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Note and Comment

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NOTE AND COMMENT

WHAT IS THE PRACTICE OF MEDICINE?—This question was quite fully considered in 4 MICHIGAN LAW REVIEW, pp. 373-379, and many of the cases bearing upon the subject that had been decided at the time of the writing of the note were therein collected and reviewed. The case of *State* v. *Wilhite*, decided by the Supreme Court of Iowa, November 14, 1906, bears upon this subject, and is, perhaps, of sufficient importance to merit a brief reference.

The defendant was charged with practicing medicine without a license from the proper state authorities. He was convicted in the trial court, and upon appeal to the Supreme Court of the state, claimed, among other defenses, that the acts charged did not constitute the practice of medicine as defined by the statute, which provided that "any person shall be held as practicing medicine, surgery or obstetrics, or to be a physician within the meaning of this chapter, who shall publicly profess to be a physician, surgeon or obstetrician, and assume the duties, or who shall make a practice of prescribing or of prescribing and furnishing medicine for the sick, or who shall publicly profess to cure or heal." The defendant advertised himself as "Dr. Wilhite, Neurologist," but he denied practicing medicine in the ordinary sense of that term, and claimed that nature did the healing of the disease, he

simply discovering by his system the cause of disease and removing it, thus giving nature a chance. "To accomplish this," says the court, "he proposed to 'stop the leaks in the nervous system and repair the damages done, by methodical rest and dietetics.' In a long creed, criticising the treatment of disease by physicians generally, published in a local paper, he announced himself 'the master mechanic of the human body,' and added: 'The system I practice is taught in but one school in the world, and I am a graduate of that school,' and proceeded: 'If your organs are not working properly, call on a master mechanic who will remove the cause. If there is a leak of power, he stops it. If there is pressure on some of the shaftings (or nerves), causing a hot box (or pain), he removes it. If the right fuel has not been used, he orders the right kind, and if the fireman does not know how to fire, he teaches him or her the business.'" This published statement was signed "Dr. J. C. Wilhite, 526½ Central Avenue, Fort Dodge, Iowa."

The court held that the defendant was a practitioner of medicine, within the meaning of the statute, first because of his public profession of ability and readiness to heal and cure, and secondly because of his advice to patients as to how to care for themselves so that nature might effect a cure. The decision was based upon *State* v. *Heath,* 125 Iowa, 585, 101 N. W. Rep. 429, and *State* v. *Edmunds,* 127 Iowa, 333, 101 N. W. Rep. 431. In the former the court construed that part of the medical act above quoted, and held that it was the evident intention of the legislature to divide those who should be deemed to be practicing medicine into three classes, the first embracing all those who profess to be physicians and assume the duties; the second, those who make a practice of prescribing, or prescribing and furnishing medicine for the sick; and third, those who publicly profess to cure or heal. In speaking of those embraced within the last class, the court said: "It is doubtless true that a mere public profession of an ability to heal would not subject anyone to the penalties of the law. Such profession must be made under such circumstances as to indicate that it is made with a view of undertaking to cure the afflicted. * * * There is some reason for not exacting proof of actual treatment in all cases. Should one profess to be a physician, and assume the duties, or prescribe for the sick, little difficulty might be experienced in obtaining evidence of the fact. But suppose a charlatan, quack or other person assumes or pretends to believe he may effect cures in an invisible manner, and undertakes to do so? Proof of his effort would be all but impossible. The statute, in order to be effective, has denounced the public profession that he will cure or heal, and this may be proven without exacting evidence that he has actually undertaken to do so."

The case under review clearly falls within the principles of *State* v. *Heath.* That the defendant publicly professed an ability to heal with a view of attracting patients and undertaking their cure, is clearly apparent. The Iowa statute is fortunately comprehensive in its terms, and reaches ignorant and designing pretenders in a way that the medical acts of some other states have failed to do.

In answer to appellant's rather unusual contention that there were others equally guilty with himself, many of whom were enumerated, the court said:

"It will be time enough to determine each case when it reaches us, and should some escape, it may afford the accused some consolation to reflect that also at the fall of the tower of Siloam those who escaped were quite as great sinners as the eighteen who were crushed beneath its walls." H. B. H.

A HOME RULE CHARTER AND THE CONSTITUTION.—A very essential requisite to the successful government of large cities is that they be allowed considerable latitude in adapting the general system of municipal government to the needs peculiar to their own conditions. That form of government suited to cities under, for instance, fifty thousand population would be entirely inadequate and unsuited to one of half a million. In order to secure to those larger cities the greatest amount of freedom of home rule and still keep within constitutional bounds many schemes have been tried. In 1901 the people of Colorado tried it in the following manner: A constitutional amendment, known as Article 20, was adopted providing, among other things, that the City of Denver and the County of Arapahoe should be from thenceforth consolidated into one body, to be known as the City and County of Denver (Sec. 1); that a charter convention be called to frame a charter for the government of such city and county (Sec. 4); and that such charter should be amended, altered, and repealed, solely by the people of the City and County of Denver (Sec. 5). The amendment and charter were both duly adopted in the manner prescribed by law. In the charter it was provided that there should be elected two county judges, and, pursuant to this, an election was held at which one Johnson and another were elected to fill the offices of county judges. Both had entered upon the performance of their duties when quo warranto proceedings were instituted against Johnson, on the ground that the state constitution provided for one judge for every district unless otherwise provided by law, and that therefore the charter provision increasing the number to two was void. The Supreme Court of Colorado, STEELE and GUNTHER, JJ., dissenting, held that the respondent was holding the office of judge without lawful authority, and so gave judgment of ouster. *People ex rel. Miller, Atty. Gen.* v. *Johnson* (1905), — Colo. —, 86 Pac. 233.

The opinion of Mr. JUSTICE MAXWELL, speaking for the majority of the court, indicates that in their opinion, the question in the case was settled by the same court in *People* v. *Sours*, 31 Colo. 369, 74 Pac. 167, 102 Am. St. Rep. 34; going so far, in fact, as to say that it could be disposed of upon that ground alone, but apparently by way of fortifying their view, satisfactory reason for the decision was found in that the charter provision in question violated that provision of the Constitution of the United States (Art. 4, Sec. 4) relating to guaranteeing a republican form of government to each state. Since such complete reliance was put upon the decision in the *Sours* case, it is fitting that we determine just what was decided thereby.

It seems that it was a proceeding in mandamus instituted by the treasurer of Arapahoe County to compel the treasurer of the City of Denver to turn over to him the moneys, books, etc., belonging to him as treasurer of the city, the action being based on the ground that upon the issuance of the governor's proclamation, he, the treasurer of the county, had by virtue of the

amendment to the constitution, known as Article 20, become the treasurer of the new municipality, the City and County of Denver, that article having so provided expressly. To the action the defendant set up the unconstitutionality of the amendment for the reasons that it had not been properly adopted, and that it violated that section of the Federal Constitution relating to the guaranteeing of a republican form of government. The court decided, the opinion being written by the JUSTICE STEELE who dissented in the principal case, that the amendment had been properly adopted, and that it found "nothing in it subversive of the state government, or repugnant to the Constitution of the United States." In disposing of this last objection, the court arguendo states that if a certain interpretation, namely, that by the amendment the people of the City and County of Denver would be freed from the operation of the state constitution, thereby in effect making that municipality a distinct sovereignty in itself, which interpretation was contended for by counsel for the defendant, were to be adopted, the amendment would have to be held void, but the court did not consider this as the proper construction of the article. It was in these general statements that the majority of the court in the principal case found adequate ground to announce the question before the court stare decisis. It is very clear that the only propositions actually decided in the *Sours* case were that the amendment had been properly adopted and that it was such an one that was within the power of the people of Colorado to make. Since, there is no question but that the doctrine of stare decisis can be applied to only those questions which are *actually decided* by the court, it would seem that the court in the principal case was entirely unwarranted in declaring the question settled by the *Sours* case.

The only way the validity of acts done pursuant to and in accordance with the provisions of a statute or amendment can be raised is by questioning the constitutionality of the statute or amendment involved. Article 20, Sec. 2, provided that "the officers of the City and County of Denver shall be such as by appointment or election may be provided for by the charter," etc., and acting under authority of this section the charter convention changed the number of county judges from one to two. Surely the terms of the section were broad enough to authorize such a provision of the charter. It might be objected that county judges were not such officers as came within the purview of section two, but nowwhere does the court distinguish them from the rest of the purely county officers, while, on the other hand, the court speaks several times of the "county judge and *other* county officers." Now since the charter provision was authorized by the amendment, and the amendment had been in the *Sours* case declared constitutional and not repugnant to the Federal Constitution, it would seem that question in the principal case was stare decisis in favor of the respondent instead of the relator. The court, so far at least as it based its decision on this ground, put itself in the novel position of basing its conclusion upon the authority of a case which at the same time they were in effect overruling. It seems that the only trouble in the decision of the case is that the court seems to have gotten the stare decisis on the wrong side.

Was there any reason to declare the disputed charter provision invalid because it violated the Federal Constitution in the respect already referred to? "But first the question would present itself, whether the changes made are so radical in their nature as to render the government unrepublican." COOLEY CONST. LAW, p. 215. It seems that the Supreme Court of the United States, though it has had occasion in a few cases to pass upon it in a general way, has never been called upon to determine the precise scope of Art. 4, Sec. 4, so it is well to examine what has been the view of men contemporary to the formation of the Constitution and of those writing later. Hamilton, in answering those who thought the provision an officious interference in state affairs, says: "It could be no impediment to reforms of the state constitutions by a majority of the people in a legal and peaceable mode. This right would remain undiminished. The guaranty could only operate against changes to be effected by violence." Federalist No. 21. Madison says: "In a confederacy founded on republican principles, and composed of republican members, the superintending government ought clearly to possess authority to defend the system against aristocratical or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist that the forms of government under which the compact was entered into should be *substantially* maintained." Federalist No. 43 (42). Curtis, in his work on the History of the U. S. Const., in Chap. 16, says: "It now remains for me to state what appears to have been the meaning of the Constitution, embraced in these provisions. It is apparent, then, from all the proceedings and discussions on this subject, that, by guaranteeing a republican form of government it was not intended to maintain the existing constitutions of the states against all changes. This would have been to exercise a control over the sovereignty of the people of a state inconsistent with the nature and purposes of the Union. The people must be left entirely free to change their fundamental law, at their own pleasure, subject only to the condition, that they continue the republican form of government. The question arises, then, what is this form? * * * *. It may be said, therefore, with strictness, that in the American system a republican government is one based on the right of the people to govern themselves, but requiring that right to be exercised through public organs of representative character; and the organs constitute the government. How much or how little shall be imparted to this government, what restrictions shall be imposed upon it, and what the precise functions of its several departments shall be, with respect to the internal concerns of the state, the Constitution of the United States leaves untouched, except in a few particulars. It merely declares that a government having the *essential characteristics* of an American system shall be permitted to be established." Cooley says, "The purpose of these is to protect a Union founded on republican principles, and composed entirely of republican members, against aristocratic and monarchical innovations." CONST. LIM., 7th ed., p. 45. In view of what these eminent writers have said, does it not seem rather far-fetched to declare the charter provision increasing the number of judges from one to two and certain other no more important changes invalid

on that ground? But the court says if the people of the City and County of Denver could free themselves from the Constitution in one respect, they can in all. To this it may be answered that the charter could contain only such matters as were permitted by Art. 20. There probably were none, and it was not even suggested that power was granted by the amendment to the charter convention to legislate upon any other subjects that would be in contravention of the Constitution, so apparently the only respect in which the people of that municipality could free themselves from the organic law was with respect to officers. But these changes regarding officers were made pursuant to and by authority of a constitutional amendment which after proper adoption and by the decision in the *Sours* case, became as much a part of the constitution of Colorado as its first section, so if they were freed from one part of the organic law, it was by that organic law itself. The people of a state by virtue of their sovereignty can adopt any amendment, no matter what its provisions, providing it does not violate the Federal Constitution, and is adopted in the manner prescribed by the Constitution for adding amendments thereto. The republican form of government clause is, under the circumstances, the only part of the Federal Constitution which it may be contended was violated. This point and the proper adoption of Art. 20 were both ruled in the *Sours* case, but even were it the intention of the court in the principal case to overrule the former case, it is difficult to conceive, in view of what seems to be the scope of the republican form of government clause, how they reasonably could have done so.

It seems that the court could very reasonably have come to the conclusion that the charter provision was a local or municipal regulation, and, therefore, given the decision for the respondent on that ground. "Within their proper sphere, the municipalities have legislative powers, and may make by-laws and ordinances which have the force of local law * * * * subject to all the restrictions which the Federal Constitution imposes on the states," etc. COOLEY CONST. LAW, p. 380. Had the legislature made such a change as the charter did, such an objection never would have been raised; so neither should there be any objection to the municipality making the same change if it was a local regulation. It would seem that the regulation should be classed as local. There were no changes in the duties, jurisdiction, qualifications, or requirements, merely a provision that the duties be discharged by two instead of one and certain other minor changes in time of election, etc., as to conform to the peculiarities of their conditions. The number was increased because it was impossible for one judge to properly perform the duties, a condition peculiar to that district, and such as probably existed in no other in the state, and a measure eminently suited to enable the municipality to properly perform its duty as a governmental agency of the state. It is difficult to conceive a regulation that would be more entitled to be classed as local.

The decision is a body blow to home rule for cities in Colorado, and is based upon a case that in no way supports it and an interpretation of Art. 4, Sec. 4 of the United States Constitution that manifestly its framers never intended it to receive. R. W. A.

RECENT DECISIONS ON TRADE-MARKS AND UNFAIR TRADE.—It is well settled law that a person has a right so to present his goods to the public that they will be recognized as his goods. In so presenting them he may use a distinctive sign or mark, but it must be of such a character as actually to make them distinct. *Canal Co.* v. *Clarke* (1871), 13 Wall. 311. He can not use a generic term, or one simply descriptive of the goods, for such a mark would not differentiate his goods from others of the same kind. *Koehler* v. *Sanders* (1890), 122 N. Y. 65; HOPKIN'S UNFAIR TRADE, pp. 58-73; HESSELTINE'S, THE LAW OF TRADE-MARKS AND UNFAIR TRADE (1906), p. 6 et seq; 1 MICHIGAN LAW REVIEW, 128.

Both federal and state statutes have been passed which provide for the registration of appropriate signs or marks; this registration gives the owner the right to use the particular mark as a technical trade-mark. The modern policy of the courts is, however, to restrict the field of technical trade-marks and to widen the scope of what is known as unfair trade. (See note to *Scheuer* v. *Miller*, 20 C. C. A. 166).

In the case of *The New York Herald Company* v. *Star Company* (1906), 146 Fed. Rep. 204, the Herald Company filed a bill alleging that they and their licensees had used the words "Buster Brown" as a heading for their comic sheet for several years, and praying for an injunction restraining the defendant from using the words in a like manner. JUDGE LACOMBE held that the Herald Company had title to the words and that an injunction pendente lite should issue. The complainant, as stated in the opinion, sought solely to restrain the infringement of a trade-mark, no question as to copyright or unfair competition being presented. There would seem to be no doubt that the complainant had the exclusive right to the use of the words "Buster Brown," as the term is neither generic nor descriptive.

On the same day the opinion in the counter-suit of *Outcalt* v. *New York Herald* (1906), 146 Fed. Rep. 205, was filed. In this case Mr. Outcalt filed a bill to enjoin the Herald Company from offering for sale "any other pictures in which, although the scenes and incidents are different, some of the characters are imitations of those which appeared in the earlier pictures which complainant sold to defendant." JUDGE LACOMBE in dismissing the bill said, "It is sufficient to say that no authority is cited supporting this proposition which seems entirely novel and does not commend itself as sound."

The weight of authority is clearly to the effect that in unfair competition in trade the essence of the wrong is the fraud upon the public which induces the public to take the defendant's goods for the complainant's. *Croft* v. *Day* (1843), 7 Beav. 84; *Amoskeag Mfg. Co.* v. *Spear* (1849), 4 N. Y. Super. Ct. (2 Sandford) 599; *Pierce* v. *Guittard* (1885), 68 Cal. 68; *Vitascope Co.* v. *U. S. Phonograph Co.* (1897), 83 Fed. Rep. 30; *Singer Mfg. Co.* v. *June Mfg. Co.* (1896), 163 U. S. 169. Contra, see *Clinton Metallic Paint Co.* v. *N. Y. Metallic Paint Co.* (1898), 50 N. Y. Supp. 437. See also *Dover Stamping Co.* v. *Fellows* (1895), 163 Mass. 191, 28 L. R. A. 448.

Under the facts of *Outcalt* v. *N. Y. Herald* it would seem that the public could be deceived by the imitations of Mr. Outcalt's drawings, for the like-

ness could be striking enough so that an ordinary reader would not detect the difference.

There is another point upon which some courts base the doctrine of Unfair Trade. These courts hold that where a business has been built up by one person, by the use of distinctive signs or marks, no other person has the right to imitate such signs or marks and thereby gain a part of the good will of the business of the first user. *Wolfe* v. *Burke* (1874), 56 N. Y. 115; *Church* v. *Kresner* (1898), 49 N. Y. Supp. 742; *Enterprise Mfg. Co.* v. *Landers* (1904), 131 Fed. Rep. 240. It would seem that under these decisions Mr. Outcalt would have a common law right in the figures he has originated, for he has spent much time and labor in perfecting the type represented, and it is only because of his success that the Herald Company now insist upon printing imitations. To be sure they bought the pictures but did they buy the right to imitate that type?

In July, 1906, the case of *Warren Bros.* v. *Barber Asphalt Paving Company*, 108 N. W. Rep. 652, was decided by the Supreme Court of Michigan. In that case the complainant filed a bill alleging that it had coined the term "Bitulithic" pavement in 1902, and had copyrighted it in the office of the Secretary of State of Michigan, and that it had spent much time and money in advertising it, and also that it was a great success. It further alleged that in 1904 the City of Detroit, by its Department of Public Works, called for proposals for the construction of "Bitulithic" pavement, and the call further stated that the streets and avenues specified, were to be paved according to the specifications adopted by the common council, Feb. 23, 1904; also according to the estimates of the city engineer and the charter and ordinances of the City of Detroit. The defendant submitted bids which were accepted and complainant filed this bill to enjoin the defendant from using the word "Bitulithic" and from offering to manufacture the "Bitulithic" pavement.

The court, speaking through Mr. JUSTICE MOORE, does not directly decide the point as to whether or not the complainant has exclusive right to use the term "Bitulithic" alone, but decides that, since the municipality in its call for bids, described in detail the pavement required, any one has the right to construct such a pavement.

"We think," says the court, "there is nothing in what is proposed to be done by defendant, calculated to deceive the municipalities inviting bids, into the belief that the defendant was proposing to furnish to them a pavement made only by the complainant."

While the Michigan court recognizes the rule as to fraud upon the public, it restricts the scope of the fraud to the cities of Detroit and Cadillac. It has been held that the persons deceived do not need to be specific. *Von Mumm* v. *Frash* (1893), 56 Fed. Rep. 830. Yet, perhaps on account of the nature of pavement, great care would naturally be used in its selection, and the chances of deceit would be small. It would seem, however, that the complainants ought to have been given the exclusive right to use the word "Bitulithic," otherwise the copyright is useless. F. B. D.

LIABILITY OF ANOMALOUS OR IRREGULAR INDORSER.—Three cases decided quite recently in Arkansas, Massachusetts and the Circuit Court for the Eastern District of Pennsylvania illustrate the rules held in the various courts of the United States in regard to the liability of the irregular indorser. For purposes of distinction they are here designated as the Old Holding, the Holding under the Negotiable Instruments Law and the Holding in the United States Courts, and are, in brief, as follows:

Old Holding:—The Southern Mercantile Co. executed four promissory notes to the Bank of Pine Bluff which one Jones and another indorsed before delivery to the payee. Jones died and J. Jones was appointed administrator of his estate. The notes were not paid at maturity and the bank presented them, duly authenticated, to the administrator for allowance against the estate of the deceased; the administrator disallowed them and suit was brought on them by the bank. The administrator contended that the bank should be required to collect first of the Southern Mercantile Co. all it could by process of law before its claim should be allowed against the estate of Jones. *Held,* Those who indorse a note at the time it is executed by the maker and for the same consideration, as was the case here, are joint makers, and may be sued immediately on the default of the maker, without any proceedings having been taken against the maker. *Jones* v. *Bank of Pine Bluff,* — Ark. — (1906), 96 S. W. 1060.

Holding under Negotiable Instruments Law:—Suit upon a promissory note signed by the defendant, H. A. Crafts, payable to the plaintiff on demand. Before its delivery to the plaintiff the other defendant, L. D. Crafts, who alone defends, placed his name upon the back of it. *Held,* Under Rev. Laws, c. 73, § 80 (N. I. L.), providing that a person's signature on an instrument otherwise than as maker shall be deemed an indorsement, unless he clearly indicates his intention to be bound in some other capacity, a person placing his name on the back of a note before its delivery is liable only as an indorser. *Toole* v. *Crafts et al.,* — Mass. — (1906), 78 N. E. 775.

Holding in United States Courts:—Defendants indorsed a note executed by the Perfect Combustion Co. of America to the plaintiff, before delivery of same to the plaintiff. The maker having failed to pay the note, this suit was brought. *Held,* If a person puts his name in blank on the back of a note at the time it was made and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note. *Columbia Finance & Trust Co.* v. *Purcell* (C. C. E. D. Penn.) (1906), 146 Fed. Rep. 85.

Before the adoption of the Negotiable Instruments Law by the various states which have adopted it so far, the majority of the state courts held a person placing his name on the back of a negotiable note payable to a third person, before delivery, to be a joint maker or surety. Arkansas, *Killian* v. *Ashley,* 24 Ark. 511; Colorado prima facie, *Good* v. *Martin,* 1 Colo. 165; Delaware, *Massey* v. *Turner,* 2 Houst. 79; Florida, *Melton* v. *Brown,* 25 Fla. 461; Georgia, *Quin* v. *Sterne,* 26 Ga. 223; but see, *Atkinson* v. *Bennet,* 103 Ga. 508; Louisiana, *Rogers* v. *Gibbs,* 24 La. Ann. 467; Maine, *Colburn* v. *Averill,* 30 Me. 310; Maryland, *Schroeder* v. *Turner,* 68 Md. 506; Massachusetts, *Chaffee*

v. *Jones*, 19 Pick. 260; *Essex Co.* v. *Edmands*, 12 Gray 273; *Union Bank* v. *Willis*, 8 Met. 504; Michigan, *Herbage* v. *McEntee*, 40 Mich. 337; *Gumz* v. *Giegling*, 108 Mich. 295; Minnesota, *Pierse* v. *Irvine*, 1 Minn. 272; *Dennis* v. *Jackson*, 57 Minn. 286; Mississippi, *Richardson* v. *Foster*, 73 Miss. 12; Missouri prima facie, *Lewis* v. *Harvey*, 18 Mo. 74; *Faulkner* v. *Faulkner*, 73 Mo. 328; Nebraska, *Salisbury* v. *First Nat. Bank*, 37 Neb. 872; New Hampshire, *Martin* v. *Boyd*, 11 N. H. 385; North Carolina, prima facie, *Baker* v. *Robinson*, 63 N. C. 191; Ohio, *Ewan* v. *Brook &c. Co.*, 55 Ohio St. 596; Rhode Island, *Carpenter* v. *McLaughlin*, 12 R. I. 270; South Carolina, *Baker* v. *Scott*, 5 Rich. 305; Tennessee, *Provident &c. Assur. Co.* v. *Edmonds*, 95 Tenn. 53; Texas, prima facie, *Cook* v. *Southwick*, 9 Tex. 615. See also, *Horton* v. *Manning*, 37 Tex. 23; Utah, prima facie, *McGee* v. *Connor*, 1 Utah 92; Vermont, prima facie, *Nash* v. *Skinner*, 12 Vt. 219; *Strong* v. *Riker*, 16 Vt. 554; Washington, prima facie, *Donohoe-Kelly Banking Co.* v. *Puget Sound Sav. Bank*, 13 Wash. 407; West Virginia, prima facie, *Burton* v. *Hansford*, 10 W. Va. 470. In a number of states the indorser before the payee was regarded as a guarantor: California, *Pierce* v. *Kennedy*, 5 Cal. 138; Connecticut, *Bradley* v. *Phelps*, 2 Root 325; Illinois, prima facie, *Camden* v. *McKoy*, 3 Scam. 437; Iowa, *Veach* v. *Thompson*, 15 Iowa 380; Kansas, prima facie, *Fullerton* v. *Hill*, 48 Kan. 558; Kentucky, prima facie, *Arnold* v. *Bryant*, 8 Bush 668; Nevada, *Van Doren* v. *Tjader*, 1 Nev. 322; Texas, see cases supra; Virginia, prima facie, *Wattson* v. *Hart*, 6 Gratt. 633; West Virginia, *Roanoke Grocery &c. Co.* v. *Watkins*, 41 Va. 787; see also, *Burton* v. *Hansford* supra. In the following states the indorser before the payee was regarded, even before the adoption of the Negotiable Instruments Law by some of them, merely as an indorser: Alabama, *Hooks* v. *Anderson*, 58 Ala. 238; California, *Jones* v. *Goodwin*, 39 Cal. 493; see also *Rogers* v. *Schulenburg*, 111 Cal. 281; Indiana, prima facie, *Early* v. *Foster*, 7 Blackf. 35; *Houston* v. *Bruner*, 39 Ind. 376; New York, *Hall* v. *Newcomb*, 7 Hill 416; Oregon, *Kamm* v. *Holland*, 2 Or. 59; Wisconsin, *Heath* v. *Van Cott*, 9 Wis. 469; *Cady* v. *Shepard*, 12 Wis. 713. New York, Oregon and Pennsylvania have held that a person putting his name on a note before delivery is, prima facie, a second indorser only: *Bacon* v. *Burnham*, 37 N. Y. 614; *Deering* v. *Creighton*, 19 Or. 118; *Barto* v. *Schmeck*, 28 Pa. St. 144. New Jersey held that the mere signature of a third person on the back of a negotiable note before its indorsement by the payee creates, per se, no implied or commercial contract whatever but such signer is liable according to the intention with which he signed the note, and parol evidence is admissible to show what such intention was: *Crozier* v. *Chambers*, 20 N. J. L. 256. West Virginia, Georgia, Missouri, Ohio, Texas, Utah, Vermont, Illinois, Indiana, Kansas, Oregon and Pennsylvania also allow parol evidence to show such intention. See cases supra.

The section of the Negotiable Instruments Law relating to the liability of irregular indorsers makes a person, not otherwise a party to a negotiable instrument, who places thereon his signature in blank before delivery, liable as an indorser. By the adoption of this law in the following states the rule formerly held to in their courts in regard to the liability of the irregular indorser has been changed, Colorado, Connecticut, Florida, Iowa, Kansas,

Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nebraska, New Jersey, to the extent of denying the admission of parol evidence to show the intention with which the note was so signed, probably, North Carolina, Ohio, Rhode Island, Tennessee, Utah, West Virginia and Washington. This section has been construed in the courts of the following states, and the anomalous signer has been held liable as indorser: Massachusetts, *Thorpe* v. *White*, 74 N. E. 592; *Leonard* v. *Draper*, 187 Mass. 536; New York, *Corn* v. *Levy*, 89 N. Y. Supp. 658; Rhode Island, *McLean* v. *Bryer*, 24 R. I. 599; *Downey* v. *O'Keefe*, 59 Atl. 929. The above cases are all that the writer has been able to find on this particular section of the Negotiable Instrument Law; the number is small but, under the circumstances, this is not strange; indeed, as Mr. Amasa M. Eaton said in his article on the Negotiable Instruments Law in Vol. II, No. 4 of the MICHIGAN LAW REVIEW, in speaking of the small number of cases construing this law since its adoption by the various states, "the wonder is that many of these cases were ever brought, for it is difficult to see how the result could have been otherwise than as was decided."

In view of the fact that the principal object of the framers of the Negotiable Instruments Law was to render the law of negotiable paper uniform throughout the United States, and in view of the importance to business relations throughout the country that this object be accomplished, the holding in the principal case of the *Columbia Finance & Trust Co.* v. *Purcell*, supra, by the United States Circuit Court of Pennsylvania seems inexplicable. True, the decision of the honorable court is legally unassailable, but it would seem to have been an excellent opportunity for a far-seeing court to have followed the Negotiable Instrument Law, adopted by Pennsylvania, May 26, 1901, and in force at the time this cause of action arose, and thus added one more jurisdiction to the fast swelling ranks of the courts holding to this uniform rule. However benficial the adoption of such a rule by the United States Courts would be, the rule in those courts now is that a third party who places his name upon the back of a negotiable promissory note at the time of its execution by the maker, and before its delivery to the payee, will be liable as a joint maker, the question of the liability of such an indorser being one of general commercial law and so the decision of the court of the state in which the note was executed and made payable not being necessarily binding in the decision thereof by a Federal court. *Good* v. *Martin*, 95 U. S. 90; *First Nat. Bank* v. *Lockstitch Fence Co.*, 24 Fed. Rep. 221; *Bendley* v. *Townsend*, 109 U. S. 665; *Swift* v. *Tyson*, 41 U. S. (16 Pet.) 1; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 14; *Burgess* v. *Seligman*, 107 U. S. 20; *Myrick* v. *Mich. Cent. R. Co.*, 107 U. S. 102; *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 106. But see, *Hudson Furniture Co.* v. *Harding*, 70 Fed. 468; *Patent Title Co.* v. *Stratton*, 89 Fed. 174. J. W.

TREATIES PART OF THE SUPREME LAW OF THE LAND.—Referring to the action of the municipal authorities of San Francisco in excluding Japanese from the city schools, some writers for the daily press have taken the position that the federal goverment can not by treaties properly made with foreign

nations affect in any way regulations, statutes, or ordinances made by state or local authorities concerning matters that are primarily and generally proper matters for regulation by the states or other local authorities.

The statement thus broadly made, cannot be accepted by anyone—no matter to which school of constitutional constructionists he may belong—as an announcement of the correct doctrine.

No matter, for example, is more appropriate for regulation by the states than the matter of title to real property. Each state has power to regulate the tenure of real property within its limits, the modes of its acquisition and transfer, the rules of descent and the extent to which testamentary disposition of it may be made. *United States* v. *Fox,* 94 U. S. 315. And the courts of the United States will respect and follow the law of the state where the property is, as that law exists in the statutes of that state and the decisions of its courts. *Gormley* v. *Clark,* 134 U. S. 338, 348; *Brine* v. *Insurance Co.,* 96 U. S. 627. Nevertheless, the protection which should be afforded to citizens of foreign countries who may acquire property in this country is a proper subject for regulation by treaty (*Geofroy* v. *Riggs,* 133 U. S. 258, 266), and the statutes of any state as to the property rights of aliens, must, therefore, be construed with reference to a treaty, should there be one concerning the matter, between the United States and the government of the alien. Under the Constitution "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land," and a treaty may amend or abrogate, as the case may be, the statutes of a state—still allowing them to remain in force as to other cases not affected by the treaty. *Hauenstein* v. *Lynham,* 100 U. S. 483. State courts have often had occasion to consider the effect of treaties upon the title to real property, and have repeatedly admitted the supremacy of the treaty over state statutes. *Scharpf* v. *Schmidt,* 172 Ill. 255; *Adams* v. *Akerlund,* 168 Ill. 632; *Doehrel* v. *Hillmer,* 102 Ia. 169; *Succession of Sala,* 50 La. Ann. 1009.

As long ago as 1796 it was held that a provision in a state constitution or statute opposed to a provision of a treaty between a foreign nation and our national government is void, *Ware* v. *Hylton,* 3 Dall. 199; and *In re Parrott,* 6 Sawy. 349, it was held that constitutional and statutory provisions adopted in California regarding the employment of Chinese laborers by corporations, were void, because they violated rights guaranteed to Chinese subjects under a treaty between China and the United States.