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# Note and Comment

Justice Wilson

William B. Clark

James Harrington Boyd

# MICHIGAN LAW REVIEW

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## NOTE AND COMMENT

THE CONSTITUTIONALITY OF STATUTORY RESTRICTIONS UPON SALES OF MERCHANDISE.—The validity of the so-called "Sales in Bulk Acts"—statutes whose purpose is to regulate the sales of merchandise in bulk and otherwise than in the ordinary course of business,—continues to be tested in the courts and, judging from the number of such enactments and the closeness with which many of them shave the line of constitutionality, they will continue to occupy the attention of the courts for some time to come.

Such a statute was passed upon and its constitutionality declared by the Supreme Court of Michigan in the recent case of *Spurr et al.* v. *Travis et al.* (1906), 108 N. W. Rep. 1090. The act passed upon (No. 223, p. 322, Michigan Public Acts of 1905) provides, in substance, that the sale in bulk, of any part or the whole of a stock of merchandise, or merchandise and fixtures, otherwise than in the ordinary course of trade, shall be *void* as against the creditors of the seller unless the seller and purchaser shall, at least five days before the sale, make a full detailed inventory of the goods to be sold, showing the quantity and, so far as possible with the exercise of reasonable diligence, the cost price thereof; and unless the purchaser demands and receives from the seller a list of the names and addresses of the creditors of the

seller, showing indebtedness due to each, and certified by the seller under oath to be correct; and unless the purchaser shall, at least five days before taking possession or paying therefor, notify personally, or by registered mail, every creditor listed, or of whom he has knowledge, of the proposed sale and of the price, terms and conditions thereof. The act further provides that its terms shall not apply to sales by executors, administrators, receivers, trustees in bankruptcy, or by any public officer under judicial process.

The validity of this act was impeached on the ground that it conflicts with section 1, of article 14, of the amendments to the Federal Constitution, and on the further ground that it violates section 32, article 6 of the constitution of the state, which provides that no person shall be deprived of life, liberty, or property without due process of law. It was contended that the act was class legislation for two reasons: first, because it does not relate to merchants who owe no debts; and, second, because it limits its operation to merchants and does not include farmers, manufacturers, etc. As to the first contention the court remarks,—"A sufficient reason for not including within its provisions merchants who owe no debts is found in the apparent purpose of the act, which is to protect creditors. If there be no creditors, there is no one requiring protection." On the second point the court quoted from *McDaniels* v. *Connelly Shoe Co.*, 30 Wash. 549, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889—"it is well known that the business of retailing goods, wares and merchandise is conducted largely on credit, and furnishes an opportunity for the commission of frauds upon creditors not usual in other classes of business." In coming to the conclusion that the act in question does not conflict with section 32 of article 6 of the state constitution, the court says, "we think it safe to state as a general rule that where in the exercise of police power a beneficent result is sought, and legislation is enacted in protection of rights which would, but for the enactment, be subject to defeat, such legislation does not infringe the liberty of the citizen in a legal sense or deprive him of property because it involves regulations which may postpone for a reasonable time the exercise of his right to sell."

Statutes similar to that passed upon in this case have been enacted in at least twenty-three states and in thirteen the courts have passed upon them. A number of these statutes, and cases dealing with their validity were discussed in 4 MICHIGAN LAW REVIEW, p. 216, in connection with a review of the opinion in the case of *Wright* v. *Hart*, 182 N. Y. 330, 75 N. E. 404, 2 L. R. A. (N. S.) 338. It is the purpose here to refer briefly to recent enactments and cases not there discussed.

Chapter 286 of the General Statutes of Connecticut, as amended by c. 72 of the Public Acts of 1893 and c. 211 of the Public Acts of 1905, places no duty whatever on the purchaser and the only requirement of the seller is that not less than seven, nor more than thirty, days before the sale he shall file in the town clerk's office a notice describing in general terms the property to be sold, the conditions of the sale, and the parties thereto. All sales made without this formality are declared void as against creditors. This act, as amended, has been passed upon by the federal court in *Re Paulis* (1906), 144 Fed. Rep. 472. It was there held that the act was a reasonable

exercise of the state's police power, and was not unconstitutional as a deprivation of property without due process of law. In 1901 the legislature of Indiana passed an act somewhat similar to the Michigan statute except that it did not exempt from its operation sales by executors, administrators, etc. It seems that in 1903 the bankers, finding that they were not protected by the act of 1901, procured the passage of an act (Laws of 1903, p. 276) which made provision for those loaning money to the seller. In *McKinster* v. *Sager,* 163 Ind. 671, 73 N. E. 854, 106 Am. St. Rep. 268, the Supreme Court of Indiana declared the act of 1903 to be in violation of the fourteenth amendment to the federal constitution, in that it was class legislation, protecting only two classes of creditors,—sellers in good faith, and lenders of money,—by confining to them the remedy, and giving them a preference on execution. An Ohio statute (95 Ohio Laws, 96) relating to the same subject was declared by the Supreme Court of that state to be repugnant to the first article of the state constitution because it placed an unwarrantable restriction upon the right of the individual to acquire and possess property, and because it contained a forbidden discrimination in favor of a limited class of creditors. The statute there passed upon was the same in effect as the Michigan statute. It contained, however, no exemption of sales by executors, etc., and made a violation of its terms a misdemeanor. The constitutionality of an Oklahoma statute (Chap. 30, p. 249, Sess. Laws, 1903), very similar in its provisions to the Michigan statute except that it provides that such sales "shall be *presumed* to be fraudulent and void," and imposes a penalty for making false and incomplete answers by the seller to the inquiries of the purchaser, has been upheld in *Williams* v. *Fourth National Bank of Wichita* (1905), — Okla. —, 82 Pac. Rep. 496, 2 L. R. A. (N. S.) 334. The Oklahoma court there found that the statute does not impair the right to private property nor is it unconstitutional as being class legislation. The Minnesota statute (Laws 1899, chap. 291, p. 357) differs from the Michigan statute in that the fraud is made merely *presumptive* and in that it does not exempt from its operation sales by executors, officers acting under judicial process, etc. In *Kolander* v. *Dunn et al.,* 95 Minn. 422, 104 N. W. 371, the court seems to assume the constitutionality of the statute but holds that the act has no application to a sale of fixtures.

An examination of the cases leads to the conclusion that the courts are very nearly evenly divided on the question of the constitutionality of these acts with, perhaps, a slight preponderance of authority in favor of their validity. The provisions are all rigorous in their application and, it has been suggested, will, in those states which sustain their validity, give rise to much litigation in the way of construction. J. P. B.

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THE LIABILITY OF A COLLECTING BANK FOR THE DEFAULTS OF ITS CORRESPONDENTS.—A case recently decided by the Supreme Court of North Carolina, again brings up the question of the liability of a collecting bank for the negligence of its correspondents and their agents. This question is one of great practical importance, and it is of interest to note the holdings of

the various states in regard to it. The case was as follows: One Floyd deposited a check for collection in plaintiff bank and the amount was credited to him to be charged back if the check was not paid. He drew several checks against the credit. The same day plaintiff sent the check for collection to defendant M. bank, its correspondent at W. On the day of receipt the M. bank forwarded it for collection to the M. & F. bank, its correspondent at D., the drawee. The M. & F. bank went into liquidation before remitting the amount of the check to defendant M. bank. It was held that when a check, payable in another place, is deposited for collection, the whole duty of the receiving bank is to transmit the same in good season to a suitable bank or other agent at the place of payment; the bank so selected being the agent of the owner of the check, and the receiving bank therefore being not liable for the negligence of its correspondent or its correspondent's agents. Also that it was negligence in the M. bank to send the check directly to the drawee bank, custom and usage or express contract to the contrary notwithstanding. *Bank of Rocky Mount.* v. *Floyd et al.* (1906), — N. C. —, 55 S. E. 95.

There are two rules on the first point decided in this case. The first is known as the New York rule and holds the bank in which the check is deposited for collection responsible for the negligence (in collecting the same) of its correspondent bank and the correspondent bank's agents. This rule is followed in New York,—*Commercial Bank* v. *Union Bank,* 11 N. Y. 203; England,—*Van Wart* v. *Woolley,* 3 Barn. & C. 439; Georgia,—*Bailie* v. *Augusta Sav. Bank,* 95 Ga. 277; Indiana,—*American Express Co.* v. *Haire,* 21 Ind. 4; Michigan,—*Simpson* v. *Waldby,* 63 Mich. 439; Minnesota,—*Stressguth* v. *Nat. German-American Bank,* 43 Minn. 50; Montana,—*Power* v. *First Nat. Bank,* 6 Mont. 251; North Dakota,—*Commercial Bank* v. *Red River Valley Nat. Bank,* 8 N. D. 382; New Jersey,—*Titus* v. *Mechanics' Nat. Bank,* 35 N. J. Law 588; Ohio,—*Reeves* v. *State Bank,* 8 Ohio St. 465, and in the United States Supreme Court, *Exchange Nat. Bank* v. *Third Nat. Bank,* 112 U. S. 276.

The courts adopting the New York rule base their holding on the strict principle of agency, that the first agent is liable to the principal for the negligence of the sub-agents employed by him in carrying out the principal's business; reasoning that the holder of the check employs the collecting bank to collect it in whatever way it may see fit, and that the risk of loss by the negligence of the sub-agents should therefore fall on the collecting bank, since the holder had no knowledge of the sub-agents, or privity with them. They answer the argument that the collecting bank has implied authority to employ sub-agents under such circumstances by the statement that the collecting bank has equal knowledge of the necessity of employing sub-agents and has the option of refusing the collection or contracting against liability for the defaults of sub-agents, if it does not wish to assume the greater liability imposed by this rule.

The second rule—"the Massachusetts rule"—holds that when a bank receiving a check on an out-of-town bank for collection has transmitted it with proper instructions to a reputable and proper bank in the place of the

drawee bank it has done its duty and is not responsible for the negligence of its correspondent or of the correspondent's agents in collecting. This rule is followed in Massachusetts,—*Fabens* v. *Mercantile Bank,* 23 Pick. 330; California,—*Davis* v. *First Nat. Bank of Fresno,* 118 Cal. 600; Connecticut,—*East Haddam Bank* v. *Scovil,* 12 Conn. 303; Illinois,—*Waterloo Milling Co.* v. *Kneuster & Co.*. 158 Ill. 259; Iowa,—*Guelick* v. *National Bank,* 56 Iowa 434; Kansas,—*Bank* v. *Ober,* 31 Kans. 599; Kentucky,—*Farmers' Bank and Trust Co.* v. *Newland,* 97 Ky. 470; Louisiana,—*Baldwin* v. *Bank of Louisiana,* 1 La. Ann. 13; Maryland,—*Citizens' Bank* v. *Howell,* 8 Md. 530; Mississippi, —*Bowling* v. *Arthur,* 34 Miss. 41; Missouri,— *Bank* v. *Bank,* 71 Mo. App. 451; Nebraska,—*First Nat. Bank of Pawnee City* v. *Sprague,* 34 Neb. 318; Pennsylvania,—*Merchants' Bank* v. *Goodman,* 109 Pa. St. 422; Tennessee,— *Bank* v. *Cummings,* 89 Tenn. 618; Utah,—*Tripler v. Bank,* 21 Utah 313; Wisconsin,—*Stacy* v. *Dane County Bank,* 12 Wis. 629; it would seem from the cases of *German Nat. Bank* v. *Burns,* 12 Colo. 539, and *Manhattan L. Ins. Co.* v. *First Nat. Bank,* 20 Colo. C. A. 529, that Colorado also follows the Massachusetts rule; South Dakota holds, in *Sherman* v. *Port Huron E. & T. Co.,* 8 S. D. 343, that the Massachusetts rule is in harmony with § 4003 Comp. Laws of South Dakota, but does not directly adopt it.

The courts following the Massachusetts rule urge that the matter of foreign collections forms an exception to the principle of "respondeat superior," for the reason that under the circumstances the holder of the check expects, or ought to expect, that the bank will pursue the ordinary course of business in such cases and transmit the check to sub-agents in the place of collection; and, therefore, since the customer has, by entrusting the check to the first bank for collection, impliedly authorized it to employ sub-agents, the risk of loss by the negligence of such sub-agents should fall on the customer.

In the following states cases calling for the application of either of these two rules seem never to have reached the courts of last resort up to 1906; Alabama, Arizona, Arkansas, Delaware, Florida, Idaho, Maine, Nevada, New Hampshire, New Mexico, Oklahoma, Oregon, Rhode Island (But see *Pawcatuck Nat. Bank* v. *Barber,* 22 R. I. 73), South Carolina, Texas, Vermont, Virginia, Washington, West Virginia, and Wyoming.

It is almost unanimously held by the courts in the United States that it is negligence, for which the collecting bank will be held liable, to send a check deposited for collection direct to the drawee bank for collection.

Mr. Justice Elliott said, in *German Nat. Bank* v. *Burns, supra,* "Even if we can conceive of such an anomaly as one bank acting as the agent of another to make a collection against itself, it must be apparent that the selection of such an agent is not sanctioned by business-like prudence and discretion. How can the debtor be the proper agent of the creditor in the very matter of collecting the debt? His interests are all adverse to those of his principal. If the debtor is embarrassed, there is the temptation to delay; if wanting in integrity, there is the opportunity to destroy and deny the evidence of the indebtedness. * * * As a matter of law such method of doing business cannot be upheld. It violates every rule of diligence." *Drovers'*

*Nat. Bank* v. *Anglo-American P. & P. Co.*, 117 Ill. 100; *Merchants' Nat. Bank* v. *Goodman*, 109 Pa. 422; *German Nat. Bank* v. *Burns*, 12 Colo. 539; *Western Wheeled Scraper Co.* v. *Sadilek*, 50 Neb. 105; *Wagner* v. *Crook*, 167 Pa. 259; Contra, *Indig* v. *City Bank*, 80 N. Y. 100. For further discussion, see 4 MICHIGAN LAW REVIEW, p. 226, and 34 Am. Dec. 307, Note.

J. W.

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REASONABLE REGULATION OF PRIMARY ELECTIONS.—Primary election laws are gradually coming into more general existence, and are bound to raise many more or less interesting issues for the courts to pass upon. An important decision has just been rendered by the Supreme Court of Minnesota, in *State ex rel Thompson* v. *Scott*, 108 N. W. Rep. 828, upon the power of the state legislature to require the payment of a fee upon the filing of papers for nomination at the primary election, and the court held such a requirement to be a reasonable regulation and constitutional.

The Minnesota statute (§ 184, Rev. Laws, 1905), provides that any person eligible and desirous of having his name placed upon the primary election ballot as a candidate for any public office shall file his affidavit with the Secretary of State, when to be voted for in more than one county, and with the county auditor when to be voted for in a single county, and if the office be one for which pecuniary compensation is provided, upon the payment of a fee of $20 to the Secretary of State when filed with him, and $10 to the county auditor when filed with him, such officer shall then place the nominee's name upon the primary election ballot.

Sec. 1, Art. 9 of the Constitution provides for uniformity and equality of taxation, and sec. 17, Art. 1 of the Constitution, that no amount of property shall ever be required as a qualification for any office of public trust.

The relator claims that the filing fee bears no relation to the emolument of the office, cost of filing or cost or expenses of the election, and that its requirement is an unwarranted interference with the right of the voter, and if intended as a regulation, it is arbitrary, unreasonable, and void, ignoring the principles of equality and uniformity.

Upon the face of it these arguments would seem to be convincing, and upon a close examination of *People* v. *Board of Election Commissioners of Chicago*, 221 Ill. 9, 77 N. E. 321 (1905), and *State* v. *Drexel* (Nebr.), 105 N. W., 174 (1905), both cited in the opinion of the principal case, one is put to task to accept the distinctions between them and this case, maintained by the Minnesota court to exist. No doubt is entertained as to the power of the legislature to adopt some reasonable means to control and regulate primary elections. But if elections must be free to all who are qualified to participate in them, is it not also a maxim of democracy that the elector may have the right and opportunity to vote for whomsoever he wishes? This much admittedly true, can a man otherwise qualified than by failing or refusing to pay a fee, be refused to have his name placed upon the ballot? The case is novel in that it is new. Primary election laws are of comparatively recent origin, and only the principal case and the Nebraska and Illinois

cases, *supra,* directly in point, have been found, and the two latter are cited in the former.

In the Illinois case was involved a sort of graduated fee system, extending from $100 for governor, United States senator and congressman, down to $25 for a Chicago alderman. It was there held an arbitrary exaction of fees, bearing no relation to the services in filing of papers or expenses of the election; that it made ability and willingness to pay the test of qualification, and of the right to choose one for office. The Minnesota court sees in the Illinois case recognition of the principle that some reasonable means might be adopted, and distinguishes its own case as one of degree or amount and thus reasonable, saying that the Illinois act seemed to have its fee correspond with the importance of the office from the standpoint of emoluments. But in disposing of its case, the Illinois court says, "Every eligible person has a right to run for public office, without being subject to arbitrary or unreasonable burdens. The voters have a right to choose any eligible person, and he owes a duty to the public to qualify and serve." Further, explaining its meaning, the same court said, "Reasonable regulations, such as a petition from a proper percentage of voters, * * * or other reasonable restrictions or conditions may be imposed, * * * but there can be no discrimination between candidates based on the ground that one has money to pay for the privilege of being a candidate and chooses to pay, and another who has not the means or is unwilling to buy the privilege." Could that court have used stronger words? It creates in one's mind a doubt whether the Illinois court would have upheld even a lesser fee.

The Nebraska case is full as clear. In that case the fee required was one per cent of the emoluments of the office for the term which the candidate, if elected, would serve. In ruling against the law, that court said: "To say that the voters are free to exercise the elective franchise at a general election for nominees in the choice of which unwarranted restrictions and hindrances were interposed, would be a hollow mockery."

Both the Nebraska and the Illinois courts say that under these laws the plain intent of the legislature, apparent on the face of the acts, is that no one shall be voted for at the primary election except those who have contributed the cash to the public treasury. In the Illinois case, the court said, "The provision by which the candidates are required to buy their way to office are an unwarranted hindrance and impediment to the rights of the candidates and voters alike."

In distinguishing the principal case from the Nebraska case, the Minnesota court says, "The court [Nebraska], however, noted the distinction between such arbitrary measures and provisions amounting to only reasonable regulations." The following are the words of the Nebraska court, "It by no means follows that reasonable provisions may not be made. * * *, as for instance, *by requiring a petition by a stated percentage of the voters of the party.*" Continuing, the same court says, "It is at once apparent that the conditions imposed with reference to a *'filing fee'* most seriously interfere with the right of the electorate to freely choose from among those eligible to office, whomsoever they may desire, and this for the reasons given

amounts to an unwarranted hindrance and impediment to the free exercise of the elective franchise."

Surely, then, the Nebraska court does not leave much room for intimation as to its meaning. It would be interesting to know what both the Illinois and the Nebraska courts would decide on a lesser fee.

We may find many cases bearing upon, but not touching squarely, the point at issue. For instance, in *Bradley* v. *Clark,* 133 Cal. 196, it was held that the requirement of the taking of an oath by the successful candidate, as to the amount of his campaign expenditures as a prerequisite of his right to take office, under the "Purity Election Act," of 1893, was unconstitutional. Likewise in *Dapper* v. *Smith,* 138 Mich. 104, under the act of 1903, the requirement that before the name of any candidate shall be placed on the primary ballot, he shall on oath declare it to be his purpose to become such candidate, was held unconstitutional, in that the Constitution shall prescribe the oath that shall be taken by public officers, and that none other shall be required as a qualification for any office. These cases are cited here only to emphasize the fact that the right of candidates and voters alike have been jealously guarded by eminent courts. It is not deemed pertinent to cite more cases along this line as they do not throw any direct light upon the question of a "filing fee."

Nor must one become confused in distinguishing the cases under discussion from the existence of the custom among political parties, that the successful candidates, after having been nominated for public offices are assessed by the political party committee a stated amount, as a contribution to the political campaign fund, which is customary and not statutory.

It would seem then that the court in the principal case has given us the basis of its ruling when it says, "What is a reasonable restriction upon the right to stand for office *is a matter of opinion.*" The court admits that its law has not based its fee on the cost of filing papers, or expense of election, when it says, "The amount should be fixed at a point which would not impose a hardship upon any persons for whom there may be any considerable desire to vote at a nominating election, and yet enough to prevent a wholesale filing of petitions;" then saying, after stating that "the fee has no appreciable relation to the income" * * * "it may have some relation to the amount of expense incurred," — And we may add,—"And it may not."

At the close of the principal case is this statement, "The law very wisely assumes that any candidate who is proper material to stand as such before the people for any public office requiring a fee of $10 or $20 *will find no difficulty in raising the amount.*" A fortiori, the people may not say who is proper material for their public offices, and the payment of a fee is a qualification. We are unable to distinguish between the three cases noted, excepting as to degree or amount. A fee is a fee, and the difference between a $100 fee in Illinois, a one per cent of the emolument fee in Nebraska, and a $20 fee in Minnesota, is computed in dollars and cents, and not in principle.

W. B. C.

ASSIGNMENT OF WAGES TO BE EARNED IN THE FUTURE IN THE ABSENCE OF A CONTRACT OF EMPLOYMENT DEFINITE AS TO TIME.—The question presented to the Supreme Court of Ohio in *Rodijkeit* v. *Andrews* (1906), 74 O. S. —, 77 N. E. Rep. 747, was whether an assignment of wages executed by Rodijkeit was a good conveyance at law of the wages earned by the assignor in the service of the L. S. & M. S. Ry. Co., between the 1st and the 25th days of January, 1905.

A copy of the assignment is as follows:—

"To the Paymaster, L. S. & M. S. R. R.:

*Dear Sir*—For value received, I hereby assign seventy-five 00-100 dollars from the amount now due me, for services rendered the L. S. & M. S. R. R. or any other railway, firm or person wherever I may be employed as switchman and you are hereby authorized to pay the above amount to P. L. Andrews, or his order, and deduct the same in settlement with me.

No. ———— (Signed) T. RODIJKEIT."

Rodijkeit demurred to the answer of P. L. Andrews and thereby admitted the existence of the above assignment and the additional facts averred in Andrews' answer: "On the twenty-second day of April, 1904, the said plaintiff was in the employ of said defendant, The Lake Shore & Michigan Southern Railroad Company, and so remained in the employ of said defendant continually up to the twenty-fifth day of January, 1905; that on the twenty-second day of April, 1904, said plaintiff, for a valuable consideration, assigned to defendant, P. L. Andrews, out of the wages then due or to become due from said defendant company, the sum of $75.00, and that there is now due this answering defendant on said assignment, a copy of which is hereto attached and marked Exhibit A, and made a part hereof, the sum of forty-five and 60-100 dollars."

The rule laid down by the court is expressed in the following paragraph and supported by the cases cited:

"The question presented is the right of a person in the employment of another, in the absence of a contract for a definite time of employment, to assign future earnings from such employment.

"It is well settled that a mere expectancy or possibility is not assignable at law, consequently wages to be earned in the future, not under an existing engagement but under engagements subsequently to be made, are not assignable. If there is an existing employment, under which it may reasonably be expected that the wages assigned will be earned then the possibility is coupled with an interest and the wages may be assigned. *Mallin* v. *Wenham*, 209 Ill. 252, 70 N. E. 564, 65 L. R. A. 602, 101 Am. St. Rep. 233; *Metcalf* v. *Kincaid*, 87 Ia. 443, 54 N. W. 867, 43 Am. St. Rep. 391; *Peterson* v. *Ball*, 121 Ia. 544, 97 N. W. 79; *Bell* v. *Mulholland*, 90 Mo. App. 612; *Manly* v. *Bitzer*, 91 Ky. 596, 16 S. W. 464, 34 Am. St. Rep. 242; *Schilling* v. *Mullen*, 55 Minn. 122, 56 N. W. 586, 43 Am. St. Rep. 475; *Augur* v. *N. Y. B. & P. Co.*, 39 Conn. 536; *Garland* v. *Harrington*, 51 N. H. 409; *Mulhall* v. *Quinn*, 1 Gray (Mass.) 105, 61 Am. Dec. 414; *Hartley* v. *Tapley*, 2 Gray (Mass.) 565; *Brackett* v. *Blake*, 7 Metc. (Mass.), 335, 41 Am. Dec. 442; *Low* v. *Pew*, 108 Mass. 347, 11 Am. Rep. 357; *Lighbody* v. *Smith*, 125 Mass. 51;

*O'Keefe* v. *Allen*, 20 R. I. 414, 39 Atl. 752, 78 Am. St. Rep. 884; *Dolan* v. *Hughes*, 20 R. I. 513, 40 Atl. 344, 40 L. R. A. 736; *Thayer* v. *Kelsey*, 28 Vt. 19, 65 Am. Dec. 220."

The only decision of the Supreme Court of Ohio, previous to the principal case, bearing on the question, is found in *Grant* v. *Ludlow*, 8 O. S., p. 38, par. 6, where the following rule is laid down:

"Whatever choses in action are transmissible by operation of law are assignable in equity. The rule stated by STORY, J., in *Comegys et al.* v. *Vasse*, 1 Pet. 213, is undoubtedly correct and has been acted upon in the State of New York in determining what assignees may sue as plaintiffs under their code, 'in general it may be affirmed that mere personal torts which die with the party and do not survive to his personal representatives, are not capable of passing by assignment;' and that vested rights *ad rem* and *in re* possibilities coupled with an interest and claims growing out of and adhering to property may pass by assignment." (*Robinson* v. *Weeks*, 6 How. Pr.) 161; *Hall* v. *Robinson*, 2 Comst. 294; *Hoyt* v. *Thompson*, 1 Selden 347.)

The rule laid down in *Grant* v. *Ludlow* is consistent with the old established authorities on the question as to what property and rights are assignable at law. *Mitchell* v. *Winslow*, 2 Story 630; *Low* v. *Pew*, 108 Mass. 349.

While the court has Illinois, Iowa and Michigan decisions of comparatively recent date to substantiate its position, it would seem nevertheless that the rule laid down is illogical in the first place and incompatible with the old and long established rules of law which determine what rights and property are assignable, or may be sold at law.

The leading case on this question, *Low* v. *Pew et al.*, 108 Mass. 347, WILLISTON'S SELECTED CASES ON SALES, p. 2, lays down the rule:

"It is equally well settled that it is sufficient if the seller has a potential interest in the thing sold, but a mere possibility or expectancy of acquiring property, not coupled with any interest, does not constitute a potential interest in it, within the meaning of this rule. The seller must have a present interest in the property, of which the thing sold is the product, growth or increase. Having such interest, the right to the thing sold, and the sale of it is valid. Thus a man may sell the wool to grow upon his own sheep, but not upon the sheep of another; or the crops to grow upon his own land, but not upon the land in which he has no interest. 2 KENT COM. (10th ed.) 468; *Jones* v. *Richardson*, 10 Met. 481; *Bellows* v. *Wells*, 36 Verm. 599; *Van Hoozer* v. *Cory*, 34 Barb. 9.

The same principles have been applied by this court to the assignment of future wages or earnings in *Mulhall* v. *Quinn*, 1 Gray 105; an assignment of future wages, there being no contract of service, was held invalid. In *Hartley* v. *Tapley*, 2 Gray, 565, it was held that if a person is under a contract of service he may assign his future earnings growing out of such contract. The distinction between the cases is, that in the former the future earnings are a mere possibility coupled with no interest, while in the latter the possibility of future earnings is coupled with an interest and the right

to have, though contingent, and liable to be defeated, is a vested right. In the case at bar, the sellers, at the time of the sale, had no interest in the thing sold. There was a possibility that they might catch halibut; but it was a mere possibility and expectancy coupled with no interest. We are of the opinion that they had no actual or potential possession of, or interest in, the fish; and that the sale to the plaintiffs was void.

The plaintiffs rely upon *Gardner* v. *Hoeg*, 18 Pick. 168, and *Tripp* v. *Brownell*, 12 Cush. 376. In both of these cases it was held that the lay or share in the profits, which a seaman in a whaling voyage agreed to receive in lieu of wages, was assignable. The assignment in each case was, not of any part of the oil to be made, but of the debt which under the shipping articles would become due to the seaman from the owners at the end of the voyage. The court treated them as cases of assignments of choses in action. The question upon which the case at bar turns did not arise, and was not considered."

It is contended that the mere allegations of an "existing employment, under which it may reasonably be expected that the wages to be assigned will be earned," is not such an interest, vested or otherwise, as is contemplated by the law as laid down in *Low* v. *Pew*, 108 Mass., and *Grant* v. *Ludlow*, 8 O. S., as will connect the possibility that the assignor in the principal case might earn wages the following January, with an interest, thereby giving him the right to sell the same the preceding April unless he were under a contract of employment covering the entire period within which the wages, attempted to be assigned, could be earned.

The court admits that if Rodijkeit was not employed at the time the assignment was executed, then the possibility of his earning wages in the future was not coupled with an interest, such as is contemplated by the law in *Grant* v. *Ludlow* and *Low* v. *Pew*. Moreover, inasmuch as the general condition of laborers is to be engaged in earning wages, the mere fact that a laborer is employed at will, does not strengthen the possibility of earning wages nine months in the future any more than if he were not so engaged. But, if he has a contract of employment for a fixed time or an indefinite period, for stipulated wages, such that in the case of a *breach of the contract, an action for damages would lie,* then and then only, is the possibility of earning wages in the future coupled with such an interest as is contemplated by the law, in *Grant* v. *Ludlow, Low* v. *Pew* and *Belding* v. *Read*, 3 Hurl., and Coltman's Rep. 961.

It should be further remarked that *Low* v. *Pew, Lightbody* v. *Smith* and *Brackett* v. *Blake, Hartley* v. *Tapley*, cited by the court above, do not support the rule laid down by the Supreme Court of Ohio; on the contrary, the court says in *Lightbody* v. *Smith:*

"AMES, J. It may have been the expectation of all the parties concerned, at the time the advances were made to Lightbody, that he would continue in the employ of the defendants long enough for his wages to repay those advances. But there was no stipulation to that effect. On the contrary, his employment was by the day, and from day to day only. They had a right to discharge him at any moment; and he had a right to seek employment

elsewhere whenever he saw fit. Except as to wages actually due him at the time of the assignment, it was an attempt to transfer a mere possibility of future earnings and not an existing chose in action." (*Mulhall* v. *Quinn*, 1 Gray, 105; *Twiss* v. *Cheever*, 2 Allen, 40; *Brackett* v. *Blake*, 7 Met. 335; *Low* v. *Pew*, 108 Mass. 347, 350.)

It is admitted that by the assignment in the principal case Rodijkeit has contracted to pay Andrews $75.00 but the *real question before the court* is when (if at all) would the title to wages earned by Rodijkeit at some future time (in this case, Jan. 1st to 25th, 1905) pass to Andrews. The assignee could not acquire under the assignment any greater right to the wages than Rodijkeit could have and he could not sue on April 22nd, 1904, the date of the assignment, for wages earned during January, 1905.

The assignment could not be enforced in equity because in an employment at will the employee could quit or the employer could discharge him without creating any liability, and thus defeat any attempt of a court of equity to enforce specific performance of such a contract. (*Fairgraves* v. *The Lehigh Navigation Co.*, 2 Phil. Rep. p. 184-7).

Moreover, in the cases of the sales of wool to be grown on one's own sheep and of crops to be grown on one's own land, the will of no one could interfere with the maturing the fleece of wool or of the crop without creating a liability for which the one, interfering with the same, must answer.

In order that A may assign or sell personal property he must have in him the title of the property or the title to a part of the property, out of which the property attempted to be assigned or sold is the growth or increase by acumulation or addition, at the time he executes his assignment or grant of the property.

"It is an elementary principle of law of sales, that a man cannot grant personal property in which he has no interest or title. To be able to sell property, he must have a vested right in it at the time of the sale. Thus it has been held that a mortgage of goods which the mortgagor does not own at the time the mortgage is made, though he afterwards acquires them, is void. *James* v. *Richardson*, 10 Met. 461. The same principle is applicable to all sales of personal property. *Rice* v. *Stone*, 1 Allen, 566, and cases cited. *Head* v. *Goodwin*, 37 Maine, 181." *Low* v. *Pew*, 108 Mass. 349.

Therefore, such an assignment, with respect to wages to be earned in the future, is nothing more than a contract to sell the wages when they are earned, and in case of a breach of the contract an action for damages only would lie, just as in the case of a contract for the sale of property for future delivery.

In the case of *Dred Scott* v. *Sanford*, 19 How. U. S., the majority of the Supreme Court erred in passing on the property rights in slaves when held in free states, in not following the rules of law established in the free and slave states, in the old English cases and those of the civil law rather than following those cases decided in slave states. So here the writer thinks that the court erred in breaking away from the old rules of law as laid down in the earlier cases, thereby establishing or tending to establish a condition of industrial slavery by declaring it to be the law that a man may sell for a consideration his future earnings for any number of years, to-wit, for life.

JAS. HARRINGTON BOYD.