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Note and Comment

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NOTE AND COMMENT

CONSTITUTIONAL PRIVILEGES IN THE PHILIPPINE ISLANDS.—About a year ago an appeal was decided in the Supreme Court of the United States which came up from the Supreme Court of the Philippine Islands, involving the question of the right of the government to appeal in a criminal case and to secure a conviction after an acquittal below. That case was *Kepner* v. *United States,* 195 U. S. 100. The court held, by a vote of five to four, that proceedings in error instituted by the government after an acquittal in the trial court, had the effect of placing the accused twice in jeopardy for the same offence, and were therefore unlawful, under the Act of Congress which provided a Bill of Rights for the Philippine Islands.

Another and a closely analogous question, touching the rights of persons accused of crime in those islands, has recently been passed upon by the United States Supreme Court. *Trono* v. *United States,* 26 Sup. Ct. Rep. 121. Trono and two others were charged with murder in the first degree. They were acquitted of that crime but were convicted of the crime of assault, a lesser crime embraced within the crime with which they were charged. They appealed to the Supreme Court of the Islands, and that court reversed the trial court and found them guilty of murder in the second degree, which is a crime

embraced within the one originally charged, but of a higher degree than that of which they were found guilty. It was contended by the accused that this action was in violation of the Act of Congress which prohibited the government from placing a person twice in jeopardy. So far as concerns the power of the Supreme Court of the Islands to itself convict the accused on appeal, such is the ordinary and valid procedure of the courts of that country. The case turned on the question of twice in jeopardy.

The United States Supreme Court held that the case was exactly parallel to one arising in one of the federal courts of this country, where, upon an indictment for a greater offense, and after the accused had been found guilty only of a lesser offense embraced within it, it was sought, after a new trial had been granted at the instance of the accused, to re-try him for the crime originally charged. The court conceded a difference in authority upon this question. Some cases held, it was admitted, that a new trial carried with it the right to be tried for no greater crime than that for which there had been a prior *conviction*. But the majority of the court were not impressed with the correctness of this view. The ground upon which new trials are awarded is that, by asking for a correction of errors made in the first trial, the accused waives the constitutional protection accorded him, and himself asks for a new trial notwithstanding that it places him twice in jeopardy. Those courts which limit the new trial to the crime as to which there was a prior conviction, hold that the accused limits this waiver to his needs, and that his request for a reversal applies only to so much of the judgment as convicted him of guilt; but he is not supposed to ask reversal of so much of it as acquitted him of offense.

In opposition to this view the court held that "it seems much more rational and in better accord with the proper administration of the criminal law to hold that, by appealing, the accused waives the right to thereafter plead once in jeopardy, when he has obtained a reversal of the judgment, even as to that part of it which acquitted him of the higher while convicting him of the lower offense. When, at his own request, he has obtained a new trial, he must take the burden with the benefit, and go back for a new trial on the whole case."

MR. JUSTICE MCKENNA, with whom concurred MR. JUSTICE WHITE and the CHIEF JUSTICE, takes the contrary view, and cites in the margin cases from seventeen American jurisdictions supporting him, and which he contends represent the clear and overwhelming weight of authority.

It is clear from this case, that the rights of appealing defendants in criminal cases, while they are strictly construed, are the same in the Philippine Islands as in the domestic territory of the United States. E. R. S.

A LAUDATORY PUBLICATION AS A CAUSE OF ACTION.—Attention was called in this Review some months ago (3 MICH. LAW REV., 559) to a decision of the Supreme Court of Georgia maintaining the legal right of privacy. That case was important, because it was the first authoritative declaration in favor of the legal sanction of a "right" which is essentially a conception of modern times, and interesting as showing the great adaptability of the common law to changing conditions and to the new conceptions of right and wrong, which come with advancing civilization.

That the civil law, at least as administered in a state whose jurisprudence and juristic ideas are influenced by its common law environment, also is capable of meeting new situations, is illustrated by the case of *Martin* v. *Nicholson Publishing Company,* decided on Jan. 2, 1906, by the Supreme Court of Louisiana. The opinion is not yet officially reported but is printed in full in the *New Orleans Picayune* (owned and controlled by the defendant) for Jan. 5, 1906. The trial court found the facts to be as follows: "That plaintiff is a physician in good repute and practice; that amongst reputable practitioners it is considered contrary to the ethics of the profession to advertise in any form in the public press, none but 'quacks' doing so; that it is considered especially reprehensible to resort to publications purporting to be interviews with patients or their relatives in which glowing accounts are given of alleged marvelous cures and physicians lauded accordingly; that this practice has been particularly condemned by the local medical society, and defendant was made aware of, and urgently requested to heed, the society's action by a committee appointed for that purpose, plaintiff being a member thereof; that within a few days after such warning defendant maliciously and well knowing the injury it would thereby inflict on plaintiff, published and circulated in its newspaper an article describing a cure wholly imaginary and fabulous, and attributing same to plaintiff, all with intent to bring him into ridicule and contempt. That the effect of this publication has been to put plaintiff in the attitude of an advertising quack, whereby he has been injured in his business, lowered in the eyes of his friends, humiliated, irritated and annoyed, for all of which he asks damages. The article complained of recites in substance: That in the case of a certain patient, after trying unsuccessfully for many years the accepted course of treatment, plaintiff had, at the last, employed in addition thereto, the method of a certain world-renowned surgeon with the result that complete success was achieved. The story purported to have come from the patient's father, who was naturally overjoyed at the outcome, and correspondingly laudatory of plaintiff." The plaintiff's treatment of this alleged case was described as "masterful," and the article contained none but words of commendation. The case was argued on defendant's exception to the petition, and was dismissed by the judge *a quo,* on the ground that the falsity of the article in question was not a sufficient cause of action, and because it did not appear from the petition that defendant *intended* to produce the impression that plaintiff procured this publication for the purpose of advertising himself. The trial court held that while such a publication might cause irritation and annoyance, yet such wrongs were too small and speculative to be actionable and that on the face of the petition "there appears no cause of action." The Supreme Court directed its discussion of the case to two questions of law. (1) Is a publication actionable which is alleged to be false, malicious and made for the "purpose of bringing plaintiff into the anger, hatred, contempt and ridicule of his fellow-doctors, and of the public," and to have injured him in his profession, by bringing him into contempt and by "disinclining people to employ him as a physician." To this question the court answered "yes;" that the initial allegation of malice expanded itself into all of the averments of the petition, and that it was not necessary, therefore, to charge that the publication was made with the intention of producing the

impression that "plaintiff had been instrumental in having his asserted cure advertised." (2) Is a publication actionable though entirely couched in commendatory words, when declared upon with the foregoing allegations as to malice and injury? And this question, too, the Supreme Court answered in the affirmative, basing its decision on the broad ground that words of praise, when spoken maliciously, may cause injury. The court also adds that "there is a principle involved, the right of privacy."

Can this decision be sustained on common law principles? Though no precise parallel, it is believed, is to be found in Anglo-Saxon jurisprudence the writer of this note is of the opinion that it can be. The plaintiff's brief, which the writer has had the privilege of examining, relies largely upon article 2315 of the Louisiana Civil Code, which is identical with article 1382 of the Code Napoleon, and reads as follows: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." This statement of the remedy for tort is broader and more sweeping than can be maintained at the common law, in particulars too well known to require mention here. But the decision of the Supreme Court is not apparently based upon any element of that article which is not also found in the recognized principles of the common law, though undoubtedly the petition in the present case would not satisfy the requirements of the strictly common law declaration in libel. But considering the principle applied in this case as an abstract principle of the law of tort, and excluding consideration of the archaic requirements of the common law regarding inducement, innuendo, etc., in pleading, the case seems sound on principle and in accordance with the general trend of authority.

The nearest approach to the facts in the present case, which the writer has been able to find, is in *Sullings* v. *Shakespeare,* 46 Mich. 408; 41 Am. Rep. 166: 9 N. W. Rep. 451, in which case the defendant had published in his newspaper an article ostentatiously puffing the plaintiff and tending thereby to bring him into ridicule. The case was allowed to go to the jury on the ground that such publication might be actionable, and of course that the question of damage was one for the jury. The jury found for the defendant, largely upon the ground that plaintiff had himself assented to the publication. In the principal case the court seems to regard the offense charged as an invasion of the right of privacy, rather than as an equivalent of the common law libel. The decision is in accordance with one's instinctive notion of "fair play," and is an encouraging indication that our courts are alive to the necessity of impartially but firmly applying general principles to curb the constantly increasing intrusion of the press into private affairs, regardless of the annoyance, humiliation or "damage" thereby inflicted upon the helpless victim.

H. M. B.

THE CY-PRES DOCTRINE.—The court of chancery of New Jersey in the recent case of *Brown et al.* v. *Condit et al.* (Sept. 30, 1905), 61 Atl. Rep. 1055, refused to apply this doctrine under the following circumstances: The will of one Susan M. Corson, bearing date July 7, 1897, disposed of her residuary estate "to the Hospital Fund for Sick Seamen at Navy Yard, Brook-

lyn, New York, care of Mr. John M. Wood, chaplain." It appears that neither at the time of the making of the will nor at any time thereafter was there a fund in existence at or in any way connected with the Brooklyn, New York, Navy Yard that could properly be designated as a "fund for sick seamen." Nor was the said John M. Wood, at the time of the making the will or thereafter a chaplain at said navy yard in any proper sense of the term. He was, however, for several years previous to his death, which took place about a year after the date of the will and about the same time prior to the death of the testatrix, engaged more or less in missionary work at the said navy yard under the auspices of the American Seamen's Friend Society. His duties consisted chiefly in holding religious meetings, and although he had no official connection with the government hospital located at the said navy yard, he had, as stated in the opinion of the court, "the privilege of ministering to the sick sailors in the hospital, presumably to such extent as his services were acceptable to them." Similar privileges were given to the representatives of other benevolent societies. On several occasions, whether before or after the making of her will does not appear, Mrs. Corson sent to Mr. Wood small sums of money with directions, in each instance, that he should with the money get delicacies and flowers for the sick sailors. The court found nothing in the evidence to show that the testatrix was ever interested in any charitable work at the said navy yard except as it was connected with Mr. Wood. After the death of the latter the American Seamen's Friend Society continued its work at the navy yard through other lay missionaries. It appeared, also, that the International Committee of Young Men's Christian Associations, one of the defendants in the case, in March, 1899, established a branch for charitable work among the sailors in the Brooklyn, New York, Navy Yard, their work being of the same kind as that carried on by the American Seamen's Friend Society, but apparently somewhat wider in its scope.

A bill for the construction of this will was filed by the executors, and besides the heirs and next of kin of testatrix, the International Committee of Young Men's Christian Associations, the American Seamen's Friend Society, and the United States of America were made defendants. The Attorney General of the State was made a party at the suggestion of the court. The heirs and next of kin answered, "claiming the entire residuary estate upon the theory that the residuary devise and bequest lapsed." The International Committee of Young Men's Christian Associations answered, and, after describing their charitable work in connection with seamen at the said navy yard, offered to take the residuary fund and apply it according to the charitable purpose of the testatrix. The bill was taken as confessed against the other defendants.

The court held that the charitable donation lapsed and that the residuary estate could not be devoted to charitable purposes through the instrumentality of the cy-pres doctrine. This conclusion was based upon the proposition that the provision in the will, construed in the light of surrounding facts and circumstances, did not show a general charitable intent such as would be necessary for the application of the cy-pres doctrine, but a particular charitable intent to be exercised in a particular way and through the

instrumentality of a designated agency. The court argued that because there was no evidence that the testatrix "ever visited the Brooklyn Navy Yard, or that she had any connection whatever with the sick seamen at that navy yard, or its hospital, excepting through Mr. Wood whom she knew and with whom she corresponded," and because it appeared further that her only contributions to said seamen during her life were made through Mr. Wood, it is proper to conclude that this missionary was an essential factor in the accomplishment of her charitable purposes. "It seems to me," says the court, "that this charitable bequest must be construed practically in the same way as if it had been in the form of a gift to Mr. Wood, to be expended by him as an incident to his missionary work for the benefit of the sick seamen in the hospital of the Brooklyn Navy Yard, with whom he came in personal contact. It might also, in other words, be described as a testamentary charitable effort to support Mr. Wood's personal dispensation of flowers and delicacies among the sick seamen to whom he ministered as a religious teacher. * * * I do not think that Mrs. Corson contemplated any dispensation of this legacy except through the personal efforts of Mr. Wood." The court bases its conclusion upon the proposition, which is sustained by abundant authority, that where it is apparent that it is a testator's purpose that his charitable intent, which is special and particular, shall be carried out through a designated agency and through no other, and that agency fails, the gift lapses.

But there would seem to be room for a difference of opinion as to the nature of the charitable intent in this case and as to the purpose of the testatrix in regard to the carrying out of this intent. The doctrine is elementary that where there is a general charitable intent apparent and that intent cannot be carried out in the manner directed in the will, the agency for the application of the charity not being of the essence of the gift, a court of equity may, cy-pres, where the principles of cy-pres are recognized, authorize the administration of the fund through a similar agency. *Weeks* v. *Hobson,* 150 Mass. 377, 6 L. R. A. 147; *Jackson* v. *Phillips,* 14 Allen 539. But what is a general charitable intent? Is it necessarily confined to those cases in which the entire property of a testator is to be devoted to charitable purposes or in which there is an intent to devote a part of the property to charity generally? Or may there be what the law calls a general charitable intent where the charity is to be applied within certain well-defined lines? Answers to these questions and also a statement of the equitable principles that might well be held to govern this case, are to be found in the following quotation from the opinion of MR. JUSTICE KAY, affirmed on appeal, in the case of *Biscoe* v. *Jackson,* L. R. 35 Ch. Div. (1887), 460, 463, 464: "I quite agree that if the mode of application is such an essential part of the gift that you cannot distinguish any general purpose of charity, but are obliged to say that that mode of doing a charitable act was the only one the testator intended, or at all contemplated, and that he had no general intention of giving his money to charity, then the court cannot, if the particular mode of doing it fails, apply the money cy-pres. On the other hand, if you do see a general intention of benefiting a certain class or number of people, who come within the ordinary definition of objects of charity, and you find that the particular mode the

testator has contemplated of doing this cannot be carried out, and you are convinced that the mode is not so essential that you cannot separate the intention of charity from that particular mode, then the court says there is a general intention of charity, and as the mode has failed, the duty of the court is, favoring charity as the court always does, to provide another mode than that which the testator has pointed out and which has failed." In this case a testator directed his trustees to set apart out of his personal estate that might by law be bequeathed for charitable purposes, a sum of money to be applied in a designated way in the establishment of a soup kitchen and cottage hospital for the parish of S. It becoming impossible to apply the funds exactly as directed in the will, the court held that the will indicated a general charitable intent to benefit the poor of the designated parish, and that, although the bequest could not be carried out in the manner directed in the will, the court would execute the trust cy-pres.

The case under review is not unlike that of *Biscoe* v. *Jackson*, and it might well be argued that the same principles should apply. The case is not one of a bequest to an institution that never existed or that no longer exists, which bequest would undoubtedly lapse. Nor does it seem to be one where the instrumentality selected is of the essence of the bequest. It might well be argued that a general charitable intent to benefit the sick seamen in the Brooklyn Navy Yard is manifested in the residuary clause of this will; that from the language used, it is apparent that the testatrix had "a general intention of benefiting a certain class or number of people, who come within the ordinary definition of objects of charity," *Biscoe* v. *Jackson, supra*, namely, sick seamen at the Brooklyn Navy Yard. The testatrix evidently supposed that there was a fund for sick seamen at this navy yard, and that it was administered by this Mr. Wood, but there is nothing in the language of the residuary clause to indicate that it was her intention that the sick seamen should receive the benefit of her bounty only through the instrumentality of Mr. Wood. Her predominant purpose, as indicated by her language, is the benefit of the sick seamen; the agency for the carrying out of this purpose is an incident. The testatrix did not indicate either by words or acts that she had selected this man because of his special qualities and that no one else should act. It may be suggested in this connection that the fact that during her lifetime she made several remittances to Mr. Wood "to get delicacies for the sick boys and flowers," if properly in the case, should not be of the controlling significance accorded to it by the court, as showing an intention on her part that her charity should be administered only through Mr. Wood. It might well be argued that such acts, taken in connection with the language of the residuary clause, simply indicate a general charitable intent to benefit a certain class of people. It appears that Mr. Wood died about a year after the making of the will and about a year before the death of the testatrix. The fact of there having been no change made in the residuary clause after the death of Mr. Wood, although not alluded to by the court in the published opinion, would seem to be of special significance as bearing upon the attitude of the testatrix in regard to the administration of her bounty. And another fact that is significant as bearing upon the question of charitable intent, is that in the paragraph of the will immediately preceding the residuary clause,

the testatrix disposes of the claims upon her bounty of those who must take if the charitable donation is held to lapse, by declaring that as to them she feels no responsibility as they will upon her death inherit the entire estate of her father, and that she, therefore, gives to each of them five dollars.

There is ample American authority for the conclusion that such a charitable intention as is disclosed in this case may be made effectual through the application of the cy-pres doctrine. In *Winslow* v *Cummings,* 3 Cush. 358, a bequest to "the Marine Bible Society," there being no society of that name, was sustained and a trustee appointed to dispose of the legacy in accordance with the intention of the testator as found by the court. The case of *Bliss* v. *The American Bible Society,* 2 Allen, 334, is to the same effect. Authority of like import is not wanting in New Jersey, the state in which the case under review arose. A bequest to "The Bridgeton Trustees for Free Schools," the income "to be applied annually for ages, as far as may be practicable for the tuition of poor children, without regard to denomination or color, in the elements of English literature" was sustained as a charitable bequest in *McBride* v. *Elmer's Executors,* 6 N. J. Eq. (2 Hal. Ch.) 107, and trustees were appointed for its execution, although there was no such body as the one named, the trustees of public schools (usually called free schools) being the only school trustees in the town of Bridgeton. In *The New York Annual Conference Ministers' Mutual Association Society* v. *Executors of Clarkson,* 8 N. J. Eq. (4 Hal. Ch., 541, a bequest to the "New York Methodist Conference Society for the support of old worn-out preachers," was sustained as a charity, although there was no such society as the one described, and turned over to the complainant society as the one intended by the testatrix. The general attitude of the New Jersey Court of Errors and Appeals in regard to the interpretation of charitable bequests is shown to be a liberal one in *Hesketh* v. *Murphy,* 36 N. J. Eq. 304, the court in the opinion citing with approval the last two cases. In *Kerrigan* v. *Tabb* (N. J. Ch.), 39 Atl. Rep. 701, a legacy to a Catholic priest to be expended for masses for the repose of testatrix's soul was sustained as a bequest to a charitable use, and was held not to lapse upon the death of the trustee before the death of the testatrix, and it was further held that another trustee should be appointed to carry out the trust.

The court, in the case under review, is clearly of the opinion that in New Jersey the cy-pres doctrine, as ordinarily understood, can receive little or no recognition; and yet, Sept. 22, 1905, eight days previous to the decision in this case, the New Jersey Court of Errors and Appeals in *MacKenzie* v. *Trustees of Presbytery of Jersey City,* 61 Atl. Rep. 1027, in a scholarly and well-reasoned opinion, settled affirmatively and apparently beyond controversy, the question of the existence in the state of the doctrine as understood and applied in those states in which it has been accorded a liberal recognition. The case was one in which a provision in a deed for the benefit of a church society, although in the form of a condition, was held to create a charitable trust which could be carried out through the instrumentality of the cy-pres doctrine, if it should, upon a future consideration of the facts in a suit suggested by the court, be found necessary to resort to that doctrine. In the course of the opinion, after a general consideration of the cy-pres doctrine, the court says:

"The objection to the doctrine of cy-pres because of the excesses which have been committed in its name (for the most part when applied by the Chancellor of England, acting under the sign manual of the crown, rather than as a judge of a court of equity), is no longer to be regarded as of weight. Modern decisions have pruned the judicial doctrine so far as it may have needed pruning, and have confined it within sensible limits. The sound rule now is, at least in America, that courts will not execute charitable trusts in a manner different from that intended, unless the intent cannot in the original mode be literally carried out; that they will preserve the substance, although the mode be departed from; and that they will not presume or invent an intention which the testator or donor has not fairly indicated." In connection with a review of some of the leading New Jersey cases upon the subject, the court says that "it can scarcely be denied that our courts have already accepted the cy-pres doctrine in its essence, although they have not labeled it with the name." * * * "On the whole," the court concludes, "we affirm that the judicial doctrine of cy-pres, as pruned and restrained by modern authorities, English and American, and as affected by our own decisions, has a proper place in our jurisprudence, and that after a proper inquiry, it may, if necessary, be applied to the management of the estate or fund in question." In connection with the discussion, the court quotes approvingly the following from the opinion of the Chancellor in *Pennington* v. *Metropolitan Museum of Art et al.*, 65 N. J. Eq. 11, *22*, 55 Atl. Rep. 468, *472*, which we give here as bearing upon the general proposition discussed in the case under review: "If trustees disclose a situation of their trust in which a slavish adherence to the terms of the trust will operate wholly to prevent the benefits intended by its creator, and they seek instructions and directions as to their duty, I think that instructions and directions for a course of conduct which, though different from that prescribed by the terms of the trust, will actually carry out the intent of the creator, may well be grounded upon and sustained by the necessity of the case. The benefits intended for the beneficiaries are the main subjects of consideration. The modes in which those benefits may be attained are incidental, and necessity may require a change of mode in order to produce the intended effect." As sustaining in a general way the charitable donation in the case under review, see *James Schouler, Petitioner*, 134 Mass. 426; *Russell* v. *Allen*, 107 U. S. 163; *Academy of Visitation* v. *Clemens*, 50 Mo. 167; *Cromie's Heirs* v. *Louisville Orphans' Home Society*, 3 Bush. (Ky.) 365. H. B. H.

DUTY OF VENDEE TO SEE TO INVESTMENT OF FUNDS.—Many will no doubt be surprised to learn that the purchaser of land from one having title in his own right may be bound to follow the funds to a prescribed investment in order to make his title to the land good. That such a duty may be imposed on the vendee is illustrated by a recent case.

A man devised his land to his daughter without defining the estate further than that it should be for her sole use and benefit, separate and free from the control of any husband she may marry; and this, by the statutes of the state would operate to give her the fee, as an equitable separate estate, though no

trustee were appointed. Her fee thus given was reduced from a fee-simple to a base fee, by virtue of a later provision of the will that, "if she shall not dispose of the estate she gets under this will by will, as she is empowered to do, and should die leaving no children or descendants, then the said real estate shall pass to the mother, and if she be dead, to her descendants." To the base fee thus given, the testator added the further restriction, that, "If the said Maggie sell the real estate she may obtain under this will, * * *, the proceeds must be invested in other real estate, and the title must be taken to her for her separate use, free from the control or debts of any husband she may have, and the purchaser must see to the reinvestment of the proceeds as above provided for, and the title shall not pass from her until the same is done, and nothing shall bar or estop her from getting or retaining the real estate she may get under this will but a reinvestment of the proceeds as above indicated." Maggie having thus a base fee with beneficial power to dispose in fee by deed or by will, subject to these provisions, she did marry, and later joined with her husband in a deed of the lands in question to A in consideration of $1450, which A paid to Maggie's husband and which the husband without protest by Maggie used in his business. Later A conveyed for value to Bair, and later Maggie filed this bill to free her title from the cloud created by these deeds. The court held that A and Bair were bound to take notice of the matters stated in their chain of title, that no title passed till the proceeds were invested in real estate and title thereto taken in Maggie's name as the will directed. It was also held that Maggie was not bound by any estoppel, and being a married woman she was not bound by the covenants of title in the deed. Therefore, the court granted the complainant's bill, and decreed the deeds void and the title to be in her. *Bell* v. *Bair et al.*, 1905, Kentucky ("not to be officially reported"), 89 S. W. Rep. 732.

It will be noticed that her title was both legal and equitable, that it was a base fee with beneficial power of disposal in fee, and yet that it was bound by this prohibition in the devise. The only case cited, and the only case we have been able to find on the point is a prior decision on the same will. *Bell* v. *Mitchell* ("not to be officially reported"), 17 Ky. Law Rep. 1335, 34 S. W. 695. The leading case on the duty of purchasers from executors and trustees to follow the proceeds is *Elliot* v. *Merryman* (1740), Barnardiston's Ch. Rep. 78, 2 Atk. 41, 1 White & Tudor's Lead. Cas. Eq. 45. For a review of the decisions see note to this case and also 2 SUGDEN ON VENDORS c. 18. The rule in these cases seems to be that if land is directed to be sold to pay particular charges named the purchaser is bound to see that the charges are paid; but if the land is made liable merely to sale to pay debts in general or to be invested till some suitable time for future disposal, the purchaser is merely required to see that the money is paid to the trustee or executor. J. R. R.

THE POWER TO DECLARE A FORFEITURE AND SELL PROPERTY USED IN VIOLATION OF A STATUTE.—"If I am correct in this opinion," says MR. JUSTICE CONNOR, in dissenting from the conclusion of the majority of the Supreme Court of North Carolina, "this case marks an epoch in our jurisprudence, and stands forth as a departure from the ancient landmarks made by the fathers

for the protection of life, liberty, and property. The decision reverses, not only adjudged cases in this court, but the entire conception of our system of government and rules of construction of our Constitution." The case thus referred to is *Daniels* v. *Homer,* — N. C. —, 51 S. E. Rep. 992.

In 1905 the General Assembly enacted a law "to regulate fishing in Albemarle and Pamlico Sounds and waters connected with them," which creates a "close" season of four months, prohibits the setting of nets across certain inlets and regulates the manner of fishing in various sections of the sounds. The act provides "that any person who shall violate any section or provision of this act shall be guilty of a misdemeanor and upon conviction in any county opposite the place at which said act is done shall be fined or imprisoned at the discretion of the court."

The provision of the act which will appear to others besides the dissenting justices as unconstitutional is the following: "Sec. 9. That it shall be the duty of the oyster commissioner or assistant oyster commissioner, whenever an affidavit is delivered to him, stating that affiant is informed and believes that said act is being violated at any particular place, to go himself or send a deputy to such place, investigate the same and they shall seize and remove all nets or other appliances setting or being used in violation of this act, sell the same at public auction and apply proceeds of sale to payment of cost and expenses of such removal, and pay any balance remaining to the school fund of county nearest to where offense is committed."

This provision is held by the majority of the court to be a legitimate exercise of the police power of the state and not unconstitutional as depriving the citizen of his property without due process of law, MR. CHIEF JUSTICE CLARK and MR. JUSTICE HOKE writing opinions concurring in this view. It authorizes, they say, the summary abatement of what the legislature has declared to be a criminal nuisance, and as the legislature has the right to regulate fishing in the waters of the state the necessities of the case in this instance justify the seizure and sale of the offending property without notice to the owner or any judgment against him after a hearing. He may contest the question of fact raised by the informant's affidavit in an action to recover the nets before sale, or after sale by an action for the proceeds of the sale or for damages, or by an injunction to prevent the sale. "He has his full remedy, but it does not include a continuance of the nuisance to his individual profit and the public detriment, while the question of violation of the statute is being determined."

So far as authorities for these views are considered reliance is placed by the court largely upon the decisions sustaining the validity of the New York and Wisconsin statutes authorizing the seizure and destruction of nets used in violation of the law for the protection of fish. *Lawton* v. *Steele,* 119 N. Y. 226, 7 L. R. A. 134, 16 Am. St. Rep. 813; 152 U. S. 133, 14 Sup. Ct. Rep. 499. *Bittenhaus* v. *Johnston,* 92 Wis. 588, 66 N. W. Rep. 805, 32 L. R. A. 380. The court, however, seems to base the decision sustaining this exercise of police power upon the actual necessity for such legislation. MR. CHIEF JUSTICE CLARK says, for example: "It [the state] has found the criminal law an ineffectual protection, and that deprivation of the nets is necessary to prevent the violation of the law. * * * The General Assembly has found,

and so says by its statute, that this remedy is necessary to enforce the execution of the law"; and MR. JUSTICE HOKE says: "And this, I apprehend, is the true principle on which forfeitures of this character can be sustained—whether it is done in abatement of the nuisance and is required by the reasonable necessity of the case."

The dissenting justices do not recognize the necessity for the arbitrary proceedings prescribed by the statute; and, while conceding the right of the legislature to regulate fishing, to prohibit the placing of nets in such parts of the public waters as it may deem proper and to declare such nets public nuisances which may be summarily abated by removal, they emphatically deny the validity of that part of the act conferring upon the oyster commissioner the power to seize the nets and sell them at auction without notice, either personal or constructive, or any judgment of condemnation by a judicial tribunal after a hearing.

Three justices of the Supreme Court dissented from the majority's conclusion in *Lawton* v. *Steele*, 152 U. S. 133, the New York Court of Appeals regarded the case "as very near the border line" (119 N. Y. 226, 240), and a recent thoughtful writer says "the principles which should govern the forfeiture of property were departed from in the decisions" in this case. (FREUND, POLICE POWER, § 527). It is not easy, in view of constitutional limitations, to see how the public welfare can be promoted ultimately if the doctrine of the principal case is sound. The authorities seem to sustain the propositions announced by MR. JUSTICE CONNOR: "(1) That the right to destroy property which is a public nuisance, either *per se*, or made so by statute, or becoming so by the manner of its use, is restricted to the necessity of the occasion or as an incident to the abatement. (2) That the power to declare property forfeited and subject it to sale by reason of its illegal use is judicial, and not legislative. That it can only be exercised as a penalty or punishment imposed upon the owner for violating the law, and, as a necessary conclusion, the forfeiture and condemnation can only be declared and enforced after a hearing or an opportunity to the owner to be heard." See FREUND, POLICE POWER, §§ 520-528; *Edson* v. *Crangle*, 62 Oh. St. 49, 56 N. E. 647; *McConnell* v. *McKillip* (Neb. 1904), 99 N. W. 505, 65 L. R. A. 610, and many other authorities cited in the dissenting opinions in the principal case. Fishing nets are capable of being put to lawful use, and are to be distinguished from implements exclusively intended to be used for violating the law and as such subject to summary seizure and detention. *Board of Police Commissioners* v. *Wagner*, 93 Md. 182, 48 Atl. Rep. 455, 86 Am. St. Rep. 423. J. H. B.

DYING DECLARATIONS.—A recent case decided in Nevada on the admissibility of dying declarations recalls the various changes this rule has undergone. This case holds that the sense of impending death necessary to support such a declaration may be shown by declarant's conduct and condition as well as his words. *State* v. *Roberts et al.* (1905), — Nev. —, 82 Pac. Rep. 100.

The first record of a dying declaration known dates as far back as 1202. 1 SELDEN SOCIETY 11, THAYER'S PRELIM. TREAT. 520. The earliest reason ad-

vanced for their admission was solely one of necessity. The only requirement was the death of the declarant and it was not necessary that they be made under a sense of impending death. (See note to *Reg.* v. *Morgan,* 14 Cox, C. C. 337.) In the case of *Wright* v. *Littler,* 3 Burr. 1244, Thayer's Cases, 351, decided by Lord Mansfield in 1761, the declarations in question were given about three weeks before declarant's death and nothing was said in the case of the necessity of their having been given under a sense of impending death. The same thing is true in the case of *Rex* v. *Reason,* 1 Strange 499, Thayer's Cases 349, decided in 1721. Later another theory as to the admission of such declarations came to be held. In *Woodcock's Case,* Leach, 4th ed. 500, Thayer's Cases, 355, decided in 1789 the reason, which has been quoted verbatim in innumerable cases since, was advanced that, "they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice." It has been argued that if this is the reason for admitting such declarations, they should be admitted in civil as well as criminal cases, and some of the early decisions seem to have taken this view. WIGMORE ON EVIDENCE, § 1431. In *Wright* v. *Littler, supra,* the dying declaration of a witness to a will was received, in which declarant said that the will was a forgery. This and a few other similar decisions have been explained by saying that in these cases the declarations were against the interest of the declarant, and it is stated in a later case that where the declaration is made for the purpose of clearing and not of accusing the declarant, that it will not be received. *King* v. *Mead,* 2 B. & C. 605. In the case of *Aveson* v. *Kinnaird,* 6 East 188, the following explanation is given: If the attesting witness had been living, he must have been called, and might have been cross-examined as to the validity of the instrument, the authenticity of which depends upon the credit given to it by his attestation. The only American case as far as known where dying declarations were admitted in a civil case is *McFarland* v. *Shaw,* 2 Car. Repos. (N. C.) 102. This case was overruled in *Barfield* v. *Britt,* 2 Jones L. (N. C.) 41. These cases are so few and their peculiar circumstances so many that the effort to prove that they support the contention that dying declarations were received in all cases, has not met with much success. *Stobart* v. *Dryden,* 1 M. & W. 615. *Wilson* v. *Boerem,* 15 Johns. (N. Y.) 286. Logically, of course, if their admission was based solely on their necessity and the probability of their being true from the solemnity of the occasion there would be no reason for restricting them to cases of homicide. But this is far from the fact. Neither of these theories gives us any logical reason for the rule as applied to cases of homicide that would not apply to other cases as well. Basing the reason for their admission upon the realization of impending death, the courts went to extreme lengths in refusing to admit these declarations unless there was certainty that such realization existed. In *Reg.* v. *Morgan,* 14 Cox C. C. 337, the declarant had his head nearly severed from his body and only lived a few minutes after writing a statement. The judges were unwilling to admit this without reserving a case for the Court for Crown Cases Reserved. This

decision is not so ludicrous as writers on Evidence have attempted to show that it is, as the test of admission is not only that declarant be in extremis, but that he realize that he is in such a state, because upon this realization rests the reason for believing the statement true. Common experience shows that a person may be in extremis and not realize the fact. Similar to the above case are *Reg.* v. *Cleary*, 2 F. & F. 850, *Reg.* v. *Bedingfield*, 14 Cox C. C. 341. The modern tendency, as illustrated by the main case, is to be more liberal and take into consideration the conditions and circumstances as well as the statements of the declarant. The best reason offered for the admission of such declarations seems to be the one advanced in *Marshall* v. *R. R.*, 48 Ill. 475: "The true foundation of the rule that they were admissible in cases of felonious homicide, were policy and necessity, since that crime is usually committed in secret, and it cannot be allowed to such an offender to commit the crime, and, by the same act still forever the tongue of the only person in the world which could speak his crime." As stated in another case, "Declarations at the best are uncertain evidence, liable to be misunderstood, imperfectly remembered, and incorrectly stated." *State* v. *Baldwin*, 79 Ia. 714. The reason given above for the admission of such declarations is believed to be a logical one and the danger of admitting such evidence seems to render it proper that such admissions be confined to homicide cases with the recognized limitations. The question has frequently arisen whether such declarations should be admitted in abortion cases, and apart from statute it has been decided that as the death of the declarant is not the subject of the charge, such dclarations will not be admitted. *People* v. *Davis*, 56 N. Y. 95. In Indiana the death of the woman is made by statute an ingredient of the crime, and it has been decided that on this principle the declarations may be admitted. *Montgomery* v. *State*, 80 Ind. 338. In Massachusetts, New York and Pennsylvania statutes have been passed making dying declarations in abortion cases admissible. For a further discussion of the subject in other of its phases see article by Prof. V. H. Lane, 1 MICH. LAW REV., 624, also *ib.* 135. C. S. A.

"JUVENILE COURTS" AND JURY TRIALS FOR NEGLECTED, DELINQUENT, CHILDREN.—The duty and the power of the state to assume control of children who are deprived of proper parental care are recognized in two recent decisions in which constitutional questions concerning the establishment and procedure of "Juvenile Courts" are considered. (*Commonwealth* v. *Fisher*, — Pa. —, 62 Atl. Rep. 198; *Hunt, Prosecuting Attorney* v. *Wayne Circuit Judges*, — Mich. —, 12 Det. Legal News 673, 105 N. W. Rep. —)

In Pennsylvania the act of 1903 created no new court, but conferred jurisdiction in caring for unfortunate or neglected children on an already existing court which the constitution recognized without defining its jurisdiction, and the objection made to the act that this tribunal was an unconstitutional body, and without jurisdiction, was overruled. In Michigan the act of 1905 attempted to confer upon the Circuit Court Commissioners of many counties judicial powers not conferred upon these officers by the constitution and, as the court considered that the language of the act indicated "not only the

purpose to provide for an uniform administration of the law, but for its general application in all territory not expressly excepted from its operation," it was held wholly unconstitutional.

In each of these cases the further objection was raised that the acts denied to the child a right of trial by jury. The Michigan court did not pass upon this question, but the Pennsylvania court set aside the objection in the following terms: "'The right of trial by jury shall remain inviolate,' are the words of the Bill of Rights, and no act of the Legislature can deny this right to any citizen, young or old, minor or adult, if he is to be tried for a crime against the commonwealth. But there was no trial for any crime here, and the act is operative only when there is to be no trial. The very purpose of the act is to prevent a trial, though, if the welfare of the public require that the minor should be tried, power to try it is not taken away from the court of quarter sessions; for the eleventh section expressly provides that nothing in the preceding sections 'shall be in derogation of the powers of the courts of quarter sessions and oyer and terminer to try, upon an indictment, any delinquent child, who, in due course may be brought to trial.' This section was entirely unnecessary, for without it, a delinquent child can be tried only by a jury for a crime charged; but, as already stated, the act is not for the trial of a child charged with a crime, but is mercifully to save it from such an ordeal, with the prison or penitentiary in its wake, if the child's own good and the best interests of the state justify such salvation. * * * The act is but an exercise by the state of its supreme power over the welfare of its children, a power under which it can take a child from its father and let it go where it will, without committing it to any guardianship or any institution, if the welfare of the child, taking its age into consideration, can be thus best promoted." This doctrine of supreme state control is also recognized by the Michigan court—though, as before stated, the objection to the Michigan act that trial by jury was denied, was not passed upon—as follows: "That the state should be and is profoundly interested in the moral and physical conditions of infant citizens goes without saying. The law recognizes, as the physical and the social senses recognize, the requirements of nurture and of education, mental and moral. Infancy imports wardship. It implies control, direction, restraint, supervision. Depending as it may and does upon the natural and usual sentiments attending parentage and family, society is conscious and has from earliest times been conscious of the fact that conditions may be such that these dependencies are without support and that the state itself must in some cases be parent to the children of the state. From the earliest times, the law while regarding the natural rights of parents and deciding between estranged parents with equal natural rights according to rules more or less certain, has always, in the last analysis of the particular case, set the welfare of the child, and the interest of the community in the welfare of the child, above every other consideration."

The general purpose of statutes like those discussed in these two cases is the prevention of crime rather than its punishment. The misfortune of the child neglected by its parents and permitted to grow up in a corrupting environment renders necessary the exercise by the state of parental authority. And the state, in exercising this authority for the purpose of reforming the

child, may deprive it of its liberty without a trial by jury. *State* v. *Brown;* 50 Minn. 353, 52 N. W. 935, 36 Am. St. Rep. 651, 16 L. R. A. 691; *Wisconsin Industrial School* v. *Clark County,* 103 Wis. 651; *Petition of Ferrier,* 103 Ill. 367; *Ex parte Ah Peen,* 51 Cal. 280. As pointed out, however, by the Supreme Court of Pennsylvania, a child charged with the commission of a crime has the right to have the question of its guilt or innocence of this crime established after a constitutional trial. *State* v. *Ray,* 63 N. H. 406, see *Lee* v. *McClelland,* 157 Ind. 84, 60 N. E. 692. J. H. B.