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Note and Comment

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NOTE AND COMMENT.

A CRITICISM OF PRESIDENT HADLEY'S VIEWS ON "THE CONSTITUTIONAL POSITION OF PROPERTY IN AMERICA."—

To the Editor of the Michigan Law Review:—

April 16, 1908, there was published in the *Independent* a report of a lecture delivered in Berlin, Prussia, by Arthur T. Hadley, President of Yale University, on "The Constitutional Position of Property in America." On page 878 of the same issue there is an editorial praising very highly President Hadley's views. In the issues of this paper for August 19 and August 26, 1909, there is further commendation of the same kind, pages 392 and 448.

There appear to me errors in this lecture which, considering the great reputation of its author and the place of delivery, ought not to pass unnoticed.

To the doctrine of the lecture that the rights of property are better protected in the United States than elsewhere, because secured by constitutional provisions, whose final interpretation is by the courts, there can be no objection. But this protection does not cover property alone. It covers every fundamental right of individuals. It follows from the fact that we have state and national constitutions, which limit the powers of government, and the rights of legislatures, state and national, to make laws in con-

flict with such constitutions. But the lecture errs in stating the steps by which our constitutional provisions were enacted. It is said: "The delegates to the Convention of 1787 were concerned with questions of constitutional law in the narrower sense. They were not thinking of the legal position of private property. But it so happened that in making mutual limitations upon the powers of the Federal and the State government, they unwittingly incorporated into the Constitution itself certain very extraordinary immunities to the property holders as a body. It was in the first place provided that there should be no taking of private property without due process of law." * * * "This constitutional provision prevented the legislature or executive either of the nation or of the individual states from taking property without judicial inquiry as to the necessity and without making full compensation even in case the result of such inquiry was favorable to the government. No man foresaw the subsequent effect of this provision in preventing a majority of voters acting in the legislature or through the executive from disturbing existing arrangements with regard to railroad building or factory operation until the railroad stockholders or factory owners had had the opportunity to have their case tried in Court."

The federal constitution of 1787 had no provisions protecting private property. The provision on the subject is found in the 5th amendment, adopted by two-thirds of both houses and ratified by three-fourths of the states in 1791, and is as follows: "No person shall * * * be deprived of life, liberty or property without due process of law." This provision applies only to the federal government. It is no restraint on the powers of the states.

So far from giving "extraordinary immunities to property holders," it is old as a principle of civilized government. As stated by CHIEF JUSTICE WAITE in delivering the opinion of the United States Supreme Court in *Munn* v. *Illinois,* (94 U. S. 113, see 123), "It is found in Magna Charta and in substance, if not in form, in nearly or quite all the constitutions that have been from time to time adopted by the several states of the union. By the Fifth Amendment, it was introduced into the constitution of the United States as a limitation upon the powers of the National Government, and by the Fourteenth, as a guaranty against any encroachment upon an acknowledged right of citizenship by the legislatures of the states."

It is safe to say that the force and effect of this ancient English principle were perfectly understood by those who drafted and adopted the fifth amendment and that they did not act "unwittingly" or inconsiderately. Similar rules are generally enforced in England and perhaps in all civilized states. It may well be questioned whether in any civilized country, the property of railroads or factory owners can be taken by the government without giving them an opportunity for trial in court. President Hadley makes too much of the *Dartmouth College Case* and the fourteenth amendment in seeking to show how the property of corporations is protected. Soon after the decision of the *Dartmouth College Case,* in 1819, the states began to provide against it by constitutional provisions enacting that corporations, save for municipal purposes, should be formed only under general laws which should be subject to alteration, amendment or repeal. It is prob-

ably a great many years since any corporation has been established not subject to this power of the legislature.

The result is that generally corporate franchises are held at the legislative pleasure. Corporate property has no other protection against federal aggression than has individual property. Up to 1868 and the adoption of the fourteenth amendment, there was no federal protection against state aggression upon the rights either of individuals or corporations, except the prohibition against impairing the obligation of contracts.

The fourteenth amendment so far as it affords protection to property but forbids the states to do what they were already forbidden by their constitutions to do and what the federal government was forbidden to do by the fifth amendment. It simply makes the federal court the final arbiter of these old provisions. Nor is it to be supposed that the very able lawyers in Congress who were instrumental in the adoption of the fourteenth amendment were ignorant of its meaning, familiar as they were with similar provisions in Magna Charta and in the federal and state constitutions. And litigation under this provision began soon after it was adopted, and not in 1882, as President Hadley seems to think. In *Davidson* v. *Miller*, 96 U. S. 97, decided in the October term, 1877, MR. JUSTICE MILLER gave a history of this provision. He further says: But while it has been a part of the constitution as a restraint upon the powers of the states, only a very few years, the docket of this court is crowded with cases in which we are asked to hold that state courts and state legislatures have deprived their own citizens of life, liberty or property without due process of law. President Hadley says: "A corporation therefore under the law of the United States is entitled to the same immunities as any other person and since the charter creating it is a contract whose obligation cannot be impaired by the one sided act of the legislature, its constitutional position as a property holder is much stronger than anywhere in Europe."

This is a great exaggeration. Corporations in the states forming them have now generally no franchises save such as are granted by the state legislatures and may be taken away by the same power. Foreign corporations, those created by other states or nations, have no right to do business in a state, except the conduct of interstate commerce, which that state may not take away. They exist only by sufferance in states other than that in which organized. It is only their property real and personal which is protected by the law. Their franchises are subject to hostile legislation wherever they try to do business.

Again President Hadley says: "The fundamental division of powers in the constitution of the United States is between voters on the one hand and property owners on the other. The forces of democracy on one side divided between the executive and the legislature are set over against the forces of property on the other side with the judiciary as arbiter between them. The constitution itself not only forbidding the legislature and executive to trench upon the rights of property, but compelling the judiciary to define and uphold those rights in a manner provided by the constitution itself."

If anything true is meant by this save that the constitution of the United

States protects rights of property as it does the right to life and liberty, and that the duty of the judiciary is to enforce this protection, I fail to see what it is. I suppose that in every civilized state the laws protect rights in property and the judges enforce these laws. The only difference is that in our constitutions we have statutes not so easily changed as the laws of most nations. There is nothing in the constitution of the United States which is intended to set off property owners as a class by themselves as against others, or which gives them greater or different protection than is accorded to others. It is possible to conceive the owners of property as one class and those who have no property as another, but this is equally true in all nations. But surely, the democracy is not to be conceived as only those who have no property. It is probable that the great majority of the citizens of the United States have some property. Do they therefore not belong to the democracy?

The evil of such statements is that, however intended, they tend to emphasize a division between the rich and the poor not based on fact and hence to stir up feeling among the latter. There are no classes of rich and poor in this country. Those who are today rich may become poor tomorrow, and the poor are often becoming rich. The constitutional provisions protecting rights in property are for the benefit of all, since every man either has or may reasonably expect to have property, and the possessions of a poor man are as dear to him as the greater abundance of the rich.

That the protection of property is one of the governmental functions recognized as important in all civilized states, it is hardly necessary to say. Its recognition in the fifth amendment is in form as well as in substance as old as Magna Charta. Its recognition in the fourteenth amendment does no more than extend to the rights of life, liberty and property, the protection of the federal government against state aggression. The great distinction between this government and that of England in this regard is that here the fundamental rights of the individual to life, liberty and property being guaranteed by written constitutions against deprivation otherwise than by due process of law have the protection of the courts against legislative as well as other encroachment.

Detroit, Oct. 27, 1909. C. A. KENT.

INCONSISTENT DEFENSES.—The vexed question of the right to rely upon inconsistent defenses is still unsettled. The conflict in the cases continues. *Light* v. *Stevens* (1908), —Cal. App. —, 103 Pac. 361, and *Postal Telegraph Cable Co. of Texas* v. *Harriss* (1909), — Tex. Civ. App. —, 121 S. W. 358, assert the right; *Fetzer & Co.* v. *Williams* (1909), — Kan. —, 103 Pac. 77, denies it. In the California case it was claimed that the contention that certain drafts were intended to apply as payment on account of a promissory note was untenable under the allegation in the pleading that these drafts were received for the use and benefit of a party upon a promise and agreement to return them; in the Texas case that although the plaintiff in his replication stated the facts substantially as set up in the answer in which defendant pleaded a contract alleged to limit its liability to its own line he could claim at the trial that the liability of the defendant was not so limited and that

said contract was a "through" contract; in the Kansas case that the defendant had rescinded a contract of purchase and that he had affirmed it.

The decisions in California and Texas are in line with the former cases in those states; the one in Kansas does not follow the suggestion made in *De Lissa* v. *Coal Co.*, 59 Kan. 319, where the court said: "It would seem that an objection to defenses in an answer upon the ground of their inconsistency with each other could never be sustained," and quoted with apparent approval the following from POMEROY'S CODE REMEDIES: "Assuming that the defenses are utterly inconsistent, the rule is established by an overwhelming weight of authority, that unless expressly prohibited by the statute, they may still be united in one answer," and where the court also said that practically the only dissent from the rule thus stated by Pomeroy was by the courts of Minnesota and Missouri. The present state of the authorities does not justify Mr. Pomeroy and many states other than those of Minnesota and Missouri must be added to the dissenting list and among them Kansas itself.

The case of *Derby* v. *Gallup*, 5 Minn. 85, is one of the earliest cases upon the question under the code system of pleading. It was decided nearly fifty years ago (1860) and is a well reasoned case. The action was trover for the taking and conversion of certain personal property, the possession and ownership of which were claimed by plaintiff. The answer was a denial of every allegation in the complaint and also an allegation by way of additional defense that the goods described in the complaint belonged to a third person and that defendant had taken them on a writ duly issued against such third person. The court below instructed the jury that under the pleadings the taking was admitted, and the corectness of this instruction came on for hearing before the Supreme Court and the case was affirmed. Although Mr. Pomeroy was of the opinion that the weight of authority was overwhelmingly the other way, he admits that the reasoning in this case by ATWATER, J., was very able and difficult to be answered upon principle.

Among the more recent cases in which the question has been fully considered is that of *Seattle National Bank* v. *Carter*, 13 Wash. 281. It was a suit upon promissory notes. The answer denied that the plaintiff was the owner and holder of the notes or that they had been indorsed and delivered to it for a valuable consideration and also alleged affirmatively the transfer of the notes to plaintiff and that they had been paid. The court below charged the jury that, under the pleading, the only question for consideration was the payment of the notes. Plaintiff obtained a verdict and the case was taken to the Supreme Court, the issue there being stated by that court as follows: "But as the question of inconsistent defenses is raised squarely in this case and has been argued with much zeal and ability by the attorneys on both sides, we have concluded to enter upon an investigation of that question and settle the law, so far as this state is concerned, on that proposition." In its opinion the court quotes the rule laid down by Pomeroy, analyzes the cases cited by him in support of the same and reaches the conclusion that he "was unwarranted in making the assertion that the rule he announced was established by an overwhelming weight of judicial authority or any weight of authority at all, under the code procedure," and declined to follow it, saying that its

"theory carried to its logical result would permit a defendant who was sued upon a promissory note to allege non-execution, want of consideration and payment. Under such allegations he would be permitted to swear that he never executed the note; that he *did* execute the note but that it was without consideration; and that he *did* execute the note, that the consideration *was* good, but that he had paid the same. Such a practice as this would not only be farcical but absolutely wrong and immoral and an encouragement of perjury * * * " The ruling of the court below was sustained.

Bell v. *Brown,* 22 Cal. 678, and *Buhne* v. *Corbett,* 43 Cal. 264, are leading cases in that state asserting and enforcing the right to plead inconsistent defenses. In the former case the court below sustained a motion that defendants be required to elect between the defense of the denial of the plaintiffs' title and possession, and the defense of voluntary abandonment and forfeiture by reason of non-compliance with mining regulations. In reversing the case the Supreme Court, referring to the code provision that the defendant may set forth as many defenses as he may have, said: "This section applies to all answers, verified and unverified. It does not attempt to make any distinction between the two, or to make any rule which does not apply equally to both. The right to set up numerous defenses in a suit is equally as important to the defendant in one case as in the other. It is an absolute right given him by law, and the principle is as old as the common law itself. He may fail to prove one defense by reason of the loss of papers, absence, death or want of recollection of a witness, and yet he ought not thereby to be precluded from proving another, equally sufficient to defeat the action. In many cases it would be a denial of justice if a defendant should be shut out from setting up several defenses." In *Buhne* v. *Corbett* the complaint alleged ownership of certain premises and that defendants entered into and unlawfully held possession of the same. The answer denied the entry and the withholding of possession and by way of further defense alleged that the defendants were in charge of the lighthouse on the premises as employees of the United States. At the trial the plaintiff was non-suited on the ground that he had not shown possession by the defendants, his position being that he was relieved from the necessity of doing so under the averments of the answer. The case was appealed and the Supreme Court, in affirming the judgment of non-suit, cited *Bell* v. *Brown* and said: "But even had he by motion presented the question of the supposed inconsistency of the several defenses in the answer, we think it could not have availed him. A party defendant in pleading may plead as many defenses as he may have. If a plea or defense separately pleaded in an answer contains several matters, these should not be repugnant or inconsistent in themselves. But the plea or defense regarded as an entirety, if it be otherwise sufficient in point of form or substance, is not to be defeated or disregarded merely because it is inconsistent with some other plea or defense pleaded."

The statement of the court in *Bell* v. *Brown,* supra, that the right of the defendant in a suit to set up numerous defenses "is an absolute right given him by law, and the principle is as old as the common law itself" calls for some comment. The strict rule of the common law was that a defendant

could plead only one defense to the same cause of action. To do otherwise would violate the rule against duplicity. This rule requiring him to choose one defense only where he had several, it frequently happened that he failed to select the strongest and the rule came to be regarded as a harsh one. This led to the enactment of the statute of 4 Anne which provided that it should "be lawful for any defendant * * * in any action or suit * * * in any court of record, with leave of court, to plead as many several matters thereto as he shall think necessary for his defense." This left the matter to the discretion of the court. At first it seems that the judges would refuse leave when inconsistent pleas were tendered, but subsequently granted it in all cases, perhaps, but those of general issue and tender. It appears therefore that at common law the question of inconsistent pleas could not arise, that under the statute of Anne the matter was wholly within discretion of the court when leave to file them was asked and that the practice finally obtained of allowing them in nearly all cases. T. A. B.

VACATION OF CORPORATION DIRECTORS.—In the case of *Kavanaugh* v. *The Commonwealth Trust Company,* decided by the Supreme Court of Saratoga County, New York, in September, 1909, VAN KIRK, J., rules upon some novel points relating to the duties of directors of trust companies in preventing the wasting of corporate assets. The suit was brought by a shareholder to recover into the treasury of the trust company, a sum of money as damages suffered by the loss of funds through the alleged negligence of the directors. The loss occurred through the connection of the trust company,—then the Trust Company of the Republic,—with the failure of that famous "artistic swindle," the United States Shipbuilding Company, in 1903.

The trust company was organized in March 1902, with $1,000,000 capital stock, $500,000 surplus, and a directorate that stood for strength and probity in the world of finance, to operate largely in the new and lucrative field of meeting the needs of the southern cotton-growers. Mr. Dresser, a merchant, son of a merchant, married into the Vanderbilt family, but with no experience in "high finance," was chosen president.

About this time John W. Young, a promoter of projects of 'unvarying failure,' and Lewis Nixon, the designer of the *Oregon,* with the prospect of large ship subsidies from the probably successful efforts of Senators Frye and Hanna in congress, dreamed of a shipbuilding trust to include the principal shipbuilders of the country, acquired options therefor, and proposed to form a company to take them over. The plan required about $8,000,000 cash,—$6,000,000 to pay for properties, and $2,000,000 for working capital and commissions. It was proposed to sell $9,000,000 of first mortgage bonds for this purpose, which should first be underwritten at 90,—one-third in London, one-third in Paris, and one-third in the United States. Through agreement and the offer of $67,000 in cash, $250,000 in bonds, and $1,400,000 in the stock of the proposed company, the stuff of Young and Nixon's dream took on the appearance of established fact, to Mr. Dresser and the directors of the trust company and they agreed to issue the prospectus of the Ship Company, and secure the underwriting of $3,000,000 of the bonds in the United

States. This they easily did; the London underwriting totally failed, but Paris responded by underwriting $4,250,000,—by irresponsible parties, as it afterward turned out. The trust company undertook to secure the $1,750,000 additional to complete the $9,000,000, and succeeded. The prospectus of the ship building company was then put out by the trust company,—false in several particulars,—and books were opened for public subscriptions. Not a penny was taken in Paris, and only $490,000 in the United States. The underwriters were then called on,—and only $25,000 was received from Paris, and a little over $2,000,000 from the United States. The options would expire August 12, when $6,000,000 would be needed to take them up. Mr. Dresser, without consulting the directors, met the crisis in two ways: (1) by loaning over $2,000,000 of the Trust Company's money to Mr. Nixon, —much more than the law permitted to be loaned to one person,—upon the security of the Ship Company bonds; (2) by depositing about $2,000,000 of the Trust Company's money with various banks, then borrowing the same from them on the joint note of himself and Mr. Nixon, secured by a deposit of double the amount, in Ship Company bonds, and the guaranty of the Trust Company. No loss, however, occurred from these transactions, as they were taken care of by a syndicate subsequently organized for that purpose. They, however, were loans that prudent business men would not have made.

It is to be noted that these transactions occurred August 12. Exactly similar transactions,—excessive loans to individuals, including loans to Mr. Dresser himself, on the security of Ship Company bonds,—advances of cash to other banks who loaned it to others on the security of Ship Company bonds and the guaranty of the Trust Company,—were made by Mr. Dresser in the latter part of August, and during September, October and November. These resulted in the losses complained of.

The by-laws provided for 25 directors who were to meet the third Tuesday of every month, at which the minutes of the meetings of the executive committee were to be read. The executive committee was to consist of six directors, who were to meet every Tuesday. Money could be deposited only in such banks as were designated by the executive committee, and in the name of the Trust Company. The by-laws also provided that this committee might authorize the president to make investments in securities and dispose of them without consulting the committee, *but all such transactions should be reported to the committee at its next meeting.*

Neither the transactions of August 12, nor those of later date were reported to the directors nor to the executive committee. According to the by-laws the executive committee, and the directors should have met on August 19, and the transactions of August 12 should have been reported to them then, or they should have inquired what loans had been made. This they did not do, nor was it done, because, as it was argued, the directors were doing as all good directors do,—taking a vacation for their health and pleasure,—on August 19.

If the executive committee and the board had conformed to the by-laws, and had met August 19, and had examined the loans made August 12, they would have been put on their guard as to the reckless acts of the president,

and would have had warning of the probability or possibility of a repetition of the same. The defendants did not in fact know of the acts of August 12, and the subsequent ones. Ought they to have known? Were they negligent in failing to know?

The Court says as to each director: "Was he warned and put on his guard by anything he knew, or ought to have known? If in the performance of his duties, with the care and attention an ordinarily prudent man, actuated by self interest, would have given to his own business affairs, he would have learned of the wrongful acts in time to have prevented them or lessened the loss, then he was negligent in failing to know them." The Court further specifies: It is the custom and duty of directors to know of the loans of the bank or trust company. Under the by-laws, it was the duty of the executive committee to require all loans and investments to be reported at its next meeting for approval, to know of them then, and of the directors to know of them at their next meeting. If the loans were not then reported to them, it was their duty to require them to be reported. This duty is not lessened or discharged because they are informed there will be no regular meeting. Such duty may be performed outside of regular meetings. If there is necessity for each director to act he may act by himself. Where there is a duty to know, failure to know is equivalent to actual knowledge and failure to act. If the directors see fit to entrust the business to officers chosen by them, it is their personal trust and not the trust of the company itself or of the stockholders. To do his duty as directors of other institutions of the same kind in the same city or community perform theirs is not sufficient. "A man cannot believe he may neglect his duty or do a wrongful act because other men to his knowledge have the habit." While a prudent man takes a vacation, he also at the time takes the risk of mismanagement or misconduct while he is gone; he is then not performing his duty to his business, but exercising faith instead of performance. There is no understanding that directors are to do their duty,—*except during vacation time.* While a director may be excused by the board or by very pressing business, or by sickness or other necessity, yet it is the duty of the board or of the executive committee to attend at the appointed time for a meeting, and they cannot abdicate these duties, and turn the company over to the executive officers, without assuming liability for imprudent acts of such officers causing loss, which they would have prevented had they attended to their duties. Neither are directors excused because they have committed their duties to the executive committee. If they rely on them it is their own reliance and their own risk. They may delegate the work, but not their responsibility.

As will be noted, the Court applies the New York rule that directors are held to "the same degree of care that men of common prudence exercise in their own affairs," *Hun* v. *Cary,* (1880), 82 N.Y. 65, 37 Am. R. 546; *Bosworth* v. *Allen* (1901), 168 N. Y. 157, 85 Am. St. R. 667, 55 L. R. A. 751, with note; also, *Marshall* v. *Farmers Bank* (1889), 85 Va. 676, 17 Am. St. R. 84; *Union National Bank* v. *Hill* (1899), 148 Mo. 380, 71 Am. St. R. 615; *Warren* v. *Robison* (1899), 19 Utah 289, 75 Am. St. R. 734; *Commercial Bank* v.

Chatfield, (1899), 121 Mich. 245; *Fisher* v. *Parr,* (1900), 92 Md. 245. It also repudiates the Pennsylvania rule, that directors "cannot be held to the same ordinary care that they take of their private affairs," and are not liable "if they perform their duties in the same manner as they are performed by all other directors of all other banks in the same city,"—*Swentzel* v. *Penn. Bank,* (1892), 147 Pa. St. 140, 30 Am. St. R. 718; *Briggs* v. *Spaulding,* (1891), 141 U. S. 132, 11 Sup. Ct. R. 924; *Killen* v. *Barnes* (1900), 106 Wis. 546, 574, 82 N. W. 536.

Cases of inattention to corporate affairs by directors are many, but the one above is the only one the writer has found involving vacations. Long ago Lord HARDWICKE said of directors and executive committees, "If some persons are guilty of gross non-attendance, and leave the management intirely to others, they may be guilty by this means of the breaches of trust that are committed by others,"—*The Charitable Corporation* v. *Sutton* (1742), 2 Atk. Ch. 400. This is considered almost the universal rule: *Mutual Building Fund* v. *Bossieux,* (1880), 3 Fed. R. 817; *Williams* v. *McKay,* (1885), 40 N. J. Eq. 189, 200, 53 Am. R. 775; *Marshall* v. *Farmers Bank,* (1889), 85 Va. 676, 17 Am. St. R. 84; *Warren* v. *Robison,* (1899), 19 Utah 289, 75 Am. St. R. 734; *Fisher* v. *Parr,* (1900), 92 Md. 245, 48 Atl. 621; *Fletcher* v. *Eagle,* (1905), 74 Ark. 585, 109 Am. St. R. 100. But compare *Briggs* v. *Spaulding.* (1891), 141 U. S. 132. Mere absence from a meeting is not alone sufficient to establish negligence, *Warner* v. *Penoyer,* (1898), 91 Fed. R. 587, 44 L. R. A. 761; *Murphy* v. *Penniman,* (1907), 105 Md. 452, 121 Am. St. R. 583; absence because of temporary severe illness is an excuse for non-attendance at a meeting, *Briggs* v. *Spaulding,* (*supra*), *Warren* v. *Robison,* (1902), 25 Utah 205; but one continually ill so he cannot attend to business should resign, *Rankin* v. *Cooper,* (1907), 149 Fed. 1010, or get a leave of absence from the board, *Briggs* v. *Spaulding,* (*supra*). Absence on private business is sometimes an excuse, *Warren* v. *Robison,* (1902), 25 Utah 205, but not always, *Rankin* v. *Cooper,* (1907), 149 Fed. 1010, 1016. H. L. W.

RIGHT OF THE UNITED STATES TO RECOVER MONEY PAID ON PENSION CHECKS BEARING FORGED INDORSEMENTS.—In the case of the *United States* v. *National Exchange Bank of Providence,* (1909), 29 Sup. Ct. 665, decided June 1, 1909, the Supreme Court of the United States rendered a decision which settles an apparent conflict relative to the law of commercial paper, that has heretofore existed in the federal courts. The main facts were as follows: The United States pension agent at Boston, during a period of several years, drew 194 checks, aggregating over $6,000 upon the sub-treasury of that city. The signatures of the payees of the checks were forged and about all the checks cashed by defendant bank. The checks in controversy were indorsed to another bank for collection, paid by the sub-treasury and later the forgeries were detected. Suit was brought by the United States in the circuit court for the amount of the checks and Judge Lowell decided that the Government could recover. 141 Fed. 209. On appeal the circuit court of appeals reversed the decision of the lower court. 151 Fed. 402. On this appeal, the

Supreme Court, reversing the judgment of the circuit court of appeals and affirming the judgment of the circuit court, held that the right of the United States to recover the amount of the checks was not conditioned either upon demand or the giving of notice of the discovery of the forgeries, in view of U. S. Rev. Stat., §§ 4764, 4765 (U. S. Comp. Stat. 1901, pp. 3284, 3285).

The defendant contended that by the operation of an exceptional rule known to prevail under certain conditions, as to commercial paper, the United States could not recover the payments of the checks, as there had been unreasonable delay in giving notice to defendant bank after the discovery of the forgeries. This exceptional rule has been followed since the early case of *Price* v. *Neal*, 3 Burr. 1354, both in the English and American courts in a distinct group of decisions where the drawee was charged with the knowledge of the genuineness of the drawer's signature. See *Smith* v. *Mercer*, 6 Taunt. 76; *Cocks* v. *Masterman*, 9 Barn. &C. 902; *Mather* v. *Lord Maidstone*, 18 C. B. 273. In *London & River Plate Bank* v. *Bank of Liverpool*, [1896] 1 Q. B. 7, the rule was somewhat extended, but modified in *Imperial Bank* v. *Bank of Hamilton*, [1903] A. C. 49, so as to preclude a recovery where no actual loss was shown by the delay in giving notice.

Mr. Justice STORY recognized the rule in *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333. Said the learned justice: "Even in relation to forged bills of third persons received in payment of a debt, there has been a qualification engrafted on the general doctrine, that the notice and return must be within a reasonable time; and any neglect will absolve the payer from responsibility." To the same effect see *Gloucester Bank* v. *Salem Bank*, 17 Mass. 32; *Salt Springs Bank* v. *Syracuse Sav. Inst.*, 62 Barb. 101; 3 KENT COMMENTARIES, ed. 13, p. 86, and note; *Thomas* v. *Todd*, 6 Hill 340; 2 CHITTY, CONTRACTS (11th Am. Ed. 931, and note; 5 AM. & ENG. ENCYC, 1069, note 1, 2; 5 DAN. NEG. INST. § 1371); *United States* v. *Clinton Nat. Bank*, 28 Fed. 357. Money paid on forged commercial paper to a holder for value and without fault cannot be recovered back where the holder would be prejudiced thereby, *Ellis* v. *Ohio L. I. & T. Co.*, 4 Ohio St. 628, 64 Am. Dec. 610; *Allen* v. *Fourth Nat. Bank*, 59 N. Y. 12.

United States v. *Cent. Nat. Bank*, 6 Fed. 134, and *United States* v. *Nat. Exchange Bank*, 45 Fed. 163, followed the exceptional rule. Both cases, however, can be distinguished from the principal case by the fact, that in one, no notice was given at all, and in the other, a month had expired before suit was brought. The government, dealing in commercial paper, is subject to the same rules and obligations that control individuals in like transactions. *Cooke* v. *United States*, 91 U. S. 389.

ALDRICH, District J., who delivered a dissenting opinion in the circuit court of appeals said, "apparently a question like that involved in this case has not been dealt with by the supreme court." Mr. Justice WHITE in delivering the opinion of the supreme court says, "We have been cited to no decision of a court of last resort, involving a case like the one before us, where it was held that such a case is controlled by the exceptional rule." The learned justice after reviewing many of the English and American

decisions comes to the conclusion that the exceptional rule does not apply to the government and especially in view of the statutes relative to the issuing of pension checks, and that the defendant's indorsement of the checks being a warranty of their genuineness no demand or notice before bringing suit for the repayment of the checks was necessary. The court refrained from expressing any opinion whether or not the facts presented a case of mutual mistake. In *United States* v. *Nat. Park Bank,* 62 Fed. 825, where the facts were quite similar to the principal case a recovery was allowed upon the theory, that the payments were made under a mutual mistake of fact. The principal case is in accord with *Merchants Bank* v. *Marine Bank* 3 Gill 96, 43 Am. Dec. 300; *White* v. *Continental Nat. Bank,* 64 N. Y. 316; *United States* v. *Onondaga County Sav. Bank,* 39 Fed. 259; *Onondaga County Sav. Bank* v. *United States,* 64 Fed. 703. The decision no doubt will have a tendency to make banks more careful in the payment of government pension checks. W. J. B.

DAMAGES RECOVERABLE ON STOCK BROKER'S FAILURE TO PURCHASE AS DIRECTED.—Whether it be due to a lack of available securities of a more tangible sort, to the urgencies which arise in modern business, or to other economic conditions pertinent to the present order, it must be apparent to those even casually connected with the business world that there is a constantly increasing amount of investment in stocks and bonds and that this condition is fraught with great importance from a legal aspect. Breach of contract, failure of duty and breach of trust in the fiduciary relations of the agent, or broker as he is generally known, having money of his principal or client to invest, give rise to many actions for damages and the courts are constantly engaged in enforcing reparation to the injured party.

It is so fundamental in the law of damages as to require no cited authority that the law aims at a reparation of the injured party, an indemnity of his wrong and a compensation for his loss. Where there exist no special facts which will permit him to collect exemplary damages, in jurisdictions where such are assessable, he will not be permitted to do more than make himself whole. In actions for breach of contract the rule in *Hadley* v. *Baxendale,* 9 Exch. Rep. 341, is, with modifications to fit particular situations, quite universal. In the absence of any special circumstances the damages for a breach of contract are such as may "reasonably be supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of a breach of it." In actions *ex delicto* a somewhat broader rule applies as to the details of proving the damage but in general the damages assessed must be compensatory merely. *Allison* v. *Chandler,* 11 Mich. 542. For breach of contract to deliver stock the damages should not be reckoned by what it costs the defendant to perform but rather the detriment to the plaintiff, i. e., the value of the stock, its pecuniary equivalent or the stock itself together with any special damage. *Barnes* v. *Brown et al.,* 130 N. Y. 372.

Rather an extraordinary assessment of damages is to be observed in the case of *Wahl* v. *Tracy et al.,* — Wis. —, 121 N. W. 660. The plaintiff, a

surgeon who was unfamiliar with stock dealing, gave to the defendants as his brokers the sum of $12,800 for immediate cash investment in a specified stock at the prevailing market price or lower if obtainable. The defendants, in violation of their instructions, ordered the stock from another broker on a margin and paid $3,000 of the plaintiff's money to cover. Representing to the plaintiff that they had purchased the stock outright and that it could not be delivered to him until after some considerable delay in obtaining a transfer on the books of the company, the defendants used the remainder of plaintiff's money in their own business and the stock, purchased on margin with the plaintiff's money and represented by certificates made out in blank, they pledged as security for their own obligations. Some weeks later plaintiff, having learned of the fraud, demanded his stock which, as soon as the entanglements could be removed, was delivered to him. It had depreciated $1,200 in value from the time of the purchase on margin to the time of the last demand. Upon suit for damages the Supreme Court of Wisconsin allowed him this difference as compensation for his injury.

The theory upon which the recovery was allowed, as was stated by Mr. Justice Dodge who delivered the prevailing opinion, rests upon a breach of the fiduciary relation existing between the broker and his client. By accepting the commission defendants became the agents of the plaintiff and, being entrusted with his money for a special purpose, they necessarily assumed and owed toward him the fiduciary duties of good faith and due diligence in carrying out his instructions. *Islam* v. *Post*, 141 N. Y. 100, *Hill* v. *American Surety Co.*, 107 Wis. 19, Dos PASSOS, STOCK BROKERS, pp 207, 218. It therefore became their duty to purchase the shares in question at the best price obtainable. *Taussig* v. *Hart*, 58 N. Y. 425, *Larrabee* v. *Badger*, 45 Ill. 440. Upon a breach of this duty the measure of damages is the value of the stock at the time and place of proper delivery and the delivery of the stock can act only in mitigation of damages by way of counterclaim. *Taussig* v. *Hart*, 49 N. Y. 301, *Thompson* v. *Kissel*, 30 N. Y. 383. At the time the purchase was completed and after the purchase price had deteriorated defendants had discharged their trust and no sooner. Being bound to purchase at the best obtainable price they became responsible to plaintiff for the amount of the slump.

To maintain this theory of recovery it is essential that the purchase be deemed not completed until the purchase price was paid for the shares, or in other words, that the purchase on margin be deemed not such a purchase for and in behalf of the plaintiff as to vest title in him immediately. It is obvious that if the legal title vests immediately in him the brokers' duty in regard to finding a "best price" is discharged. There is ample authority, however, that this contention cannot successfully be maintained but that rather upon a purchase of stock on margin for a client the title vests in him immediately and he becomes the owner thereof, the relation of bailor and bailee arising between the two when the agent or broker keeps the certificates of the stock in his possession. *Markham* v. *Juadon*, 41 N. Y. 235, *Baker* v. *Drake*, 53 N. Y. 211, *Skiff* v. *Stoddard*, 63 Conn. 198, *Nourse* v. *Prime*, 4 Johns. Ch. 490, *Horton* v. *Morgan*, 19 N. Y. 170, *Le Marchant* v. *Moore*,

150 N. Y. 209. It is true that the act of purchasing the stock on margin was unauthorized and irregular, but had the plaintiff wished to avail himself of this fact, as Mr. JUSTICE MARSHALL, dissenting, points out, he should have repudiated the transaction for irregularity in the purchase and the pledging back of the shares, recovered his money from the brokers and purchased the stock on the market at the then market price, or, after having repudiated the purchase, have received the stock in mitigation of the damages. *Baker* v. *Drake,* supra. But failure to repudiate operates as a ratification. *Clews* v. *Jamieson,* 182 U. S. 461, 21 Sup. Ct. 845. Ratification may be presumed from the acts of the parties and if a principal knowingly appropriate the fruits of his agent's act he will not be heard to say afterwards that the act was unauthorized. *McDermott* v. *Jackson,* 97 Wis. 64, MECHEM, AGENCY, §§ 146, 148, *Hyatt* v. *Clark,* 118 N. Y. 536, *Jones* v. *Atkinson,* 68 Ala. 167, *Thatcher* v. *Pray,* 113 Mass. 291, *Mayer* v. *Dean,* 115 N. Y. 556.

But whether the purchase for the plaintiff be considered as consummated at the time of the purchasing on margin or at the later time of complete and full payment is of no importance in this case. "No maxim is better settled in the law of agency than the maxim *omnis ratihabitio retrotrahitur, et mandato priori equiparatur,*" that ratification is equivalent to prior authority, where rights of innocent third parties do not intervene. Story, J., in *Fleckner* v. *Bank of U. S.,* 8 Wheat, 338, *Cook* v. *Tullis,* 18 Wall, 332, *McCracken* v. *San Francisco,* 16 Cal. 591. If the principal elects to ratify he must ratify *in toto.* MECHEM, AGENCY, §130, *Trixione* v. *Tagliaferro,* 10 Moo. P. C.C. 175, *Eberts* v. *Selover,* 44 Mich. 519, *Wheeler* v. *Sleigh Co.,* 39 Fed. 347, *Baldwin* v. *Burrows,* 47 N. Y. 199. An agent whose act is thus ratified is relieved from his dilemma of responsibility. MECHEM, AGENCY, § 170, *Wilson* v. *Dame,* 58 N. H. 392, *Bank* v. *Bank,* 13 Bush 526, *Hazard* v. *Spears,* 4 Keyes 469, *Szymanski* v. *Plasson,* 20 La. Ann. 90.

In the light of the cardinal rule of damages in actions of this nature, that the plaintiff is to be compensated merely for his loss, it must appear that he is not entitled to his recovery in this case. He was not damaged to that amount nor in that manner nor do the defendants hold the amount recovered as ill gotten profits to the plaintiff's use. By completing the purchase of the shares which they held on margin they paid out precisely the sum necessary to have bought the shares outright at the beginning. It will be observed that the plaintiff received the specified shares for exactly the amount he expected to pay, the lowest price for which they could be obtained at the time of giving the order. Whether it be considered that the purchase on margins was in reality a purchase for the plaintiff which was affirmed by his subsequent ratification, or whether it be considered that the ratification of the completed purchase related back to the first act of the brokers and exonerated them as to irregularity in the whole transaction, it must be apparent that he is not entitled to receive the exact article contracted for, at the exact price he contracted to pay and then collect as damages in a law-suit from his brokers the amount of depreciation of the stock which, by proper action on his own part, he might have availed himself of.

J. T. C.

CAPACITY TO MAKE CONTRACTS RELATING TO LAND GOVERNED BY LEX SITUS. —In *Bank of Africa* v. *Cohen,* [1909] 2 Ch. 129, the Court of Appeal applies the general rule of private international law, that in regard to immovable property the lex situs prevails in regard to all rights, interests, and titles in and to such property, to the question of the capacity of a married woman to enter into a contract relating to her real property situated in a colony.

A married woman domiciled in England by a deed executed there agreed with the plaintiff bank to mortgage or transfer, as security for advances made or to be made by plaintiff to her husband, her real property situated in the Transvaal, but without incurring personal liability for the advances; and she appointed plaintiff's manager in the Transvaal her attorney to mortgage and transfer the land, authorizing him to renounce in plaintiff's favor the benefit of all rights which the law of the Transvaal granted her concerning the land. By that law a married woman is, speaking generally, incapable of becoming surety for her husband unless she expressly renounces the benefit of certain provisions of the Roman-Dutch law after having been informed of her rights thereunder. The court holds that the law of the Transvaal governed the question of her capacity to enter into this agreement and that it was void for want of capacity.

There appears to be no English authority precisely in point on this question and the bank's counsel relied somewhat upon *Polson* v. *Stewart,* 167 Mass. 211, in urging the distinction between the capacity to contract and the capacity to convey, but as the contract was one to charge land the court adopts Mr. Dicey's view (CONFLICT OF LAWS, 2d ed., pp. 501, 510) as to the controlling effect of the lex situs. The decision appears to be in accord with the weight of authority in this country: *Linton* v. *Moorhead,* 209 Pa. 646; *Morris* v. *Linton,* 61 Neb. 537; *Post* v. *First National Bank,* 138 Ill. 559; *Cochran* v. *Benton,* 126 Ind. 58; *Doyle* v. *McGuire,* 38 Ia. 410; *Johnston* v. *Gawtry,* 11 Mo. App. 322.