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Note and Comment

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NOTE AND COMMENT

THE LAW SCHOOL.—Few changes in the personnel of the law faculty are to be noted. Mr. Gustav Stein, whose efficient work for two years as an instructor had been so appreciated that he had been promoted to an assistant professorship, resigned shortly after Commencement, and Mr. Evans Holbrook, who was graduated here in 1900 and has practiced law in Chicago for several years, has accepted an appointment to the vacancy caused by Mr. Stein's resignation.

Registration of students is not yet completed and the publication of particulars concerning the enrollment will be postponed till our next issue. The number of students at the present time is greater than that at the corresponding date of last year.

THE NEGOTIABLE INSTRUMENTS LAW.—Those disinterested lawyers who have been working for uniform legislation concerning important branches of the law are to be congratulated on the fact that the Negotiable Instruments Law is now in force in more than three-fifths of the States. During the last few months this law has been given effect in Kansas, Michigan, Missouri, Nebraska and Wyoming and the prophecy of its advocates that before many

years it would be accepted by all the States seems likely soon to be accomplished. Its enactment in Michigan was due largely to the efforts of Mr. George W. Bates, of the Detroit Bar.

UNAUTHORIZED OPERATION BY PHYSICIAN.—A case of interest involving the question of a patient's consent to a surgical operation was recently before the Supreme Court of Minnesota, *Mohr* v. *Williams*, 104 N. W. Rep. 12. The defendant, a physician and surgeon of standing and character in the profession, who made the disorders of the ear a specialty, was consulted by the plaintiff for a trouble in her right ear. At her request, he made an examination of that organ for the purpose of ascertaining its condition. He informed the plaintiff of the result of the examination, and advised an operation. At the same time he made a partial examination of the left ear, but owing to the presence therein of foreign substances, did not attempt a diagnosis, and apparently offered no suggestions as to the course that should be taken in regard to that ear. The plaintiff, after consulting with her family physician and after one or two further consultations with the defendant, decided to submit to the operation that the defendant had advised. At this time she had not been informed that her left ear was in any way diseased and understood that the operation was to be confined to the right. After the patient was under the influence of the anæsthetic, the defendant made a thorough examination of the left ear and found its condition to be much more serious than that of the right ear. This was called to the attention of the family physician of the plaintiff, who was present at plaintiff's request, and who confirmed the diagnosis of the defendant. Upon a further examination of the right ear, it was found that its condition was less serious than the defendant had supposed, and he thereupon concluded to and did operate upon the left ear instead of the right, intending, after the operation, to give other treatment to the right ear. The operation, it appears, was performed with skill and was in every way successful. But it was claimed by the plaintiff that her hearing was impaired by the operation, and that, as it was done without her consent, it was wrongful and unlawful and constituted an assault and battery. The trial in the court below resulted in a verdict for the plaintiff of $14,322.50. The defendant appealed from an order denying his motion for judgment notwithstanding the verdict, and the plaintiff from an order granting a new trial on the ground that the verdict was excessive. The Supreme Court sustained the trial court upon both contentions, holding in regard to the contention of the defendant that he was entitled to judgment notwithstanding the verdict that he had no authority to perform the operation without the consent of the plaintiff, either express or implied; that no express consent appearing, whether it should be implied from the circumstances of the case, was a question of fact for the jury; and that the operation was wrongful and unlawful, and constituted an assault and battery, if it was not authorized by the express or implied consent of the plaintiff.

The court was undoubtedly correct in its conclusions. Consent to a surgical operation is necessary. If not laboring under such disability as would make an intelligent consent impossible, it is for the patient to decide whether or not

the operation should be performed. The consent of the patient may be express, or it may be implied from circumstances connected with the case. Usually the question of implied consent is one of fact for the jury, but in some cases the court would hold as a matter of law that consent for the performance of a particular operation should be implied from the fact that the patient placed himself under the surgeon's care with a view of his performing the particular operation. The patient may, of course, leave it to the discretion of the surgeon to proceed as his judgment may dictate. Where the nature and extent of the operation cannot be fully determined by a preliminary examination, it is a wise precaution for the surgeon to have the scope of his authority fully settled in advance. He may properly refuse to operate unless unlimited discretion is given to him. Undoubtedly, if in the course of an operation, and when the patient is under the influence of the anæsthetic, unusual and unexpected conditions are found that, in the judgment of the surgeon, call for a more extended or a different operation than the one contemplated, and for which consent has been given, the surgeon would be justified in proceeding without express consent, if, in his judgment, a failure to do so would imperil the life of the patient or greatly endanger his health. The cases upon the subject are limited in number, but the foregoing suggestions find support in the opinion in the case under examination and in *State* v. *Housekeeper,* 70 Md. 162; *Pratt* v. *Davis* (Ill. App. Court), 37 Chicago Legal News, 213; *M'Clallen* v. *Adams,* 19 Pick 333.

The English *nisi prius* case of *Beatty* v. *Cullingworth,* noted with comments in 44 Cent. Law Journal 153, is of interest in this connection, although the doctrine of the case would not probably be generally followed in this country. The plaintiff therein, an unmarried woman, said to the surgeon who was about to perform upon her the operation of ovariotomy, that if he found both ovaries to be diseased, he must remove neither. To this he replied, "You must leave that to me," but the plaintiff denied hearing this reply. Both ovaries were removed, as both were found to be diseased. The defendant and his assistant both testified as to the necessity of the double operation. At the time of the operation, the plaintiff was engaged to be married, but upon learning as to the extent of the operation, she broke the engagement and later brought suit against the surgeon. Under a charge from the court that the plaintiff had tacitly consented to the operation, the jury found a verdict for the defendant. It would seem that, from the circumstances as developed upon the trial, the question of consent was one for the jury.

If the patient is unable, on account of bodily or mental infirmities, to give an intelligent consent, authority to perform the operation should be obtained from the person who is naturally or legally the guardian of the patient. Consent by the husband, for example, under such circumstances, to an operation upon the wife, or by a parent, to an operation upon a minor child, would undoubtedly protect the surgeon. But if the wife is able to give consent, there is no necessity of securing the consent of the husband. The surgeon, under such circumstances, will be protected by the consent of the wife. The husband, indeed, has no right to withhold his consent to a necessary surgical operation upon his wife to which she is willing to submit.

In State v. *Housekeeper,* 70 Md. 162, 169, in which the husband claimed that an operation was performed without his consent and that the surgeon was consequently liable, the court says: "If she consented to the operation the doctors were justified in performing it, if after consultation, they deemed it necessary for the preservation and prolongation of the patient's life. Surely the law does not authorize the husband to say to his wife, you shall die of the cancer; you cannot be cured, and a surgical operation affording only temporary relief, will result in useless expense. The husband has no power to withhold from his wife the medical assistance which her case might require." See, also, *M'Clallen* v. *Adams,* 19 Pick. 333, in which it was held that it was not necessary for the surgeon to give notice to the husband of his intention to perform upon the wife a dangerous operation, to which her assent could be presumed from the circumstances, where the husband had placed his wife under the care of the surgeon for medical and surgical treatment for a dangerous disease. It should be observed, however, that it is a wise precaution for the surgeon to secure the consent of both husband and wife before performing upon either a capital operation.

While the consent of the parents before operating upon a minor child should ordinarily be secured by the surgeon, it is probable that the consent of the child to a necessary operation, if of such age and understanding as to appreciate the situation and the nature of the operation, would protect the surgeon, although so far as the writer has observed, this question has not as yet been passed upon by a court of last resort. H. B. H.

THE KANSAS OIL REFINERY BILL.—The case of *State ex rel. Coleman, Atty. Gen.* v. *Kelly* (1905), — Kan. —, 81 Pac. Rep. 450, in which the so-called "Kansas Oil Refinery Bill" was declared unconstitutional, contains perhaps more of interest for the historian and the economist than for the lawyer. This bill marked the culmination of the contest waged within the last year by the State of Kansas against the Standard Oil Company. The substance of the bill is indicated in its title, which is "An act to provide for branch penitentiary and oil refinery in connection therewith, the issuance of bonds for said purpose, and making an appropriation therefor, and for the payment of principal and interest on said bonds." (Laws 1905, p. 783, c. 478.) The warden of the penitentiary is empowered to secure a site for such branch penitentiary and oil refinery, and to construct, maintain and operate on such site an oil refinery as a department of the State Penitentiary, to furnish the requisite machinery and equipment and to market the products of said refinery. The warden is also authorized to employ convicts in the construction of the plant and in operating it when completed, and to provide "suitable and humane quarters" for housing, feeding and guarding such convicts. Lump sums are appropriated for these purposes, to be raised from the proceeds of state bonds, the issue and sale of which are duly authorized.

This case was a proceeding on the relation of the attorney general for a peremptory writ of mandamus to compel the warden and the state treasurer to issue the bonds and apply the proceeds as directed by said bill. The sole

question to be determined was the constitutionality of the act, and that, the court declared, must depend upon the object and purpose of the bill. The court found some difficulty in deciding what the object was, from an inspection of the provisions of the act itself, and therefore availed itself of the right to take "into consideration the history of the enactment and the conditions of the people of the state at that particular time." Authority for such a course in construing a statute is abundant (See *United States* v. *Union Pacific R'y Co.*, 91 U. S. 72, 23 L. Ed. 224 and cases there cited) and had been recently asserted in *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 25 Sup. Ct. 158. Among the conditions and records of which the court thus took judicial notice, were the notorious facts concerning the warfare which had been waged by independent oil refiners and many of the people of Kansas on the one side and the Standard Oil Company on the other side, the recent discovery of enormous oil reservoirs, the Senate journals and the message of Governor Hoch accompanying his approval of the bill in question. From a consideration of these and other circumstances the court reached the conclusion that the prime object of the bill was to establish and operate an oil refinery, and not to establish a branch penitentiary, and therefore that it was clearly violative of Section 8 of Article II of the Constitution of Kansas, which is as follows: "The state shall never be a party in carrying on any works of internal improvement." There would seem to be little room for doubt about the correctness of this conclusion.

It is interesting to note that this case is the first occasion since the adoption of the constitution, forty-six years before, on which it has become "necessary to invoke the aid of this provision of the constitution to protect the state, in its sovereign capacity, from the public disaster which history shows would follow its engaging in a purely private business enterprise." This carries us back to that period in our history, beginning shortly after the War of 1812, when the craze for "internal improvements" at federal and state expense, led to the adoption in so many state constitutions, between 1830 and 1850, of provisions authorizing and in some instances directing state authorities to undertake such improvements. The story of the wild-cat enterprises which followed and which with other conditions produced the profound financial distress of that period and which resulted finally in the adoption, by many states from 1850 on, of constitutional provisions like that here involved, prohibiting state participation in "internal improvements," is told briefly but interestingly in the well known case of *Attorney General* v. *Pingree*, 120 Mich. 550, 79 N. W. 814, 46 L. R. A. 407, which is quoted at some length in the principal case. The whole episode is an illuminating instance of one feature of the American form of government in which, as all Americans believe, it excels any other government known to history, namely, the admirable constitutional scheme of checks and balances. For, however much the people of Kansas may have reason to complain of the oppression of the great trust at which this bill was aimed and however desirable state ownership and operation of such forms of industry may be, when conditions are ripe for it, yet in the light of subsequent events and disclosures in Kansas, it can scarcely be doubted that this constitutional provision saved the people of Kansas from embarking

under unfavorable conditions and auspices upon an enterprise for which they were not ready, and that it checked, at an opportune time and place, the rising tide of state socialism. H. M. B.

GARNISHMENT OF PUBLIC CORPORATIONS.—Of all the doctrines, supported by fine reasoning, promulgated on considerations of public policy, and generally accepted by the judiciary, but emphatically and universally denounced and repudiated by the people, one of the most conspicuous is the rule of construction by which more than half the courts of the several states have held that "any person" or "any person or corporation" in the statutes declaring who may be made garnishees, cannot be construed to include public corporations.

The principal reason given for this strict construction is that it would interfere with the performance of their public functions if they could be required to respond to such garnishments. It was said that the officers of the municipality would be required to leave their public duties unperformed to answer garnishment suits; and public enterprises would be paralyzed by the diversion of public funds from their true purpose; for who would serve the public if his earnings were to be paid to his creditors instead of to himself, and who could execute the great building contracts for the public if each installment should be liable to be seized by a general creditor of the contractors before they could get any of it to buy materials and pay the laborers to do the next division of the work. It was seen that to permit such proceedings would produce a general public calamity. Better that one creditor should go forever unpaid than that the whole business of the commonwealth should be paralyzed. A few courts thought that men who pay their honest debts could be induced to enter the public service if others would not remain, and even ventured the surmise that they would make good public servants; but the general opinion of the judges seemed to be the other way.

The Supreme Court of Minnesota adopted the strict construction rule at an early day, and a few years ago went to such an extreme as to hold that a private citizen could not be charged as garnishee of the public surveyor for a debt due as fees for public services (*Sexton* v. *Brown* [1897], 72 Minn. 371, 75 N. W. 600), nor a city for the remnant of the salary of an ex-official. *Orme* v. *Kingsley* (1898), 73 Minn. 143, 75 N. W. 1123, 72 Am. St. Rep. 614. Soon after this decision the people enacted that: "The salary or wages of any officers of, or any person employed by, any county, city, town, village, school district, or any department of either thereof, shall be liable" to garnishment the same as the wages of any other person. Minn. Gen. Laws 1901, c. 96.

A case falling within the old rule and not within the curative provisions of the statute was recently submitted to the Supreme Court of that state. A city was summoned as garnishee to reach a debt to one not an officer and not an employé. The court was urged to apply the strict rule; but in view of the evident wish of the people, the court held that the rule must be considered entirely changed; and the garnishee was accordingly held properly charged. *Mitchell* v. *Miller* (1905), — Minn. —, 103 N. W. 716.

I. R. R.

THE RULE IN WILD'S CASE TO-DAY.—Probably the rule in *Shelley's Case* is sufficiently familiar to the profession to suggest a fairly well defined idea to most lawyers, however it may be as to the rule itself being generally understood. But it would seem that the nature and practical importance to-day of the rule in *Wild's Case* (1599), 6 Coke 17a, are not so generally appreciated. Many may suppose that the rule in *Wild's Case* arises only in construction of wills; but the error of such a supposition is shown by the fact that cases are continually being presented in which the rule is involved in the interpretation of deeds. There have been at least two important cases of this kind decided and reported since the appearance of our last issue. That the rule in *Wild's Case* is not generally familiar is also shown by the fact that in one of these cases, in a very able court, the whole discussion is about the rule in *Shelley's Case,* whereas the only question is the application of the rule in *Wild's Case.*

The rule in *Shelley's Case* has to do with whether the word *heirs* or equivalent expression in any conveyance creates an estate in such heirs or only defines the duration of the estate of the ancestor. The rule in *Wild's Case* has to do with the question whether the word *children* in any conveyance creates an estate in such children, and if so, what, or only marks the duration of the estate of the parent. At the time *Wild's Case* was decided, even a devise was only for life unless expressed to be of a greater estate, and a fee could not be created by deed without use of the word *heirs* as a word of limitation; and therefore if *children* were not held to be a word of limitation in a devise to A and his children, only an estate or estates for life or lives passed. For which reason, out of favor to the devisee, the courts held that *children* was a word of limitation in such devises, giving the devisee a fee-tail, unless there were children in being at the time of the death of the testator, in which case they took as purchasers. Our statutes abolishing the necessity of the use of the word *heirs* to create a fee by deed, have made the rule applicable to deeds, which was formerly applicable only to wills. The statutes declaring that every grant or devise shall be presumed to be of all the estate the grantor or testator had to convey, unless a different intention appears therein, have removed the difficulty which caused the introduction of the rule, and yet the rule remains with us, and is more important than ever before.

In one of the recent cases above referred to the deed was in terms made between the grantor of the first part and E and her children parties of the second part, to have and to hold to E and her children forever. E had children living at the time the deed was executed and others were afterwards born, and it was held that E had an estate for life only, in severalty, and all the children then in being or afterwards born took in fee by remainder. About a dozen prior Kentucky decisions on the rule were cited and discussed in the opinion. *Hall* v. *Wright* (June 17, 1905),—Ky.—, 87 S. W. 1129, 27 Ky. L. R. 1185. The same was held in the other case; but the deed was somewhat different, having no habendum clause. It was in these words: "Know all men by these presents, that we, William West and Elizabeth West, husband and wife [&c., in consideration of affection and $1,000], * * * hereby convey to Elmira Hubbird and children [&c., describing the land] * * * . It is expressly agreed by the grantee accepting this deed that she

shall not sell, convey, incumber, or in any manner dispose of the same, but to retain the same for the use of herself and her children forever," concluding with a general covenant of warranty. Elmira did sell, and in an action in behalf of the children against the purchaser, it was held that the statute of limitations had run against the children then born, but not against the younger children. *Hubbird* v. *Goin* (in Circuit Court of Appeals, 8th circuit, on rehearing June 26, 1905), 137 Fed. 822. The land involved in this case is in Iowa, but decisions from several states are reviewed in the opinion.

J. R. R.

EFFECT OF A COMPLICATED FORM OF BALLOT ON THE ELECTOR'S FREEDOM OF CHOICE.—May the legislature put into use an election ballot so complicated as to make it extremely difficult to vote anything other than the straight party ticket? The Supreme Court of Pennsylvania takes the stand that it may. *Oughton v. Black* (1905), 61 Atl. Rep. 346, the case in which this decision was rendered arose under a statute which provides that there shall be printed *on the left* of the ballot a column of the names of the political parties represented on the ballot, with a square at the right of each party named, and that a cross in this square will signify a vote for all the candidates of the party. When presidential electors are to be chosen, the names of the candidates for president and vice-president shall be placed beneath the party appellations at the head of their respective tickets, and a cross *at the right of their names* shall be a vote for every *presidential elector* on the ticket. If the voter should wish to split the ticket he must not mark in either of these places, but after the name of each candidate for whom he desires to vote. (Act of April 29, 1903—P. L. 338).

In the election of Nov. 8, 1904, the Municipal League put into the field a ticket for the offices of the city of Philadelphia. The candidates for these offices prayed for an injunction against the city commissioners restraining them from printing the ballots in conformity with the new law, which, they contended, violated the state constitutional requirement that "elections shall be free and equal" in that it made the vote of a straight party ticket an easy matter, while "splitting" is hedged about with difficulties. By a divided court of three to four the law was upheld.

Mr. JUSTICE BROWN in the majority opinion says in part, "The test of the constitutional freedom of elections is the freedom of the elector to deposit his vote as the expression of his own unfettered will, guided only by his own conscience as he may have had it properly enlightened. Tried by this, the only test, it cannot reasonably be said that, because one voter may more quickly prepare his ballot than another, the election is not free to both alike. In other words, because the voters who insist on making up their own tickets, as is their unquestioned right, must necessarily make a number of marks, the contention of appellants is that elections are not equal, if other electors may indicate the candidates of their choice by making fewer marks. This is not the test of inequality. The legislature has neither denied, qualified, nor restricted the right of every elector to vote freely and for the persons of his choice. It has simply told him how he may vote freely and equally with all others."

The decision seems to be supported by the authorities. One only, *Eaton* v. *Brown* (1892), 96 Calif. 371, is squarely opposed. In this case, on similar facts, except that the ballot in question was the ordinary Australian ballot, the court observed: "In cases where a certain party nominated to part of the offices only,—as where they put forward a local ticket and no state ticket,—a party heading would do no good and would rather be a snare, for a person voting under it would be disfranchised as to any office for which the ticket made no nomination." For this reason they held such a ballot unconstitutional.

Another case, however, supports the decision of the Pennsylvania court in the principal case. In *Ritchie* v. *Richards* (1896), 14 Utah 345, on facts similar to those in *Eaton* v. *Brown,* the court upheld the law, and contended that, even if its action was to discourage the splitting of tickets, the question raised was not one of law but of political science. Hence the matter was for the consideration of the legislature, and its action the courts could not presume to review.

The decisions in *Ritchie* v. *Richards* and the case under discussion rest upon the assumption that the constitutional provision for free and equal elections was meant as a broad guaranty of republican institutions, not a technical rule of legislation in matters of detail and that it might not be invoked to remedy the political unwisdom (if such it were) of the law-making body. For this proposition there is abundant authority, though the cases arise out of different facts. In *State* v. *Anderson,* 100 Wis. 523, and *Todd* v. *Election Commissioners,* 104 Mich. 474, where the constitutionality of laws forbidding the printing of a candidate's name on more than one ticket was questioned, on the ground that they interfered with the freedom and equality of elections, the laws were upheld. The regulation, it was held, was one of mere detail, intended, presumably, to prevent the ballot from becoming unwieldy through multiplication of tickets bearing the same names. In *Cole* v. *Tucker,* 164 Mass. 486, 29 L. R. A. 668, where the ballot, printed in accordance with an Australian ballot law, contained only the Republican and Democratic tickets (those being the only parties that had polled sufficient votes to entitle them to places) but a place was provided on the ballot where the voter might write additional names, the rights of persons desiring to vote a Prohibition ticket were held not to be prejudiced, and the law was upheld. The question arose in somewhat different form in the case of *People* v. *Hoffman* (1886), 116 Ill. 587, where it was held that differences in the machinery of election in various parts of the state did not make the election "unequal." An act had been passed amending the election law in certain details. The act was to go into effect in such cities as should choose to adopt it. The objection that there was inequality between those places which had adopted the law and those which had not was held merely technical and the court refused to entertain it, on the ground that the constitutional guaranty is not a legislative rule of thumb, but is "declaratory of a general principle of Republican government." In Pennsylvania itself the same rule of constitutional construction had been laid down. In *De Walt* v. *Bartley* (1892), 146 Pa. 529, the legislature was admitted to have the right to prescribe in a general law what groups of candidates might be printed on the official ballot, and the mere inconvenience to the elector who might desire to vote for candi-

dates whose names did not appear would not violate the equality of elections.

Yet the position of complainants in the Pennsylvania case is based on more than a mere technicality. Whatever the theory, the practical effect of such a ballot as that used in Pennsylvania is to disfranchise large numbers of those attempting to cast an independent vote. The case was not decided until after the election had taken place, and in that election, as DEAN, J., in his dissenting opinion points out, 100,000 votes were rejected because of failure in an attempt to "split" the ticket. Such wholesale disfranchisement might well prove decisive of an election.

The tendency is toward independent voting, and toward a ballot which places as few difficulties as possible in the way. In some states the voter may mark the head of the ticket as if he were voting a straight ticket and then mark the names of candidates on other tickets for whom he wishes to vote, crossing off the candidates of his own party for those offices. In other states the arrangement by parties is done away with, and the candidates are grouped according to the offices for which they have been nominated, at the right of each name being an initial to designate the party to which the candidate belongs. Since the desirability of independence in voting is so evident it is a serious question whether the legislature should be allowed by the invention of ingenious and complicated systems of ballot marking to minimize the power and restrict the activity of such movements as the Municipal League in this case. The weight of authority, however, is that they may, and the question appears to relate more to political science than to law.

C. L. D.

SITUS OF DEBTS FOR GARNISHMENT.—We have had occasion to note in these pages the divergent views entertained by different courts as to the effect of the place of contract, payment, and performance, or of the place of residence or incorporation of the garnishee, on the question as to whether the court has jurisdiction of the debt sought to be garnished. (See 3 MICH. LAW REVIEW, pp. 229, 240, 411).

A decision has recently been rendered by the Supreme Court of the United States, which is believed to put an end to the discussion so far as the question of jurisdiction is involved. Different courts may yet disagree as to the policy or propriety of requiring the garnishee to respond in certain cases, and that is a matter that each court may decide according to its own notions of the fitness of things, without becoming embarrassed in a conflict with another court. The thing to rejoice over is the fact that the courts may now proceed without further fear of being called usurpers if they require a garnishee duly served to respond for any debt he may owe the defendant, regardless of where any of the parties resides, or where the debt was contracted, incurred, or payable, and without fear that any court entertaining different views may treat the judgment with contempt and require second payment, and we may all rest in the assurance that if required to pay under a regular garnishment in one state no further payment elsewhere can be required.

In the case of *Chicago R. I. & P. Ry. Co.* v. *Sturm* (1898), 174 U. S. 710, 19 S. Ct. 898, many of us hoped that a solution had been reached; but because

the railroad company summoned as garnishee in that case happened to be incorporated in the state where the garnishment was instituted, and not in the state where the debtor resided, was hired, and earned his wages, we were soon told that a garnishment was void for want of jurisdiction unless either the debtor or garnishee was domiciled in the state where the garnishment was had. Now this contention is happily silenced.

A man by the name of Harris living in North Carolina borrowed money of a man by the name of Balk living in the same state. Later Harris went to Baltimore, Md., for a day, on business; and while there he was summoned as the garnishee of Balk, who was served only by publication. On his return without defending the garnishment, Harris was sued by Balk in North Carolina; after which he authorized his attorney to confess judgment and pay the debt into the Maryland court. This payment being made, Harris set it up in the North Carolina court as a defense to the action of his creditor. The case went up and down in the North Carolina courts for several years (for various reports of the case see 122 N. C. 64, 30 S. E. 318, 45 L. R. A. 257; 124 N. C. 467, 32 S. E. 799, 45 L. R. A. 260, 70 Am. St. Rep. 606; 130 N. C. 381, 41 S. E. 940; 132 N. C. 10, 43 S. E. 477); but finally it reached the Supreme Court of the United States; and there it was held that the courts of North Carolina erred in not giving full faith and credit to the judgment of the Maryland court set up as a defense. It was held in North Carolina that the garnishment was no defense because neither Balk nor Harris resided in Maryland, and the debt was not contracted nor payable there. This was held to be error. *Harris* v. *Balk* (1905), 198 U. S. 215, 25 S. Ct. 625.

It will be seen that judgment by confession is as perfect a defense as judgment and payment on contest. The Supreme Court of the United States, however, added a very salutary limitation to its judgment, in declaring that if a garnishee would avail himself of garnishment and payment thereunder in a case in which the principal debtor was not personally served, he must give his creditor such notice of the garnishment as will enable him to make defense. In this case it was held that notice after payment was sufficient, inasmuch as the statutes of Maryland permit the principal defendant to have restitution at any time within a year on proof that he was not indebted.

J. R. R.

MALICIOUS INTERFERENCE WITH THE CONTRACT OF EMPLOYMENT.—The "Right to Contract," is gradually taking on more definite shape by the decisions of the courts in controversies between employers and employees, growing out of existing labor conditions, and arising from the various devices resorted to by one party or the other to secure and maintain a position of advantage of one over the other.

The "Right to Contract" as it is sometimes termed, includes certain rights existing aside from the rights created by the contract, either as between the parties to the contract, or as to third parties. As between the parties to the relation, there are rights, existing independent of the contract, or before it is entered into,—such as a right by each party not to be defrauded, or put under duress or undue influence, by the other. And as between the parties to the relation or proposed relation and third parties, there are certain rights of

non-interference by such third parties, which have been difficult to define. These, of course, can conceivably take two forms: 1. Right to exemption from such interference as prevents or tends to prevent the formation of the contract; and 2. Right to exemption from such interference as induces or tends to induce a breach or termination of the contractual relation already entered into. These latter are usually divided into two classes: (A) contracts of service, and (B) contracts other than for service; and the first of these may be divided into (a) contracts of service for a definite term, or (b) those terminable at the will of either party. The controversies have been largely concerning 1, A(b), and B.

Judge Cooley in his work on *Torts*, p. 328, states the general principle underlying these rights as follows: "It is part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice. With his reasons neither the public nor third parties have any concern. It is also his right to have business relations with any one with whom he can make contracts, and if he is wrongfully deprived of this right by others, he is entitled to redress. Thus if one is prevented by the wrongful act of a third party from securing some employment he has sought, he suffers a legal wrong, provided he can show that the failure to employ him was the direct and natural consequence of the wrongful act."

One phase of this question,—the right to have an existing contractual relation of service, though terminable at will, not disturbed by a third person without justifiable cause has been carefully dealt with in the recent case of *Berry* v. *Donovan* (1905), — Mass. —, 74 N. E. Rep. 603. The facts were:

"This is an action of tort, brought to recover damages sustained by reason of the defendant's malicious interference with the plaintiff's contract of employment." Plaintiff was a shoemaker employed by Goodrich & Co. under a contract terminable at will, and had been so employed for nearly four years. The defendant was the representative, and a member, of the Boot & Shoe Makers' Union. The evidence showed that he caused Goodrich & Co. to discharge the plaintiff greatly to his damage. Shortly before the discharge of the plaintiff, a contract was entered into between the Union and Goodrich & Co., which was signed by the defendant for the Union, and which stipulated that "the employer agrees to hire only members of the Union in good standing, and agrees not to retain any shoe worker in his employment after receiving notice from the Union that such shoe worker is objectionable to the Union on account of being in arrears for dues, or disobedience of Union rules or laws, or *from any other cause*." Plaintiff was not a member of the Union. Soon after the contract was made defendant *demanded* of Goodrich that the plaintiff be discharged, and the evidence tended to show that the sole ground for the demand was that the plaintiff was not a member of the Union and that he persistently declined to join it after repeated suggestions that he should do so. At the close of the evidence the defendant asked that the jury be instructed, that the contract with Goodrich & Co. was valid; that the defendant had a right to call the firm's attention to the fact that they were violating its terms by keeping the plaintiff employed, and insisting upon an observance of the contract even if the defendant knew such observance

would result in plaintiff's discharge; that the contract was a justification of the defendant's acts; and that he could not be liable unless he used threats, intimidation, slander, or unlawful coercion to or against plaintiff's employer, and thereby induced plaintiff's discharge. The court refused to give this charge, the defendant excepted, and plaintiff had judgment for $1,500. In overruling defendant's exception, KNOWLTON, C. J., says: "The primary right of plaintiff to have the benefit of his contract and to remain undisturbed in the performance of it is universally recognized. Such a right can lawfully be interfered with only by one who is acting in the exercise of an equal or superior right which comes in conflict with the other. An intentional interference with such a right without lawful justification is malicious in law, even if it is from good motives and without express malice," citing *Walker* v. *Cronin,* 107 Mass. 555-562; *Plant* v. *Woods,* 176 Mass. 492-498, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; *Allen* v. *Flood* (1898), A. C. 1-18; *Mogul Steamship Co.* v. *McGregor,* 23 Q. B. D. 598-613; *Reed* v. *Friendly Society, etc.* (1902), 2 K. B. 88-96; *Giblan* v. *National etc. Union* (1903), 2 K. B. 600-617.

As to the provision of the contract by which the employer agreed not to keep in his employment any shoe worker that was objectionable to the Union for any cause, it is said "Whatever the contracting parties may do if no one but themselves is concerned, it is evident that, as against the workman, a contract of this kind does not of itself justify interference with his employment by a third person who made the contract with his employer. *Curran v. Galen,* 152 N. Y. 33, 46 N. E. 299, 37 L. R. A. 802, 57 Am. St. Rep. 496. No one can legally interfere with the employment of another unless in the exercise of some right of his own, which the law respects. His will so to interfere for his own gratification is not such a right. * * * If the plaintiff's habits or conduct or character had been such as to render him an unfit associate in the shop for ordinary workmen of good character, that would have been a sufficient reason. * * * The only reason for procuring his discharge was his refusal to join the Union." Is such an interference unlawful? Labor unions justify it as a kind of *competition,* either competition among laborers themselves, or competition between employers and employees. Of the first of these the court says: Such competition "would justify a member of the Union, who was seeking employment for himself, in making an offer to serve on such terms as would result, and as he knew would result, in the discharge of the plaintiff by his employer, to make a place for the new comer. Such an offer, for such a purpose, would be unobjectionable. It would be merely the exercise of a personal right, equal in importance to the plaintiff's right. But an interference by a combination of persons to obtain the discharge of a workman because he refuses to comply with their wishes, for their advantage, in some matter in which he has a right to act independently, is not competition." * * * "Inducing a person to join a union has no tendency to aid them in such competition. Indeed, the object of organizations of this kind is to prevent such competition, to bring all to equality and to make them act together in a common interest."

As to the second—the competition between employers and the employed,—in the strict sense, this is hardly competition. "It is a struggle or contention

of interests of different kinds which are in opposition, so far as the division of profits is concerned." It permits "reasonable efforts of a proper kind, which have a direct tendency to benefit one party in his business at the expense of the other. It is no legal objection to action whose direct effect is helpful to one of the parties in the struggle that it is also directly detrimental to the other." The gain which a labor union may expect to derive from inducing others to join it "is too remote to be considered a benefit in business such as to justify the infliction of intentional injury upon a third person for the purpose of obtaining it. If such an object were treated as legitimate, and allowed to be pursued to its complete accomplishment, every employee would be forced into membership in a union, and the unions, by a combination of those in different trades and occupations, would have complete and absolute control of the industries of the country. Employers would be forced to yield to all of their demands or go out of business. The attainment of such an object in the struggle with employers would not be competition but monopoly. A monopoly, controlling anything which the world must have is fatal to prosperity and progress. In matters of this kind the law does not tolerate monopolies. The attempt to force all laborers to combine into unions is against the policy of the law, because it aims at monopoly. It therefore does not justify causing the discharge, by his employer, of an individual laborer working under a contract." * * * "Labor unions cannot be permitted to drive men out of employment because they choose to work independently."

"The fact that the plaintiff's contract was terminable at will, instead of ending at a stated time does not affect his right to recover. It only affects the amount that he is to receive as damages," citing *Moran* v. *Dunphy*, 177 Mass. 485-487, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289; *Perkins* v. *Pendleton*, 99 Me. 166-176, 38 Atl. 96, 60 Am. St. Rep. 252; *Lucke* v. *Clothing Cutters' Assn.*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep. 421; *London Guarantee Co.* v. *Horn*, 101 Ill. App. 355, 206 Ill. 493, 69 N. E. 526, 99 Am. St. Rep. 185.

There have been a great variety of opinion and much conflict upon cases of this kind. In *Allen* v. *Flood* [1898], A. C. 1, the House of Lords with an extraordinary conflict of views, and contrary to the opinion of the majority of the law judges called upon to advise them, held that "Persuading or inducing a man without unlawful means, (in this case inducing a master to discharge two workmen not hired for a definite period of time, by informing the employer of the intention of all of the other workmen in the master's employ to strike), to do something he has a right to do, though to the prejudice of a third person, gives that person no right of action whatever the persuader's motive may have been." The same view was held by the Court of Appeals of New York in a decision in which there was almost as great a variety of opinion,—in the case of *National Protective Association* v. *Cumming*, 170 N. Y. 315.

In the later English cases, what was supposed to be the rule in *Allen* v. *Flood*, has been considerably modified. In *Quinn* v. *Leathem* [1901], A. C. 495, it is said, "A combination of two or more, without justification or excuse to injure a man in his trade by inducing his customers or servants to break

their contracts to deal with him or continue in his employment, is, if it results in damages to him, actionable;" and in the later case of *Giblan* v. *National Amalgamated etc. Union*, L. R. [1903] 2 K. B. 600, ROMER, L. J., says that "A combination of two or more persons without justification, to injure a workman by inducing employers not to employ him or continue to employ him, is, if it results in damage to him, actionable,"—relying on *Quinn* v. *Leathem*.

In Massachusetts these questions have in recent years been more fully and carefully considered by the Supreme Judicial Court, than in any of the other States, and the decision here commented upon was already fairly involved in what had been said before. In *Carew* v. *Rutherford*, 106 Mass. 1, (1870), JUDGE CHAPMAN held that a conspiracy against a person to obtain money from him which he was under no legal liability to pay, by inducing his workmen to leave him, and by deterring others from entering his employment, or by threatening to do this so that he is induced to pay the money, is illegal, and actionable. In *Walker* v. *Cronin*, 107 Mass. 555 (1871), JUDGE WELLS, held on demurrer that a count alleging the defendant wilfully induced workmen to leave plaintiff's employment, and others who were about to enter it to abandon it, stated a cause of action. In *May* v. *Wood*, 172 Mass. 11, on 14, (1898), MR. JUSTICE HOLMES, in dissenting to the ruling of the majority on a demurrer as to what were essential allegations in such cases, said, "I regard it as settled in this Commonwealth, and rightly settled, that an action will lie for depriving a man of custom, that is, possible contracts, as well when the result is effected by persuasion as when it is accomplished by fraud or force, if the harm is effected simply from malevolence, and without some justifiable cause, such as competition in trade,"—citing several earlier Massachusetts cases. In *Plant* v. *Woods*, 176 Mass. 492, 79 Am. St. Rep. 330 (1900), it was held by HAMMOND, J., (HOLMES, J. dissenting), that "a general scheme on the part of a labor union to compel the members of another union to desert it and become members of the former, and if necessary to that end to threaten employees and cause them to believe there would be trouble and strikes or boycotts if they continue, unles they abandon their own union and join the other, is unlawful and may be enjoined, and it is not material that no violence has been resorted to." And in *Moran* v. *Dunphy*, 177 Mass. 485, HOLMES, C. J., himself said, "Maliciously procuring the discharge of a servant, whether accomplished by intimidation, slander or malevolent advice is actionable." "Maliciously and without justifiable cause to induce a third person to end his employment, whether the inducement be false slanders or successful persuasion is an actionable tort." This is the same principle, though the reverse in application, as the decision in *Berry* v. *Donovan*, above. The opinion contains pretty full references to the cases upon the subject. For criticism of *Allen* v. *Flood*, see 1 MICH. LAW REV. p. 28; and for a short history of such actions see 2 MICH. LAW REV. p. 305. H. L. W.