconsin court in *Minneapolis, St. Paul & Sault Ste. Marie R. R.* v. *Wisconsin R. Com.*, 136 Wis. 146, in commenting upon the argument that a delegation of rate-making power to commissions was contrary to the organic law, said: "Such a construction would make the mere implications of the Constitution greater than the Constitution itself, and would lose sight of the main and paramount purpose of the creation of the state and the adoption of the constitution. A constitution so construed would last only so long as it took to bring about an amendment or a new constitution. * * * This is called by counsel the doctrine of expediency, but we think it the doctrine of common sense that forbids implications from an instrument which tend to render nugatory or destroy that instrument." Again, in *Butterfield* v. *Stranahan*, 192 U. S. 470, the constitutionality of an act which prohibited the importation of inferior teas and gave the Secretary of the Treasury power to fix the standards of quality of tea to be imported was questioned. The court said: "Congress legislated on the subject so far as was reasonably practicable, and from the necessities of the case was forced to leave to executive officers the duty to bring about the result pointed out by the statute. To deny power to Congress to delegate such a duty would in effect amount to declaring that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously executed." These and other similar utterances suggest the embryonic development of some theory by which the doctrine forbidding delegation might be qualified, and the authority to delegate legislative power conceded to an extent to be measured by the necessities of the particular case in order that statutory regulation may be made effective.

In summary, and before concluding, the following outstanding considerations of the issue involved must be borne clearly in mind:

1. The doctrine forbidding re-delegation is implied only, and implications should not be regarded as sacred when they defeat their very purpose.

2. The necessities of modern legislation make occasional delegation of fractional portions of the legislative power imperative.

3. The courts do, in fact, recognize such delegations when they appear sufficiently necessary, but are reluctant to call them by their true name.

4. Some courts have at least suggested that a modification of the original doctrine is essential so that in proper cases sensible results may be reached in a logical manner.

It would be presumptuous to attempt to enunciate any new theory of constitutional law on the basis of the foregoing extremely sketchy review of the authorities, but it is neither presumptuous nor academic to quote the words with which Justice Timlin concluded his address, above cited. He said: "I should say in conclusion that whether or not a statute is invalid because of an unconstitutional delegation of legislative power depends upon the extent to which the power usually exercised by the legislature is attempted to be delegated; that delegation to a greater extent is permissible where without such delegation it is impossible to make the statute effectual for an exercise of legislative power otherwise clearly constitutional; that the validity of such a statute does not depend upon the conventional or legal name of that fraction of legislative power delegated, nor upon its intrinsic nature, but *rather upon the necessity for such delegation* and the existence of a general rule of statute law covering the subject in general terms, to which rule the delegated power is an aid or adjunct."

If this principle had been applied to the proposed Massachusetts legislation in the principal case, it can hardly be doubted that an opposite result would have been reached. It is true that the attempted delegation is of an unusual sort and should be carefully scrutinized for that reason. But when one considers that in the Eighteenth Amendment the state and federal systems are given "concurrent power" for its enforcement, that the federal laws will be in force in Massachusetts in any event, whether they are adopted as state laws or not, that in view of the peculiar difficulties of prohibition enforcement it is particularly desirable that laws promoting that end should be uniform in application, it would seem to be highly desirable, if not a practical necessity, that the sheriff and the marshal act under like laws. This result could be accomplished by successive enactments by the General Court, but all considerations of convenience seem to justify an automatic injection of the federal laws into the state system. It should be noted that the opinion is written on proposed and not enacted legislation. It is not improbable that, had the legislature actually passed the measure before the question of its constitutionality arose, the court would have found a way to avoid holding it unconstitutional. E. B. S.

DUE PROCESS—EQUAL PROTECTION—DENIAL OF THE INJUNCTIVE REMEDY.—During the past two decades the power of a court of equity to issue an injunction in labor disputes has been inveighed against in the bitterest terms. In two recent cases the Supreme Court of the United States has been confronted with the problems raised by the injunction, and in both instances

has held the injunction a valid remedy against picketing, which was not in fact peaceable; in the first case, notwithstanding the Clayton Act, and in the second, despite a state statute forbidding the use of injunction in labor disputes. *American Steel Foundries* v. *Tri-City Central Trades Council et al.*, 42 Sup. Ct. Rep. 72, brought to the attention of the court a labor dispute involving picketing, to which it applied § 20 of the Clayton Act, passed while the case was pending in the Circuit Court of Appeals, and held that so-called "peaceful picketing" was a contradiction in terms, saying: "In the present case the three or four groups of picketers were made up of from four to twelve in a group. They constituted the picket line. Each union * * * had several representatives on the picket line, and assaults and violence ensued. They began early and continued from time to time during the three weeks of the strike after the picketing began. All information tendered, all arguments advanced and all persuasion used under such circumstances were intimidation. They could not be otherwise. It is idle to talk of peaceful communication in such a place and under such conditions. The numbers of the pickets in the groups constituted intimidation. The name 'picket' indicated a militant purpose, inconsistent with peaceable persuasion. * * * Our conclusion is that picketing thus instituted is unlawful and cannot be peaceable, and may be properly enjoined by the specific term because its meaning is clearly understood in the sphere of the controversy by those who are parties to it."

Truax v. *Corrigan*, 42 Sup. Ct. Rep. 124, involved the constitutionality of a statute enacted in 1913 by the legislature of Arizona, specifically excepting disputes between employees and employers from injunction process and declaring: "No restraining order or injunction shall be granted by any court of this state, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of a dispute concerning terms or conditions of employment. * * *" Ariz., 1913, R. S., § 1462. Union leaders had ordered a strike of employees in plaintiffs' restaurant in Bisbee and then had placed pickets outside the place of business, displayed banners, denounced plaintiffs as unfair, and had urged customers to stay away, intimating injury to future patrons. The result of the campaign was to reduce the business from one of more than $55,000 a year to one of $12,000. Plaintiffs asked for an injunction, setting up the insolvency of defendants and alleging that actions for damages would involve a multiplicity of suits and that the Arizona statute was of no effect, being unconstitutional in that it deprived plaintiffs of their property without due process and denied them the equal protection of the laws. Defendant's demurrer was sustained, and this judgment was affirmed by the supreme court of Arizona. In the United States Supreme Court the decision was reversed by a five to four decision, Mr. Chief Justice Taft writing the majority opinion. The first question considered was whether the statute amounted to a taking of property without due process. The court held that the business was a property right, and that defendants'

acts were illegal, saying: "Violence could not have been more effective. It was moral coercion by illegal annoyance and obstruction, and it thus was plainly a conspiracy." The decision on this point seems to rest on the fact that plaintiffs were without legal remedy as a practical matter and that because they were thus without practical protection the court would not be overly concerned about purely technical remedies utterly valueless to plaintiffs. The Chief Justice says: "It is true that no one has a vested right in any particular rule of the common law, but it is also true that the legislative power of a state can only be exerted in subordination to the fundamental principles of right and justice which the guaranty of due process in the Fourteenth Amendment is intended to preserve, and that a purely arbitrary or capricious exercise of that power whereby a wrongful and highly injurious invasion of property rights, as here, is practically sanctioned and the owner stripped of *all real remedy,* is wholly at variance with those principles. * * *To give operation to a statute whereby serious losses inflicted by such unlawful means are in effect made remediless is, we think, to disregard fundamental rights of liberty and property and to deprive the person suffering the loss of due process of law."

The court construes the opinion of the supreme court of Arizona as withholding from plaintiffs *all* remedy for the wrongs they suffered. Then the court proceeds: "If, however, contrary to such construction only the equitable relief of injunction is withheld, have plaintiffs been denied the equal protection of the laws?" and answers in the affirmative, saying: "If, as is asserted, the granting of equitable remedies falls within the police power and is a matter which the legislature may vary as its judgment and discretion shall dictate, this does not meet the objection under the equality clause, which forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction."

The classification is also objected to, the Chief Justice saying: "It seems a far cry from classification on the basis of the relation of employer and employee in respect of injury received in course of employment to classification based on the relation of an employer, not to an employee, but to one who has ceased to be so, in respect of torts thereafter committed by such ex-employee on the business and property right of the employer."

The minority opinions written by Justice Pitney (Justice Clark concurring), Justice Brandeis and Justice Holmes, raise the objection that the process of injunction is a measure of police regulation, a mere rule of law in which no person has a vested right, and subject to change by the legislature at will. In regard to the guaranty of equal protection Justice Pitney observes: "Examination shows that it does not discriminate against the class to which plaintiffs belong in favor of any other. There is no discrimination as against them; others situated like them are accorded no greater right to an injunction than is accorded to them." The reasonableness of the classification does not trouble Mr. Justice Holmes. Justice Brandeis' dissenting opinion, fortified by a wealth of authority and historical refer-

ence, reviews the economic struggle between employer and employee during the past century, and concludes that the denial of the injunction was merely a denial of a rule of law in which planitiff had no vested right.

In commenting on the decision it would seem superfluous to do more than call attention to the arguments of the members of the court. They are the best commentaries on the case that can be given; and yet, in spite of a thorough agreement with the result which the majority of the court reached, it would seem as though the argument of the minority is unanswerable—the remedy by injunction is a mere method of procedure, just a rule of law, and subject to change and modification by the legislature as it sees fit. There is a hint to the contrary by Mr. Justice Pitney, however, in *Arizona Employers' Liability Cases,* 250 U. S. 400, 421, where the court says: "Rules of law are not placed by the Fourteenth Amendment beyond the reach of the state's power to alter them through legislation designed to promote the general welfare, so long as it does not interfere arbitrarily and unreasonably and in defiance of natural justice." The Supreme Court has held that a state may deprive a person of a right to a trial by a common law jury without violating due process or equal protection. *Maxwell* v. *Dow,* 176 U. S. 581. Is the right to an injunction more sacred? Certainly the process of injunction cannot claim the antiquity of trial by jury; may it not also be denied by a state? If we are to take the case on its facts and simply characterize the entire proceeding which the decision had to meet as arbitrary and contrary to the principles of justice, the decision of the court may perhaps be upheld, as in the tax case of *Norwood* v. *Baker,* 172 U. S. 269. But if the case is an authority for the proposition that the legislature cannot change or prohibit the use of the injunction in certain cases, it is indeed difficult to understand the reasoning of the court and to avoid the logic of Mr. Justice Pitney in his dissent.

In the New York supreme court an injunction was issued at the request of a labor union against an employer, *International, etc., Union* v. *Cloak, etc., Manufacturers' Association,* N. Y. Supreme Court, Jan. 11, 1922, thus putting the shoe of government by injunction on the capitalist foot, and giving labor the benefit of a law so often denounced. But regardless of this decision's converting the unions to the use of the injunction, the majority of the United States Supreme Court have no doubt as to the legality and efficacy of the injunction in controversies between employer and employee.

W. C. O'K.

WORKMEN'S COMPENSATION—EMPLOYER'S RIGHT TO SUBROGATION AND EFFECT OF PAYMENT BY WRONGDOER.—Nice questions are continually arising under the Workmen's Compensation Acts with reference to the employer's right to be subrogated to the employee's rights against third persons, and the effect of payment by the wrongdoer to the employee. A recent Iowa case, *Renner* v. *Model Laundry, Cleaning & Dyeing Co.* (1921), 184 N. W. 611, presents the problem very pointedly. In that case the plaintiff's intes-

tate, while in defendant's employ, was injured by the collision of a street railway company's car with the laundry wagon which he was driving. For a consideration of $750 the injured employee covenanted not to sue the railway company for or on account of the injuries or damages sustained by him in the collision, it being expressly stated that the instrument was not a release of the railway company, or the employer, or any other corporation, firm, or person. Under the Workmen's Compensation Act (Iowa Code Supp., 1913, sec. 2744m6), it is provided that where an employee's injury has been caused under circumstances creating a legal liability in some person other than the employer, the compensation shall be reduced by the amount of damages recovered by the employee therefor. In an action for compensation by the administrator of the injured employee, it was *held* that the defendant employer was not entitled to a reduction of the compensation to the amount received by the employee for the covenant not to sue.

The court placed its decision primarily on the ground that no facts were alleged or proved showing that the injury was received under circumstances which would create a legal liability in some person other than the employer; hence the statutory basis for relief had not been established. Just what facts would be deemed to show "legal liability" on the part of such other person is not altogether clear. The payment of such a substantial sum by the railway company for the covenant not to sue would seem to raise a presumption of liability therefor. It is true that a mere gratuity received by the employee from the injuring party does not raise such a presumption and is not deducted from the employee's claim for compensation. See *Blackford* v. *Green*, 87 N. J. L. 359. In this connection the holding of the court in *Rosenbaum v. Hartford News Co.*, 92 Conn. 398, is instructive. In that case the employee of a news company was injured by a railroad company's car, and the railroad company voluntarily paid the employee $3000 for a release from all rights of action, claims, or demands for or by reason of any injuries sustained by the employee in the accident. In an action by the employee against his employer under a Workmen's Compensation Act containing the same provisions as the Iowa act, it was held that the news company was entitled to have the money paid the injured employee by the railroad applied to the discharge of its own obligation to the employee under the act. The commissioner had found that the railroad was "apparently liable," but its legal liability had not been determined, and the payment was made voluntarily. The court said: "The written contract does not establish the legal liability of the railroad company. But so far as the claimant is concerned, the contract assumes the existence of such a liability, and in this proceeding between the injured employee and the employer the claimant cannot equitably be permitted to take any other position than that the $3000 was received in partial satisfaction of a valid claim for damages." To the same effect see *Page* v. *Burtwell*, [1908] 2 K. B. 758; *Cripps' Case*, 216 Mass. 586, decided under acts similar to that in the principal case. Although the court in the principal case refused to allow it, it

is submitted that the same holding might be applied to a covenant not to sue as well as to a release.

Assuming a legal liability on the part of the railroad company in the principal case, an interesting question might arise as to whether the consideration received for the covenant not to sue would be "damages" within the meaning of the statute. The court in the principal case held that the burden of proof was on the employer to show that the employee had really "recovered damages" from the railroad company, and not on the employee to negative that possibility. The court did not indicate what it would regard as damages, but certainly within the popular sense of the word, money received in such a way would be "damages." Unless such an interpretation were allowed, the possibility of a double payment by the injuring party would be presented, since the court held that the injured employee, entitled to compensation under the Compensation Act, could in no way by an agreement not to sue the wrongdoer deprive the employer, or his insurer, of the right of subrogation to the employee's right to recover damages against such wrongdoer. The third party not having paid damages would not even have a partial defense against the suit of the employer, and his only possible recourse would be against the employee—a very doubtful and unsatisfactory recourse. On the other hand, if he were held to have paid damages, he would be protected under the holding in *Southern Surety Co.* v. *Chicago, St. P., M. & O. Ry. Co.*, 187 Iowa 357, to the effect that the amount paid by an insurance carrier to an injured employee cannot be recovered by the insurer from the actual wrongdoer from whom the employee recovered full damages before payment of compensation. But see *Murphy Const. Co.* v. *Serck*, 104 Neb. 398, where it was held that a negligent third party who, without the concurrence of the employer of the injured employee, settled with the latter could not affect or preclude the employer's right to recover for damages sustained by the employee to the extent of the compensation awarded.

In general, one paying compensation to an injured servant under a Workmen's Compensation Act is entitled to be subrogated to the rights of the servant against a third person liable for such injury. *Mayhugh* v. *Somerset Telephone Co.*, 265 Pa. 496; *Carlson* v. *Minneapolis St. Ry. Co.*, 143 Minn. 129; *Labuff* v. *Worcester Consol. St. Ry. Co.*, 231 Mass. 170; *Houlihan* v. *Sulzberger & Sons Co.*, 282 Ill. 76. But see *Newark Paving Co.* v. *Klotz*, 85 N. J. L. 432, for a holding to the contrary. In *Western States Gas & Electric Co.* v. *Bayside Lumber Co.*, 182 Cal. 140, it was held that the employer, on payment of compensation to the injured employee, might sue the third party responsible for the injury, and the recovery was not limited to the compensation paid; but any recovery over that amount was for the benefit of the injured party. See also *Gones* v. *Fisher*, 286 Ill. 606; *Otis Elevator Co.* v. *Miller & Paine*, 240 Fed. 376; *Casualty Co. of America* v. *Swett Electric Light and Power Co.*, 162 N. Y. Supp. 107. However, in *Black* v. *Chicago Great Western R. Co.*, 187 Iowa 904, it was held that the

employer was subrogated only to the extent of the compensation paid, if it was less than the damages due from the third person, and that such subrogation did not involve a splitting of causes of action. See also *Albrecht Co.* v. *Whitehead & Kales Iron Works,* 200 Mich. 109; *Houlihan* v. *Sulzberger & Sons Co., supra.*

On the basis of strict statutory construction, the decision in the principal case is perhaps justifiable. No unjust result is arrived at so far as the employer is concerned, for he may recover from the injuring party the amount he is forced to pay as compensation. But the purpose of the Workmen's Compensation Act is to entitle the employee to full indemnity, but no more, and to put the common law damages, but no more, on the third party. It would seem, therefore, that the court might better have given effect to such purpose instead of opening up the possibility of a recovery of more than complete indemnity by the employee. C. Y. M.