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Note and Comment

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NOTE AND COMMENT.

THE WORK OF THE COMMISSIONERS ON UNIFORM STATE LAWS.—At a time when lawyers are being generally blamed for not reforming procedure and preventing delays in the administration of justice, it is especially gratifying to be able to point to definite good work that some lawyers of public spirit have recently performed in making uniform our variant state laws.

The first Conference of the Commissioners on Uniform State Laws was held at Saratoga in August 1892, the second in November of the same year at New York, and in August, 1909, the nineteenth Conference was held at Detroit.

During the intervening years this body of lawyer-commissioners has become recognized, by reason of the valuable work it has accomplished, as a national representative council of great importance.

Since the first draft of the Negotiable Instruments Law was made in 1895, thirty-eight states and territories have adopted the Uniform Negotiable Instruments Act.

In 1906 the Conference approved the Uniform Warehouse Receipts Act and the Uniform Sales Act; the former of these has been adopted in eighteen states and the latter in six. At the last meeting, in 1909, the Uniform Stock

Transfer Act and the Uniform Bills of Lading Act were approved and will be presented to the legislatures of the several states during their next sessions.

The Commissioners have under consideration a Uniform Partnership Act and a Uniform Incorporation Act, besides laws relating to Marriage, Family Desertion and Non-Support, Insurance and Wills.

The American Bar Association which originated the idea of a national commission for the promotion of uniformity of legislation has assisted the Conference of Commissioners on Uniform State Laws financially and otherwise, and recently several national associations of business men and others have taken active interest in its work.

The important conference on uniform legislation promoted by the National Civic Federation which occurred in January was an indirect result of the good work of the state commissioners and was undertaken partly with the avowed purpose of arousing a popular sentiment in each state in support of the labors of the commission.

In view of what has been accomplished by the commissioners, who have had to contend often against prejudice, ignorance, state pride and general apathy, there ought now to be sufficient appropriations made by each state to enable them to carry on their work still more effectively. All the states share in the benefits of the work and all should contribute to the expenses, and not permit them to be met by contributions from the American Bar Association and a few states.

It is evident that if the uniformity which has been secured is to be maintained, amendments should not be made to the various uniform acts by state legislatures until the proposed amendments have been approved by the National Conference of Commissioners. These uniform laws are the result of most patient and intelligent work, the acts have been redrafted several times before receiving the approval of the commissioners, and ill-considered amendments adopted by the several state legislatures may soon destroy uniformity and bring about a new state of confusion almost as troublesome as that which was intended to be removed by the act. The adoption of even necessary or desirable amendments should be postponed until the commissioners, who are responsible for the original act, shall have considered them and recommended their general adoption. Mr. Amasa M. Eaton, the retiring president of the Conference, directs attention to this matter in his last annual address in speaking of amendments that have been made in at least two states to the Negotiable Instruments Law. He also calls attention to the disposition of some courts to construe the statute strictly, rather than liberally in favor of uniformity, and urges upon the courts the desirability of considering decisions of other states in order that there may be uniformity in the decisions under the law as well as uniformity in legislation.

SOME DIFFICULTIES OF CODE PLEADING.—The common law system of pleading was founded upon the theory that issues of fact, representing the gist of the controversy between the contending parties to a suit, should be developed by the pleadings. In practice this was not always realized, for many

fictions and legal conclusions obtained recognition as legitimate allegations, and upon them issues were formed which satisfied the courts. The most striking and familiar instance of this is found in the common counts. Here there is an allegation of indebtedness, which is a mere legal conclusion, and with this as a consideration a promise to pay is alleged, which in all cases of implied contracts is a pure fiction.

The framers of the Code sought to establish a really logical and consistent system, and to that end a statute was enacted, which is common to all the codes, providing for the abolition of all forms of action and for the allegation of facts constituting the cause of action in simple and concise language. Clearly, this, by its terms, excludes fictions and conclusions of law.

But the common counts, as known at the common law, were too useful to be relinquished, and in spite of a few early adverse decisions and the strenuous opposition of such text writers as Mr. Pomeroy, the courts of the code states, with almost no exception, have declared them sufficient under the reformed procedure. *Goodman* v. *Alexander,* 165 N. Y. 289; *Nichols* v. *Randall,* 136 Cal. 426; *Burton* v. *Rosemary Co.,* 132 N. C. 17. At most they have been held merely subject to a motion to make more definite and certain. *Minor* v. *Baldridge,* 123 Cal. 187; *Thomson* v. *Town of Elton,* 109 Wis. 589; *Kimball* v. *Lyton,* 19 Col. 266.

Common law pleading doubtless contained much that was formal and technical, and it failed in many instances to spread the actual facts of the case upon the record, but it is not so clear that this was always a fault. The very formalism of the common law was often a real protection to the pleader and his client, and so far as the plaintiff was concerned, it enabled him, by the use of approved formulæ, to get into court and stay there with the least amount of labor and risk, while at the same time the defendant was protected by his right to demand particulars. The pleader under the code, always predisposed and frequently required to disregard the common law conventions, often finds that the license given by the statute is a path leading among the quicksands. Curious instances of this constantly appear in the decisions, and lead one to question whether the code is founded upon a really satisfactory theory.

In a recent California case, the plaintiff sued for the purchase price of goods, and he alleged in his complaint that he sold to the defendant a horse and buggy for the sum of $550.00, that the defendant paid $200.00 on account thereof, and that there was still due and owing and unpaid on account of said sale $350.00. *Christensen* v. *Cram* (1909), — Cal. —, 105 Pac. 950. Here was a typical case for the common counts. A common law pleader could hardly have failed to state an unimpeachable cause of action. But the code pleader, disdaining precedent, attempted to state his cause of action "in simple and concise language," as the code directs. Two objections were raised. First, there was no allegation of a promise on defendant's part to pay the $350.00. The court held, however, that plaintiff's allegation of a sale for a stated price was by implication an averment of a promise to pay, and it considered the defect cured by verdict. Second, there was no allegation showing that the price was due and payable, and since, in the absence of an agreement to the

contrary, the price of goods sold is not payable until delivery, it must appear from the complaint that delivery has been made. At common law the counts for goods sold and delivered or goods bargained and sold would have answered the purpose. But the pleader here used only the term *sold*. It was conceded that his count was bad unless sold included the idea of delivery. At common law it did not. 1 CHITTY, PLEADING, *346 (11th Am. Ed.). The California court was willing, however, to strain a point to sustain the pleading, and held that the term sold was equivalent to sold and delivered.

Whether this ruling was correct is perhaps questionable. In *Kirkpatrick-Koch Dry Goods Co.* v. *Box*, 13 Utah 494, a precisely similar point was raised upon an almost identical pleading, and the court held that the term sold did not include the notion of a delivery, and that the complaint failed for that reason to state a cause of action.

In a case of this kind the pleader's task is hardly more than clerical at common law, but under the code, if its directions are followed, it becomes a matter requiring some skill and care. In other words, the code has not made it easier, but has made it harder, to draw a good pleading on a quasi-contract. Of course the defendant, in either the California or the Utah case, could hardly have been misled by the language used. He doubtless understood perfectly the nature of the claim made against him. The established theory of pleading was the only sufferer, for under this theory the test of a good complaint is the sufficiency of the facts stated to constitute a cause of action, and not their sufficiency to inform the defendant of the nature of the plaintiff's case. Whether it would be better to change this theory and establish in its stead a system based upon the idea of notice, is another question, which has been discussed with some care by Professor Whittier in a recent number of the Illinois Law Review. It is perhaps safe to say that such a change would destroy the occasion for raising three-fourths of the questions on pleading which are now so frequent under the code system. E. R. S.

APPLICABILITY OF ORDINANCES TO THE DISTRIBUTION OF LIQUORS BY SOCIAL CLUBS.—The sale of liquors by a social club presents a question of interest not only to the legal profession, because of the varying views taken by the different courts, but also to the laymen who are interested as members of such social clubs, which may be found in almost every town and city throughout the country. The socialistic tendency of the present day finds its expression in this as in nearly all other matters, and "the principle of law that prohibits a laboring man from buying a drink of liquor in a saloon ought to prevent the wealthy gentlemen from organizing themselves into a corporation for the purpose of selling it to their members" accords with the views of the general public regarding fair play and equality before the law. The rule that revenue laws require a liberal construction in their favor to prevent evasions, has definitely settled the matter in the federal courts, which are uniform in holding that such clubs must procure a license. *United States* v. *Wittig*, Fed. Cas. No. 16, 748; *United States* v. *Giller* (C. C.), 54 Fed. 656; *United States* v. *Alexis Club* (D. C.), 98 Fed. 725. The question is also free from doubt when the laws are prohibitory in character, as prohibition statutes have

never been construed as exempting social clubs from their operation. *Barden* v. *Montana Club,* 24 Am. St. Rep. 27, Note p. 35.

Several recent cases have again brought the matter to the attention of the courts. In *Manning et al.* v. *Canon City* (1909), — Colo. —, 101 Pac. 978, the defendants, constituting the board of control of the Elks' Club of Canon City, were convicted of violating a city ordinance providing that "whosoever by himself or another either as principal, clerk, agent or servant, shall sell or dispose of intoxicating liquors * * *" shall be fined. The club dispensed liquors as a mere incident in carrying out its social purposes. The court in holding such a transaction a sale within the provisions of the ordinance, cites *State* v. *The Easton Social Club,* 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64, which quotes with approval from *South Shore Club* v. *People,* 228 Ill. 75, 81 N. E. 805, 12 L. R. A. (N. S.) 519, 119 Am. St. Rep. 417, "that there is no occasion to be astute and to indulge in questionable refinements in order to relieve these corporations of the just consequences of their acts." The principles here involved were reaffirmed in *Lloyd et al.* v. *Canon City* (1909), — Colo. —, 103 Pac. 288. A few months later the Supreme Court of Washington reached the same conclusion in the *City of Spokane* v. *Baughman* (1909), — Wash. —, 103 Pac. 14. The facts of that case were very similar to the preceding cases. The defendant, steward of the Spokane Club, was convicted of violating an ordinance providing in effect that a license should be procured by anyone desiring to keep a drinking shop, barroom or saloon, at which liquors might be sold. The ordinance was passed in 1886, the club was organized in 1890, and incorporated in 1899. No attempt was made prior to the suit to enforce the ordinance against the club. The decision in this, as in the Colorado cases, turned upon whether such transactions should be considered sales, and in holding them such, the court applied Blackstone's definition that "a sale is a transmutation of property from one man to another, in consideration of some price or recompense in value." The fact that sales could only be made to club members did not change the nature, but simply limited the number, of transactions. These decisions find support in: *People* v. *Soule,* 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494; *State* v. *Horacek,* 41 Kan. 87, 21 Pac. 204, 3 L. R. A. 687; *State* v. *Neis,* 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412; *Newark* v. *Essex Club,* 53 N. J. L. 99, 20 Atl. 769; *Kentucky Club* v. *Louisville,* 92 Ky. 309, 17 S. W. 743; *Nogales Club* v. *State,* 69 Miss. 218, 10 South. 574; *Marmont* v. *State,* 48 Ind. 21; *Mohrman* v. *State,* 105 Ga. 709, 32 S. E. 143, 43 L. R. A. 398, 70 Am. St. Rep. 74; *State* v. *Shumate,* 44 W. Va. 490, 29 S. E. 1001; *State* v. *Boston & Pickwick Club,* 45 La. Ann. 585, 12 South. 895, 20 L. R. A. 185. But a contrary holding would have been equally well supported. In *Cuzner* v. *California Club* (1909), — Cal. —, 100 Pac. 868, decided several months prior to the cases under discussion, the court holds that such a club is not doing a "business of selling liquors"; but in a separate opinion Chief Justice BEATTY states that he would have serious doubts as to this conclusion, were it not that after the re-enactment of an existing ordinance no attempt had been made to collect a license, thus supporting a construction put upon the ordinance that the club did not come within its terms. But an even longer lapse of time received no consideration as affecting the

construction in *City of Spokane* v. *Baughman,* supra. For facts and discussion of *Cuzner* v. *California Club,* see 7 MICH. L. REV. 698. In support of the California case may be cited: *Klein* v. *Livingston Club,* 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717; *People* v. *Adelphi Club,* 149 N. Y. 5, 43 N. E. 410, 31 L. R. A. 510, 52 Am. St. Rep. 700; *Commonwealth* v. *Smith,* 102 Mass. 144; *State* v. *St. Louis Club,* 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; *Manassas Club* v. *City of Mobile,* 121 Ala. 561, 25 South. 628; *State* v. *Austin Club,* 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; *Tennessee Club* v. *Dwyer,* 11 Lea (Tenn.) 452, 47 Am. Rep. 298; *Piedmont Club* v. *Com.,* 87 Va. 540, 12 S. E. 963; *State ex rel. Columbia Club* v. *McMaster,* 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826; *Barden* v. *Montana Club,* 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27.

Since the determination of these cases necessarily turns upon the construction given to ordinances not uniform in their terms the decisions in many cases cannot be said to be in direct conflict, but often the difference is so slight as to justify such a view. The most obvious course which should be taken to prevent the question from arising would be to include or to exclude such organizations from the operation of the ordinance by express terms.

F. H. S.

CAPIAS IN EXECUTION WITHOUT PRIOR ORDER OR ARREST.—A practice question of some interest and frequent occurrence, which recently received careful consideration in the supreme court of New Jersey, is whether execution against the body without special order of the court granting it nor mention of it in the judgment, is valid if the action was not commenced by *capias* and there was no order of arrest during the action before judgment.

The cautious lawyer would of course get the order in advance rather than take any chances of liability for false imprisonment; but even lawyers are not always thoughtful and cautious, or our courts would have less business, and the paragraph writer would lose this opportunity.

On principle it would seem that the only advantage of or reason for prior order would be to get adjudication of the right in the particular case, to avoid risk of taking it in an unwarranted case. For the execution is the end and aim of the law and the only purpose in suing at all; wherefore, the execution follows as a matter of course from the fact of judgment; and there need be no mention of it in the judgment, other than the statement that it is considered and adjudged that the plaintiff do recover, &c., whereupon execution appropriate to the judgment given will issue as a matter of course. A judgment without right to execution would be a vain thing; and if no particular execution is mentioned, why should it not be a *capias* as well as any other process? The only rule is that the execution must follow and be appropriate to the judgment to be executed.

Historically considered, *capias* being a common law process, the right to have it issue would seem to exist unless there is a special order in the judgment against it or some statutory restraint. For when a right is shown to exist at common law it would be presumed to continue in the absence of anything to indicate the contrary. At the common law the rule was that the

judgment creditor might have execution against the body on all judgments for wrongs done by force; which was gradually extended by statutes till *capias* would lie on nearly all cases; and when the reaction came it was restricted again till now *capias* lies principally on judgments and in actions for torts, or where there has been some fraud or breach of trust. Throughout all these changes produced by the statutes there has been one rule consistently adhered to by the courts, thus expressed by Lord Coke, and after him commonly repeated: "Where *capias* lies in process, there, after judgment, *capias ad respondendum* lies, and there the king shall have *capias pro fine*. With that agreeth 8 Hen. 6, 9; 35 Hen. 6, 6; 22 Edw. 4, 22; 40 Edw. 3, 25; 49 Edw. 3, 2, and many other books." *Sir William Harbert's Case*, 3 Coke 11b.

In all the discussion on this subject in the old common law no distinction is made as to whether there was in the particular case a *capias* issued in process or order of arrest made before judgment, but only whether the case was appropriate for one. In New York and several other states it has been held that *capias* lies in execution where it could not have been had in process, if the case was commenced in a court that could not issue a *capias* and on appeal judgment was rendered in a court that could issue such execution, provided the facts were such as to have warranted *capias* in process had the case been commenced in the court that rendered the final judgment. See *Winton* v. *Knott* (1895), 7 S. Dak. 179, 63 N. W. 783, for review of cases.

In the New Jersey case above referred to the suit was not commenced by *capias*, no order of arrest was made before judgment, and the judgment did not direct a *capias* to issue; wherefore the clerk of the court refused to issue one. The plaintiff asked for and the court granted an order against the clerk commanding him to issue the *capias*, and making reference to numerous prior cases in which such executions had been issued in that state without prior special order. *Kintzel* v. *Olsen* (July 9, 1909), — N. J. L. —, 73 Atl. 962.

The decisions in the states generally are to the same effect. See: *Roberts* v. *Prosser* (1873), 53 N. Y. 260, holding an attorney not guilty of false imprisonment of an assignee for creditors on a judgment against him for conversion of the trust fund; *Peebles* v. *Foote* (1880), 83 N. Car. 102, refusing an application to vacate an arrest on execution on a judgment without mention of *capias* or prior use of it as process, though the statute expressly declared that no *capias* should issue in any other case "unless the complaint contains a statement of facts showing one or more causes of arrest;" *Eames* v. *Stevens* (1852), 26 N. H. 117, on judgment in trover without mention or prior use of *capias; Hormann* v. *Sherin* (1896), 8 S. Dak. 36, 65 N. W. 434, 59 Am. St. Rep. 744, denying *habeas corpus* to one held on *capias* issued on a judgment for converted funds, without mention of *capias* in the judgment or prior use of it; *Adams* v. *Wait* (1869), 42 Vt. 17, commenced by *capias* obtained merely on affidavit that defendant was about to leave the state.

J. R. R.

THE DEGREE OF CARE REQUIRED IN THE OPERATION OF A SCENIC RAILWAY. —The case of *O'Callaghan* v. *Dellwood Park Co.*, — Ill. —, 89 N. E. 1005, decided by the supreme court of Illinois, October 26, 1909, is of interest

because of the holding of owners and operators of scenic railways to the same high degree of care required of railroads and common carriers of passengers in general. The action was in case for the recovery of damages for injuries suffered by the plaintiff by reason of having been thrown out of a car on defendant's scenic railway. The plaintiff had paid the usual charge for the ride and was, at the time of the accident, a passenger on the car. The trial court charged the jury, in substance, that it was the duty of the defendant in operating the railway to exercise the highest degree of care and caution for the safety of its passengers and to do all that human foresight and vigilance could reasonably do, consistent with the mode of conveyance and the practical operation of the railway, to prevent accidents to passengers while riding on its cars. On appeal the instructions were approved.

This seems to be the only reported case involving the precise point, and is, therefore, on that account, of peculiar interest. As said by the court, "The precise question now under discussion has not been decided by this court, and our attention has not been called to any case where the degree of care and responsibility resting upon those managing a railway of this kind has been considered. * * * We think, not only by fair analogy, but on reason and sound public policy, appellant should be held to the same degree of responsibility in the management of the railway in question as a common carrier."

In Illinois it is held that persons operating passenger elevators in buildings are chargeable with the same degree of care required of common carriers. *Hartford Deposit Co.* v. *Sollitt,* 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Chicago Exchange Building Co.* v. *Nelson,* 197 Ill. 334, 64 N. E. 369; *Steiskal* v. *Field & Co.,* 238 Ill. 92, 87 N. E. 117. These cases follow the leading case on this point. *Treadwell* v. *Whittier,* 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. On the other hand there are well considered cases holding the opposite view. See *Griffen* v. *Manice,* 166 N. Y. 188, 59 N. E. 525, 52 L. R. A. 922, 82 Am. St. Rep. 630, and *Burgess* v. *Stowe,* 134 Mich. 204, 96 N. W. 29, 10 Det. Legal News 434. The court in the principal case was of the opinion that the principle of these passenger elevator cases afforded the strongest sort of analogy for the rule applied.

The holding in the principal case would seem to be in accord with reason and public policy. In *Phila. & R. R. Co.* v. *Derby,* 14 How. 468, 486, 14 L. Ed. 502, the court said: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to sport of chance, or the negligence of careless agents." See, also, COOLEY, TORTS, (Ed. 2) 768, 769; *Taylor* v. *Grand Trunk R. Co.,* 48 N. H. 304. The comparative helplessness of the passengers in case of accident and the tenderness of the law for human life and limb, and not the mere nature of the motive power, seem to be the true reasons for requiring the high degree of care. In *Farish* v. *Reigle,* 11 Gratt, 697, 709, where the point involved was whether the proprietor of a stage coach was liable for more than ordinary care, the court said: "As they under-

take for the carriage of human beings, whose lives and limbs and health are of great importance as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem (he says) to furnish the true analogy and rule." See also STORY, BAILMENTS, § 601, and *Jackson* v. *Follett*, 3 Eng. C. L. 307. And in *Treadwell* v. *Whittier*, supra, the court held the proprietor of a passenger elevator liable for the use of the utmost care and vigilance, on the ground that the danger in such transportation is as great or greater than in the case of the ordinary railroad transportation. To anyone familiar with the modern scenic railway it is evident that the danger and helplessness of the passenger in case of accident are fully as great as in the case of the passenger elevator or ordinary railroad. In this connection may be noted the case of *Johnson* v. *Coey*, 237 Ill. 88, 86 N. E. 678, in which the action was against the owner of an automobile hired by the plaintiff, for negligent operation of the machine by defendant's servant. In the course of the opinion the court observed that the "driver of the automobile was bound to use at least reasonable and ordinary care." Inasmuch as the defendant was held liable it was unnecessary, for the purposes of that case, for the court to go further.

The rule of the principal case should not be confused with the holding in cases involving the degree of care in general required of owners of amusement parks. The rule, almost without exception, in those cases is that only ordinary care is required. *Hart* v. *Washington Park*, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 492, 48 Am. St. Rep. 298; *Dunn* v. *Agricultural Society*, 48 Oh. St. 93, 18 N. E. 496, 1 L. R. A. 754, 15 Am. St. Rep. 556; *Sebeck* v. *Verein*, 64 N. J. L. 624, 46 Atl. 631, 50 L. R. A. 199, 81 Am. St. Rep. 512. Cf. *Scott* v. *University of Michigan Athletic Ass'n.*, 152 Mich. 684. R. W. A.

WHO CAN COMPLAIN OF ULTRA VIRES ACQUISITION OF REAL ESTATE BY A CORPORATION?—In answer to the question just formulated, it may be said in general that, as a result of the application of the doctrines of estoppel and of the application of the legal maxim "in pari delicto conditio defendentis potior est," private individuals are not allowed to complain of ultra vires and illegal holdings of realty by corporations. The positive answer to the question is found in the ruling that such objection must come from the state, and in the ancillary ruling to the effect that silence on the part of the state signifies the assent of the only power entitled to interfere. The court of civil appeals of Texas has been confronted very recently with the question and, owing to the numerous decisions at hand and the well settled status of the law upon the subject, had little difficulty in arriving at a conclusion in accord with these decisions. *Knowles et al.* v. *Northern Texas Traction Company* (1909), — Tex. Civ. App. —, 121 S. W. 232.

In the above-cited case, the question was presented in an interesting manner. The Midland Company was the owner of a rather extensive tract of land, over which it had granted the defendant Traction Company a right of way. The Midland Company subsequently conveyed the tract of land to one Knowles. Knowles brought suit against the Traction Company to try the title

to and for the purpose of obtaining possession of the land thus appropriated by the Traction Company as its right of way. It did not definitely appear, but the court assumed, for a part of its discussion at least, that the defendant had no power to take and hold the right of way. The decision below was affirmed and the plaintiff was deemed not entitled to any relief whatever. The plaintiff's contentions, that the Traction Company was without power to take and hold a grant of the right of way, that the grant was void, and that plaintiff could attack the validity of the holding, were not sustained. This power, the court held, was one which could be questioned by the state alone, and the court refused to go into a discussion or investigation of the validity of the holding at the instigation of the plaintiff.

The principle that only the state can complain of an ultra vires holding of realty by a corporation, where the conveyance has been made and the transaction has been fully executed, has been so often laid down by eminent jurists that it has become a well known and firmly established principle in our law. *Pere Marquette Railroad Co.* v. *Graham,* 136 Mich. 444. Where the corporation is holding as a result of an executed contractual agreement with the complaining party, the courts will not interfere, and will generally leave both parties where it finds them. The articles of incorporation and statutes under which corporations are formed are matters of public record with which persons dealing with corporations are presumed to have acquainted themselves. No contractual relations existed between plaintiff and defendant in the above-mentioned case, but there also the complaining party was remediless. The state, it is believed, but seldom sees or takes hold of these "invisible, intangible beings" and brings them to justice, so it can readily be seen that, laying aside the scant possibility of interference from the state, corporations of *all* sorts and descriptions have practically an unlimited capacity to take and hold realty. In spite of this obvious injustice and inconsistency, it is believed that the ruling that the state alone can complain is the proper one and does justice in more cases than would be done by any that has yet been suggested. The law is theoretically correct, and the dangers will be removed when a closer scrutiny is given to corporate affairs by state officials.

It might be interesting to note in passing that the deed, in the absence of any statute to the contrary, vests the title indefeasibly in the corporation even though the taking be illegal. The state cannot confiscate the land so obtained, nor can a private person render the deed ineffective. The only punishment to which the corporation may be subjected is the forfeiture of its charter as the result of a direct proceeding for that purpose upon the part of the state. *Barnes* v. *Suddard,* 117 Ill. 237, 7 N. E. 477; *Lancaster* v. *Improvement Co.,* 140 N. Y. 576; *Nat. Bank* v. *Whitney,* 103 U. S. 99, 35 N. E. 964.

When the transaction has not been fully executed, a different rule often prevails. Especially true is this of actions wherein the corporation is seeking specific performance or is otherwise trying to perfect its title. In such cases it may be said, in general, that an interested individual may question the corporation's power to take the real estate in question. See *South & N. R. Co.* v. *Highland Ave., etc.,* 119 Ala. 105, 24 South 114. The courts are about evenly divided upon the question as to whether a corporation can maintain

ejectment for lands which it is ultra vires for it to hold. That it can, see *Shewalter* v. *Pioneer*, 55 Mo. 218. That it cannot, see *Carroll* v. *E. St. L.* 60 Ill. 568. Some courts hold that, where a devise of real estate exceeds the quantity of realty which a corporation is permitted to hold, the heir or residuary legatee may recover such excess. *In re McGraw's Estate*, 111 N. Y. 66, 2 L. R. A. 387, 19 N. E. 233; *Wood* v. *Hammond*, 16 R. I. 98, 17 Atl. 324; *House of Mercy* v. *Davidson*, 90 Tex. 529, 39 S. W. 924. See note in 9 L. R. A. (N. S.) 689. A number of courts hold otherwise. *Hanson* v. *Sisters of the Poor*, 79 Md. 434, 32 L. R. A. 293 and note; *Farrington* v. *Putnam*, 90 Me. 405, 37 Atl. 652; *Jones* v. *Habersham*, 107 U. S. 174, 27 L. Ed. 401. Furthermore, a stockholder has the right to the aid of a court of equity to prevent the corporation or its managing officers from misapplying its capital in making ultra vires acquisitions of realty. *Pollock* v. *Farmer's L. & T. Co.*, 157 U. S. 429. Even when the transaction is fully executed, the better ruling would seem to be that equity will relieve an injured stockholder, who acts promptly, even to the extent of setting aside the ultra vires transaction, if, in the meantime, no superior equity has intervened nor the rights of innocent third parties attached. *Harding* v. *Glucose Co.*, 182 Ill. 551, 55 N. E. 577. A person outside the corporation cannot object after the transaction has been executed, no matter how promptly he acts. A stockholder it seems is the only one who can ever object to an ultra vires acquisition and then only under the circumstances above-mentioned.

The rule that the state alone can complain would be entirely satisfactory if in every case the state officials could have actual knowledge of the ultra vires transaction. At the present time this is anything but true. President Taft in a recent speech delivered at Denver upon the new corporation income tax said: "Another feature of it is that incidentally it will give the federal government an opportunity to secure most valuable information in respect to the conduct of corporations, their actual financial condition, which they are required to show in general terms in a public return. In addition the law provides the means under proper limitations of investigating fully and in detail their course of business. * * * Up to this time we have no adequate statistics concerning our corporations. Even the stockholders, whatever their right may be to know the course of business of corporations, are generally in a state of complete ignorance, and any instrumentality by which the corporations shall be compelled to disclose the accuracy of a general statement of their conditions certainly makes for the public good." The present tendencies, as exhibited by the new law just referred to, are for a closer supervision and regulation of corporate affairs, and the effect will probably be to greatly diminish the number of ultra vires transactions in real estate. R. T. H.

THE HEINRICH BRUNNER MEMORIAL.—Heinrich Brunner, professor of law in the University of Berlin, will celebrate on June 21, 1910, his seventieth birthday. A committee of prominent German jurists has been formed to assure due recognition, on this anniversary, of Brunner's achievements as teacher and as writer. It is proposed to publish, as is customery on such occasions, a volume of essays prepared in his honor by his colleagues and

former pupils, and also to raise a fund for a permanent memorial. In view of the fact that Brunner's researches in early German law and in the law of the Frank Empire have direct bearing upon the legal history of all the West-European states, including England, and that the results attained by him have been of the greatest value to French, Italian and English legal historians, it has seemed proper to give to the lawyers and historical students of all these countries and of the United States an opportunity to contribute to the memorial fund.

All American lawyers and historians who are familiar with the development of legal history during the last forty years are aware that Brunner, in his monumental "History of German Law," has cleared up many important and previously obscure points in Anglo-Saxon and in Anglo-Norman law, and that before the appearance of this work he had shown in a now famous little book, the origin of the English jury system. No reader of Maitland or of Thayer or of Ames is ignorant of the debt which English legal history owes to Brunner. It is hoped that American lawyers and other Americans who are interested in legal history will largely embrace this opportunity to do honor, during his life, to one of the most eminent of living scholars. Since the value of the testimonial will depend far more on the number of subscribers than on the amount of their subscriptions, it is hoped that no one who wishes to contribute will hesitate to send a small sum. By direction of the German committee, American contributions are to be sent to Professor MUNROE SMITH, Columbia University, New York City.