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Note and Comment

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NOTE AND COMMENT

THE LIABILITY OF CHARITABLE CORPORATIONS FOR THE TORTS OF THEIR SERVANTS.—This question was discussed quite fully in the last number of the REVIEW, pp. 552-559, under the title *Liability of Hospitals for the Negligence of their Physicians and Nurses,* particular attention being given to the reasons underlying the doctrine that charitable corporations are not liable for the negligence of their servants, provided proper care has been exercised in their selection, and to the limitations within which that doctrine should be confined. It was concluded that the true reason for the doctrine is not to be found, as many cases apparently hold, in the inviolability of trust funds, or, as some hold, in the exercise of a sound public policy, but rather in the contract relation which those who receive the benefits of the charity occupy toward such funds, and that the doctrine should be limited in its application to those who have expressly contracted that they will not hold the corporation liable for the negligence of its servants and those who, by accepting the benefits of the charity, impliedly contract that they will not, provided proper care has been exercised in the selection of such servants. Among the cases cited in

support of the proposition that public charities are not liable for the negligence of servants on account of the inviolability of trust funds was that of *Downes* v. *Harper Hospital*, 101 Mich. 555, 60 N. W. Rep. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427. Apparently this case stood for that doctrine. At all events, it had been frequently cited as authority for the doctrine. But in the recent case of *Bruce* v. *Central Methodist Episcopal Church*, decided by the Michigan Supreme Court, March 5, 1907, and reported in 110 N. W. Rep. 951, the *Downes Case* is distinguished and its apparent doctrine materially limited. The writer of the note in the last number of the REVIEW had not, at the time of its preparation, seen the case of *Bruce* v. *Central Methodist Episcopal Church*, and did not have the advantage of the excellent opinions filed therein, but it is quite apparent that they were inspired by the exhaustive opinion that inspired the note, namely, that of JUDGE LOWELL in *Powers* v. *Massachusetts Homœopathic Hospital*, 47 C. C. A. 122, 109 Fed. Rep. 294, 65 L. R. A. 372.

In *Bruce* v. *Central Methodist Episcopal Church*, plaintiff brought his action for injuries received while he was at work for a contractor tinting the ceiling of defendant's church edifice, the injury being caused by the breaking of a scaffolding furnished by defendant and which was defective owing to defendant's negligence. It was claimed that the defendant was a public charitable organization and that, under the doctrine of the *Downes Case*, its funds could not be used to satisfy a judgment for the negligent acts of its servants. While recognizing defendant as a charitable organization and that it is the law that the funds of such an organization cannot be used ordinarily for purposes other than those contemplated by the founders, the court maintained that the immunity was limited to the cases of those who had been beneficiaries of the charity, the reason of the limitation being that when such parties accept the benefits of the charity, they enter into a relation by which they impliedly contract that they will assume the risks arising from the negligence of the servants of the charity, if due care has been exercised in the selection of such servants.

Commenting upon the *Downes Case*, JUSTICE CARPENTER in his opinion says: "There is this distinction between *Downes* v. *Harper Hospital* and this case, viz.: in the *Downes Case* plaintiff was a patient in defendant's hospital and, therefore, a beneficiary of the charitable trust administered by the hospital corporation, while in this case, he was an employee of defendant's contractor, and not a beneficiary of the trust administered by defendant. If we hold that the principle of the *Downes Case* applies to the case at bar, we must declare that that principle exempts a corporation administering a charitable trust from all liability for the torts of its agents, and as a corporation can act only by and through its agents, that it is exempt from all liability whatsoever for torts. What is the principle underlying the *Downes Case?* Does it exempt a corporation administering a charitable trust from all liability for torts? Those who answer this question in the affirmative cannot support their position by appealing to the reasoning of the opinion in that case. While that opinion says, 'the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed

in its execution,' the pith of its reasoning in my judgment is contained in the following words: 'It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employes, though such acts result in damages to an innocent *beneficiary*. Those voluntarily accepting the benefit of the charity accept it upon this condition.'"

JUSTICE CARPENTER then proceeds to determine the true principle underlying the *Downes Case*, and after citing numerous authorities, continues:

"In the latest of these cases (*Powers* v. *Mass. Homœopathic Hospital*) the opinion is exhaustive and elaborate and discusses nearly all authorities—it is held that the ground upon which liability is denied is that of assumed risk, the court saying: 'One who accepts the benefit of a public or of a private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity; at any rate if the benefactor has used due care in selecting those servants.' If this is correct it is scarcely necessary to say that that principle has no application to the case at bar. Is it correct?

"The ground upon which liability is denied in nearly all the foregoing cases is that stated in the *Downes Case*, viz.: that it would thwart the purpose of the trust; that is, it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's torts. It is entirely logical to say that this will must be recognized by beneficiaries of the trust. It may justly be said that the benefit of the trust is extended to them and accepted by them upon the implied condition that they shall recognize that will. By becoming beneficiaries they agree to recognize it. But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by the general laws, and the duty of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative and not to the judicial department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity. * * * * * * * * * *

"I conclude from this reasoning that corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot, therefore claim exemption from responsibility for the torts

of their agents, unless that claim is based on a contract with the person injured by such a tort, and that *Downes* v. *Harper Hospital,* and other similar cases are consistent with this rule. They rest upon the principle correctly stated in *Powers* v. *Mass. Homœopathic Hospital, supra,* viz.: that the beneficiary of such charitable trust enters into a contract whereby he assumes the risk of such torts. It is not surprising that years should have elapsed before the correct legal principle governing these cases was announced in *Powers* v. *Mass. Homœopathic Hospital.* The discovery of correct legal principles, like the discovery of scientific and social truths, requires time and patient investigation."

The holding of the court in this case, resulting, as it does, in the limitation of the apparent doctrine of the *Downes Case,* is undoubtedly correct. The case defines and limits, in a clear and unmistakable way, the immunity of charities for the negligent acts of agents and servants. H. B. H.

THE POWERS OF GENERAL AND SPECIAL AGENTS.—The rule that one dealing with a general agent is not bound by limitations on the authority of such agent of which he does not know, was recently applied in the case of *Western Union Telegraph Co.* v. *Heathcote* (Ala.), 43 So. Rep. 117. A telegraph message was delayed, but the sendee of the message, plaintiff in the action, did not, as the rules of the company required, make claim for damages in writing within 60 days after the message was delivered for transmission. Plaintiff claimed that the local agent in charge of the business of the company in Birmingham had been orally notified, and that he had waived written notice. Defendant denied this, and insisted that in any case such agent had no authority to waive their rule requiring written notice. For other errors the case was sent back for new trial, but on this point the court held that as the agent was the general agent of defendants, and as there was no evidence that plaintiff, or her agent, knew of any limitation imposed by defendant on his authority, it would follow that on proof of a waiver by the agent defendant would be bound by his acts in this respect.

A distinction is taken in many of the cases between a general and a special agent, and the rule is laid down that the acts of a general agent, in all matters within the proper and legitimate scope of the business, bind the principal notwithstanding any secret limitations the principal may have imposed. In the case of a special agent, however, it is said that if he exceeds the authority given, the principal will not be bound. *Towle* v. *Leavitt,* 23 N. H. 360, 55 Am. Dec. 195, and cases cited, *Maryland Casualty Co.* v. *Peoples,* 26 Pa. Super. Ct. 142; *Sullivan* v. *Jahren* (Kan.), 79 Pac. Rep. 1071; *Schenck* v. *Griffith* (Ark.), 86 S. W. 850; *Loudon Savings Fund Society* v. *Hagerstown Savings Bank,* 36 Pa. St. 371. It is the purpose of this note to inquire whether this is a well founded distinction.

The cases are not agreed as to the definitions of general and special agents. While some definitions of a general agent give him a much broader authority than do others, yet there is substantial agreement that a general agent is one having authority to transact the business generally of his principal, or more often, the business of his principal of a particular kind, or in a partic-

ular place. *British and American Mortgage Co.* v. *Cody,* 135 Ala. 622; *First National Bank* v. *Nelson,* 38 Ga. 391; *Union Stock Yards Co.* v. *Mallory,* 157 Ill. 554. The definitions of a special agent are various. In *Loudon Savings Fund Society* v. *Hagerstown Savings Bank,* 36 Pa. St. 371, he is said to be one who is employed about one specific act, or certain specific acts only. See also *Gibson* v. *Snow Hardware Co.,* 94 Ala. 346; *South Bend Tag Mfg. Co.* v. *Dakota Ins. Co.,* 3 S. D. 205. The case of *Butler* v. *Maples,* 9 Wall. (U. S.) 766, is often cited. STRONG, J., says: "The purpose of the latter," the special agency, "is a single transaction, or a transaction with designated persons. It does not leave to the agent any discretion as to the persons with whom he may contract for the principal, if he be empowered to make more than one contract. Authority to buy for a principal a single article of merchandise by one contract, or to buy several articles from a person named, is a special agency." This distinction between one having authority to do specific acts only, and one having authority to act generally seems of small importance. The authority to do one act manifestly may be as broad in the performance of that act, as authority to do two or many acts, in the performance of those acts.

A more important distinction is brought out in the definition of a special agent as one acting under limited and circumscribed powers, the limitations being either imposed by the principal or naturally inferred from the nature of the act to be done. *Gibson* v. *Snow Hardware Co.,* 94 Ala. 346; *Pacific Biscuit Co.* v. *Dugger,* 40 Ore. 362; *Davis* v. *Talbot,* 137 Ind. 235; *St. Louis Gunning Advertising Co.* v. *Wanamaker* (Mo.), 90 S. W. 737. It is easy to see how legal consequences depend on whether one acts under limited or unlimited authority, and if agents can be classified into such as act under restrictions and such as do not, then here is a sensible and important classification. But it is believed there is no such distinction that can clearly be made. Every agent is presumed by law to be limited, either by his principal's instructions or by the nature of his undertaking. Some are more limited, others less; some secretly, others openly. If the limitations are secret it needs no citation of authorities to establish that the third person who deals with the general agent is not bound by them. The same is true of the special agent. If the limitations are not secret, then in either case the third person is bound by them. *Towle* v. *Leavitt,* 23 N. H. 360, 55 Am. Dec. 195; *Hatch* v. *Taylor,* 10 N. H. 538; *Bryant* v. *Moore,* 26 Me. 84, 45 Am. Dec. 96.

A number of cases have pointed out the impossibility of precise rules based on such distinctions. *Haskell* v. *Starbird,* 152 Mass. 117, 23 Am. St. Rep. 812; *Mechanics Bank* v. *New York & N. H. R. Co.,* 13 N. Y. 599, 632; *Cross* v. *A. T. & S. F. Ry. Co.,* 141 Mo. 132, 42 S. W. 675. The difficulty is well stated in *Merchants Ins. Co.* v. *New Mexico Lumber Co.,* 10 Colo. App. 223, 51 Pac. 174. "The great trouble is, courts are totally unable to define what a special, and what a general agent is, in terms which shall make the definition applicable to each particular case, so that it by no means follows that when an agent is called a general agent he possesses certain power, and when he is called a special one, the power may not be taken to be within the limits of his authority." The conclusion seems clear that general and special

are merely relative terms incapable of precise definition except as applied to the particular facts of each case. The scope of the authority of a general agent is, in general, broader than that of a special, *Mars* v. *Mars*, 27 S. C. 132, but it is entirely proper to refer to the same agent as either general or special, according as the emphasis is on the extent or the limitations of his powers. The terms are not precise, but used in this way they are often convenient. In any case the liability of the principal can not be settled by calling the agent a general agent or a special agent. If the act done by the agent, general or special, was within the real or apparent scope of his authority the principal will be bound. If it was not, the principal is not liable, regardless of whether the agent was general or special, or whether he acted under a general or a special authority. No objection can be taken to defining, as in the present case, what are the limits of the authority of a "general agent" of a telegraph company, and then announcing that limitations beyond those to be implied from the nature of the employment are not binding on third persons unless they are informed of them. But it would be open to the objections above pointed out to say that limitations are not binding because the agency is a general one. E. C. G.

MUNICIPAL ORDINANCES LICENSING TRADES AND OCCUPATIONS.—The validity of these ordinances and of the licenses imposed under them is a matter which has come before the courts with increasing frequency within the last fifteen or twenty years. The Supreme Court of Kansas has considered the question in the recent case of *City of Lebanon* v. *Zanditon*, 89 Pac. Rep. 10 (Feb. 9, 1907). The defendant was convicted of violating an ordinance of the city of Lebanon which provided that no transient merchant should be permitted to sell or offer for sale at retail any article of merchandise usually kept for sale by any merchant or manufacturer of the city within the limits of the city, without first paying a license tax of $10 per day. The penalty was a fine of not less than $5, nor more than $25 for each offense, and each day's violation should be considered a separate offense. The defendant, carrying a stock of clothing and furnishings, averaging $5,000 in value, was charged in the complaint upon 19 separate counts and was fined $304.00, or $16 for each day. The city had a population of about 700 people and was therefore, under the statutes of Kansas, a city of the third class. The cities of this class are empowered by the General Statutes of 1901, Sec. 1127, to license various trades and occupations. Such license tax, however, must be just and reasonable. Gen. St. 1901, Sec. 1128. Evidence was introduced in the lower court tending to prove that the annual revenue of the city for the two preceding years had not exceeded $1,000 per annum, and that this amount had been sufficient to pay the expenses of the municipality. There was also evidence that the annual sales of the resident merchants ranged from $7,000 to $16,000, and the net profits from such sales did not exceed $1,250 a year. The defendant contended that the tax was, under the circumstances, unjust and unreasonable. The majority opinion held that, under previous decisions of the court, such license could be used for the purpose of raising revenue; that, being a tax, "it knows no limit other than the neces-

sities of the public treasury, and the discretion of the taxing power;" that it must be flagrant abuse of the power to warrant the interference of the court, and that the tax was not unreasonable because it fell on transient merchants alone and not upon both transient and resident merchants, thus requiring of the former only a daily payment of $10 for the few days they transacted their business within the town. Upon this distinction the reasoning of the Illinois courts in the cases of *City of Peoria* v. *Gugenheim*, 61 Ill. App. 374, and *City of Carrolton* v. *Bazzette*, 159 Ill. 24, 42 N. E. 837, 31 L. R. A. 522, was held not to apply to the case under consideration. It was from the part of the opinion holding the tax reasonable that PORTER, J., dissented. It is argued in the dissenting opinion of the learned judge that the fourteenth amendment to the Federal Constitution, "protects the stranger within the gates equally with the oldest inhabitant," and "it forbids a city from suppressing or prohibiting a lawful business under the guise of an attempt to regulate, license or tax such business." It is also argued that the tax was unreasonable under the circumstances, for the ordinance required the daily payment whether the transient merchant remained one day or six months. Ordinances similar to this one of the city of Lebanon have usually been attacked, upon one or more of three grounds in a majority of the cases. The *first* has to do with the power of municipalities to license occupations, and especially their right to raise revenue by such license. The *second* considers the limitation upon such power that the tax must not discriminate. The *third* raises the question of the amount of the license fee. Is it reasonable or unreasonable?

What power then has a municipality to license or tax trades and occupations? The state may in the exercise of its police power and for purposes of regulation impose the burden of taking out a license upon occupations, trades or professions and require the payment of a fee before permitting the individual to engage in the business or vocation. The regulations may go to the extent of fixing the place, manner or time of carrying on such business, and may also place limits upon the number and personal qualifications of those who seek to engage in it. The police power and the taxing power are both inherent, so the state, in the absence of constitutional limitations, can require that such license be taken out either for the purposes of revenue or for regulation. *Kentz* v. *City of Mobile*, 120 Ala. 623; *Los Angeles County* v. *Eikenberry*, 131 Cal. 461; *Johnston* v. *City of Macon*, 62 Ga. 645; *Gundling* v. *Chicago*, 176 Ill. 340, 52 N. E. 44, 48 L. R. A. 230; *Hogan* v. *Indianapolis*, 159 Ind. 523, 65 N. E. 525; *Springfield* v. *Smith*, 138 Mo. 645, 40 S. W. 757; *Fretwell* v. *City of Troy*, 18 Kan. 271; *In re Martin*, 62 Kan. 638, 64 Pac. 43; *City of Ogden* v. *Crossman*, 17 Utah 66, 53 Pac. 985. However, when the state came to delegate this power to the municipalities there was at first some question, but now by statutes or under the decisions of the courts it has become usual for the state so to confer it and to allow its exercise for both purposes. *Van Hook* v. *Selma*, 70 Ala. 361; *San Jose* v. *S. J. & S. C. Ry. Co.*, 53 Cal. 475, 481; *Johnston* v. *City of Macon*, 62 Ga. 645; *Fretwell* v. *City of Troy*, 18 Kan. 271; *City of Newton* v. *Atchison*, 31 Kan. 151, 1 Pac. 288, 47 Am. Rep. 486; *St. Louis* v. *Bircher*, 76 Mo. 431; *Magneau* v. *Fremont*,

30 Neb. 843, 47 N. W. 280, 9 L. R. A. 786; *State* v. *French*, 109 N. C. 722, 14 S. E. 383, 26 Am. St. Rep. 590; *Marmet* v. *State*, 45 Ohio St. 63, 12 N. E. 463; *Lent* v. *Portland*, 42 Ore. 488, 71 Pac. 645; *State* v. *Hayne*, 4 S. C. 403; *State* v. *Stephens*, 4 Tex. 137; *Woodall* v. *Lynchburg*, 100 Va. 318, 40 S. E. 915. The two Kansas citations have clearly made it the law of that state that the powers under discussion can there be delegated for all purposes, but where this is not the case the distinction between licensing and taxing becomes of the utmost importance. The police power and the power to tax are separate and distinct. This distinction is of equal importance whether the state itself or one of its municipalities to which the right has been delegated is attempting to exercise it. As a rule the power to regulate by license does not give the power to raise revenue by license, but, when it appears to have been the legislative intent that such power should be given, the courts will so construe a charter or enactment. *Davis* v. *Macon*, 64 Ga. 128; *State* v. *Hoboken*, 33 N. J. L. 280. Neither can the state under the guise of regulating by the police power levy a tax, for the power to regulate is not the power to tax. *Van Hook* v. *Selma*, 70 Ala. 361; *Ottumwa* v. *Zekind*, 95 Iowa 622; *North Hudson County R. Co.* v. *City of Hoboken*, 41 N. J. L. 71; *Cache County* v. *Jensen*, 21 Utah 207, 61 Pac. 303. Conversely the power to raise revenue by license does not give the power to regulate. *Johnston* v. *City of Macon*, 62 Ga. 645. Still some courts have held that the power to regulate by license may be used to raise a reasonable revenue. The practical value of the distinction, as applied to licensing trades and occupations, is apparent, as it controls the validity of an ordinance both as to its purpose and as to the amount charged for taking it out or the fines imposed for a violation. When the ordinance is passed in the exercise of the police power it must be passed for the purpose of regulation, and in such case the fee is limited to the cost of supervision and administration. The amount charged must not be so large as to practically levy a tax, nor can it amount to a prohibition. *State* v. *Galvin*, 67 Conn. 29, 34 Atl. 708; *Fretwell* v. *Troy*, 18 Kan. 271; *Vansant* v. *Harlem Stage Co.*, 59 Md. 330; *Mankato* v. *Fowler*, 32 Minn. 364, 20 N. W. 361; *State ex rel. Wyatt* v. *Ashbrook*, 154 Mo. 375, 55 S. W. 627; *Caldwell* v. *Lincoln*, 19 Neb. 569, 27 N. W. 647; *North Hudson County Ry. Co.* v. *Hoboken*, 41 N. J. L. 71. To this general rule there is, however, an important exception. In the case of trades or occupations which are injurious to health or morals, the municipality may, in its discretion, place the amount of the license fee so high as to prohibit the carrying on of the business. This can be done only under the police power and for the protection of the public. *Howland* v. *City of Chicago*, 108 Ill. 496; *Walcott* v. *People*, 17 Mich. 68. But the distinction is clearly made here between a business or occupation of this character and an honorable or useful trade or profession. The exception stated can not be made to apply to the latter, even though they stand in need of regulation. Any charge over and above the necessary amount can be sustained only under the power to tax, as delegated to the municipality by the state through statute. And when the question becomes one of taxation, the usual limitations incident to the power to tax apply. The power to raise revenue by licensing occupations can not

inhere in a municipality, and can only be exercised by virtue of an express grant and by the use of plain terms or by necessary implication. The bare right to license for regulation must be plainly conferred, and the power to license for the purpose of raising revenue must be given in even more clear and unambiguous terms. *Kniper* v. *Louisville,* 7 Bush (Ky.) 599; *New Iberia* v. *Migues,* 32 La. Ann. 923; *St. Paul* v. *Briggs,* 85 Minn. 290, 88 N. W. 984; *Cache County* v. *Jensen,* 21 Utah 207, 61 Pac. 303. These questions were not raised in the case under consideration except incidentally, for by the statute the power to tax the occupation of merchants by license was clearly granted, and, under the former decisions of the Supreme Court of Kansas, it could not be denied to the city. The fee in question was therefore a tax and nothing else.

When, however, useful trades and occupations are thus taxed and revenue is the object of the ordinance, important limitations apply. Leaving out of consideration the federal question sometimes involved, it is difficult to classify the various restrictions from the cases, but two propositions are settled. The license must not discriminate and must not prohibit or be unreasonable. These are the second and third of the three points usually raised. That there must be no discrimination means, in general, that the license tax must operate equally upon all the individuals of the class. *In re Yot Sang* (D. C.), 75 F. 983; *City of Ft. Smith* v. *Scruggs,* 70 Ark. 549, 58 L. R. A. 921; *Stewart* v. *Kehrer,* 115 Ga. 184; *Braun* v. *City of Chicago,* 110 Ill. 186; *City of Terre Haute* v. *Kersey,* 159 Ind. 300, 64 N. E. 469; *City of Leavenworth* v. *Booth,* 15 Kan. 627; *Bullett* v. *Paducah,* 8 Ky. L. 870, 3 S. W. 802; *Brown* v. *Selser,* 106 Ia. 691; *Ash* v. *People,* 11 Mich. 347; *City of St. Louis* v. *Bowler,* 94 Mo. 630; *State* v. *French,* 17 Mont. 54, 30 L. R. A. 415; *Magneau* v. *City of Fremont,* 30 Neb. 843, 9 L. R. A. 786; *State* v. *Carter,* 129 N. C. 525; *Radebaugh* v. *Plain City,* 11 Ohio Dec. 612; *Mechanicsburg* v. *Koons,* 18 Pa. Super. Ct. 131; *Hill* v. *Abbeville,* 59 S. C. 396, 38 S. E. 11; *City of Columbia* v. *Beasley,* 20 Tenn. (Humph.) 232; *Huefling* v. *City of San Antonio,* 85 Tex. 228, 16 L. R. A. 608; *Morrill* v. *State,* 38 Wis. 428; *State* v. *Willingham,* 9 Wyo. 290, 52 L. R. A. 198. But a bona fide division of occupations into classes is not discrimination. The state can, and when the authority is given, the municipality may, judge what are separate classes, but it must be an actual and reasonable classification. *City Council of Augusta* v. *Clark & Co.,* 124 Ga. 254, 52 S. E. 881; *City of Waukon* v. *Fisk,* 124 Iowa 464, 100 N. W. 475; *Brady* v. *Mattern,* 125 Ia. 158, 100 N. W. 358; *In re Watson,* 17 S. D. 486, 97 N. W. 463. Furthermore it is discrimination where the burden is placed upon non-residents only. *City of Saginaw* v. *McKnight,* 106 Mich. 32, 63 N. W. 985; *Brooks* v. *Mangan,* 86 Mich. 576, 49 N. W. 633; *Borough of Sayre* v. *Phillips,* 148 Pa. 482, 16 L. R. A. 49; *Borough of Shamokin* v. *Flannigan,* 156 Pa. 43. And the ordinance is void if it discriminates against non-residents by favoring residents of the same class. *Morgan* v. *City of Orange,* 50 N. J. L. 389; *Thompson* v. *Ocean Grove Camp Meeting Ass'n,* 55 N. J. L. 507, 26 Atl. 798. In *People* v. *Russell,* 49 Mich. 619, 14 N. W. 568, Mr. JUSTICE COOLEY said, "It seems to us that this ordinance is aimed at non-residents, and there is room for the suspicion that it was designed for the benefit of

residents and therefore open to the criticism that it is in restraint of trade." In *Brooks* v. *Mangan* (*supra*), the ordinance was held objectionable because "It practically exempts residents from its provisions while imposing so unjust and unreasonable a license upon non-residents." In general any discrimination between the two will render an ordinance void. *Ex parte Deeds*, 75 Ark. 542, 87 S. W. 1030; *Gould* v. *City of Atlanta*, 55 Ga. 678; *Lucas* v. *City of Macomb*, 49 Ill. App. 60; *Kiel* v. *Chicago*, 176 Ill. 137; *City of Indianapolis* v. *Bieler*, 138 Ind. 30; *Simrall* v. *Covington*, 90 Ky. 444; *City of St. Louis* v. *Consolidated Coal Co.*, 113 Mo. 83; *Morgan* v. *Orange*, 50 N. J. L. 389; *Sipe* v. *Murphy*, 49 Ohio St. 536; *Nashville* v. *Althrop*, 5 Cold. (Tenn.) 554; *Clements* v. *Casper*, 4 Wyo. 494, 35 Pac. 472, and the cases cited above. The contrary is held in *City of Ottumwa* v. *Zekind*, 95 Iowa, 622, 29 L. R. A. 734, and *Temple* v. *Sumner*, 51 Miss. 13, on the ground that the word "transient" refers to the nature of the business, and not to the residence of a transient merchant. The discrimination in these cases may take various forms. It may be that fees are remitted when selling to resident merchants alone. *Nashville* v. *Althrop* (*supra*); *Clements* v. *Casper* (*supra*). There may be a proviso excepting the resident merchants. *Borough of Sayre* v. *Phillips* (*supra*). Such resident merchants as have paid a local mercantile tax may be excepted. *Borough of Shamokin* v. *Flannigan* (*supra*). The ordinance by its very terms may apply to transients or non-residents, *Ex parte Deeds* (*supra*); *Gould* v. *City of Atlanta* (*supra*). Or the ordinance may by its operation in fact discriminate and, though innocent in its terms, be held void. *People* v. *Russell* (*supra*); *Thompson* v. *Ocean Grove Camp Meeting Ass'n* (*supra*). Both residents and non-residents may be taxed, but the latter at a higher rate. *Morgan* v. *Orange* (*supra*). Or it may be that no license is required for the sale of articles manufactured by the residents of the city. *Lucas* v. *City of Macomb* (*supra*). This matter of discrimination does not seem to have been brought to the attention of the court in the case under consideration, but it is hard to see how the Lebanon ordinance does not offend in several particulars. By its terms it applies to transients only and, while a transient is not necessarily a non-resident, the practical effect of its operation is against non-residents in favor of residents. The Court distinguishes the case from the Illinois cases upon the very ground that the license falls upon transients and not upon resident merchants. The statute allows a municipality to license merchants. It may be questioned whether a classification as transients is bona fide. Furthermore the tax is levied only upon such transients as may be selling articles usually kept for sale by resident merchants.

The second limitation upon this form of taxation is that the license must not be prohibitive or unreasonable. The statutes conferring the powers are strictly construed by the courts, but when the power has been once clearly delegated a license imposed under it is deemed to be reasonable until the contrary is proved, and this question is for the courts to decide. It is a question of law. *Kingsley* v. *Chicago*, 124 Ill. 39; *City of South Bend* v. *Martin*, 142 Ind. 31, 29 L. R. A. 531; *Iowa City* v. *Newell*, 115 Iowa 55, 87 N. W. 739; *In re Martin*, 62 Kan. 638, 64 Pac. 43; *Kniper* v. *Louisville*, 7

Bush (Ky.) 599; *Mason* v. *Cumberland,* 92 Md. 451; *Van Baalen* v. *People,* 40 Mich. 258. It is admitted that the municipality is the proper judge of its own needs and of the amount of the license tax, but it must be reasonable. In Kansas the requirement is not so strict. There must be a gross abuse of its power by the city, *In re Martin* (*supra*), and before the courts can declare a tax unreasonable and void it must appear that there has been such unjust discrimination against the business that it is forced to bear more than its share of the expenses of the city government. *Fretwell* v. *City of Troy,* 18 Kan. 271. Under the police power dangerous occupations may be prohibited, but, if the power to license is to be lawfully exercised for the purpose of raising revenue, the fees for carrying on useful trades and occupations, while thus left in a large measure to the discretion of the city government, must not be so high as to be unreasonable or prohibitory and so defeat the very purpose for which they were imposed, the filling of the municipal treasury. *Ex parte Burnett,* 30 Ala. 461; *Morton* v. *Mayor and Council of Macon,* 111 Ga. 162, 50 L. R. A. 485; *City of Chicago* v. *Gunning System,* 214 Ill. 628, 73 N. E. 1035; *City of Lyons* v. *Cooper,* 39 Kan. 324; *People* v. *Russell,* 49 Mich. 617, 14 N. W. 568; *City of Mankato* v. *Fowler,* 32 Minn. 364; *City of Jackson* v. *Newman,* 59 Miss. 385; *Caldwell* v. *City of Lincoln,* 19 Neb. 569; *Ex parte Gregory,* 20 Tex. App. 210; *Cache County* v. *Jensen,* 21 Utah 207, 61 Pac. 303. Many of the cases in which the courts deal with the question of what is reasonable and what is unreasonable fall clearly upon the one side or the other. Some which stand nearer the border-line might well be examined. A license fee of $200 per year upon an auctioneer is reasonable in Chicago. *Wiggins* v. *Chicago,* 68 Ill. 372. Fees ranging from $5 to $25 per year on foot-peddlers, and running as high as $100 when two horses are used, are not unreasonable. *People* v. *Hotchkiss,* 118 Mich. 428; *Kneeland* v. *City of Pittsburg* (Pa.), 11 Atl. 657; *Rosenbloom* v. *State,* 64 Neb. 342. An auctioneer's fee of $5 for each auction day is reasonable. *Fretwell* v. *City of Troy,* 18 Kan. 271. And a fee upon hucksters of $35 per half year has been sustained. *Kansas City* v. *Overton,* 68 Kan. 560, 75 Pac. 549. On the other hand, $500 a year from druggists selling intoxicants in a town of 1600 inhabitants is illegal and prohibitive. *City of Lyons* v. *Cooper,* 39 Kan. 324, 18 Pac. 296. A fee of $10 for the first and $5 for each subsequent day from a peddler is unreasonable. *Brooks* v. *Mangan,* 86 Mich. 576, 49 N. W. 633, and one of $10 per day upon transient merchants "borders very closely upon the line." *City of Saginaw* v. *McKnight,* 106 Mich. 32, 53 N. W. 985. A license fee of $12 per day and not issued for less than ten days to sell bankrupt stock at auction is prohibitive. *Caldwell* v. *City of Lincoln,* 19 Neb. 569. A peddler's fee of $3 a day or $15 a week is held unreasonable and prohibitive in *Borough of Sayre* v. *Phillips,* 148 Pa. 482, 16 L. R. A. 49, and one of $10 per day upon transient merchants is held burdensome and void in *City of Carrollton* v. *Bazzette,* 159 Ill. 284, 42 N. E. 837, 31 L. R. A. 522. Also in *City of Peoria* v. *Gugenheim,* 61 Ill. App. 374, a similar fee of $200 a month is held to be unreasonable, discriminatory and void. It is difficult to draw any exact line from the decisions, for each case is controlled by its own particular circumstances. The purpose of the levy, the needs of the city,

its size and the amount of business done are all important factors. Applying these tests to the ordinance in the case under discussion, and considering the circumstances, the cases would seem to support the dissenting opinion.

F. B. F.

"SIC UTERE TUO UT ALIENUM NON LAEDAS."—By sanction of judicial opinion, the expression that the rightful use of one's own property cannot be a legal wrong to another; and, if damage happens, it is *damnum absque injuria,* has long been recognized, at least in the abstract, as a truism. As a proposition generally accepted, it may be stated that every man has a right to the natural use and enjoyment of his own property; and if, while lawfully in such use and enjoyment, without malice or negligence on his part, an unavoidable loss occurs to his neighbor, it is damage without any legal wrong. However, this principle has limitations. The courts are not disinclined to modify it when exigencies arise which would result in injustice, were it laid down as a hard and fast rule. Thus, in a recent case, the pumping of contaminated water from a coal mine into a stream used by the plaintiff for domestic purposes, rendering it unfit for use, the defendant coal company was held liable for damages, although such disposal of the water was necessary to the operation of the mine. *H. B. Bowling Coal Co.* v. *Ruffner* (1907), — Tenn. —, 100 S. W. Rep. 116.

The court looked upon the pollution of the stream as an invasion of an established right, such as will, in general, *per se,* constitute an injury for which damages are recoverable, and based its decision upon the broad ground that it is not permissible, under the facts involved, for a man to use his own property so as to injure the property of his neighbor. A contrary view has become the settled doctrine in Pennsylvania, set forth in the leading, but much criticised, case of *Sanderson* v. *The Pennsylvania Coal Co.,* 113 Pa. 126, 6 Atl. 457. S. purchased a tract of land in the coal regions, upon which he erected a handsome residence. One of the principal inducements to the purchase was that a stream of pure mountain water ran through the tract. This stream was actually used by him for culinary, bathing and other purposes. Shortly after the improvements were completed, defendants opened a coal mine above the land, the water from which so polluted the stream as to render the water unfit for use. The court held that the land on the lower level owed a natural servitude to that above in respect of receiving, without compensation by the owner, the water naturally flowing from it, and a pollution of the stream by the running into it of acidulated water from the mine was *damnum absque injuria,* where the stream formed the natural drainage of the basin, and the mine was conducted in the ordinary and usual mode of mining. The decision appears to have been founded upon expediency, and it would seem that its extreme views were justified by the peculiarity of local conditions. The case presents special circumstances as regards the great relative value of the minerals as compared with the surface of the surrounding country. It was followed, the next year, by another Pennsylvania case, and the doctrine sustained, that no recovery can be had by a lower against an

upper riparian proprietor for pollution of the water of the stream by pumping water from a mine in its natural condition, where the impurities are not due to artificial causes. *Long* v. *Trexler*, 5 Pa. Sup. Ct. 456, 8 Atl. 620. Also see *Merrifield* v. *Worcester*, 110 Mass. 216; *Frazier* v. *Brown*, 12 Ohio St. 294; *New Boston Coal Co.* v. *Pottsville Water Co.*, 54 Pa. St. 164; *Gibson* v. *Puchta*, 33 Cal. 310; *Prentice* v. *Geiger*, 74 N. Y. 341. That liability cannot be attached to the bare exercise of a legal right, if the party injuring confined himself strictly to its exercise, and if the injury done could not have been avoided except by abandoning the right, would appear to be a just and equitable rule of law. To have adopted a different rule in *Sanderson* v. *Coal Co.* would probably have enjoined the operation of the mine altogether, or have prevented mining except by the general consent of all parties affected. An early California case had already given expression to the same view,—that the adulteration of the water of a stream in its reasonable use for mining purposes was, as to the parties below entitled to the water, an injury without consequent damage. *Bear River & A. W. & M. Co.* v. *N. Y. Mining Co.*, 8 Cal. 327, 68 Am. Dec. 325.

The case at bar repudiates the doctrine of the Pennsylvania cases, and finds but little in the shape of judicial opinion to support it; and cannot discover, in the enormous value of the mining interests in Pennsylvania, a sufficient legal ground for allowing the proprietor of a mine so to work his minerals for his own profit as to destroy or greatly injure another's property by subjecting it to the burden of receiving water impaired in quality, without payment of compensation for the injury done. And the position has strong support both in England and in this country. *Mason* v. *Hill*, 5 B. & A. 1; *Acton* v. *Blundell*, 12 M. & W. 324; *Smith* v. *Fletcher*, L. R. 7 Ex. 305; *Baird* v. *Williamson*, 15 C. B. (N. S.) 375; *Rylands* v. *Fletcher*, L. R. (3 H. L. 330); *Pennington* v. *Coal Co.*, 5 Ch. Div. 769; *Tenn. Coal Co.* v. *Hamilton*, 100 Ala. 252, 14 South. 167; *Beach* v. *Sterling Iron & Zinc Co.*, 54 N. J. Eq. 65, 33 Atl. 286; *Iron Co.* v. *Tucker*, 48 Ohio St. 41. Again, courts readily act upon the proposition that "Riparian owners have, also, a natural right to have natural streams flow unimpaired in quality as well as quantity; and any use of the stream by one proprietor, which defiles or corrupts it to such a degree as essentially to impair its purity and usefulness for any of the purposes to which running water is usually applied, is an invasion of private right for which those injured thereby are entitled to a remedy." GOULD, WATERS, § 219; *Woodward* v. *Worcester*, 121 Mass. 245; *Richmond Mfg. Co.* v. *Atlantic De Laine Co.*, 10 R. I. 106; *Lewis* v. *Stein*, 16 Ala. 214; *Townsend* v. *Bell*, 24 N. Y. Supp. 193; *O'Riley* v. *McChesney*, 3 Lans. 278, 49 N. Y. 672; *Miss. Mills Co.* v. *Smith*, 69 Miss. 299; *State* v. *Kendall*, 38 Neb. 817. The doctrine emphasized is, that there must be one rule of law for all men, and by that rule all men's rights must be tried and tested; relaxation of legal liabilities and remission of legal duties in one direction would logically be followed by the same looseness in every other direction, resulting in an invasion of individual right which would be intolerable.

No test which satisfies the reason of the law in all respects can be made applicable to all cases. In view of the conflict of authority, rules of substan-

tial justice must be looked to in each case for an adjustment of the important problems growing out of the varied interests of the riparian owner and those of his neighbor engaged in the operation of his mine; and upon consideration of each individual controversy, except when the questions involved are qualified by the existence of peculiar conditions, the duty of the owner of property may be fixed within the limits of the maxim at the head of this article.

G. A. I.

INTERFERENCE WITH THE FORMATION OF CONTRACTS.—It is an open question as to what extent one person may lawfully interfere in the formation of contracts by others. The boycott and the blacklist are examples of such attempted interference made common in recent years by the violent strife between organized capital and organized labor. Minnesota has undertaken to settle one phase of this question by statute (Rev. Laws 1905, § 5097), which a recent case (*Joyce* v. *The Great Northern Ry. Co.* (1907), 110 N. W. Rep. 975) has interpreted and applied.

The portion of the statute here material is as follows: "It shall be unlawful for any two or more employers, or any two or more corporations, to combine or to agree to combine or confer together for the purpose of interfering with or preventing any person or persons from procuring employment, either by threats, promises, or by circulating or causing to be circulated blacklists, or for the purpose of procuring and causing the discharge of any employee or employees by any means whatsoever." Plaintiff in the case above cited was employed by the Union Depot Company as a track repairer. The defendant with other railway companies was a tenant of the Depot Company, paying rent for the use of its property, and had the exclusive control of three tracks leading thereto. Plaintiff, while repairing a track, was struck by defendant's engine, through the negligence, as he alleged, of defendant's engineer. Before he was recovered sufficiently to resume work, defendant's claim agent wrote to the Depot Company requesting that it refuse to take plaintiff on again unless he would release the railway company from all liability for the injury, in return for the payment of his medical expenses during his disability. The Depot Company acceded to the defendant's request and, Joyce being unwilling to sign the release, was refused reemployment. Thereupon he brought suit against the railway company in two separate causes of action, (1) for injury to his person caused by the alleged negligence of defendant's servant; (2) for the wrongful conduct of defendant in preventing his securing employment from the Union Depot Company. The trial court dismissed the second cause of action, and from an order denying a new trial as to that, plaintiff appealed. The attention of the court was first called to the statute by one of its members in consultation and additional briefs were called for.

The defendant contended: First, the sole object of the statute was to prevent conspiracy on the part of employers, designed to coerce employees, and the evidence here did not disclose a conspiracy. The court held, however, that the evident intent of the statute was to remedy the evils arising

from the "malicious conduct of employers in interfering with the free exercise of the will of employees in pursuing their calling * * * of which blacklist cases furnish an illustration." The terms of the statute were much broader than council for defendant contended, and it was a question for the jury to determine whether on the facts disclosed there was not a conference within the meaning of the statute.

A second contention of the defendant, and the ground on which the trial court dismissed the action, was that the railway company had such an interest in the conduct of the affairs of the Depot Company as to justify it in requesting the latter company not to employ any workman who may not be acceptable to the railway company. The court on this point conceded that the statute could not be given a literal application. "That is, it should not be so construed or applied that a rightful interference in preventing a person from obtaining employment with a particular employer would constitute a violation of its provisions. * * * Or as expressed in the case of *Hobe* v. *Swift*, 58 Minn. 84, 59 N. W. 831, the courts may 'spell the defense of good faith into the statute.'" *Price* v. *Denison*, 95 Minn. 106, 103 N. W. 728. A person may take such action in furtherance of his own interests, in the preservation and protection of his property rights, as circumstances may require, and so long as he does not act maliciously (that is, without justifiable cause) "toward, or unreasonable or unnecessarily interfere with the rights of his neighbor, he cannot be charged with actionable wrong, whatever may be the result of his conduct in pursuing his own welfare." If it was true, as defendant claimed, that the plaintiff was injured through his own negligence, and was prosecuting a wholly groundless claim, his character was such that the defendant might lawfully oppose his reemployment by the Depot Company which would place him in a position to assert other claims of the same nature. If, on the other hand, the defendant used its influence with the Depot Company to coerce the plaintiff into releasing a valid claim, its action was not justifiable. The question should have been left to the jury to determine from the evidence which position was the correct one.

Accepting the above interpretation, the problem is presented, what amounts to a justification? It is closely analagous to the original question confronting the courts when they seek to determine what, under the principles of the common law, amounts to an unlawful interference with the right to make contracts. It is an element of the natural liberty of all normal persons to be free to enjoy the fruits of their labor, skill, enterprise, without hindrance. "He that hinders another in his trade of livelihood, is liable to an action for so hindering him." HOLT in *Keeble* v. *Hickeringill*, 11 East 574; COOLEY, TORTS, p. 328. Interference with the right by force, fraud, or intimidation is unquestionably wrongful. In *Garret* v. *Taylor* (18 James 1 Cro. Jac. 567), one was held liable who by threats of mayhem, and suits of law prevented customers from patronizing plaintiffs' quarry. This is the unlawful element present in most boycott cases. *Gray* v. *Building Trade Council*, 91 Minn. 171; *Vegelahn* v. *Guntner*, 167 Mass. 92; *Hopkins* v. *Oxley Stave Co.*, 83 Fed. Rep. 912; *Moore* v. *Bricklayers' Union*, 23 Ohio L. J. 48; *Temperton* v. *Russell* [1903], 1 Q. B. 715; *Casey* v. *Typographical Union*, 45 Fed. 135.

Threat of financial loss may be as effective as threat of personal injury. The presence of combination or conspiracy in these cases is material only as affecting the force available to give meaning to their threats. It would seem that the accomplishment of the same end by an individual possessed of the same power to intimidate, would be equally unlawful, HOLMES in *Vegelahn* v. *Guntner, supra; Toledo, A. A. & N. M. Ry. Co.* v. *Penn Ry. Co.*, 54 Fed. Rep. 730; *Ertz* v. *Produce Co.*, 79 Minn. 140; *Brewster* v. *C. Millers Sons Co.*, 101 Ky. 368; *Mogul Steamship Co.* v. *McGregor* [1892], A. C. 25.

The puzzling question has been whether persuasion alone, with or without malice in law or in fact may amount to a wrongful interference with the right to contract. See Note 62 L. R. A. 709. Under our constitutional form of government this right of personal liberty against the violation of which by individuals the common law gives a remedy, is protected from arbitrary infringement at the hands of the legislature. TIEDEMAN, STATE AND FEDERAL CONTROL OF PERSONS AND PROPERTY, pp. 15, 76; REDFIELD'S annotation to *People* v. *Turner*, 55 Ill. 280; *Allgeyor* v. *La.*, 165 U. S. 578; 3 MICH. LAW REV. 617.

The state may curb the liberty of each individual for the benefit of the public as a whole or to protect other individuals in the exercise of equal rights. Just how far it may go in any particular case, must always be a question of some difficulty, the ultimate answer to which rests with the courts. It is this difficulty that the courts meet in construing and applying such a statute as the one in question. From this standpoint, the cases are suggestive that indicate the extent to which the courts have gone to protect the right to contract of one person in restraining the natural liberty of others.

In *Mattison* v. *L. S. & M. S. Ry. Co.*, 2 Ohio N. P. 276, defendant was held liable for blacklisting plaintiff and maliciously preventing his employment by another railway company. In *Vanarsdale* v. *Laverty*, 69 Pa. 103, defendants, for the purpose of injuring plaintiff, and without any valid grounds addressed a petition to a school board to prevent plaintiff from receiving employment as a teacher. The act was held unlawful. They had a "right to speak out but * * * the right of petition is not so sacred that the private purposes and motives of the actors cannot be inquired into."

Several cases have arisen where an employer has forbidden his employees from patronizing a store or business carried on by some third party. In *Payne* v. *Western & A. Ry. Co.*, 13 Lea. 507, 49 Am. Rep. 666, the employer was not held liable to the third party. The holding was similar in *Robison* v. *Texas Pine Land Ass'n* (Tex. Civ. App.), 40 S. W. 843, justified here on the ground of lawful trade competition; the defendant was operating a company store with which plaintiff competed. Upon facts similar to those in the *Payne* case, *supra*, the opposite conclusion was reached in *Graham* v. *St. Charles Street Ry. Co.*, 47 La. Ann. 214; *International & G. N. Ry. Co.* v. *Greenwood*, 2 Tex. Civ. App. 76, and *Chiatovich* v. *Hanchett*, 88 Fed. Rep. 873. The reasoning was in general that while the employer could hire whomsoever he would he had no right to make the injury of a third party a condition of employment to gratify his own whim, caprice or prejudice.

Ordinary trade competition is lawful howsoever it may injure others,

and one may give discounts below actual cost of service to those who will deal with him exclusively, under-sell, grant rebates, etc., for the purpose of upbuilding his own business. *Mogul Steamship Company* v. *McGregor* [1892], A. C. 25; *Lough* v. *Outerbridge,* 143 N. Y. 271; *Ajello* v. *Worsley* [1898], 1 Ch. 274; *Continental Ins. Co.* v. *Fire Underwriters,* 67 Fed. Rep. 310. But when wholesale lumber dealers persuaded other dealers not to deal with the plaintiffs who were mill owners, because they had sold direct to consumers, they were held liable. *Olive* v. *Van Patten,* 7 Tex. Civ. App. 630; *Delz* v. *Winfree,* 80 Tex. 400; *Jackson* v. *Stanfield,* 137 Ind. 592, and *Ertz* v. *Produce Exchange Co.,* 79 Minn. 140, are similar in effect. The object in these cases was to interfere in the internal affairs of the plaintiffs, directly injuring them, for the purpose of indirectly benefiting the defendants by maintaining a monopoly.

In several cases the officers or members of trade unions have been held liable, where, for the purpose of compelling the plaintiff to conform to their regulations they have deprived him of present or prospective patrons by threatening to boycott the latter if they dealt with him. *Gray* v. *Building Trade Council,* 91 Minn. 171; *Temperton* v. *Russell* [1893], 1 Q. B. 715; *Quinn* v. *Leathem* [1901], A. C. 495. On the other hand, their action has been justified on the ground of lawful trade competition where they have prevented the employment or procured the discharge of the plaintiff by refusing to work with him under a common employer. *Nat. Protective Ass'n* v. *Cumming,* 170 N. Y. 315; *Allen* v. *Flood* [1898], A. C. 1, 1 MICH. LAW REV. 28; *Contra, Berry* v. *Donovan* (1905), 188 Mass. 353, 74 N. E. Rep. 603, where the sole object was to compel the plaintiff, or fellow workman, to join the union, a matter in which he should be allowed to exercise his own discretion. The court said the action would have been justifiable if the plaintiff had been an incompetent or unsafe workman.

In *Vegelahn* v. *Guntner,* 167 Mass. 92, defendants were enjoined from maintaining pickets in front of plaintiff's building and from preventing other workmen from entering his employment either by force, intimidation, or persuasion. Mr. JUSTICE FIELD and Mr. JUSTICE HOLMES dissented on the ground that if they had a right to strike at all, they also should be allowed to state their grievances to others, and thus by lawful persuasion procure their aid in effecting the object of the strike. HOLMES, in his opinion made an observation that becomes patent after a review of the cases. "It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question that judicial reasoning seems often to be inadequate. The true grounds of decision are considerations of policy and social advantage, and it is vain to suppose that solutions can be attained merely by logic, and the general propositions of law that nobody disputes." Some confusion has resulted from the failure to distinguish between malice in law and malice in fact. See 2 MICH. LAW REV. 305. The subject may be summed up in general terms in the language of the court in *Berry* v. *Donovan, supra,* where the plaintiff employed at will lost his place through the malicious intermeddling of the defendant. "Such a right (of contract) may be lawfully interfered

with only by one who is acting in the exercise of an equal or a superior right which comes in conflict with the other. An intentional interference with such a right without lawful justification is malicious in law even if it is from good motives and without express malice." It permits "reasonable efforts of a proper kind which have a direct tendency to benefit one party in his business at the expense of another." Of course, the gist of the question is, however, what are "reasonable efforts" and what rights of the defendant are "equal" or "superior" to the plaintiff's?

Interference with the formation and interference with the performance of contracts are analagous subjects. The latter has been treated in previous numbers of this REVIEW. In an article by Prof. Wilgus on *Allen* v. *Flood*, [1898], A. C. 1, 1 MICH. LAW REV. 28, and Note and Comment by H. L. W. in *Glamorgan Coal Co. et al.* v. *S. Wales Miners' Federation et al.* [1903], 2 K. B. 545, 2 MICH. LAW REV. 305; on *Berry* v. *Donovan*, 188 Mass. 353, 4 MICH. LAW REV. 58, and on *S. Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905], A. C. 239, 4 MICH. LAW REV. 138. In these articles the history of this right of action has been traced from its inception in old feudal principles to the present doctrine laid down in the *Glamorgan* case, that "knowingly inducing breach of contract without just cause is unlawful." The right of action for interference with the formation of contracts is of recent origin and is a recognition of the need of more adequate protection to individual liberty. The tendency of modern cases is to place the two in the same category. See articles by JEREMIAH SMITH, 20 HARV. LAW REV., pp. 253, 345, 429. However, while no clear line of demarcation yet appears in the cases, it seems reasonable that less would be required to justify interference with the formation than with the performance of contracts. *Walker* v. *Cronin*, 107 Mass. 555; *Pope Motor Car Co.* v. *Keegan*, 150 Fed. 148; *Harges Furniture Co.* v. *Amalgamated Wood Workers' Local Union*, 165 Ind. 421, 2 L. R. A. (n. s.) 788. A. B. C.

THE RIGHT OF DIRECTORS TO USE CORPORATE FUNDS IN GETTING PROXIES FROM THE STOCKHOLDERS.—There has been much interest of late in the question of the right of the directors of a corporation to use the corporate funds in securing their own reelection, or in gaining support for some particular policy. The question, though one of great practical importance, has seldom reached the courts, and what seems to be the first American decision on the subject has been recently handed down by the New York Court of Appeals in *Lawyer's Advertising Co.* v. *Consolidated Ry. Lighting & Refrigerating Co.* (1907), — N. Y. —, 80 N. E. Rep. 199. In this case a majority of the directors were engaged with the president in a contest for the control of the corporation. By contract with plaintiff they published in its newspapers not only notices of a stockholder's meeting, but notices urging the stockholders to execute proxies and return them to the directors for their use in the contest, and they published a reply to a circular which had been sent to the stockholders by the other faction. The plaintiff sued the corporation on the contract. But the court held that the directors had no right to divert the

funds of the corporation to any such purpose; conceding that they were acting in good faith, on its face the contract showed that the directors had no power to make it on behalf of the corporation, and for this service (except as to the notice of the meeting) the plaintiff could not recover.

Practically the same question has just been decided in England in *Peel* v. *London and Northwestern Railway Company* (1907), L. R., 1 Ch. 5. In this case certain shareholders sued for an injunction against the railway company and its directors, to restrain them from using the corporate funds in sending out proxies and circulars with a view of influencing the votes of shareholders in favor of a policy advocated by the directors. There had been a controversy for some time between certain shareholders and the directors, as to the proper policy to be pursued by the corporation and both sides were lining up their forces for the half-yearly meeting of the shareholders. Not only did the directors propose to send circulars and proxy blanks stamped with revenue stamps to the shareholders, but they sent out orders for certain "district goods" managers and "traffic" superintendents to canvass and obtain signed proxies for the directors. The court *held* that inasmuch as the directors were not in any way acting in their own interests, or for the purpose of procuring their own reelection, but solely in the interests of the company as they understood them, that therefore the expenditures were properly chargeable to the corporation and that injunction would not lie.

The court expressly overrules the only other English decision on the point, *Studdert* v. *Grosvenor* (1886), L. R. 33 Ch. 528, in which KAY, J., had laid down the rule that "the directors have no right to employ the funds of the company to get into their own hands the majority of the voting power," and that "such a proceeding was a misapplication of the funds, beyond the power of a general meeting to sanction."

This latter would seem to be unquestionably the better rule. Otherwise what protection have the stockholders against the directors using *all* the corporate funds in reckless contests to maintain themselves in power? To this very obvious argument, BUCKLEY, L. J., replies: "I am well aware that cases often arise in which the board in power are anxious to maintain themselves in power, to procure their own re-election, or to drive a policy not really in the interests of the corporation, but for some private purpose of their own, down the throats of the corporators at a general meeting, and in which they issue at the expense of the company circulars and proxy papers, for the purpose of attaining that object. When a case of that kind comes before the court, I sincerely trust that the decision of this court in this case will not be cited as any authority for justifying the action of the directors."

But it is submitted that this is a dangerous doctrine. In the cases which have arisen, the amounts involved have been less than $1,000. But if the new English rule is correct, the directors may spend many thousands of dollars of the corporation's money, to perpetuate their policy or power. And the only safeguard which the law would require would be *good faith*. But how is the court to determine whether directors are acting in good faith? How can a judge accurately weigh and determine the motives of men engaged in contests of this kind? The forces which control the large corporation are

so concealed, the interests involved are so great, the opportunities for getting at the real facts are so inadequate, that the courts would be unable to give the stockholders any protection whatever.

More than that, the theory of corporate control is that each owner of a share has as much right to impress his views as to corporate policies on his fellow-shareholders as any other member of the corporation, voting of course according to the number of shares which he owns. But if the directors are to add to the prestige and influence which naturally comes to them as directors, all the power which they may gain by using the corporation funds and the corporation employees to control and gather the proxies of the stockholders, the fundamental theory of corporate control is gone, and the concentration of power in the officers which we have today would be marvelously and dangerously enhanced. In most of our large corporations, a directorate, once in power could never be dislodged. The New York court lays down what seems to be the better and safer rule. H. T. M.

SALES VOID FOR UNCERTAINTY AND LACK OF MUTUALITY.—Plaintiff sued defendants, wholesalers in salt, for damages for failure to deliver salt in accordance with demand of plaintiffs, under terms of a written contract whereby plaintiffs agreed to order and defendants agreed to ship, within a certain period, 750 tons of salt to be ordered by plaintiffs out of a list of some nine different grades of salt, at different prices. Plaintiffs in two orders, ordered the entire 750 tons, of one grade, and defendants refused to comply. Defence was that this was an executed contract void for uncertainty. *Held,* that contract was an executory one and not void for uncertainty merely because it gave the buyer the right to order the stipulated amount in any one or all of the nine different grades of salt. *Mebius & Drescher Co.* v. *Mills* (1907), — Calif. —, 88 Pac. Rep. 917.

The case is of importance as passing upon the binding effect of a contract which in numberless forms, is in daily use in the business world. The general principles underlying the decision are elementary, viz., that in order to create a valid and binding contract there must be mutuality and certainty. Courts do not differ in the recognition of the force of these principles, but there is some confusion noticeable in the application of these principles by different courts to somewhat similar sets of facts. Thus a contract to furnish so much of a commodity as the purchaser "may require in his trade" has been held invalid. *Crane* v. *Crane & Co.,* 105 Fed. 869. The following contracts have likewise been held invalid on ground of lack of certainty and mutuality: to sell such amounts as purchaser may "want or desire in his business," *Cold Blast Transp. Co.* v. *Kansas City Co.,* 114 Fed. 77; to deliver oil in such quantities per week as buyer may "desire," *Cotton Oil Co.* v. *Kirk,* 68 Fed. 791; the agreement of a railroad to carry freight at a certain rate without the agreement of the shipper to use the particular railroad, *Railroad Co.* v. *Bagley,* 60 Kan. 424; agreement to deliver such quantities of coal as vendee might "require during year," without stipulation of vendee to take any, *Campbell* v. *Lambert,* 36 La. Ann. 35; an agreement between two parties to contribute respectively to a certain business "as long as it was profitable or paid expenses," *Pulliam* v. *Schimpf,* 109 Ala. 179.

On the other hand it is held in a considerable number of cases that an agreement to furnish vendee with such quantities of certain articles as he shall require in his business during a specified period is not invalid. *Nat'l Furnace Co.* v. *Keystone Mfg. Co.*, 110 Ill. 427; *Minn. Lumber Co.* v. *Whitebreast Coal Co.*, 160 Ill. 85; *Smith* v. *Morse*, 20 La. Ann. 220. The theory of the cases cited and of the numerous cases in accord with them, seems to be that under such a contract the vendee is obligated to purchase all the specified articles needed in his business during the specified period, from the vendor. It has also been held that an agreement to furnish at specified prices all iron which vendee's storekeeper might order from time to time, was valid. *Great No. Ry. Co.* v. *Witham*, L. R. 9 C. P. 16. A contract to sell all the straw which vendor might have to "spare" has been sustained. *Parker* v. *Pettit*, 43 N. J. L. 512, as have also contracts to furnish vendee's steamers with coal during a certain season. *Wells* v. *Alexandre*, 130 N. Y. 642, and contracts to care for all logs and timber sent down a river by defendant during the season, although defendant was not bound to send any. *Robson* v. *Logging Co.*, 43 Fed. 364. In determining whether a contract is invalid for uncertainty, it was laid down as a guiding principle, in the case of *Boykin* v. *Bank of Mobile*, 72 Ala. 262, that "The law leans against the destruction of contracts because of uncertainty and they are not suffered to perish, unless after reading and interpreting them in the light of the circumstances under which they were made, the intention of the parties cannot be fairly and reasonably collected and effectuated." This certainty can moreover be aided by the cotemporaneous acts of the parties or by later acts, orders, acquiescence, etc., on the theory that that is certain, which can be made certain. *Southern R. R. Co.* v. *No. Alabama R. R. Co.*, 84 Ala. 571; *Parker* v. *Pettit*, 43 N. J. L. 512; *Minn. Lumber Co.* v. *Whitebreast Coal Co.*, 160 Ill. 85; *Smith* v. *Morse*, 20 La. Ann. 220. Although a contract may be void for uncertainty and lack of mutuality, yet accepted orders for goods under such void contracts constitute sales of the goods thus ordered at prices named in the contract, but they do not validate the contract. *Cold Blast Transp. Co.* v. *Kans. City Co.*, 114 Fed. 77; *Crane* v. *Crane & Co.*, 105 Fed. 869; *Oil Co.* v. *Kirk*, 68 Fed. 791; *Drake* v. *Vorse*, 52 Ia. 417; *Ashcroft* v. *Butterworth*, 136 Mass. 511; *Railway Co.* v. *Mitchell*, 38 Tex. 85.

The principles which must control courts in deciding such cases as the principal case, are stated by JUDGE SANBORN in this way: "The rules applicable to contracts of this sort may be thus briefly stated: A contract for the future delivery of personal property is void * * * if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty." Regarding the principal case in the light of the decided cases, it would seem to be in accord with the weight of authority. The amount was certain, the period was certain, the obligation was mutual; the only element of uncertainty was in regard to what grades of salt and what amounts of such grades would be selected by the purchaser. This uncertain element was rendered certain by the two accepted orders of the plaintiffs.

This question, however, still presents itself: if the purchaser had made default and refused to order any salt, how could the vendor have estimated damages when the grade or grades of salt which purchaser might have ordered, could not be ascertained? H. S.

THE NEGOTIABLE INSTRUMENTS LAW AS AFFECTING THE DISCHARGE OF ACCOMMODATION MAKER AND SURETY BY EXTENSION OF TIME OF PAYMENT.—The following two cases, recently decided in Oregon and Maryland, respectively, under the Negotiable Instruments Law, hold that that act has abrogated the rule of suretyship releasing a surety or accommodation maker from liability when the payee has given the debtor a valid extension of time of payment.

Action by the payees on a promissory note signed by one Meachem and one Lyons, the word "surety" being added to the name of the latter. Meachem defaulted. Lyons answered admitting the execution of the note, and for an affirmative defense pleaded that he signed the instrument as a surety only, without consideration, and for the sole use and benefit of Meachem and of the plaintiffs; that the payees had full knowledge of the conditions under which it was executed; that after the note had matured, plaintiffs, in consideration of additional security given them by Meachem, and without the knowledge and consent of the defendant, Lyons, extended the time of payment; and that by reason thereof he was relieved from all liability. *Held,* that the extension of time did not discharge Lyons, and that he continued liable on the note. *Cellers et al.* v. *Meachem et al.* (1907), — Ore. —, 89 Pac. Rep. 426.

The Court reasoned that "since the word 'surety' can only affect the status of the makers of the note as between themselves, and as Lyons' liability to the plaintiffs is the same as if he had signed the instrument without using the qualifying word after his name, he became, in the language of the Negotiable Instruments Law, 'absolutely required to pay the same' and is therefore 'primarily liable.'" Oregon Laws, 1899, p. 18; B. & C. Comp., § 4592. This reasoning was held applicable notwithstanding the fact that "the holder at the time of taking the instrument knew him to be only an accommodation party." B. & C. Comp., § 4431. The Negotiable Instruments Law (B. & C. Comp., § 4521) sets out the methods whereby a negotiable instrument may be discharged. It also specifies (B. & C. Comp., § 4522) the methods whereby a party secondarily liable may be discharged. Among the latter, but not among the former, is found the defense relied upon in this case. The Court applied the maxim "expressio unius est exclusio alterius," and arrived at the conclusion set out above.

The Farmers' and Mechanics' National Bank sued William H. Vanderford and two other men on a promissory note, payable to the order of the bank in two months from date. Vanderford had signed the note without in any way indicating on the face of the note that he was anything other than a maker thereof, or that he was to be bound by it otherwise than as a joint and several maker with the other two men. Vanderford pleaded as a defense to this suit that he was a surety on this note; that such fact was known to the bank at the time the note was executed and delivered; that after the maturtiy of the note, with such knowledge, the bank, for a valuable consideration paid

to it by the principal of the note, and without the knowledge or consent of Vanderford, extended the time of the payment of the note for four months; and that he (Vanderford) was thereby discharged from all liability thereon. *Held,* that, under § 15 of the Negotiable Instruments Law of 1898, which states that "the person primarily liable on an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same," Vanderford was primarily liable for the payment of this note; and that, as the Legislature has declared in § 138 of the same law, that a negotiable instrument, signed by a party who is primarily liable thereon, as that liability is defined by the act, may be discharged in one of five specified methods, no one of which had been set up as a defense in this case, the methods so specified are exclusive, on the principle "expressio unius est exclusio alterius," and the pleas of Vanderford in this case were fatally defective. *Vanderford* v. *Farmers' and Mechanics' National Bank* (1907), — Md. —, 66 Atl. 47.

A joint maker may be shown by parol to be a surety, and will be discharged by any act of the creditor, after he had knowledge of the fact of suretyship, which would discharge any other surety. *Hubbard* v. *Gurney,* 64 N. Y. 457; *Kennedy* v. *Evans,* 31 Ill. 258; *Coats* v. *Swindle,* 55 Mo. 31; *Welfare* v. *Thompson,* 83 N. C. 276; *Irvine* v. *Adams,* 48 Wis. 468; *Thompson* v. *Coffman,* 15 Ore. 631; *Stevens* v. *Oaks,* 58 Mich. 343. The addition of the word "surety" to the name of the signer of an instrument is only prima facie evidence of his suretyship, and parol evidence may be admitted to prove the contrary. *Boulware* v. *Hartsook's Adm'r,* 83 Va. 679. Such addition indicates the relation in which the parties stand to each other, and the payee and other subsequent parties to the note must deal with it with the knowledge that the makers occupy such position. *Harris* v. *Brooks,* 21 Pick. (Mass.) 195; *Hubbard* v. *Gurney,* 64 N. Y. 457. The relationship of principal and surety exists as between the person for whose benefit a note has been made and the accommodated party, at least so far as their own interests are concerned. *Cummings* v. *Little,* 45 Me. 183; *State Bank* v. *Smith,* 155 N. Y. 185; *Parks* v. *Ingram,* 22 N. H. 283. A creditor, by a valid and binding agreement, without the assent of the surety, giving an extension of time for payment to the principal, thereby discharges the surety. *Home Nat. Bank* v. *Waterman,* 134 Ill. 461; *Wylie* v. *Hightower,* 74 Tex. 306; *Post* v. *Losey,* 111 Ind. 74; *Alley* v. *Hopkins,* 98 Ky. 668; *Brooks* v. *Wright,* 13 Allen (Mass.) 72; *McComb* v. *Kittridge,* 14 O. 348. And a joint maker who is in fact a surety or accommodation maker, to the knowledge of the holder, is discharged under the same circumstances. *Hall* v. *Capital Bank,* 71 Ga. 715; *Barron* v. *Cady,* 40 Mich. 259; *Smith* v. *Freyler,* 4 Mont. 489; *Gordon* v. *Chattanooga Third Nat. Bank,* 144 U. S. 97. The foregoing were the rules in force in the majority of the states before the passage of the Negotiable Instruments Law in many of them. In view of the decisions in the two principal cases, that law would seem to have changed these rules in whatever states it has been adopted, as far as negotiable paper is concerned; and in such states neither the surety nor the accommodation maker apparently is discharged by a binding extension of time of payment to the debtor by the creditor, without the knowledge or consent of the surety or accommodation maker. *National Citizens' Bank* v. *Toplitz,* 81 N. Y. Supp. 422. J. W.