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Note and Comment

Horace L. Wilgus

Thomas V. Williams

Fabian B. Dodds

Hugo Sonnenschein

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NOTE AND COMMENT

PAYMENT OF DIVIDENDS OUT OF CAPITAL OF CORPORATIONS AND THE NATURE OF TREASURY STOCK.—For a long time New Jersey has been considered the home of the "trusts." It has been the popular view that all sorts of institutions could be organized under the New Jersey Corporation Law of 1896, without any adequate supervision over their relations to their shareholders, the public, or the state, or any check upon many disreputable practices. It has been the opinion of the writer that when several of the provisions of the New Jersey law came before the courts for consideration, they would be found to be inconsistent with many of the schemes practiced by those who organized corporations under that law. The devices and contrivances of business men and promoters are always ahead of the actual development of the law, while "trusty justice in the courts follows after with slow and measured tread," and the schemes of men are often found to have gone awry. Notwithstanding the unfortunate decisions—if the writer may express his opinion—of the *Trenton Potteries Company* v. *Oliphant*, 58 N. J. Eq. 507, 78 Am. St. R. 612, 46 L. R. A. 255, 43 Atl. 723, WILGUS CORP. CAS. 981 (1899), and *Hodge* v. *U. S. Steel Corp.*, 54 Atl. 1. 1 MICH. LAW REV. 665 (1903), the New Jersey

courts have recently rendered several strong decisions having a wholesome tendency to check practices that are usually felt to be unwise, if nothing more. Of these special mention should be made of *Warren* v. *Pim* (1904), — N. J. C. —, 59 Atl. 773, validity of voting trusts, and *See* v. *Heppenheim* (1905), — N. J. C. —, 61 Atl. 843, 4 MICH. LAW REV. 220, 526, right of creditors to hold shareholders liable, as on unpaid stock, when issued for property valued on basis of prospective profits.

We have now two other cases just decided by the Court of Errors and Appeals. The first is *Siegman* v. *Electric Vehicle Co.*, March 4, 1907, relating to the declaration of dividends out of capital instead of profits. The second is *Knickerbocker Importation Co.* v. *State Board of Assessors*, decided the same date, and relating to the issue of treasury stock. The first will make directors careful about paying dividends out of capital, and the second will tend to check the improvident issue of treasury stock without some real substance back of it.

The opinion in the first case is by PITNEY, J. The General Corporation Act provided that in January of each year the directors should declare and pay a dividend of the whole accumulated profits, in excess of such reserved sum as was fixed by the shareholders as working capital, and that "No corporation shall make dividends except from the surplus profits, * * * nor in any way pay to the stockholders * * * any part of its capital stock, or reduce its capital stock except according to this act, and in case of any violation * * * of this section, the directors [so doing] shall be jointly and severally liable at any time within six years * * * to the corporation and to its creditors in the event of its dissolution or insolvency, to the full amount of the dividend * * * so paid out, etc."

Plaintiff as a stockholder suing on behalf of himself and all other stockholders, filed his bill against Mr. Kissel, one of the directors who, in 1899, declared and paid two dividends to the amount of $325,000 out of the capital of the company. The plea of the defendant, not denying this, set out that in 1903, when the plaintiff demanded of an entirely new board of directors that they bring suit to recover these dividends, they referred the matter to a committee, which, after thorough investigation, reported that the claim was without substance, no action should be brought or could be maintained, and if so it would be unfair to directors and against the best interest of the company; the directors approved this, found the dividends were declared fairly and in good faith, and refused to bring suit unless the shareholders so ordered. On request of plaintiff a shareholders' meeting was called to consider the matter, and after excluding the vote of the offending directors, 124,759 shares were voted against, and 650 shares in favor of, bringing the suit, all of which was stated to have been done in good faith. This plea was overruled, and defendant was ordered to answer the bill. In affirming this decision, the higher court holds that while it is ordinarily within the power of the board to determine whether a surplus exists, it cannot by making a mistake in this give itself or the corporation a power that is withheld; that this amounts to a reduction of stock, which by the statute can be done only in a certain prescribed way; that this act is not merely *ultra vires* as

unauthorized, but *ultra vires* because prohibited; the prohibition is addressed not merely to the directors but to the company. "Nothing less than the unanimous voice of the stockholders can sanction the violation of a statutory prohibition even when the prohibition is intended for the protection of the stockholders only. Where it is intended for the protection of the public as well * * * it is not easy to see how even the unanimous consent of the stockholders may give sanction." It would seem from this interpretation that the directors are liable to the corporation, without regard to its solvency or insolvency, for that matter was not referred to. Nothing is said or suggested as to whether the directors who have to return to the corporation the amount of the dividend so paid out, can recover the same from the shareholders who have received them, or whether the latter may keep them. The decision is based wholly upon the terms of the statute.

Upon this latter point—whether shareholders will be required to refund such dividends as are paid out of capital by the directors, but received by the shareholders in good faith, supposing they were paid from profits—it was held by Mr. JUSTICE PECKHAM in *McDonald* v. *Williams* (1899), 174 U. S. 397, WILGUS, CORP. CAS. 1981, that the receiver could not recover such from the shareholders, whether they were paid before or after insolvency; and that this was true notwithstanding the provisions of § 5204, R. S. of U. S., relating to National banks, saying, "No association, or any member thereof, shall during the time it shall continue its banking operations withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." The court intimated that the directors should be held personally liable. A similar view was taken in *Dykman* v. *Keeney* (1899), 160 N. Y. 677, 54 N. E. 1090, and *In re National Bank of Wales* (1899), 68 L. J. Ch. 634, 81 L. T. R. (N. S.) 363. The rule is the other way, if the share holder receives the dividends with knowledge that they are improperly paid out of the capital. *Grant* v. *Southern Contract Co.* (1898), 20 Ky. L. R. 960, 47 S. W. 1091; *Davenport* v. *Lines* (1899), 72 Conn. 118, WILGUS, CORP. CAS. 1980; *Davenport* v. *Lines* (1905), 77 Conn. 473, 59 Atl. 603

In the other recent New Jersey case referred to above—*Importation Co.* v. *Assessors*, the opinion was by Judge JAMES B. DILL, reversing the judgment of the Supreme Court, 62 Atl. 266. The plaintiff company was organized in 1903 for the importation and sale of wines and liquors, but with no special power to purchase, hold or reissue shares of its own capital stock, which was fixed at $500,000, all of which, at the organization of the company, it was agreed should be issued to the Cazanove Champagne Co. for all the latter's "rights and everything," and subject to its liabilities; as a part of the same transaction the Champagne Co. agreed to turn back immediately, upon its its receipt, to the Importation Co., $371,800 of the stock so received, to be held, and sold as needed, as treasury stock full paid and non-assessable, of the Importation Co. This was done, so that in fact the Champagne Co. received only $128,200 of the par value of the stock of the Importation Co., for the property turned over to that company, which thereupon declared its whole issue of $500,000 as full paid and non-assessable, and so reported to the State, at the same time crediting itself upon its books with $500,000 of prop-

erty against its stock, and with surplus assets of $371,800 in treasury stock—the usual book-keeping trick of making $128,200 worth of property appear to be equal to $871,800. This seemed to be all right until the State Board of Assessors assessed the franchise tax of one-tenth of one per cent upon the $500,000 instead of upon that sum less the treasury stock, which the Importing Co. claimed "cannot be considered as outstanding." It had already been ruled that a binding subscription to corporate stock fixed the basis of the franchise tax, whether the issue was valid, or for value or not (*American Pig Iron Storage Co.* v. *Assessors*, 56 N. J. L. 389; *Storage Battery Co.* v. *Assessors*, 60 N. J. L. 66), and so the defendant Assessors claimed, (1) that stock once issued remains outstanding until called in and canceled according to law; and (2) that the plaintiff company could not legally acquire, by purchase or gift, its own shares for the purpose stated, for such was not "a legitimate corporate purpose," within the implied authority to acquire its own shares for some purposes, admitted to exist under the corporation law (*Chapman* v. *Ironclad Rheostat Co.*, 62 N. J. L. 497; *Berger* v. *U. S. Steel Corp.*, 63 N. J. Eq. 809; *Oliver* v. *Ice Co.*, 64 N. J. Eq. 597),—the burden of showing the legitimacy of the transaction being upon the plaintiff.

The court ruled squarely in favor of the Assessors upon both points, saying as to the first, "Stock once issued is and remains outstanding within the purview of the Franchise Tax Act, although owned by the corporation issuing the same, until retired and canceled as provided by statute for the reduction of capital stock," and relying upon the decision of the Supreme Court in *American Pig Iron Storage Co.* v. *Assessors*, 56 N. J. L. 389, holding that the insertion of "issued and outstanding," after "capital stock," in the former law had not changed it, and upon the case of *Siegman* v. *Electric Vehicle Co.* (see above), to the effect that dividends cannot be paid out of capital.

As to the second point the court says the Champagne Co. subscribed for $500,000 of the stock, and could not, even by consent or connivance of the Importation Co., discharge itself of the liability to pay its subscription in full by paying a less sum either in money or property. There is no adequate proof of dollar for dollar value in the property received by the Importation Co. for the stock issued therefor; $128,200 of stock is the net consideration the Champagne Co. received for the property transferred; neither book-keeping nor resolutions of a board of directors creating values can be accepted as the equivalent of the proof of *bona fide* value required by the statute where stock is issued for property purchased; judged by either the "good faith" or "true value" rules, the proofs in this case do not make out the legality of this transaction. "We are forced to the conclusion that the record does not demonstrate a 'legitimate corporate purpose,' in the subscription, issue and return of this stock. The law, therefore, declares such transactions invalid. (MORAWETZ ON PRIVATE CORPORATIONS, § 112, 2d Ed; see *Maryland Trust Co.* v. *National Mechanics Bank*, — Md. —, 63 Atl. 70.)"

The issue of *treasury stock*, after the plan adopted in the case above, has become quite common. There is considerable difference of view upon the validity and effect of such stock, especially as regards creditors. Such a

method of issuing stock has been held valid as to creditors in *Otter* v. *Brevoort Petroleum Co.* (1867), 52 Barb. N. Y. 247; *Lake Superior Iron Co.* v. *Drexel* (1882), 90 N. Y. 87; *Davis Bros.* v. *Furnace Co.* (1892), 101 Ala. 127; *Kelly Bros.* v. *Fletcher* (1894), 94 Tenn. 1; *American Tube & Iron Co.* v. *Gas Co.* (1895), 165 Pa. St. 489; *Procter Land Co.* v. *Cooke* (1898), — Ky. —, 44 S. W. 391, and in a suit by a shareholder to enjoin the issue of such stock at less than face value, *Mosher* v. *Sinnott* (1905), — Colo. —, 79 Pac. 742. In all the foregoing cases the court in some way came to the conclusion that the whole stock so issued was issued in good faith and was full paid. It is difficult to understand how the courts reach such conclusions when there is a single transaction in which the owner of property agrees to sell his property for the whole issue of the capital stock of a corporation, and at the same time agrees to give back to the company half or more of the stock he receives. It is a credulous person that believes the seller really thinks his property is worth more than the stock he keeps, and it is rare to find a person who is so very liberal as to actually donate any large part of any property he really thinks worth anything to a private corporation. Such cases as *Morrow* v. *Iron & Steel Co.* (1889), 87 Tenn. 262, 10 Am. St. R. 658, 2 KEENER'S CORP. CAS. 989; *Alling* v. *Wenzel* (1890), 133 Ill. 264, 24 N. E. 551; *Coleman* v. *Howe* (1894), 154 Ill. 458, 45 Am. St. R. 133, and the case under review, in the writer's opinion, come much more nearly holding in accordance with actual, instead of simulated, facts. H. L. W.

DUTY OF A MANAGING DIRECTOR OF A CORPORATION TO AN INDIVIDUAL SHAREHOLDER.—An interesting case has recently been decided by the Supreme Court of the Philippine Islands, growing out of the sale of the friar lands, and upon the duty of a director, who purchases stock of a shareholder, to give such shareholder, without request, information concerning matters known to the director, but unknown to the shareholder, which make the stock much more valuable than it is supposed to be. The case is *Strong* v. *Gutierrez*, 5 Official Gazette, p. 72, January 30, 1907. Mrs. Strong, the plaintiff, was the owner of 800 shares in the Philippine Sugar Estates Development Company, Limited, an anonymous society formed under the Code of Commerce to hold the Dominican friar lands. Gutierrez was the owner of 30,040 of the 42,030 shares of the company, and was also its managing director. During the negotiations with Governor Taft for the purchase of the friar lands—July to October, 1903,—the defendant represented the company, without formal authority of the society, but after informal discussion at the directors' meeting. The fact that the negotiations were going on, and that the defendant represented the company, were generally known, and were known to the plaintiff and her agent. July 5, 1903, the defendant received an offer for the lands of the company which was to remain open for acceptance by the defendant till the end of October, 1903. This offer was such as to make the 800 shares of the plaintiff worth $129,664, Mexican currency. Near the end of October, Governor Taft made a higher offer, and the land was actually sold at a price making the 800 shares worth $181,504, Mexican currency.

October 10, 1903, these 800 shares of the plaintiff were in the hands of her agent, Jones, with power to sell, and were that day sold for $16,000, Mexican currency, to one Kauffman, who represented that he wished to purchase for a member of his wife's family. The negotiations for the purchase extended over a period of about three weeks, and were carried on through a broker, Mr. Sloan. It turned out, however, that Kauffman was in fact purchasing for the defendant, whose office was in the same building with Jones, while Kauffman's was some distance away; Kauffman was paid $1,800 for his services, and the defendant, in order to conceal his identity as purchaser, paid for the stock by the check of another party. Neither the plaintiff nor her agent had any reason to suppose the defendant was the purchaser, and as soon as the plaintiff became aware of this fact, she repudiated the sale, and brought suit to have it set aside, on the ground that the defendant being a director of the company and having knowledge of the facts making the shares so valuable was bound to disclose them or his identity as the purchaser to the plaintiff or her agent, whom he knew had the power to sell, before purchasing for himself.

The court by TRACY, J. (ARELLANO, C. J., TORRES, MAPA, and WILLARD, JJ., concurring) held for the defendant, while JOHNSON, J., gives a vigorous dissenting opinion, on the ground that "the defendant had concealed what he was under obligations to reveal." The Civil Code provides that consent given by reason of fraud shall be void; and "Deceit exists when by means of insidious words or machinations on the part of one of the contracting parties, the other is induced to enter into a contract which without them he could not have made." Under this, ARELLANO, C. J., and MAPA, J., held that there must be "some positive act of fraud"; a failure to give information, by one upon whom there is a duty to give information, is not *deceit by insidious words and machinations,* and so the Code provisions do not apply.

In the trial of the case, the pertinent American corporation cases were discussed, and are reviewed by JUDGE TRACY and JUDGE JOHNSON, the former relying upon *Commissioners* v. *Tippecanoe Co.* (1873), 44 Ind. 509, and *Deaderick* v. *Wilson* (1874), 67 Tenn. 108, WILGUS, CORP. CAS. 1791, directly sustaining his view, with other cases such as *Smith* v. *Hurd,* 12 Metc. 371, WILGUS, CORP. CAS. 1706, and *Slee* v. *Bloom,* 20 Johns. N. Y. 669, holding there is no legal privity between directors and shareholders, and that the former are not trustees for the latter in their individual capacity. JUDGE JOHNSON was able to cite two recent cases, *Stewart* v. *Harris* (1904), 69 Kans. 498, 77 Pac. 277, 105 Am. St. R. 178, and *Oliver* v. *Oliver* (1903), 118 Ga. 362, 45 S. E. 232, both of which are directly in point, the former holding that "before a director of the corporation, having knowledge of its affairs, can rightfully purchase the stock of one not actively engaged in the management of the concern, he must inform such stockholder of the true condition of corporate affairs." JUDGE JOHNSON, however, relies more, perhaps, upon the rule, as it is so generally stated in text-books and cases, that "the directors are trustees for the corporation and its shareholders," and holds there is no substantial distinction between the shareholders in their collective and in their individual capacity.

It is universally agreed that the directors can in no way use their position

to secure an advantage to themselves at the expense of the corporation—the artificial body; and if it was a partnership who selected an agent to manage its affairs, a like duty would result to each member. As the judge says: "Directors are persons selected to manage the business of the company for the benefit of the shareholders. It is an office of trust which if they undertake it is their duty to perform fully and entirely." Because there is a certain organization designed for the facility of management, and a certificate of stock, interposed between the real party in interest and the persons selected to manage this interest for him, never seemed to the writer to be a very satisfactory reason for saying that the one selected as manager might withhold his special knowledge gained while manager in order to secure from the one who selected him a special advantage for himself. However, it must be conceded that at present the weight of authority is with the majority opinion. Other American cases so holding are *Carpenter* v. *Danforth* (1868), 52 Barb. 581; *Johnson* v. *Laflin* (1878), 5 Dill 65, 103 U. S. 800; *Hooker* v. *Midland Steel Co.* (1905), 215 Ill. 444, 74 N. E. 445, 106 Am. St. R. 170. The case of *Rothmiller* v. *Stein* (1894), 143 N. Y. 581, held that where directors upon inquiry gave false information to one who in reliance upon this failed to sell his shares to advantage, such shareholder had an action for the deceit. This perhaps would have been "insidious words or machinations" within the meaning of the Civil Code; it, however, would not be by "one of the contracting parties," and for that reason might not have been actionable under that Code. H. L. W.

IMPAIRING OBLIGATION OF CONTRACT WITH FOREIGN CORPORATIONS.—In error to the Supreme Court of the United States to review a judgment of the Supreme Court of Colorado, on a proceeding by *quo warranto*, forfeiting the right of the plaintiff in error, a foreign corporation, to do business in Colorado until it should pay the state certain fees. The Colorado statute provided that foreign corporations upon admission into the State should "be subjected to all the liabilities, restrictions and duties which are or may be imposed upon such corporations of like character organized under the general laws of the state, and shall have no other or greater powers."

Under a Colorado law then in force, domestic corporations had a life of twenty years. A statute passed about three years after the admission of the plaintiff in error, imposed an annual *license* tax upon all corporations, two cents upon every $1,000 of the capital stock of domestic corporations, and four cents upon a like basis in the case of foreign corporations. Any corporation failing to pay this tax should forfeit its right to do business in the State until, etc. *Held*, MR. JUSTICE HOLMES, MR. JUSTICE HARLAN and MR. JUSTICE MOODY, dissenting, that the statute last mentioned did not impair the obligation of a contract existing between the plaintiff in error and the State. The dissenting justices assign no reason for their position. *American Smelting and Refining Co.* v. *People of the State of Colorado* (1907), 27 Sup. Ct. Rep. 198.

It seems that a State may not discriminate in respect to property taxation between foreign and domestic corporations, as such (BEALE. FOREIGN COR-

PORATIONS, § 466), foreign corporations being within the protection of the 14th Amendment to the Constitution of the United States. *Missouri Pacific Ry. Co.* v. *Mackey* (1888), 127 U. S. 205; *Pembina Consolidated Silver Mining & Milling Co.* v. *Penn* (1887), 125 U. S. 181. However, we have no concern with that provision. as the tax attempted to be imposed in the principal case is professedly a *license* tax. A foreign corporation is generally considered a mere licensee. *Doyle* v. *Continental Ins. Co.* (1876), 94 U. S. 535, 544. "The power and right of the State to exclude foreign corporations not engaged in interstate commerce, or in the furtherance of the business of the United States, from entering the State, includes the right to prevent such foreign corporations from continuing in business, and also includes the right to impose conditions upon such continuances." *Manchester Fire Ins. Co.* v. *Herriott* (1899), 91 Fed. 711. See also *Security Life Ins. Co.* v. *Prewitt* (1906), 202 U. S. 246, 26 Sup. Ct. Rep. 619. In the case of the *Home Ins. Co.* v. *City Council* (1876), 93 U. S. 116, a New York insurance company was admitted to do business in Georgia for one year. A few days later, a new law imposed upon it a license tax. It was held there was no impairment of a contract obligation. In the *Scottish U. & N. Ins. Co.* v. *Herriott* (1899), 109 Iowa 606, an English corporation of 20 years' standing in Iowa vainly contested the validity of a law imposing an annual business tax in the nature of a license tax (id. p. 614) on insurance companies, and discriminating between foreign and domestic corporations. Analogous to these is the case of *Mutual Life Ins. Co.* v. *Spratley* (1899), 172 U. S. 602.

The ENCYCLOPEDIA OF LAW AND PROCEDURE, Vol. 19, p. 1232, says: "And if there is not merely a license, but a grant or contract between a State and a foreign corporation, on the faith of which the corporation has expended money and begun operations, such contract cannot be impaired by subsequent legislation." To support this is cited, *Commonwealth* v. *Mobile & D. R. Co.* (1901), 64 S. W. 451, which in turn cites *New York, L. E. & W. R. Co.* v. *Penn* (1894), 153 U. S. 628, 643, 14 Sup. Ct. Rep. 952, 38 L. ed. 846. Investigation shows these to be cases where a foreign corporation was admitted by special law.

The case most like the present is *Wisconsin & Michigan Ry. Co.* v. *Powers* (1903), 191 U. S. 379, in which MR. JUSTICE HOLMES (here dissenting) wrote the opinion. A Michigan law, passed in 1893, exempted from taxation for a period of ten years all railroad corporations which should thereafter build and operate north of a certain parallel, unless their gross earnings should exceed $4,000 per mile. A railroad company thereafter incorporated under the laws of Michigan and immediately sold its property, rights and franchises to a foreign corporation, which claimed the right to exemption from taxation under the law of 1893, and in the face of an amendatory act of 1897, imposing a tax on every railroad operating within the state. MR. JUSTICE HOLMES admitted there was a consideration, viz., a detriment to the railroad, for the exemption contained in the act of 1893, but held the act of 1897 to be constitutional. "A distinction between an exemption from taxation contained in a special charter and general encouragement to all persons to engage in a certain class of enterprises is pointed out. * * * The broad ground of a case

like this is that, in view of the subject matter, the legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them and therefore it makes no promise to them." This was approvingly cited by Mr. JUSTICE BREWER in *Powers* v. *Detroit and Grand Haven Ry.* (1905), 201 U. S. 557. "But the difference between that case and this is obvious. That arose on a general law in respect to taxation, this on a special act having reference to a particular corporation * * *." If *Wisconsin & Michigan Ry. Co.* v. *Powers* is to be reconciled with the principal case, it can only be on this (a doubtful) ground: the one law promised an absolute exemption, the other (in effect) the same rate as that imposed on domestic corporations. T. V. W.

MAY A LEGISLATURE PASS AN ACT ALLOWING ACTUAL EXPENSES TO CIRCUIT JUDGES WHOSE SALARIES ARE FIXED BY THE STATE CONSTITUTION?—In June, 1905, the legislature of Michigan passed an act "providing for the reimbursement of circuit judges for actual expenses incurred by them in holding court in counties other than in the county where they reside." Public Acts Mich. 1905, p. 317. Article IX, § 1, of the Constitution of Michigan, provides that "the judges of the Circuit Court shall each receive an annual salary of $2,500.00. They shall receive no fees or perquisites whatever for the performance of any duties connected with their office. It shall not be competent for the legislature to increase the salaries herein provided."

The question arises, Is the act constitutional? The question has not been adjudicated in the courts of the state. Two modes of solving the problem present themselves: (1) A comparison with like situations in other states, and (2) An inquiry into what is meant by "salary," "fee," and "perquisite."

An examination of the situation in other states shows that in only two do the constitutions definitely fix the salaries of circuit judges. In Florida, Article V, § 9, of the Constitution, provides that "the salary of each circuit judge shall be $2,500.00 per year." The Revised Statutes (1892), p. 474, § 1376, provide for the reimbursement for extra expense in holding court out of the circuit. There has been no adjudication up to 1904, so presumably the statute has been in force since 1892, with no question arising as to its validity. In Nebraska, Article VI, §§ 13 and 14, of the Constitution, provide that "circuit judges shall receive $2,500.00 and shall not receive any other compensation, perquisite or benefit, for or on account of his office in any form whatsoever." No statute granting expenses has been passed, nor has any question arisen in the courts of the state. In Florida the situation is apparently the same as that in Michigan, with the exception that "fee and perquisites" do not appear in the constitutional provision. In Nebraska, the language of the Constitution places particular stress upon the finality of the salary first given.

2nd. The meaning of the constitutional provision of Michigan, in question, may be made clear by an examination of the judicial scope of "salary,"

"fee," and "perquisite." In *Windmiller* v. *People* (1898), 78 Ill. App. 273, it was held that salary means reward or recompense and does not include money paid to others as expenses. See also *Houser* v. *Orangeburg County* (1900), 59 S. C. 265, 37 S. E. Rep. 831; *Hall* v. *Hamilton* (1874), 74 Ill. 437. In *Commonwealth* v. *Bailey* (1881), 3 Ky. Law Rep. 110, 114, it was held that fees are rewards to be paid by individuals to public officers for their own or for public use. Salaries are rewards paid to public officers out of public funds for such service. See also *Steiner* v. *Sullivan* (1898), 74 Minn. 498. In *State* v. *Atherton* (1886), 19 Nev. 332, 10 Pac. Rep. 901, it was held that necessary expenses actually paid by judges for traveling by public conveyance in going to and from the place of holding court are not fees or perquisites of office. Although no direct adjudication on the constitutionality of the Michigan statute is obtainable, it would seem that the situation in Florida, taken together with the meaning of "salary," "fee" or "perquisite" as found in the decisions, would establish the constitutionality of the statute, and in view of the further provisions in § 11 of Article VI of the Constitution of Michigan, that circuit judges "may hold court for each other, and shall do so when required by law," it may be said that at least in so far as it refers to expenses incurred outside the circuit. when required by the governor to go on official duty in other circuits, there should be no question as to its validity.

F. B. D.

WHAT CONSTITUTES A WAIVER BY IMPLICATION OF THE PRIVILEGE OF CONFIDENTIAL COMMUNICATIONS BETWEEN ATTORNEY AND CLIENT.—"The rule is clear and well settled, that the confidential counsellor, solicitor or attorney of the party, cannot be compelled to disclose papers delivered or communications made to him or letters or entries made by him in that capacity." GREENLEAF, EVIDENCE, Vol. I, pp. 373, 374 (16th Ed.); *Bobo* v. *Bryson*, 21 Ark. 387; *Foster* v. *Hall*, 12 Pick. (Mass.) 89. Scarcely less elementary is the broad basis of public policy upon which the privilege rests, for if such communications were not protected, no man would dare to consult a professional adviser with a view to his defence or to the enforcement of his rights; and no man could safely come into a court either to obtain redress or to defend himself. LORD CHANCELLOR BROUGHAM *in Greenough* v. *Gaskell*, 1 My. & K. 101. The reason of the privilege makes it clear that the privilege is that of the client and not of the attorney, and such is today undisputed law, although under the original theory of the privilege it was the attorney's and not the client's. WIGMORE, EVIDENCE, Vol. IV, §2321; *Chirac* v. *Reinicker*, 11 Wheat. 294; *Lorimer* v. *Lorimer*, 124 Mich. 631; *Tate* v. *Tate*, 75 Va. 522; *State* v. *Tall*, 43 Minn. 273. It would seem, therefore, that the client alone or his attorney on his behalf, and not a third person, although a party to the cause, could object to the introduction of testimony involving privileged communications. WIGMORE, EVIDENCE, Vol. IV, § 2321. But the contrary is maintained by the court in the case of *Bacon* v. *Frisbie*, 80 N. Y. 394, in the following language: "And had Ratnour (client) not been a party to the action and so have no right to be at the trial and object, yet the objec-

tion would lie in the mouth of Frisbie, who by it would but call upon the court to keep untouched a rule of public policy, made and to be kept not for his good but for that of all men." Be that as it may it is undisputed that the rule of privilege is for the protection of the client only and that he and he alone can waive the privilege. WIGMORE, EVIDENCE, Vol. IV, § 2327; *Rowland* v. *Plummer*, 50 Ala. 182; *Tate* v. *Tate*, 75 Va. 522; *Lorimer* v. *Lorimer*, 124 Mich. 631; *Riddles* v. *Aiken*, 29 Mo. 453; *Hunt* v. *Blackburn*, 128 U. S. 464; *Blackburn* v. *Crawfords*, 3 Wall. 175. But the heirs, devisees or personal representatives of the client are so far regarded as standing in his place that they may waive the privilege of communications between the deceased client and his attorney. *Fossler* v. *Schriber*, 38 Ill. 172; *Winters* v. *Winters*, 102 Ia. 53. And where the privilege belongs to several clients in reference to the same communication, it was held by Chancellor Walworth in the leading case of *Bank of Utica* v. *Mersereau*, 3 Barb. Ch. (N. Y.) 528, that no one of them or even a majority, contrary to the expressed will of the others, could waive the privilege so as legally to justify the attorney in giving testimony in relation to such privileged communication. In accord, *Michael* v. *Foil*, 100 N. C. 178.

The client, moreover, can waive the privilege either expressly or by implication. WIGMORE, EVIDENCE, Vol. IV, § 2327; *Koeber* v. *Somers*, 108 Wis. 497; *Blackburn* v. *Crawfords*, 3 Wall. 175. But it is generally recognized that a waiver by implication should be plain and unequivocal. "An intention to release the privilege ought to be expressed, or if implied, the implication ought to be plain." *Cahoon* v. *The Commonwealth*, 21 Gratt. (Va.) 822; *State* v. *James*, 34 S. C. 49. No difficulty arises in the consideration of what constitutes an express waiver by the client, but there is much uncertainty and conflict concerning waiver by implication. Mr. Wigmore in his work on Evidence (Vol. IV, § 2327) sums up the situation in these words: "What constitutes a waiver by implication? Judicial decisions give no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i. e., not only the element of implied intention but also the element of fairness and consistency." Although perhaps the decisions on this point cannot all be reconciled a brief survey of a few differentiated cases may not be without value.

In England the rule seems to be that a party does not lose the right to withhold privileged documents by referring to the same in his pleadings. *Roberts* v. *Oppenheim*, 26 Ch. D. 724. In *Belsham* v. *Perceval*, 10 Jur. 772, it was held by Sir James Wigram that when a defendant set out part of a privileged document in his answer and referred to the remainder he lost the benefit of the privilege as to the part set out but not as to the remainder. The rule laid down in *Hunt* v. *Blackburn*, 128 U. S. 464, generally regarded as embodying the American holding on this particular aspect of waivers, seems, although somewhat obliquely, to be opposed to the English doctrine. CHIEF JUSTICE FULLER in delivering the opinion of the court in that case, said, "But the privilege is that of the client alone; no rule prohibits the latter from divulging his own secrets, and if the client has voluntarily waived the privilege it cannot be insisted upon to close the mouth of the attorney.

When Mrs. Blackburn entered upon *a line of defence* which involved what transpired between herself and Weatherford (attorney) and respecting which she testified, she waived her right to object to his giving his own account of the matter * * * ." It is also held in England that where there are a number of privileged documents involved, a waiver in respect to some of them does not preclude the party from claiming the privilege as to the remainder. *Lyell* v. *Kennedy,* 27 Ch. D. 1.

But the most difficult and oft met questions in relation to waiver by implication cluster around two main sets of facts, first, where the client himself takes the stand and, second, where the client calls his attorney as a witness in his behalf.

On the question whether a client in a criminal case, who turns state's evidence and goes on the stand to convict others by testimony which also convicts himself, waives the privilege of communications to and from his attorney, the cases are in conflict. The court in *Jones* v. *State,* 65 Miss. 179; and in *Alderman* v. *People,* 4 Mich. 414, held that there was such a waiver implied, on the theory that to preserve the privilege in such a case would be worse than vain, for while it could not help the witness, it might by withholding one, perhaps the only means, of impeaching him, work injustice toward the party on trial. But the contrary is maintained in able decisions in *Sutton* v. *State,* 16 Tex. App. 490; *State* v. *James,* 34 S. C. 49.

Where the client in the ordinary civil or criminal case takes the stand to testify in general in the cause, it would seem that he does not thereby waive the privilege of communications with his attorney, and the adversary ought not to be allowed to force such communications from him on cross-examination. By taking the stand it may be implied that he is ready to testify to all the facts within his knowledge touching the issues, but are confidential communications within the range of such facts? To hold in the affirmative would create the situation described by Mr. Wigmore in his work on EVIDENCE, Vol. IV, p. 3253, "the privilege would be exercised only at the penalty of closing the client's own mouth on the stand." The clear weight of authority seems to be, that a client does not waive the privilege by testifying in general in the cause. *Hemenway* v. *Smith,* 28 Vt. 701; *Duttenhofer* v. *The State,* 34 Oh. St. 91 (a criminal case), but see *King* v. *Barrett,* seq.; *Bigler* v. *Reyher,* 43 Ind. 112; *Oliver* v. *Pate,* 43 Ind. 132; *Barker* v. *Kuhn,* 38 Ia. 392; *State* v. *White,* 19 Kas. 445; *Wilkins* v. *Moore,* 20 Kan. 538; *McCooe* v. *Dighton,* 173 Mass. 117; *Herring* v. *State* (Texas), 42 S. W. 301. But in Ohio it was held that under their Code of Civil Procedure, if the client take the stand as a witness generally in his own behalf, he waives the privilege, *King* v. *Barrett,* 11 Oh. St. 261; and in an early Massachusetts' case, JUDGE AMES in rendering the opinion of the court said: "The objection that the defendant was wrongfully compelled to undergo a cross-examination as to what he said to his counsel cannot be sustained. The policy of the law will not allow the counsel himself to make disclosures of confidential communications from his client, but if his client sees fit to be a witness he makes himself liable to full cross-examination like any other witness" (p. 200). *Woburn* v. *Henshaw,* 101 Mass. 193.

But it is equally clear that if the client takes the stand in his own behalf and testifies as to certain communications to his attorney, he waives the priv-

ilege and the adversary is at liberty both to cross-examine the client in regard to such communications and also to call the attorney to the stand and examine him as to the same communications for the purpose of contradicting the client or otherwise discrediting the client's testimony. It would not subserve public policy to allow a client to use the privilege both as a sword and as a shield, to disclose as much of the privileged communications as suited his case and to withhold the remainder, and in addition, to have his voluntary disclosures exempted from the test of cross-examination. And to such effect are the authorities. WIGMORE, EVIDENCE, Vol. IV, § 2327; *Takamori* v. *Kanai*, 11 Hawaiian 1; *Louisville* v. *Nashville R. R.* v. *Hill*, 115 Ala. 334; *Hartford Fire Ins. Co.* v. *Reynolds*, 36 Mich. 502; *Young* v. *State*, 65 Ga. 525; *Eldridge* v. *State*, 126 Ala. 63; *Oliver* v. *Pate*, 43 Ind. 132; *Wilkins* v. *Moore*, 20 Kan. 538; *Tate* v. *Tate*, 75 Va. 522.

When the client calls his attorney as a witness in his own behalf, the question of how far such proceeding is a waiver by implication of the privilege, is apparently determined by the same considerations as in the case where the client himself takes the stand. The law on this point is well summarized in the early case of *Vaillant* v. *Dodemead*, 2 Atkyn's Rep. 524 (1742). The suit involved a bill to be relieved against a collusive assignment of a lease; the defendant having examined Mr. Bristow, his clerk in court, the plaintiff exhibited interrogatories for cross-examination, which were demurred to on the ground that the witness knew nothing of the matters inquired of, except what had come to his knowledge as the defendant's clerk. The Lord Chancellor in overruling the demurrer said, "That this is a cross-examination and whenever at law, the party calls upon his own attorney for a witness, the other side may cross-examine, but that must be relative to the same matter and not as to other points in the cause." If the client call his attorney as a witness in general to testify to facts which came to his knowledge otherwise than through confidential communications, he does not by implication waive the privilege of such communications. WIGMORE, EVIDENCE, Vol. IV, p. 3253, § 2327; *Landsberger* v. *Gorham*, 5 Calif. 450; *Montgomery* v. *Pickering*, 116 Mass. 227; *Blount* v. *Kimpton*, 155 Mass. 378. But if the client introduces testimony of his attorney regarding or involving privileged communications, then he impliedly waives the right to secrecy and the adversary can cross-examine as to such privileged communications as touch and concern the issues involved in the cause and developed on direct examination, but not as to other privileged communications. *Vaillant* v. *Dodemead*, 2 Atkyn's Rep. 524; *Takamori* v. *Kanai*, 11 Hawaiian Rep. 1; *Tate* v. *Tate*, 75 Va. 522.

Although different courts may reach dissimilar conclusions as to what constitutes an implied waiver of privileged communications to or by an attorney, under nearly identical sets of facts, yet they all seem to agree on the test to be applied, viz., that the client must be consistent and fair. If he wishes to avail himself of the privilege he must not attempt to benefit his case by introducing such communications in his own behalf; if he calls upon the attorney to disclose a portion of such communications in his interest, the adversary has then a right to draw out from the attorney or from the client (if he takes the stand) the entire communication and to test it by cross-examination.

H. S.