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Note and Comment

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NOTE AND COMMENT

THE EFFECT OF ABANDONMENT ON THE CONTRACT OF AFFREIGHTMENT; *The Eliza Lines* IN THE SUPREME COURT.—After sixteen years of troubled sailing through the courts the *Eliza Lines* at last reaches port. (61 Fed. Rep. 308; 102 Fed. Rep. 184; 114 Fed. Rep. 307, 52 C. C. A. 195; 132 Fed. Rep. 242, 65 C. C. A. 538; 26 Sup. Ct. Rep. 8.) The variety of complex questions which these opinions discuss merits her admission into that classic haven of the Admiralty where repose so many famous craft of bygone days, dear to proctors and advocates and seasoned clients. The opinions of the Supreme Court, however, consider but one of these questions, whether a forced abandonment of the ship by master and crew dissolves the contract of affreightment and entitles the shipper to reclaim his goods without payment of freight, although the master offers to resume and complete the voyage.

The *Eliza Lines* was a Norwegian barque which, in 1889, loaded with lumber at Pensacola for Montevideo. She had not completed the voyage when severe gales drove her northerly until, off the New England coast, she was justifiably abandoned by her master and crew. A passing vessel took them to Nova Scotia, while certain salvors found the *Lines* derelict in the ocean and succeeded in navigating her, still loaded, into Boston. Thereupon

the master hurried to resume possession of his ship and proposed to complete the voyage. On the other hand, the owners of the cargo claimed their property, asserting that the previous abandonment released them from all obligations to pay any freight or to permit it to be carried to the original destination.

The question has long been a vexed one in maritime law. Considering an involuntary abandonment through sea perils as a misfortune common to both ship and cargo, for which no blame could be imputed to either, it has seemed to many that natural justice required that neither should have advantage to evade the original contract if circumstances made it possible to resume performance. On the other hand it has been urged that the act of abandonment plainly evidences the intent of the master not to carry out his contract, is, in effect, a repudiation of the agreement, and therefore entitles the owners of the cargo to treat the relationship as ended and absolved; in case of rescue the parties may agree to a new contract, but neither can be compelled to go on with the old one. The majority of the Supreme Court have adopted this latter view notwithstanding the strong dissent of four of the justices and the particularly persuasive opinions of the courts below.

It must be admitted that the great weight of decided cases is with the majority opinion which holds, with the English courts, that such an abandonment as that of the *Lines,* although followed by rescue and ability to complete the performance of the contract, entitles the cargo-owner to insist on a rescission and re-take the goods without paying freight even if the carriage has been practically performed. It is to be noted that the contrary view (that of the four justices of the Supreme Court, all the judges of the Court of Appeals and of the Circuit Court) admits the weight of authority to be against it, and proceeds entirely on the claims of natural justice. All the opinions are terse, clear and learned, and it is apparent that the disagreement is not so much about what the law is as about what "natural justice" requires. And this raises the ancient question of whether the courts should decide what the law is, or what the law ought to be. One cannot read these opinions without being impressed with the fact that there is a serious conflict in the views of eminent jurists as to the reason and justice of the present rule, although it is admittedly sustained by precedent. G. L. C.

THE CONSTITUTIONALITY OF STATUTORY RESTRICTIONS UPON SALES OF MERCHANDISE.—If one were to undertake to do for the jurisprudence of this country what Professor Dicey of Oxford has so admirably done for that of England, in his recent book LAW AND PUBLIC OPINION IN ENGLAND, he would find food for thought in a somewhat remarkable wave of legislation concerning sales of merchandise which has swept over the country during the last five years. A New York statute on this subject has been recently passed upon by the Court of Appeals of that state in the case of *Wright* v. *Hart,* 75 N. E. Rep. 404, the opinion in which was filed October 3, 1905. The act in question, Chapter 528 LAWS OF NEW YORK, 1902, provides in substance that any sale of any portion of a stock of merchandise, other than in the ordinary course of trade in the seller's business, or any sale of the entire stock of merchandise in bulk, shall be *fraudulent and void* as against

the creditors of the seller, unless the seller and purchaser, at least five days before the sale, shall make a detailed inventory of the goods to be sold, giving the cost price thereof, and unless the purchaser shall notify, personally or by registered mail, each of the seller's creditors of the proposed sale, the price to be paid, etc. For this purpose the purchaser is required to demand and the seller to furnish a list of all of the seller's creditors. In the present case, a sale had been made in violation of this statute, and the plaintiff, as trustee in bankruptcy of the selling corporation, brought this action to set aside the sale, because of such violation. The purchasing defendant demurred to the complaint on the ground that the statute is unconstitutional, (1) because it deprives citizens of liberty and property, without due process of law; and (2) because it deprives them of equal protection of the law, in that the act is directed only at merchants, and therefore is class legislation. By a bare majority the Court of Appeals declares the act unconstitutional, thus reversing the Appellate Division, which had upheld the statute also by a divided vote. WERNER, J., in the principal opinion, points out the serious, and sometimes destructive restrictions which this "drastic and cumbersome statute" imposes upon the merchant's business and declares that, as "liberty includes the right to acquire property, and that includes the right to make and enforce contracts," this act is invalid, and that it both restricts the liberty and the property of the citizen unlawfully. The judge admits that the act is sought to be justified "under that shibboleth of legislatures and courts known as the police power," and that the ostensible purpose of its enactment was to correct "the fraudulent practice of obtaining merchandise on credit for the purpose of making hasty and secret sales thereof in bulk and then decamping with, or otherwise disposing of, the proceeds at the expense of the creditors." But he contends that the statute "is, in some particulars, so thoroughly unrelated to the probable object of its enactment, and in others so cumbersome, burdensome, unreasonable and unworkable as to violate every one of the constitutional provisions under which it is challenged." JUDGE VANN, in a very strong dissenting opinion, contends that such legislation is needed to correct a great and growing evil, that this particular act is a valid exercise of the police power, and that it is uniform in its effect upon all to whom it applies, that the classification is not arbitrary but that the act applies to all who carry on a certain kind of business, "which presents special temptations and opportunities for the commission of fraud," and is not therefore unconstitutional class legislation. JUDGE VANN also holds that while the act in question disturbs freedom of contract, it does so no more, nor in any other sense, than does the "fixing the price of elevating grains" (*Munn* v. *Illinois*, 94 U. S. 113), "or the prohibition of options" (*Booth* v. *Illinois*, 184 U. S. 425), to which might be added the requirements that unless chattel mortgages and so-called conditional sales, be recorded, they shall be deemed fraudulent and void.

The dissenting opinion refers to similar statutes in twenty different states and the District of Columbia, and to these may be added that of Illinois, approved May 13, 1905, (Laws of Illinois, 1905, page 284). The constitutionality of eight of these statutes has been tested in courts of last resort, with varying results. The Connecticut Act which requires only that the

sale or assignment be recorded within one day from the day of sale, was upheld in *Walp* v. *Mooar,* 76 Conn. 515. An act almost identical with the New York statute was upheld, as a valid exercise of the police power in *J. P. Squire & Co.* v. *Tellier et al.,* 185 Mass. 18. The Tennessee Act declares that unless its requirements (similar to those of New York) be complied with, the sale "shall be *presumed* to be fraudulent and void." This Act was declared constitutional in *Neas* v. *Borches,* 109 Tenn. 398, but the court does not discuss at all the effect to be given to the words "presumed to be." A vigorous dissenting opinion was filed in this case. The Washington statute requires the purchaser to pay the purchase price, pro rata, to all creditors of the seller to the extent of their claims, or to see that it is so applied. And the Act was sustained in *McDaniels* v. *Connelly Shoe Co.,* 30 Wash. 549. The Wisconsin Act declares that unless its requirements are complied with, the sale shall be deemed *presumptively* void only, and this Act is declared constitutional in *Fisher* v. *Herrmann,* 118 Wis. 424, the court placing much emphasis upon the provision that sales in violation of the act are only presumed to be fraudulent; and the same is true of the Maryland Act, *Hart* v. *Roney,* 93 Md. 432. The Utah statute, which is like the New York statute except that a violation of it is made a crime, was declared unconstitutional in *Block* v. *Schwartz, 27* Utah 387. It is interesting to note that the New York statute was amended in 1904 so as to read that sales made in violation of the Act "will be *presumed* to be fraudulent and void as against the creditors of the seller." (LAWS OF NEW YORK, 1905, ch. 569, p. 1385.) This is, undoubtedly, a more conservative and more just provision than that of the original Act, and probably as effective in correcting the evil aimed at.

An examination of these statutes reveals the striking fact that they have all been passed since 1899, and that they bear a singularly close resemblance to each other in purpose, form and even in language. The student cannot help wondering whether this spasm of paternal legislation is a remarkable instance of the recent effect of public opinion upon legislation, in the direction of that collectivism discussed by Professor Dicey in his book above referred to (pp. 258-263), or only, as JUDGE WERNER suspects, of that kind of legislation which is "meant to protect some class in the community against the fair, free and full competition of some other class." As JUDGE WERNER says, "Statutes that are passed *pro bono publico* rarely sweep the country with such irresistible momentum, while much fantastic legislation has resulted from organized crusades upon legislatures by the advocates and supporters of special classes." H. M. B.

CONSTITUTIONALITY OF STATE LAWS AS TO SERVICE OF PROCESS ON FOREIGN CORPORATIONS.—What is the extent of the powers of the state legislatures in fixing the methods of service of process on foreign corporations, so as to satisfy the requirement of the United States Constitution, that no person shall be deprived of property without due process of law, as interpreted by the Supreme Court of the United States in *Pennoyer* v. *Neff,* 95 U. S. 714, holding that personal judgments cannot be rendered without personal service of process within the jurisdiction and time to answer and make defense? This is a very important practical question, and the answer to it has not yet

been given entirely by our highest court. The subject is made prominent by the vast extent of business done in every state now-a-days by foreign corporations, by the numerous and various provisions made by the statutes of the several states as to how these corporations may be served with process, and by several recent decisions in which the constitutionality of these statutes is questioned.

In the first place it is settled that corporations are *persons* entitled to the protection of the constitutional provision, and that the rule announced in *Pennoyer* v. *Neff* applies to actions against them, as much as it does to actions against natural persons; and although there can be no such thing as actual personal service on these creatures of the law's imagination, yet something reasonably equivalent to it must be done; there must be personal service on some agent of the corporation which can be said to stand in the place of and represent the corporation for that purpose. Further, there can be no personal service on a corporation created under the laws of another state, unless it does business in the state where it is sued; it is held that if agents of the foreign corporation, even its president, be in the state for any purpose other than to represent the corporation, and the corporation is not doing business in the state, service on them or him can in no reasonable sense be said to be service on the foreign corporation, and personal judgments against the corporation founded on such service are absolutely void. All these questions are practically settled by the decisions in *St. Clair* v. *Cox*, 106 U. S. 350, 1 S. Ct. Rep. 354; and *Goldey* v. *Morning News*, (1895), 156 U. S. 518, 15 S. Ct. Rep. 559.

What is doing business, is not in all respects settled; but it has been somewhat discussed. It is held that an insurance company that has lost its license to write new risks, but still collects premiums on policies written before the license was revoked, is still doing business in the state. *Connecticut Mut. Life Ins. Co.* v. *Spratley*, (1899), 179 U. S. 602, 19 S. Ct. Rep. 308, 43 L. Ed. 569. And when a foreign corporation appoints an agent to receive service of process, in order to obtain a license to do business in the state, and later withdraws from the state, or is forced out, it cannot revoke the authority of the agent to receive service of process so long as there are citizens of the state having rights to sue it in the state courts on obligations incurred while the corporation was doing business in the state under the license. *Mutual Reserve Fund Life Assn.* v. *Phelps* (1903), 190 U. S. 147, 23 S. Ct. Rep. 707; *Fisher* v. *Traders' Mut. Life Ins. Co.* (1904), 136 N. C. 217, 48 S. E. Rep. 667. and cases there cited.

As foreign corporations do business by grace, and not by right, it would seem as though the state might impose any conditions on its license, and that the foreign corporation must submit to the conditions or stay out. *Connecticut Mut. Life Ins. Co.* v. *Spratley* (1899), 179 U. S. 602, arose under a Kentucky statute providing that service of process on any foreign corporation doing business in the state might be made on any agent of the corporation or any agent of any corporation that acted as agent of the foreign corporation; and the court expressly refused to pass on the validity of the whole act, but held that the adjuster and claims-agent, who came into the state for the purpose of settling the claim in question, did carry the repre-

sentative character into the state, so that service on him was sufficient service on the foreign corporation.

A number of states have passed statutes providing that until the foreign corporation does file in the required public office the proper power of attorney authorizing specified persons to receive service of process against it, such process may be served on a specified public official, who shall send the process by mail to the corporation at its home address, as near as he can ascertain it, and that process so served shall be deemed served on the corporation. Such a statute, providing that the process might be served on the register of deeds of the county where the foreign corporation was doing business and had its principal office, and that such service should be deemed to be service on the corporation, was held unconstitutional in Wisconsin, on the ground that such public officer could in no just sense be said to represent the corporation, that notice to him was not notice to the corporation, that the state did not possess power to declare arbitrarily who should be deemed to be the agent of the corporation, and therefore the judgment rendered on such service was void for want of personal service of process on the defendant. *Pinney* v. *Providence Loan and Investment Co.* (1900), 106 Wis. 396, 82 N. W. Rep. 308, 80 Am. St. Rep. 41.

On the other hand, the North Carolina Supreme Court recently held that a statute of that state providing that until such power of attorney was filed all process might be served on the state commissioner of corporations, was valid. *Fisher* v. *Traders' Mut. Life Ins. Co.* (1904); 136 N. C. 217, 48 S. E. 667.

The latest expression on the question that we have discovered is by the Supreme Court of West Virginia, sustaining mandamus against a non-resident domestic corporation to compel it to authorize the state auditor to receive service of all process against it, and to pay him the statutory fee of ten dollars for such services, and holding that the statute which required all foreign corporations doing business in the state, and all domestic corporations not having their principal office in the state, to authorize service of process on the state auditor and pay him for such service was not unconstitutional, as depriving the corporation of its property without due process of law, nor because it required the corporation to appoint one to receive service of process on it that did not represent it in any way, nor because it deprived the corporation of the right of contract and choice of its agents. By BRANNON, P., SANDERS, J., dissenting. *State* v. *St. Mary's Franco-American Petroleum Co.* (1905), — W. Va. —, 51 S. E. Rep. 865. J. R. R.

CREDITORS' RIGHT TO HOLD SHAREHOLDERS LIABLE ON CORPORATE STOCK ISSUED FOR PROPERTY VALUED ON THE BASIS OF PROSPECTIVE PROFITS.—The recent case of *See* v. *Heppenheimer*, — N. J. Ch. —, 61 Atl. Rep. 843, decided by VICE CHANCELLOR PITNEY, in a luminous opinion, if not disturbed by the Court of Errors and Appeals, will go a long way to correct what have been serious and not unusual abuses in the organization of many corporations under the New Jersey laws.

The suit was brought by the receiver of the Columbia Straw Paper Company against the shareholders to recover unpaid stock subscriptions

necessary for the payment of debts. In 1892, there were, in the Central States, from Ohio to Nebraska, from 40 to 70 mills engaged in the manufacture, from rye and oat straw, of wrapping paper used by butchers and grocers. Owing to excessive competition the business was not prosperous. One Stein, of Chicago, learning the facts, along with a Mr. Beard, of Buffalo, conceived the notion of consolidating these into one corporation. They brought the matter to the attention of Mr. Samuel Untermeyer, a lawyer of large experience in organizing such corporations. The three formed the plan to share jointly in the profits of the enterprise; each was to raise one-third of the necessary funds, and Mr. Untermeyer's law firm was to receive $50,000 for its services. Mr. Untermeyer drew up an option agreement whereby the owners of the mills proposed to convey the property and good-will of the business, including trade marks and trade names with a covenant not to engage in the business within five years, for a certain amount of cash, and so much of the preferred and common stock in a corporation formed under the New Jersey laws, with $1,000,000 preferred stock, $3,000,000 common stock and $1,000,000 bonds secured by a mortgage on the plants conveyed to the corporation. Mr. Stein set about securing the options, and by October had obtained such options, to expire January 1, on 39 plants, to be paid for by $750,000 cash, $750,000 in preferred stock of the corporation, and $1,500,000 of the common stock at fifty cents on the dollar,—making the agreed purchase price $2,250,000. The three promoters then undertook to raise the money necessary to pay the cash required, and offered $1,000 in mortgage bonds, $200 of preferred stock, and $400 of common stock for each $1,000 received in cash. Mr. Untermeyer took $50,000 of bonds with the bonus of stock for the fees of his firm, and he and his friends took $467,000 in bonds on the same basis. All of this was done before the organization of the corporation, and was made possible by a prospectus setting forth the condition of the industry; that the cost to manufacture the paper was $18 per ton; the selling price was then $21 per ton; 90,000 tons were used annually, and if a monopoly was secured, the price could be raised to $28, and a profit of $900,000 per year realized. In addition to this a confidential circular stated that the vendors and their friends retained $800,000 of the preferred, and $2,600,000 of the common, stock; $1,000,000 bonds were to be sold for cash with a bonus of stock as above, and $750,000 of the cash was to be paid to the vendors, "being about one-third of the appraised value of the property," $200,000 kept for working capital, and $50,000 for legal fees. The company was incorporated by Mr. Untermeyer's Private Secretary, Mr. Beard, and Mr. Heppenheimer, each of whom took 4 shares; they elected themselves and 6 others (all clerks in Mr. Untermeyer's office) directors, and one share of stock was issued to each, who never paid anything thereon. At the first meeting of directors, an elaborate proposition of sale, prepared by Mr. Untermeyer, was presented by Mr. Stein to the company to sell all of the 39 plants for which he held options, for $5,000,000, — $1,800 in cash, $1,000,000, 6 per cent. mortgage bonds, $1,000,000 preferred stock, and $2,998,200 in common stock. The proposition was immediately accepted in a series of resolutions previously prepared by Mr. Untermeyer, who was present and directed the proceedings.

Within a week this board of directors, except Mr. Beard and Mr. Heppenheimer, resigned, and others were elected, five of them being former owners or managers of mills purchased. The corporation began operations early in 1893; they raised prices, and other mills were started; wood pulp came into use; the managers did not agree; the financial depression came; fire destroyed some of the mills, — all soon went to rack and ruin; foreclosures began; the property all shrunk in value, and many creditors could not be paid out of the company's property, and the day of reckoning for the promoters and shareholders came, to be worked out in this case. The statutes provide that "where the whole capital of the corporation shall not have been paid in, and the capital paid in shall be insufficient to satisfy the claims of creditors, each stockholder shall be bound to pay on each share held by him the sum necessary to complete the amount of such share as fixed by the charter of the company or such proportion of that sum as shall be required to satisfy the debts of the company." Also that "the directors * * may purchase manufactories or other property necessary for their business * * * and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and taken to be full paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payments."

Defendants claimed that the corporation purchased from Stein the mills for $5,000,000, for which the stock and bonds were issued; the creditors replied that Stein was a mere figurehead, acting for himself, Beard and Untermeyer, as promoters of the company, for which the property, including good-will, was in fact purchased for $2,250,000. The court says, taking the view most favorable to the defendants, the question is, "Can *prospective profits,* however promising, be considered as *property* as that word is used in the statute as above quoted?" To this the court answers: "The word 'property' must evidently be construed by its context, which refers to something visible and tangible and necessary for the business," and stock only to the value thereof can be issued therefor. The defendants justify their valuation, because (1) it was made in good faith, and (2) includes good-will. To the first it was replied that the good faith rule did not apply when the thing valued was not 'property'; that the good faith alleged will not stand the test of close scrutiny; and that there was no appraisement of the property by a competent board of directors.

As to the *good-will,* the court admitted it was "an element of value quite as important as,—in some cases perhaps far more important than—the plant or machinery with which the business is carried on," and that it can be justly included in the value of property for which stock is issued, as has been held. *Merchants Ad-Sign Co.* v. *Sterling,* 124 Cal. 429, 71 Am. St. R. 94, 46 L. R. A. 142 (1899); *Washburn* v. *National Wall Paper Co.,* 81 Fed. Rep. 17, 2 WILGUS' CORP. CAS. 1936 (1897); *Wilmer* v. *Thomas,* 74 Md. 485, 13 L. R. A. 380 (note).

In this case, however, the individual good-will of the different properties was included in the $2,250,000 to be paid for them; Mr. Stein had no other good-will to convey; and the new corporation had not yet acquired any, so the question again is, is "the speculative good-will," dependent on

prospective and contingent profits, due to good management and the general course of business of the country, property? The court says: "It seems to me there can be but one opinion as to the soundness of the notion that profits derived, or to be derived, from the prosecution of any business can be properly taken into account, except to a limited extent, in estimating the value of the mere inanimate instrument which is used in conducting that business; * * * an instrument which produces something of great value at little cost is of itself of value, which however is limited by the cost of reproducing the instrument itself."

It was argued that this was an usual practice, which the court admitted, but added "it has brought obloquy upon our state and its legislation, * * * and it has involved a clear infringement of, if not a fraud upon, the plain letter and spirit of our legislation."

As to *good faith,* it was found that it went no further than getting in on the ground floor by getting a $1,000 bond secured by a first mortgage on property of twice the value, for each $1,000 cash paid in,—with a bonus of 60 per cent. in stock which it was hoped and expected would receive dividends long enough "to be distributed to," and later on, to be "digested by the public"; this sort of good faith is not that which is required to legalize such transactions. It was argued the defendants had lost $400,000 cash; to which it was answered that those who do business under the shield of corporate existence, avoid personal liability, enjoy all the gain if prosperous, and lose only their original investment if unsuccessful, the unfortunate creditors bearing the additional loss; the investors should not complain if the creditors demand that the original statement of the capital stock be made good; simple justice and common honesty require the law to be so enforced against these defendants.

Again, the court points out that Stein, Beard, and Untermeyer were promoters, and as such it was their duty to furnish the corporation with competent and independent directors; to disclose their position as vendors, to tell the actual cost of the properties, and to invite investigation as to their value, instead of concealing information on these last two points; the contract of purchase from Stein was a palpable fraud on the Act of the Legislature and operated as a fraud on the future stockholders and the creditors, and there was no honest judgment of the directors as to the value of the property

Further, the offer to disgorge and turn back to the company the stock which proved valueless, "evades the real question, which is whether the defendants have received certificates of stock for which they have not paid."—as required by the statute which "is a simple expression of the common law that the unpaid subscriptions to the capital stock of a corporation form an asset for the payment of the debts thereof"; and the fact that none of the defendants made an actual subscription to the stock which he received is unimportant, for "in equity, and as against creditors, the acceptance of the stock without paying for it, places the acceptor in the position of a subscriber."

The court does not discuss, nor rely greatly upon former decisions, but considers the case in a very straightforward way upon principle. The prin-

cipal cases referred to are *Washburn* v. *National Wall Paper Co., supra; Donald* v. *Smelting Co.,* 62 N. J. Eq. 729, 48 Atl. Rep. 771; *Woodbury Heights Land Co.* v. *Londenslager,* 55 N. J. Eq. 78, 91, 35 Atl. Rep. 436, 56 N. J. Eq. 411, 41 Atl. Rep. 1115, 58 N. J. Eq. 556, 43 Atl. Rep. 671; *Plaquemines Tropical Fruit Co.* v. *Buck,* 52 N. J. Eq. 219, 27 Atl. Rep. 1094; *Weatherbee* v. *Baker,* 35 N. J. Eq. 501; *Handley* v. *Stutz,* 139 U. S. 417, 11 Sup. Ct. R. 530, WILGUS' CORP. CAS. 1923; *Clark* v. *Bever,* 139 U. S. 96, 11 Sup. Ct. R. 468; *Richardson* v. *Green,* 133 U. S. 30, 10 Sup. Ct. R. 280.

Much litigation between other parties in relation to this company has already occurred. See *Northern Trust Co.* v. *Columbia Straw Paper Co.,* 75 Fed. Rep. 936; *Dickerman* v. *Northern Trust Co.,* 80 Fed. Rep. 450, 176 U. S. 181, 20 Sup. Ct. R. 311.

Ever since the decisions in *Van Cott* v. *Van Brunt,* 82 N. Y. 535, WILGUS' CORP. CAS. 1919 (1880), and *Handley* v. *Stutz* (1891) supra, were rendered it has been considered lawful to issue stock at an overvaluation even as against subsequent creditors to pay for construction that cannot otherwise be paid for, or to save a 'going concern' that cannot otherwise be rehabilitated. So, too, recently, profits, present and prospective, have been recognized as important elements in the valuation of property for the purpose of taxation. *Adams Express Co.* v. *Ohio,* 165 U. S. 194, 166 U. S. 185, WILGUS' CORP. CAS. 1381 (1897). In the development of patents, copyrights, and mining properties, speculative profits have been recognized as a proper basis of valuation of property for which stock is issued, even as against subsequent creditors. *In re South Mountain Consolidated Mining Co.,* 7 Saw. 30, 8 Saw. 366 (1881-2); *American Tube and Iron Co.* v. *Hays,* 165 Pa. St. 489, 30 Atl. Rep. 936 (1895); *Graves* v. *Brooks,* 117 Mich. 424, WILGUS' CORP. CAS. 1950 (1898). This practice is vigorously defended by a recent work by T. G. Frost, A TREATISE ON THE INCORPORATION AND ORGANIZATION OF CORPORATIONS, pp. 125-136. Such doctrine is, however, criticised by Judge Thompson in 2 CORPORATIONS §§ 1665-76. The 'true value' and 'good faith' rules are clearly noted, with the cases collected and classified in *State Trust Co.* v. *Turner,* 111 Ia. 664, 53 L. R. A. 136, 82 N. W. Rep. 1029, WILGUS' CORP. CAS. 1943 (1900).

We believe the true rule on matters of this kind, should be that stated by CHIEF JUSTICE FULLER in his dissenting opinion in *Handley* v. *Stutz,* supra,—no "arrangement to relieve those who would reap the benefit derived from the possession of the stock, in the event of the success, from liability for the consequences, in the event of the failure of the enterprise," should be sanctioned by the courts. H. L. W.

HEIRS AS GRANTEES WITH MIXED ESTATES OF ENTIRETY TO PARENTS.—Several recent decisions emphasize in a peculiar way the wisdom of Lord Coke's advice to avoid studiously any departure from the accustomed forms of expression in all deeds of conveyance. Perhaps these remarks are out of place in a lawyer's magazine, as most lawyers are sufficiently careful in that matter at all times. Perhaps they might better be addressed to the layman and the justice of the peace, with the addition that it is cheaper to pay a few shillings more and have a lawyer draw the deed than to pay many dollars later in

lawyer's fees and court costs, to find out what the deed can possibly mean, as the layman has drawn it. Very likely the cases we are about to mention are cases in which the deeds were drawn by laymen or justices of the peace, or the like; for in most cases they might seem very clear to such persons, while to the lawyer they are inexplicable. The lawyer need not mourn over loss of such business, for it comes to him later with ten-fold increase. But woe to the lawyer who draws such a deed.

Three recent cases will serve as illustration of the matter we are speaking of. Lands were granted "unto Berrick Norman, to him and his heirs and assigns forever, * * * to have and to hold the above described lands to him and his heirs and assigns * * * and after the death of Berrick Norman and Moseller Norman, his wife, the lands and premises to descend to their heirs, Lad Wilkins, Ellick Wilkins, and Susan Norman, and to be equally divided between the three." It was held that the grant to Berrick Norman was in fee absolute, and that the added provision was repugnant and void. *Wilkins* v. *Norman* (1905), — N. C. —, 51 S. E. Rep. 797.

John Pierce and Olive Pierce, of the first part, conveyed to William Gibbs, Harriet Gibbs, and the heirs of said Harriet Gibbs, of the second part. Harriet was the wife of William, had two children by a former husband, and the grantors were her parents. It was held that William and Harriet took one-third as tenants by entireties with right of survivorship, and that the children of Harriet by the former marriage took one-third each, as tenants in common. *Fullager* v. *Stockdale* (1904), — Mich. —, 101 N. W. Rep. 576.

A deed was made by "R. J. Taylor and wife, of the first part, and Saml. Williams and wife Annie and their heirs, including the former children of the said Annie by another husband, of the second part." Annie died, then Saml. died, and now his heirs claim he took all by survivorship, and they inherited from him. Defendants claim as children of Annie and grantees under the deed. *Held* that Saml. and Annie took one fourth as tenants by entirety, and each of Annie's children living when the deed was executed (there being three of them) took one fourth, as tenants in common with the husband and wife, not by way of remainder. *Darden* v. *Timberlake* (1905), — N. C. —, 51 S. E. Rep. 895.

Let us hope that no lawyer drew any of these deeds. J. R. R.