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Note and Comment

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NOTE AND COMMENT

THE LAW SCHOOL—PRESIDENT ANGELL ON LARGER PRELIMINARY REQUIREMENTS—FACULTY CHANGES—ENROLLMENT.—President Angell, in his Report to the Board of Regents for the year ending September 28th, 1909, after mentioning the fact that the total attendance of students at the University last year was 5,223—"the largest number ever on our rolls"—and expressing gratification that the largest increase was in the Literary Department, says: "* * * important as is the prosperity of our professional schools; the foundation of our strength must be found in the successful work in our Literary Department. Our professional faculties all welcome the broadest and richest preliminary training for their students. The medical students will hereafter be required to have completed two years of work in the Literary Department before entering on their medical studies.

"The Engineering Department is encouraging and stimulating its students to a broader course of training than has heretofore been required of them: A larger preliminary requirement for the law students cannot long be deferred if we are to retain the high reputation of the Law Department. * * *

"The new requirement of two years' work in the Literary Department for admission to the Department of Medicine and Surgery may be expected to

reduce for a time the number of students. But a similar step has to be taken by every medical school which keeps its place in the rank of the best schools in the country. Of course it raises the grade of medical education throughout the land. We could not afford to be behind our compeers. * * *

"Similar considerations will require us soon to raise the requirements for admission to the Law School, as the Faculty of that Department have recommended. Some reduction in the attendance for a time would be the result, especially while the courts in many states are so lax in the admission of men to the bar. But apparently if the attainments of the members of the American bar are to be raised, the result must be accomplished by the Law Schools, which seem destined henceforth to furnish the professional education of the great body of competent lawyers."

That "some reduction in the attendance" can be endured by the Law Department is demonstrated by the fact that although the registration of students is not yet completed, over 800 have already enrolled—a larger number than were in attendance at any time during the past year.

President Angell's resignation and the appointment of Dean Hutchins to the Presidency of the University, have resulted in a change in the personnel of the law faculty, for, while Dr. Hutchins will continue to act as Dean of this department, his work in second year Equity and in third year Equity will be taken by Professor George L. Clark, who, having admirably served the law school of the University of Illinois for five years and that of Leland Stanford University for two years earlier, has accepted an appointment to Michigan's law faculty.

A MISLEADING OPINION AS TO THE DEFENSE OF NON-DELIVERY OF A NEGOTIABLE INSTRUMENT IN AN ACTION BY A HOLDER IN DUE COURSE.—The case of *Sheffer* v. *Fleisher,* decided by the Supreme Court of Michigan, September 21, 1909, and reported in 16 Detroit Legal News, 589, 122 N. W. 543, has already attracted considerable attention, by reason of its apparent disregard of a provision of the act of June 16th, 1905, P. A. 1905, p. 389, commonly known as the Negotiable Instruments Law.

The case as reported is shortly this: Six notes bearing the genuine signature of the defendant as maker came to the hands of the plaintiff as a *bona fide* purchaser for value. The defense interposed was that the notes were not delivered to the payee or any other person. The jury found a verdict for the defendant.

The testimony was, in substance, that one Hirschberg, representing the Le Maire Optical Company, came into the defendant's store and attempted to sell defendant some optical goods. Hirschberg and the defendant had practically agreed orally upon an arrangement, which Hirschberg had put or was to put in the form of a contract, but which was not signed by the defendant. The purport of the arrangement between the parties was that the defendant was to order certain goods, but defendant had not signed the order. He had, however, signed the notes which were left lying on the show-case or counter in the defendant's store. Hirschberg was to make a

copy of the order for the defendant. In this posture of affairs, the defendant was called away to wait upon a customer, whereupon Hirschberg, in defendant's absence, took possession of all the papers and left the store. Defendant immediately wrote the payee repudiating the transaction, and later refused to receive the goods.

The only question in the case was whether a verdict should have been directed for the plaintiff. The trial court left but one question to the jury, namely whether there had been a delivery of the notes; obviously the jury found that there had not been. Plaintiff's contention was that defendant, by leaving his signed notes on the counter, placed it in the power of Hirschberg to purloin and negotiate them. The court says: "We think the case within the rule of *Burson* v. *Huntington*, 21 Mich. 415; *Cressinger* v. *Dessenberg*, 42 Mich. 583; *Lapard* v. *Sherwood*, 79 Mich. 525; *Portsmouth Savings Bank Company* v. *Ashley*, 91 Mich. 681." Judgment for defendant was affirmed.

This is the case as reported, and from it the conclusion can be drawn, and has been drawn, that the rule as to delivery of a negotiable instrument as laid down in *Burson* v. *Huntington*, supra, is still the rule in Michigan, notwithstanding the provision of the statute of June 16th, 1905, Section 181, of the following tenor:

"But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him, so as to make them liable to him, is *conclusively presumed.*"

Under the law merchant and independent of statute, the courts were divided upon the proposition whether the defense of non-delivery was available in a suit brought by a holder in due course. Among the cases holding such a defense available are: *Burson* v. *Huntington*, supra; *Palmer* v. *Poor*, 121 Ind. 135; *Branch* v. *Sinking Fund*, 80 Va. 427; 56 Am. Rep. 596; *Hillsdale College* v. *Thomas*, 40 Wis. 661; *Dodd* v. *Dunne*, 71 Wis. 578. Among the cases holding the contrary are *Kinyon* v. *Wohlford*, 17 Minn. 239; *Faulkner* v. *White*, 33 Neb. 139; *Martina* v. *Muhlke*, 186 Ill. 327; *Gould* v. *Segee*, 5 Duer. (N. Y.) 260. A question similar to that involved in the principal case came before the Supreme Judicial Court of Massachusetts in January, 1905, after the negotiable instruments law had been enacted in that commonwealth. The precise question was whether under the negotiable instruments law, a holder in due course of a note payable to bearer, that had been stolen, could acquire a good title from the thief. The court says: "Even before the enactment of the statute, while the decisions were not uniform, the weight of authority was in favor of an affirmative answer to the question." * * * The following specific language of the statute touching the question was intended to establish the law in favor of holders in due course: 'But where the instrument is in the hands of a holder in due course, a valid delivery thereof by all parties prior to him so as to make them liable to him is *conclusively* presumed.' This conclusive presumption exists as well when the note is taken from a thief as in any other case." *Mass Nat. Bank* v. *Snow*, 187 Mass. 159.

The primary purpose of the negotiable instruments law was to make the

law relating to commercial paper uniform throughout the United States. Specifically, it was the purpose of the act to exclude non-delivery by the maker as a defense to a suit on a note complete in form and execution by a holder in due course. The notes in the principal case were complete in form and execution.

There would seem to be no doubt that the provision of the statute above quoted has overthrown the rule laid down in *Burson* v. *Huntington*, supra. The principal case as reported is startling to those acquainted with the statutory provision above quoted. The fault, however, is not in the decision but in the opinion as reported. The fact is that the statute was not involved in the case at all. The notes in suit bore date November 4th, 1901, and were payable respectively one, two, three, four, five, and six months after date. But this fact appears only from the record. It should appear from the opinion. The case as reported is needlessly misleading. It puts the court in the position of adhering to a rule expressly nullified by statute. Before the opinion appears in the official reports it should be amended so as to show that the notes in suit bore date and reached maturity before the negotiable instruments law went into effect. R. E. B.

QUALIFICATIONS OF ALIENS FOR NATURALIZATION.—Two great decisions on the naturalization of aliens (*United States* v. *Hrasky*,—Ill.—88 N. E. 1031 and *State ex rel United States* v. *District Court of Seventeenth District et al.*, Minn., 120 N. W. 898), are of considerable interest and importance as illustrating the differing tendencies of courts toward a strict and severely logical or a liberal construction of the federal statutes on this subject.

In the former case the petitioner, a native of Austria and a saloon-keeper, testified that though for some time he had been acquainted with the statute of Illinois requiring saloons to be kept closed on Sundays, he, notwithstanding, had kept the back door of his saloon open regularly on Sundays and would continue to do so after taking the oath of allegiance. The attorney for the government opposed the naturalization of the petitioner on the ground that during the five years immediately preceding his application he had not "behaved as a man of good moral character, attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same." The lower court overruled the objection of the government on the ground that it would be unreasonable to require a more strict observance of law by the petitioner as a condition precedent to his admission to citizenship than was actually required of native-born citizens and as the authorities of cities allowed saloon-keepers to keep the back doors of their saloons open on Sunday the petitioner should not be refused naturalization because he had done so. On appeal the Supreme Court of Illinois reversed this decision with directions to refuse the petitioner a certificate of naturalization.

In the Minnesota case the lower court admitted to citizenship one Marius Hansen, a native of Norway, forty-six years of age, who had been a resident of this country twenty-four years and of the State of Minnesota

eighteen years, who was a sober, industrious, honest and law-abiding farmer, speaking English fairly well and reading and writing the language to some extent, but who could not name the president of the United States, the governor of Minnesota nor the capital of his state, and did not possess any accurate knowledge of the Constitution of the United States or of its meaning or of the meaning of the oath of allegiance. The Supreme Court of Minnesota, ELLIOT and JAGGARD, JJ., dissenting, affirmed the finding of the lower court.

All of the cases on this subject seem agreed on the proposition that what Congress aimed to secure by the enactment of the present naturalization statute was the admission to citizenship of all those and only those who seemed likely to make good, law-abiding citizens. The different results reached by different courts are due to a disagreement as to the mode of interpreting the statute so as to effect this purpose. Those courts which uphold the liberal interpretation reason that satisfactory proof that the petitioner is a man of good moral character and "has behaved as a man should behave who is attached to the principles of the Constitution" is sufficient to support a finding that the petitioner "has behaved as a man of good moral character, attached to the principles of the Constitution of the United Staets, and well disposed to the good order and happiness of the same" and to entitle the petitioner to a judgment admitting him to citizenship; that requiring the petitioner to exhibit a knowledge of the Constitution and of the principles and forms of our government is by *judicial legislation* requiring of him an educational qualification which Congress did not intend to prescribe. *State ex rel. United States* v *.Dist. Court of the Seventeenth Dist., supra; In re Rodriguez,* 81 Fed. 337; *Ex Parte Lars Johnson,* 79 Miss. 637.

The courts which insist on the more logical and strict interpretation of the federal naturalization statutes reason that Congress in providing that the petitioner must make a declaration, on oath, before the court, to support the Constitution of the United States meant to surround the declaration with solemnity and render it binding and that it is, therefore, the duty of the court to see that the petitioner understands the significance of the oath he is taking which it is impossible for him to do unless he has some general knowledge of the Constitution and its principles; and further, that in order that the petitioner may be "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same," as required by the statute, it is necessary that he have some understanding of the Constitution, its principles and of our form of government. *In re Kanaka Nian,* 6 Utah 259, 21 Pac. 993; *In reBodek,* 63 Fed. 813; *In re Meakins,* 164 Fed. 334.

The statute allows the courts a large discretion in determining who are and who are not, qualified to become citizens of this country. Undoubtedly it is necessary and proper that this should be so. And while this condition exists we may expect different courts to reach different conclusions. It seems, however, that more uniform and gratifying results would be attained, if the courts would recognize some standard, some "irreducible minimum

in intellectual and moral fitness," which should be required of every alien to whom naturalization is granted. And even if this standard were higher than some of our native-born citizens could meet, would it work any injustice or be contrary to the spirit of the naturalization statute or the intent of the legislators who enacted it? If the aim of Congress in the enactment of this statute was, as the courts agree, the admission to the privileges of citizenship of those aliens and only those who are likely to make good, law-abiding citizens, then certainly such a construction of that clause of the statute which demands of the petitioner a satisfactory showing of good moral character and attachment to the principles of the Constitution, as would require a moral character higher than that exhibited by some of our citizens or the rudimentary knowledge of the Constitution and the principles of our government necessary to a fair understanding of the significance of the oath of allegiance, would be neither unjust nor forced.

The danger lies in too much liberality rather than in too great strictness of interpretation. Even granting that the setting of a reasonable minimum standard of moral and intellectual fitness for naturalization would result in the exclusion from naturalization of a few individuals who would make good citizens, and this is very doubtful; it would certainly effect an inestimable benefit to the country by excluding from such privileges large numbers of the ignorant and undesirable class. The alien who is really desirous of becoming a citizen will not be long in complying with the requirements of a reasonable standard. If his desire is not great enough to stimulate him to make such effort as this would necessitate, he would be, at least, an indifferent citizen. Naturalization is the *privilege* and not the *right* of the alien, and until he can prepare himself to appreciate properly the duties and privileges of citizenship, he can afford to wait and so can the country.

W. G. S.

FRIGHT WITHOUT PHYSICAL IMPACT BUT RESULTING IN PHYSICAL INJURY.—The recent Maryland case of *Green* v. *T. A. Shoemaker & Co.*, reported in 73 Atlantic Reporter, 688, (June, 1909) puts this jurisdiction squarely on the side of those courts that do allow recovery for fright alone, if physical injury is caused thereby. The court confesses that "the numerical weight of authority supports the general rule that there can be no recovery for nervous affections unaccompanied by contemporaneous physical injury," but nevertheless holds firmly with the minority of the courts to the view that there are exceptions to this rule and that this case falls within the exceptions.

The facts of the present case are fortunately so clearly defined as to simplify materially the reasoning of the court. The plaintiff, a young married woman, of sound health, lived in a neighborhood where extensive excavations had been undertaken by the defendant. The repeated explosions of dynamite, used by the defendant in blasting operations, threw stones and dirt on the dwelling of the plaintiff and kept her for a considerable period in a state of nervous terror, though none of the debris actually struck her. As a result of this fright she developed nervous prostration which her attending physician attributed to the shock of the blasting.

The courts which have denied recovery on similar states of facts have usually offered one or more of three different reasons for their decisions. (1) That fright alone may not be a cause of action because, if such a doctrine were once established, it would, in the words of the New York court, "result in a flood of litigation in cases where the injury complained of may be easily feigned." *Mitchell* v. *Rochester Ry. Co.*, 151 N. Y. 110. (2) That it can not be easily shown that the fright is the proximate cause of the injury alleged. Cf. *Ward* v. *West Jersey etc. Ry. Co.*, 65 N. J. L. 385. "Physical suffering is not the probable or natural consequence of fright in the case of a person of ordinary physical or mental vigor." (3) A corollary of (2), if fright alone does not warrant recovery, the consequences of fright would not do so. Cf. 3 L. R. A. (N. S.) 50, Note.

That the argument from expediency, for denying recovery for fright unaccompanied by contemporaneous physical injury, is unsatisfactory, even to some of the courts that still uphold the rule, is shown by the use made of this so-called "physical impact theory" to justify a recovery. In the case of *Homans* v. *Boston Elevated Ry. Co.*, 180 Mass. 456 (1902), Chief Justice HOLMES says: "When there has been a battery and the nervous shock results from the same wrongful management as the battery, it is * * * impracticable to go further and to inquire whether the shock comes through the battery or along with it." A recent decision of the New Jersey court, *Porter* v. *D. L. & W. Ry. Co.*, 73 N. J. L. 405 (1906), says that "The proof by the plaintiff was that she was hit on the neck by something and that *dust* from the falling debris went into her eyes. Proof of *either* of these injuries would take the case out of the rule as to non-recovery for fright alone. * * * If she received physical injuries, all the resultant effects to her system, due to the accident are recoverable." The Massachusetts court seems also to ignore the necessity of proof of proximate cause. In the *Homans* case, just cited, it was called to the attention of the court that the effect of the shock of fright was one influence in producing the resultant nervous trouble and the blow was another, and that recovery should be allowed only for the proximate result of the physical impact and not for the result of the shock. The answer of the court to this was, "further refining [in the application of the Massachusetts Rule] would be wrong."

The expediency argument proceeds upon the theory that nervous injuries are often imaginary rather than real and it is almost impossible to distinguish the one from the other, but our leading case well says that a nervous injury resulting from physical impact is quite as likely to be imagined or feigned as one resulting from fright without impact, and the former is quite as capable of simulation as the latter.

The answer to the third objection above cited is well given by Sedgwick in his ELEMENTS OF LAW OF DAMAGES, Second Ed., p. 114, where he says that the cause of action is the negligence coupled with the material damage, the nervous shock being the link that connects the two."

The court in the principal case concludes that the rigid rule requiring actual contemporaneous physical impact producing physical injury can not be applied, and the case should have gone to the jury on the question as to

whether the injury to the plaintiff's health was a reasonable and natural consequence of the fright.

This case again calls attention to the curious divergence of the courts in their allowance of recovery for the mental suffering caused by sorrow and that form of mental disturbance produced by fright. The Maryland court says that "it may be considered as settled that mere fright without any physical injury resulting therefrom can not form the basis of a cause of action." But recovery is allowed for sorrow alone by a number of courts, following the lead of the Texas court in *So Relle* v. *W. U. Tel. Co.*, 55 Tex. 308. Cf. MICHIGAN LAW REVIEW, Vol. 4, p. 244, and cases there cited. The question naturally arises, what is the reason for this distinction? The California court in the case of *Sloane* v. *S. Cal. Ry. Co.*, 111 Cal. 668, attempted to answer the question by saying that "a nervous shock or paroxysm or a disturbance of the nervous system [caused by fright] is distinct from mental anguish and falls within the physiological rather than the psychological branch of the human organism. This seems to be a distinction without a difference for it gives us no means of determining what is physiological as distinguished from psychological. In what way is insomnia, for example, produced by a serious fright different from the insomnia produced by deep sorrow, except that the fright is usually of short duration and the sorrow likely to be continuous? It seems not unlikely that the real reason that the courts have had for allowing recovery for sorrow alone and denying it for fright alone rests upon the same argument that has led most of our courts to deny recovery for mental anguish of any sort; namely, the difficulty of proof. It is plainly within the experience of the average person [the juryman] that keen suffering would almost inevitably result to a father by being kept away from the bedside of his dying child, though there might be no manifest marks of that sorrow. On the other hand, in the cases where fright is alleged as a variety of mental suffering endured, it is by no means so plain that the suffering actually has occurred unless some physical result therefrom is shown.

The leading case brings one more court over to the minority that allows recovery for fright as a form of mental anguish, if the proof thereof is plain, and we may well hazard the conjecture that if the courts have presented to them cases in which the causal relation is evident between the injuries complained of and the mental anguish produced by the negligent act, the tendency will be for them to range themselves on the side of those courts now in the minority, unless they should feel compelled by their own previous decisions to say, as did the Pennsylvania court in the Huston case, *supra*, that the question "is settled for this state and no longer open for discussion."

J. H. D.

NONCOMPLIANCE WITH STATUTORY REQUIREMENTS AS A DEFENSE TO SUITS BROUGHT BY FOREIGN CORPORATIONS WHERE THE IRREGULARITY HAS BEEN CURED SUBSEQUENTLY TO THE INSTITUTION OF THE SUIT.—The law is very much unsettled and the decisions are conflicting upon the questions and situations arising out of the failure of foreign corporations to comply with the

regulations and requirements laid down by the various states as prerequisites to their doing any business in these states. The questions involved depend to a considerable extent upon the peculiar wording of the particular statute in question, yet there is much conflict in the decisions upon statutes worded alike.

For this reason the questions presented by the recent case of *Amalgamated Zinc & Lead Co.* v. *Bay State Zinc Mining Co.* (1909), ... Mo. ..., 120 S. W. 31, are important. In this case, plaintiff, a corporation organized under the laws of New Jersey, sought to enjoin and restrain the defendant corporation from mining on a certain tract of land in Missouri. Plaintiff set up sufficient facts entitling it to a decree. The defense was that plaintiff had not complied with the laws of Missouri by filing a copy of its charter or articles of incorporation with the Secretary of State, and had no license to transact business in the state of Missouri, and therefore could not "maintain" a suit in that state. The statute read that no such foreign corporation could "maintain any suit or action" without filing the above mentioned papers. The evidence disclosed the fact that the suit had been brought one month before the papers were filed and the license granted.

The chief question to be decided was whether plaintiff could bring an action in the Missouri courts without license to do business in that state and, after having so brought the action, be permitted to maintain and prosecute it by taking out the required license before trial. The supreme court of Missouri answered this question in the negative. GRAVES, J., in rendering the opinion of the court, said that a prohibition against maintaining an action implied a prohibition against beginning or commencing it, since the beginning of the action was one of the necessary steps in maintaining it. He said that any other interpretation would render the statute nugatory, and would allow foreign corporations to do business in Missouri in defiance of the law until some party should plead its noncompliance. To allow the corporation to remedy the defect at that late hour would be contrary to the spirit of the statute and opposed to the public policy of the state.

The position taken by GRAVES, J., seems to be invulnerable, and it is difficult to understand why there has been so much conflict upon the question. The court in this case was confronted by the case of *Carson-Rand Company* v. *Stern et al.*, 129 Mo. 381, 31 S. W. 772, 32 L. R. A. 420, in which is laid down a doctrine directly opposed to that of the principal case. In the *Carson-Rand* case, BARCLAY, J., said that the prohibitory command did not reach the right to begin the action, and that there was a well defined distinction between beginning and maintaining an action. The court in the principal case met the difficulty by reversing the *Carson-Rand* case. The solution of the problem depends to a great extent upon a proper interpretation of the word "maintain" as used in the statutes. See 5 WORDS AND PHRASES, p. 4278, for judicial interpretation and definitions of "maintain."

"Maintain" as used in pleading means to support what has already been brought into existence, so that to maintain an action is not the same as to commence an action. *Moon* v. *Durden*, 2 Exch. 30. In this case the question to be decided was whether a certain statute prohibiting gaming and

rendering gaming contracts void should have a retrospective effect. With the exception of the dictum of PLATT, B. in the Moon case there seems to be no authority or precedent for the interpretation put upon "maintain" by BARCLAY, J., and, when we consider the fact that PLATT, B. was rendering a dissenting opinion, that he expressly limited his definition of "maintain" to questions of pleading, and that the remark was not necessary to the decision of the case, it is difficult to see how BARCLAY, J., could have gotten much support out of the remark. A few months after the *Carson-Rand* case was decided, the supreme court of California put a similar construction upon the effect of the word "maintain," but that could not have been an authority for the *Carson-Rand* case. *California Savings and Loan Society* v. *Harris*, 111 Cal. 133, 43 Pac. 525.

An interesting discussion of the question may be found in the note to the case of the *National Fertilizer Co.* v. *Fall River Five Cents Saving Bank et al.*, 14 L. R. A. (N.S.) 561 et seq.—The case being reported in 196 Mass. 458, 82 N. E. 671. The annotator prefacing his remarks upon the particular question involved says: "Of course in those jurisdictions in which it is held that any contract entered into by a foreign corporation before complying with the local statute is void, the particular question presented in the foregoing case could not arise, for if the contract is void from the beginning, subsequent compliance with the requirements of the statutes either before or after bringing suit would not remedy the defect. In those jurisdictions, however, which hold that such contracts are not invalid, but merely unenforceable by the corporation before its compliance with the statutory requirements, there is much difference of opinion as to the effect of a compliance after the commencement of the suit but before judgment." The *National Fertilizer Co.* case is opposed to the principal case. Here the supreme court of Massachusetts held that a similar statute was merely directory and that noncompliance with it resulted in a mere temporary disability, to remove which lies within the power of the corporation at any time; that the statute merely suspended the privileges of the courts during the period of non-compliance with the law; and that the purpose of the statute was to bring foreign corporations under the supervision and regulation of the state officials of Massachusetts. This is all very well, but the state officials seem to have other things to do than enforce compliance by these corporations, and it would seem that the best and simplest way to enforce compliance would be to allow private parties to plead the noncompliance as a defense to suits brought by these foreign corporations. If the ruling in the principal case were recognized as law everywhere, corporations probably would take greater pains to comply with the laws of the states, other than those creating them, in which they do business. Then again, if a private person knows that the noncompliance operates only as a temporary bar it is doubtful if he will plead it and thus call the attention of the state to the noncompliance.

RUGG, *J.*, in the *National Fertilizer Co.* case, gives a long list of authorities sustaining the view there taken, but these decisions are those of but four states—Massachusetts, California, Kansas and Arkansas. *State* v. *American Book Co.*, 69 Kan. 1, 76 Pac. 411, 1 L. R. A. (N.S.) 1041 and *Buffalo*

Zinc and Copper Co. v. *Crump*, 70 Ark. 525, 69 S. W. 572, 91 Am. St. Rep. 87—the first of the Kansas and Arkansas cases—find their authority and precedent in the early Missouri cases which, it has been shown, have been lately overruled by the principal case. The early California *Savings and Loan Society* case, *supra*, decided a few months after the *Carson-Rand* case. also found its precedent in the above dictum of the dissenting judge in the old *Moon* case. The Massachusetts statute expressly provided that "such failure shall not affect the validity of any contract by or with such corporation," so it is doubtful if these early Massachusetts cases are in point. See: *C. B. Rogers and Co.* v. *Simmons*, 155 Mass. 259, 29 N. E. 580. Thus it appears that the decisions opposed to the principal case, though numerous, have a faulty origin and rest upon a poor foundation.

On the other hand, there is considerable authority and precedent for the construction put upon "maintain" by GRAVES, J., in the principal case. The supreme court of Minnesota, in the case of *G. Heilman Brewing Co.* v. *Peimeisl*, 85 Minn. 121, 88 N. W. 441, expressly and emphatically refused to follow the *Carson-Rand* case and held that a prohibition against maintaining an action implies a prohibition against beginning it. The same interpretation is put upon a similar statute in New York. *Halsey* v. *Jewett Dramatic Co.*, 114 App. Div. 424, 99 N. Y. Supp. 1122. The Illinois cases, *J. Walter Thompson Co.* v. *Whitehed*, 185 Ill. 454, 56 N. E. 1106, 76 Am. St. Rep. 51; *United Lead Co.* v. *J. W. Reedy Elevator Mfg. Co.*, 222 Ill. 199, 78 N. E. 567, are in accord with the principal case. Many other courts construe somewhat similar statutes in practically the same way, but without a knowledge of the peculiar wording of these statutes reference to them would be of little value. "Men both in and out of the profession of law often speak of maintaining an action, having reference to one yet to be instituted." PARDEE, J., in *Smith* v. *Lyon*, 44 Conn. 175, 178.

Both Ohio and California have laws regulating the right of partnerships to sue, providing that they may not "maintain" any action upon any contract made with them in their partnership names until they have filed a certain certificate and made the publication required by statute. The Clark County Common Pleas Court of Ohio and the supreme court of California have held that the commencement of an action is a part of the maintaining of it, and that the statutes relate to the institution of the action as well as to its continuance. Hence the right to bring an action is prohibited unless the certificate has been filed and the publication thereof has been completed. *Kinsey & Co.* v. *Ohio Southern R. Co.*, 3 Ohio Dec. 249. *Byers* v. *Bourret*, 64 Cal. 73, 28 Pac. 61. If the right of a domestic partnership to bring suit is construed thus strictly, it would seem to be even more fitting and even more in accord with public policy for the courts of the states, other than the state of the corporation's birth, to require a rigid compliance with the laws in regard to foreign corporations by giving the same construction to the word "maintain." Many of these corporations are organized under state laws which are more lax and which give much greater powers than the laws of the particular state in which they are suing. This latter state should heed the public policy revealed by its own statutes, should be jealous of the rights and

powers of these foreign corporations, and should require a strict compliance with its laws before opening the gates to them and giving them the entré into its courts.

A corporation created by one state can exercise none of the privileges conferred by its charter in any other state except by the consent of the latter. *Farmers and Merchants Ins. Co.* v. *Harrah,* 47 Ind. 236. When a state legislature has realized the necessity of having supervision over the acts and transactions of these foreign corporations, and has seen fit to prescribe certain conditions before allowing them to enter for purposes, other, of course than the carrying on of interstate commerce, it would seem to devolve upon the courts of that state to carry out the legislative intent and policy so exhibited, by making these statutes as effective as possible rather than to render them almost nugatory upon some trivial and unsubstantial ground. Furthermore, it is believed that by giving to the word "maintain" its full meaning the result would be in accord with the principal case. The principal case seems to be a proper interpretation of the letter and spirit of the Missouri statute and to be in keeping with the public policy of Missouri as revealed by that statute. R. T. H.

IN ABSENCE OF PROOF WHAT IS THE PRESUMPTION AS TO THE LAW OF A COUNTRY NOT OF COMMON LAW ORIGIN.—A very interesting case is that of *Cuba R. Co.* v. *Crosby,* 170 Fed. 369, decided by the circuit court of appeals for the third circuit in May, 1909. The plaintiff was a citizen of Tennessee, and the defendant corporation a citizen of New Jersey. It appeared that the plaintiff, while working for the defendant in its planing mill in Cuba, was injured, the plaintiff claiming that the injuries were caused by the negligence of the defendant in failing to provide reasonably safe machinery and appliances. The defenses were assumption of risk and that the negligence, if any, was that of a fellow servant. The jury found for the plaintiff, and judgment was duly entered upon the verdict. It seems that the declaration did not aver the law of Cuba, nor did it charge that the facts alleged were by the Cuban law made unlawful and tortious, and no evidence was offered to that effect. It was contended that the trial court had erred in failing to direct a verdict for the defendant.

ARCHBALD, J., DALLAS, J. concurring, wrote the opinion affirming the judgment below. GRAY, J., dissented. The opinion of the majority was based upon the theory that nothing having been offered at the trial as to the Cuban law the presumption was that the lex loci was the same as the lex fori, and that the latter would therefore be applied, negligence being tortious and actionable at common law. GRAY, J., on the other hand, while conceding that such might be the rule applicable where the foreign law was that of a sister state or country wherein the common law prevailed, argued that inasmuch as the court would take judicial notice of the fact that Cuba is a Latin country with the civil law the same rule does not apply.

There are a great many cases on the proposition as to what is the presumption of foreign law when the foreign law is that of a sister state. In a great many cases the generally accepted rule is stated to be that it is pre-

sumed to be the same as the law of the forum. In some cases, however, a rule to the effect that the court will presume the foreign law to be the common law has been announced. The cases on this subject are classified and considered quite at length in WHARTON, CONFLICT OF LAWS, §781 c. But whatever may be the law on that point it does not dispose of the position taken by Judge Gray that when the foreign country is one which the court will judicially notice as not having the common law the same presumption does not apply. It would seem, as suggested by Judge Gray, that a court might quite properly take judicial notice of the fact that Cuba is a Latin country in which the civil law prevails. *Buchanan* v. *Hubbard,* 119 Ind. 187; *Brown* v. *Wright,* 58 Ark. 20; *Garner* v. *Wright,* 52 Ark. 385; *Banco de Sonora* v. *Bankers Mut. Cas. Co.,* 124 Iowa 576, 95 N. W. 232; WHARTON, CONFL. OF LAWS, §781 a. That being true and since the lex loci must be looked to in order to determine whether an act is tortious and actionable it follows that no acts committed there would be actionable unless made so by the code which is of course *written* law as distinguished from our *common* law. Of course it is not meant by this that the code must provide for just such a case; there must, however, be some sort of code authorization for the maintenance of such actions in general. (As to the position of torts in the Spanish law see 6 MICH. LAW REV. 136.) And thus the case is brought within the well recognized limitation of the above rule, namely, that when the foreign law relied upon is written it must be proved, no matter what presumptions may be indulged in as to unwritten law. Whatever may be said as to the *reason* of this argument it must be conceded that most of the cases which are in point support the conclusion of the majority, but without noticing the point raised by Judge Gray.

In *Buchanan* v. *Hubbard,* 119 Ind. 187, it was claimed that certain Kansas lands were impressed with a trust. The court announced the rule that in absence of proof of the Kansas law it would be presumed that it was the common law, but conceded that if Kansas had ever been under the civil law as a part of the Louisiana Purchase the presumption would then be that their law was the same as the law of the forum instead of the common law. In *Brown* v. *Wright,* 58 Ark. 20, 22 S. W. 1022, the point in issue was whether money delivered in Texas by a wife to her husband for investment became his property. The court stated the same general rule as in *Buchanan* v. *Hubbard, supra,* but held that since the jurisprudence of Texas was not founded upon or derived from the common law it would not be presumed that the common law prevailed there, and the court applied the presumption that the Texas law was the same as the law of Arkansas. In *Garner* v. *Wright,* 52 Ark. 385, it was held that the courts of Arkansas would not presume that the common law was in force in Indian Territory, where no system of law had been adopted, and the Arkansas law was applied. See also *Peet* v. *Hatcher,* 112 Ala. 514, 21 South. 711, which involved a consideration of the laws of Louisiana, and *Davison* v. *Gibson,* 56 Fed. 443, 5 C. C. A. 543, involving the law of the Creek nation, wherein the same conclusions were reached. In the opinion of Judge Archbald may be found reference to a number of other cases, particularly *Whitford* v. *Panama R. R.,* 23 N. Y. 465;

Hynes v. *McDermott,* 82 N. Y. 41, 37 Am. Rep. 538; *Mackey* v. *Mexican Cent. R. R.,* 78 N. Y. Supp. 966; *Sokel* v. *People,* 212 Ill. 238, 72 N. E. 382; *State* v. *Morrill,* 68 Vt. 60, 33 Atl. 1070, 54 Am. St. Rep. 870; *Loaiza* v. *Superior Court,* 85 Cal. 11, 24 Pac. 707, 9 L. R. A. 376, 20 Am. St. Rep. 197; *Mittenthal* v. *Mascagui,* 183 Mass. 19, 66 N. E. 425, 60 L. R. A. 812, 97 Am. St. Rep. 404. The rule, then, applicable to cases such as the principal case, deduced from the above authorities, is that where the lex loci, or *proper law.* is not founded upon or derived from the common law the presumption is that the lex loci is the same as the lex fori, no matter whether it is relied upon as the basis of a right or defense.

The only case found which seems to squarely support the dissenting opinion of Judge Gray is *Leach* v. *Pillsbury,* 15 N. H. 137. In that case a creditor of the father of an intestate who had died in Louisiana attached a fund in the hands of a trustee, claiming that the fund belonged to the father of the deceased as the heir or distributee of his son. No proof as to the Louisiana law was offered, and the court dismissed the proceeding, holding that it could not presume the Louisiana law and the law of New Hampshire to be the same. R. W. A.