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Note and Comment

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NOTE AND COMMENT.

INTERSTATE COMMERCE AND STATE CONTROL OF FOREIGN CORPORATIONS.—Corporations are the creatures of their parent state and outside the borders of the state creating them they have no existence except such as is granted them by comity. *Bank of Augusta* v. *Earle,* 13 Pet. 519; *Lafayette Ins. Co.* v. *French,* 18 How. 404; *Paul* v. *Virginia,* 8 Wall. 168; *Ducat* v. *Chicago,* 10 Wall. 410; *Liverpool Ins. Co.* v. *Massachusetts,* 10 Wall, 566; *Home Ins. Co.* v. *Morse,* 20 Wall. 445; *Horn Silver Mining Co.* v. *New York,* 143 U. S. 305; *Waters-Pierce Oil Co.* v. *Texas,* 177 U. S. 28; *Security Mut. L. I. Co.* v. *Prewitt,* 202 U. S. 246. A state may prohibit a foreign corporation from doing business within its borders or allow it to do business there upon such terms and conditions as may be prescribed. Same cases. The power of the states to prescribe such conditions, however, is qualified to the extent that the foreign corporation cannot be required to give up a right or privilege held under the federal constitution or statutes. For example, a condition that the corporation shall not remove any case to the federal courts is invalid and the corporation may remove cases despite the condition. *Home Ins. Co.* v. *Morse, supra.* But for breach of such condition the state may revoke the permit to do business

within its borders. *Doyle* v. *Insurance Co.*, 94 U. S. 535; *Security Mut. L. I. Co.* v. *Prewitt*, supra. "Thus it is admitted that a state has power to prevent a company from coming into its domain, and that it has power to take away its right to remain after having been permitted once to enter, and that right may be exercised from good or bad motives." *Prewitt* case, supra, page 257.

Corporations engaged in interstate commerce may come into a state for the purpose of such interstate commerce, and the foreign state cannot impose any burdens or restrictions in respect of such interstate business. *Pensacola Telegraph Co.* v. *Western Union Tel. Co.*, 96 U. S. 1; *Cooper M'f'g. Co.* v. *Ferguson*, 113 U. S. 727; *Crutcher* v. *Kentucky*, 141 U. S. 47. The right to enter a state, however, for the purpose of doing interstate commerce does not necessarily carry with it the privilege of doing intrastate business, for it is conceded that while a state may impose no burdens upon a corporation in respect of its interstate business the right to impose a tax in respect of intrastate business or upon property of the corporation within the state is unrestricted. *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Postal Tel. Cable Co.* v. *Charleston*, 153 U. S. 692; *Pullman Co.* v. *Adams*, 189 U. S. 420; *Allen* v. *Pullmans Pal. Car Co.*, 191 U. S. 171; *Kehrer* v. *Stewart*, 197 U. S. 60. These cases establish the proposition that corporations engaged in interstate commerce may be taxed in respect of their privilege of carrying on domestic or intrastate business. Inasmuch as the power to tax carries with it the power to destroy, a state may totally prohibit the doing of intrastate business by a foreign corporation. Interstate and intrastate business are therefore separable; the one is beyond the control of the states, while the other may be exercised only upon such terms as may be prescribed by the state in which the business is done. Having the power to prohibit absolutely the doing of intrastate business by a foreign corporation a state may permit such business upon such terms and conditions as it sees fit to impose, subject however, to the qualification above referred to, that the corporation is not bound by any condition which requires it to give up a right or privilege held under the constitution or laws of the United States.

A usual condition upon which foreign corporations are permitted to carry on business, not interstate commerce, is the payment of a license tax or fee. If the burden imposed upon the company is in the nature of a tax upon the privilege of doing business in the state exacting such tax, it is immaterial how its amount is measured. Thus in determining the amount of a tax upon corporate business or franchises subjects may be included which in themselves the states have no power to tax. *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Society for Savings* v. *Coite*, 6 Wall. 594; *Home Ins. Co.* v. *New York*, 134 U. S. 594. But where the real nature of the tax is doubtful the manner of its measurement may be important as being indicative of whether or not the exaction is really a privilege tax or something else. In *Horn Silver Mining Co.* v. *New York*, supra, there was considered the validity of a New York statute imposing a tax upon the franchises or business of corporations organized in that state or elsewhere based upon the amount of capital stock. The *Horn Silver Mining Co.* was a Utah corporation, only a small portion of its capital being engaged in business in New

York, and the company objected to the payment of the tax on the ground that it was extraterritorial taxation and a burden upon interstate commerce. The court, however, held that the tax was in the nature of a license fee for the privilege of doing business within the state. Mr. Justice FIELD, in delivering the opinion of the court, said (page 315): "Having the absolute power of excluding the foreign corporation the state may, of course, impose such conditions upon permitting the corporation to do business within its limits as it may judge expedient; and it may make the grant or privilege dependent upon the payment of a specific license tax, *or a sum proportioned to the amount of its capital.*" (Italics are writer's.) Again on page 317: "The extent of the tax is a matter purely of state regulation, and any interference with it is beyond the jurisdiction of this court. The objection that it operates as a direct interference with interstate commerce we do not think tenable. The tax is not levied upon articles imported, nor is there any impediment to their importation. The products of the mine can be brought into the state and sold there without taxation, and they can be exhibited there for sale in any office or building obtained for that purpose; the tax is levied only upon the franchise or business of the company." See also *New York* v. *Roberts,* 171 U. S. 658, involving much the same questions and the same statute, except that the act had been changed so that the amount of the tax was measured by the amount of capital employed within the state.

The very recent decisions of the Supreme Court, however, in *Western Union Tel. Co.* v. *Kansas,* 30 Sup. Ct. 190, and the *Pullman Company* v. *Kansas,* 30 Sup. Ct. 232, cannot be explained, it is believed, except as an overruling of one or more of the propositions above set forth. Both of these cases involved the validity of certain sections of the chapter of the Kansas statutes relating to corporations. The substance and effect of the sections in question was that all corporations after obtaining a permit to organize from a commission created for that purpose should pay into the treasury of the state as a prerequisite to doing business therein a certain graduated fee or tax measured by the authorized capital stock. This provision was in express terms made applicable to foreign corporations seeking to do business within the state. The complaining companies having refused to pay the tax were enjoined from doing intrastate or domestic business, with the qualification, in the case of the Western Union Company, that the decree should not in anywise affect the company's duties to or contracts with the United States. The decisions of the Kansas Supreme Court affirming the decrees entered below were reversed by the Supreme Court on the ground that the provisions of the Kansas act were unconstitutional as applied to the complaining companies for the reason that the tax or fee was a tax upon property without the domain of the state and a burden upon and interference with interstate commerce. The prevailing opinion was written by Mr. Justice HARLAN and concurred in by Mr. Justice MOODY, Mr. Justice BREWER and Mr. Justice DAY. Mr. Justice WHITE concurred specially. A very vigorous dissent concurred in by the Chief Justice and Mr. Justice MCKENNA was written by Mr. Justice HOLMES. Mr. Justice PECKHAM died before the decision, but heard the argument and agreed with the minority. It was the view of the majority that

inasmuch as a very large percentage of the capital stock of the companies was represented by property outside the state of Kansas and engaged in interstate commerce a tax measured upon the entire amount of capital stock was imposed upon property which the state had no power to tax and constituted a direct burden upon interstate commerce, stress being laid upon the latter point.

The court does not expressly overrule any of its earlier decisions. It seems impossible, however, to understand the cases otherwise than as a repudiation of one or more of the principles of the cases hereinbefore referred to. If the tax imposed by the New York statute considered in the *Horn Silver Mining Company* case was a tax or fee exacted for the privilege of doing domestic business in a corporate capacity within the state of New York, only a very small percentage of the company's capital being engaged within the state, it is indeed difficult to see how the tax in the principal cases was of a different nature. The method of measuring the taxes was the same and much the same objections were urged in both cases. So if the court meant to hold that the tax was a tax upon property without the state as distinguished from a license tax or fee for the privilege of doing domestic business, the cases in effect overrule the principle of the *Horn Silver Mining Co.* case. On the other hand if that view of the decision is not taken and the tax is considered as of the same nature as the one imposed in the *Horn Silver Mining Co.* case, the conclusion of the court can only be construed as denying the right of a state to freely tax the privilege of doing domestic business by corporations engaged in interstate commerce, thus in effect overruling the principle clearly established by the cases above cited, namely, that the intrastate busines of a foreign corporation is a proper subject of state taxation. The arguments against the holdings of the court in these two cases are so clearly and forcibly stated in the dissenting opinions of Mr. Justice HOLMES that it would be a mere matter of repetition to set them down here. R. W. A.

QUANTUM OF EVIDENCE NECESSARY TO SUSTAIN A PLEA OF JUSTIFICATION, TO A CIVIL ACTION OF LIBEL OR SLANDER, FOR CHARGING THE PLAINTIFF WITH A CRIME.—In civil cases it often happens that the nature of the defense is such that the only issue to be tried is as to whether or not the plaintiff is guilty of a crime. This occurred in the case of *Lay* v. *Linke,* — Tenn. —, 123 S. W. 746 ,a case decided by the supreme court of the state of Tennessee Dec. 31, 1909. The defendant, in that case, entered a plea of justification to an action for slander, in which the plaintiff alleged that the defendant had accused him of having committed the crime of perjury. The lower court held, that since the only issue raised by the defendant's plea was as to whether or not the plaintiff was guilty of a crime, it was necessary for him, in order that he might succeed, to establish the truth of his plea beyond a reasonable doubt. The supreme court held this error, ruling that a preponderance of evidence only is necessary to establish any issue in a civil case.

The rule followed by the lower court, in the above case, has given the courts of this country a great deal of trouble. It is often stated as being

the English rule. 2 ENCY. OF EVID. 787 *et seq.* Although it once received the sanction of such an authority on evidence as Greenleaf, it is now very generally disapproved of , both in the cases and in the recognized text books. The rule is stated in Vol. II GREENLEAF (16th Ed.) § 426, as follows: "To support a special plea in justification, where crime is imputed, the same evidence must be adduced as would be necessary to convict the plaintiff upon an indictment for the crime imputed to him; and it is conceived that he would be entitled to the benefit of any reasonable doubts of his guilt in the minds of the jury, in the same manner as in a criminal trial." A note to this section, by the authors of this edition, is to the effect that the rule, as thus stated by Greenleaf, is no longer supported by the weight of authority. The rule as thus stated seems still to be pretty well established in Indiana and Illinois. *Wintrode* v. *Renbarger,* 150 Ind. 556; *Wilson* v. *Barnett,* 45 Ind. 163; *Fowler* v. *Wallace,* 131 Ind. 347; *Crandall* v. *Dawson,* 6 Ill. 556; *Harbison* v. *Shook,* 41 Ill. 141; *Germania Fire Ins. Co.* v. *Klewer,* 129 Ill. 599; *Flannery* v. *The People,* 225 Ill. 62.

The lower court, in the case under discussion, was misled by a number of dicta found in previously decided Tennessee cases, one to the effect that "To prove or fix the charge (perjury) upon the plaintiff in a civil case should require the same quantum of proof which would be required to convict him upon a criminal prosecution." *Coulter* v. *Stuart,* 2 Yerg. (Tenn.) 225.

The absurdity of this rule is clearly shown by the following quotation from an article criticising it, by Judge MAY: "The plaintiff in a libel case charges the defendant with the commission of a crime—for libel is an indictable offense—in that he published that the plaintiff was a thief, and he is told that it is needful for him to prove his cause only by a preponderance of evidence; while the defendant who has said the plaintiff is a thief, and now justifies by saying that what he said is true, is told that he must prove the crime which he charges against the plaintiff beyond a reasonable doubt. In other words, the plaintiff charges the defendant with crime, and is allowed to prove it by a preponderance of evidence; while the defendant, who charges the plaintiff with crime, is required to prove it beyond all reasonable doubt." 10 AM. L. REV. 650.

Prof. WIGMORE states the rule which, according to the present weight of authority, controls the situation under discussion, in the following words: "But the chief topic of controversy has been whether in civil cases the measure of persuasion in criminal cases should be applied. Policy suggests that the latter test should be strictly confined to its original field, and that there ought to be no attempt to employ it in any civil case. Nevertheless, the effort has been made (though usually without success) to introduce it in certain sorts of civil cases where an analogy seems to obtain. It is sometimes said that, in general, wherever in a civil case a criminal act is charged, the rule in criminal cases should apply, but this has been generally repudiated." Vol. 4, WIGMORE ON EVID., § 2498. The following authorities are in support of the rule as thus laid down: NEWELL ON DEF. AND SLANDER, p. 795; COOLEY, TORTS, (Ed. 2) 208; *Heärne* v *.DeYoung.* 119 Cal. 670; *Finley* v. *Widner,* 112 Mich. 230; *Ellis* v. *Buzzell,* 60 Me. 209; *Sloan* v. *Gilbert,*

12 Bush. (Ky.) 51; *Kane* v. *Hibernia Ins. Co.*, 39 N. J. L. 697; *Atlanta Journal* v. *Mayson*, 92 Ga. 640; 2 ENCYC. OF EVID. 788, and cases there cited. As showing the change in the attitude of the state courts on this question, compare the following pairs of cases, the later one of which in each instance is in support of the rule as stated by Prof. WIGMORE: *Atlanta Journal* v. *Mayson* (1893), supra, and *Williams* v. *Gunnels* (1881), 66 Ga. 521; *Riley* v. *Norton* (1884), 65 Iowa 306, and *Fountain* v. *West* (1867), 23 Iowa 9; *Edwards* v. *Knapp & Co.* (1888), 97 Mo. 432, and *Polston v. See* (1873), 54 Mo. 291. T. L. O'L.

STATUTES REQUIRING THE APPOINTMENT OF PUBLIC OFFICERS FROM CERTAIN POLITICAL PARTIES.—The mayor of Council Bluffs in accordance with a statute creating a board of police and fire commissioners for that city, appointed two democrats to serve as commissioners after four republicans had refused to accept the unsalaried offices. The statute provided that, "the said commissioners shall be selected from the two leading political parties, so that, as far as practicable, two members of the board shall be members of the dominant political party and one member of the board shall be a member of the political party next in numerical strength." In a recent case the constitutionality of this statutory provision was drawn in question, and it was decided that in was constitutional. The vigorous dissenting opinion by Mr. Justice WEAVER, Mr. Justice EVANS concurring in part, is based upon the ground that the proscription of any class of citizens from holding any office on account of political opinion is prohibited constitutionally by the inherent nature of a republican form of government and by the fair implication of the constitution as written. *State ex rel. Jones* v. *Sargent* (1910), — Ia. —, 124 N. W. 339.

Undoutedly the purpose of the statutory provision in question was to separate the police administration of Council Bluffs as far as possible from party politics. "For more than a quarter of a century, the current of public opinion and of federal and state legislation has been in the direction of establishing non-partisan boards or commissions for the administration of federal, state and municipal affairs." *Rathbone* v. *Wirth*, 150 N. Y. 459, 509. A survey of the cases involving this type of legislation shows that although such acts are quite general, yet there are important and far-reaching differences in phraseology.

For our purpose the cases involving the legislation under discussion may be generally divided into two groups. In the first class the statutes provide what might be termed a "negative qualification" e.g. not more than two members of said board shall belong to the same political party. These cases can give no aid in solving the problem of *State* v. *Sargent*, supra, as there is in them no law disqualifying the adherents of any political party to hold office. *Patterson* v. *Barlow*, 60 Pa. St. 54, 80; *People* v. *Hoffman*, 116 Ill. 587, 605; *Pearce* v. *Stephens*, 18 App. Div (N. Y.) 101; *State* v. *Bemis*, 45 Neb. 724; *Bowden* v. *Bedell*, 68 N. J. Law 451; *State* v. *Smith*, 35 Neb. 13, 16 L. R. A. 791; *Rogers* v. *Common Council*, 123 N. Y. 173, 9 L. R. A. 579; *McCarter* v. *McKelvey*, 73 Atl. (N. J.) 884. This type of legislation is held to be constitutional. So far, therefore, it seems established that there is at least one

constitutional method whereby the advantage of the non-partisan board or commission may be secured without proscribing the members of any political party from the privilege of holding office.

The second class of cases to which *State* v. *Sargent,* supra, belongs, involves a type of statute requiring that the board shall be composed of the members of the two leading political parties. Such a qualification for office is arbitrary, and bars all except the specified classes from holding office. The courts have decided differently as to the constitutionality of such statutes. *State* v. *Sargent,* supra, and *Commonwealth* v. *Plaisted,* 148 Mass, 375, 383, 387, are the only cases which the writer has been able to find that uphold the constitutionality of this type of statutory provision. The following cases are contra: *Mayor* v. *State,* 15 Md., 376; *Att'y Gen.* v. *Board of Councilmen,* 58 Mich. 213, 55 Am. Rep. 675; *Evansville et al.* v. *State,* 118 Ind. 426; *State* v. *Denny,* 118 Ind. 449, 4L. R. A. 65, 78; *Rathbone* v. *Worth,* 150 N. Y. 459, 34 L. R. A. 408; *People* v. *Hurlbut,* 24 Mich. 44, 9 Am. Rep. 103.

The arbitrary prohibition of any class of citizens from holding office upon the basis of political opinion, no matter what the motive of the legislature may be, is vicious and fundamentally in conflict with the inherent nature of a republican form of government secured by the constitution. COOLEY, CONST. LIM, ed. 7, p. 556. It is admitted that where "the constitution does not prescribe the qualifications, it is the province and the right of the legislature to declare upon what terms and subject to what conditions the right to hold office shall be conferred." MECHEM, PUB. OFF., § 66. Yet some powers are limited by the general frame work of the constitution. Constitutional freedom "consists in civil and political rights, which are absolutely guaranteed, assured, and guarded; in one's liberties as a man and a citizen—his right to vote, his right to hold office, his right to worship God according to the dictates of his own conscience; his equality with all others who are his fellow citizens; all these, guarded and protected, and not held at the mercy and discretion of one man or of any popular majority." *State* v *Hurlbut,* supra. If the legislature may arbitrarily exclude all but the members of two political parties from holding office, it is able to confine the right to the adherents of one party. Then, in legal theory are our state governments republican only through the indulgence of the Legislature? Mr. Justice WEAVER'S answer to this question in the principal case is worthy of careful consideration.

H. W. I.

PROXIMATE CAUSE.—The steamer Santa Rita, while lying beside the wharf at Oakland, California, discharged a quantity of fuel oil from her hold into the bay. The wharf by some independent means caught fire and damaged part of a vessel lying beside the wharf. The oil in the bay was ignited and did further damage to the vessel. The owner of the vessel libelled the Santa Rita to recover damages. (A statute of California makes it a misdemeanor to discharge fuel oil into the waters of any navigable bay in the state.) It was held that the act of the Santa Rita was not the proximate cause of the injury and that she was not liable. *The Santa Rita* (1909), — D. C., N. D., Calif. —, 173 Fed. 413

The definitions of proximate cause are easily given in general terms, but they are very difficult of practical application to the facts of each particular case. *Anderson* v. *Miller,* 96 Tenn. 35. General formulas have been frequently stated, but these have carried us but little, if any, beyond the meaning conveyed by the words of the maxim—*Causa proxima, et non remota spectatur.* It is easy to illustrate, but hard to define what is an immediate and what a remote cause. The Supreme Court of Pennsylvania in the case of *Hoag* v. *L. S. & M. S. R. Co.,* 85 Pa. 293, laid down the rule that the injury must be the natural and probable consequence of the negligence—such a consequence as, under the surrounding circumstances of the case, might and ought to have been foreseen by the wrongdoer as likely to flow from his act. *Enlow* v. *Hawkins,* 71 Kan. 633, 81 Pac. 189; *Am. Nat. Bank* v. *Morey,* 113 Ky. 857, 69 S. W. 759, 24 Ky Law Rep. 658, 58 L. R. A. 956, 101 Am. St. Rep. 379; *Logan* v. *Wabash R. Co.,* 96 Mo. App. 461, 70 S. W. 734; *Peters* v. *Johnson,* 50 W. Va. 644, 41 S. E. 190, 57 L. R. A. 428, 88 Am. St. Rep. 909; *McDonald* v. *Snelling,* 14 Allen 29; *Barron* v. *Eldridge,* 100 Mass. 455; *Kellog* v. *C. & N. W. R. Co.,* 26 Wis. 223, 278; *Seale* v. *G. C. & S. F. R. Co.,* 51 Tex. 274. 16 AM. & ENG. ENCYC. OF LAW, Ed. 2, p. 436, defines proximate cause more broadly as that cause which in a natural and continuous sequence, unbroken by any efficient, intervening cause, produces the results complained of, and without which that result would not have occurred. *Milwaukee Etc. R. Co.* v. *Kellog,* 94 U. S. 469; *Watson* v. *Rheinderknecht,* 82 Minn. 235, 84 N. W. 798; *Davis* v. *The Holy Terror Min. Co.,* 20 S. D. 399, 107 N. W. 374; *Kuhn* v. *Jewett,* 32 N. J. Eq. 647; *Western R. Co. of Ala.* v. *Mutch,* 97 Ala. 194, 11 South. 894; *Bosqui* v. *Sutro R. Co.,* 131 Cal. 390, 63 Pac. 682; *Liming* v. *R. Co.,* 81 Iowa 246, 251, 47 N. W. 66.

It is difficult in many cases to tell which rule the courts of a state follow. The New York courts are in hopeless conflict on this question, sometimes laying down one rule and sometimes another. The fundamental difference between the rules does not seem to be so much in the rules themselves as in the construction and application of them. It is upon the question of what consequences are the natural and probable result of the wrongful act, or might have been anticipated as such that the decisions diverge, and, in many cases become irreconcilable with each other. Some cases appear to be disposed of on the ground that the act complained of is not the proximate cause of the injury, where the real ground of the decisions seems to be that the act in question is not negligent. See *Missouri Pac. Co.* v. *Columbia,* 65 Kan. 390, 69 Pac. 338, 58 L. R. A. 399; *Murphy* v. *New York,* 89 App Div. 93, 85 N. Y. S. 445; *Scott* v. *Ry. Co.,* 172 Pa. St. 646, 33 Atl. 712; *Christianson* v. *Ry. Co.,* 67 Minn. 94, 69 N. W. 640. What character of intervening act will break the causal connection between the original wrongful act and the subsequent injury is also many times left in doubt. The current of authority seems to be that if the intervening cause and its probable or reasonable consequences be such as could reasonably be anticipated by the original wrong doer, then the connection is not broken. *Scott* v. *Shepherd,* 2 W. Bl. 892 (Squib Case); *Kellogg* v. *C. & N. W. R. Co.,* supra. Although in strict logic it may be considered that he who is the cause of an injury should be answerable for all

losses which follow from his causation, yet in the practical workings of society the law finds in this, as in a variety of other matters, that this rule of law would be unjust in some cases and in many more impracticable of operation, and herein lies one of the chief distinctions between the effect of the two rules. The distinction may be illustrated also by the use of two cases, *Hoag* v. *L. S. & M. S. R. Co.*, 85 Pa. 293, and *Kuhn* v. *Jewett*, 32 N. J. Eq. 647. In the first case defendant's train ran into a slide of earth and stone and was wrecked, an oil car burst, the oil was ignited, floated down a stream near the tracks and set fire to plaintiff's building. The court said: "A man's responsibility for his negligence and that of his servant must end somewhere. An admittedly correct principle may be extended so as to reach the *reductio ad absurdum*, so far as it applies to the practical business of life." The court held the defendant's negligence was not the proximate cause of plaintiff's loss. In the New Jersey case, there was a wreck on the defendant's road due to its negligence, an oil car burst, the oil was ignited, ran into a stream and was carried down the stream to plaintiff's buildings which were burned. The court in this case allowed the plaintiff to recover. "Causal connection only ceases when, between the negligence and the damage, an object is interposed which would have prevented the damage, if due care had been taken. In keeping up continuity between cause and effect, water may be just as certain and effectual in its operations as the wind or any other material force." The Pennsylvania case holds that the plaintiff's loss would not have been foreseen by an ordinarily prudent man as the natural and probable consequences of his negligence. The New Jersey case holds that the stream does not break up the continuity of cause and effect and therefore is not a sufficient intervening cause. The consequences which actually did ensue need not, however, of necessity have followed from the defendant's acts. *Byrne* v. *Wilson*, 5 I. R. C. L. 332; *Clifford* v. *R. Co.* 9 Colo. 333; *Dickson* v. *Hollister*, 123 Pa. St. 421; *Vandenburgh* v. *Truax*, 4 Denio (N. Y.) 464, 467; but see *Laidlaw* v. *Sage*, 158 N. Y. 73, 99, in which the court says,—"A proximate cause is one in which is involved the idea of necessity. This idea of necessity—the necessary connection between the cause and effect—is the prime distinction between the proximate and a remote cause." Some courts have even gone so far as to hold that an intervening cause to excuse the defendant must be shown to be culpable and that if innocent it is no defense, but this is contrary to the weight of authority. *McKelven* v. *London*, 22 Ont. Rep. 70; *Lewis* v. *Terry*, 111 Cal. 39 (folding bed case); *Chacey* v. *Fargo*, 5 N. Dak, 173. The case of *Drum* v. *Miller*, 135 N. C. 204, 47 S. E. 421, 102 Am. St. Rep. 528, offers a solution for the use of these two rules,—In case of an injury inflicted in the performance of a lawful act, the natural and probable consequence rule should apply, but where the act causing the injury is itself unlawful or is at least a willful wrong, the third intervening cause rule should be the test, and this may be the explanation of the apparent confusion in many of the states.

In the principal case, the court, after laying down the different rules as to proximate cause, adheres to the natural and probable consequence theory. "A man of ordinary prudence and foresight would not have thought, in view

of all the surrounding circumstances, that fuel oil, if discharged into the waters of the bay, with its tides and winds, would probably be set on fire, by the accidental or negligent burning of the wharf, or by live coals thrown into the bay and coming in contact with the oil." *Stone* v. *B. & A. R. Co.*, supra. S. R. W.

POLICE REGULATION OF THE BUSINESS OF PLUMBING.—The constitutionality of a statute requiring plumbers to pass an examination before entering into that business has not been before the courts of this country many times. There has, however, been legislation on the subject in a number of the states, which has taken two forms; first, examination of the individual intending to carry on that occupation, thereby qualifying him to use his own discretion in the work; second, compelling anyone intending to do any plumbing work, to submit plans of the same to a board of plumbing inspectors, which shall examine and approve of them before the work can be done. A law of the latter sort was passed by the legislature of Iowa in 1907 and by that of New Jersey in 1888, neither having been seriously questioned as to constitutionality up to the present time. In a recent New Jersey case the court peremptorily dismissed the objection that such a law violated the rights of individuals in carrying on their business, saying simply that it was "manifestly without legal footing." *Board of Health of Asbury Park* v. *Hayes* (Oct. 1909), — N. J. —, 74 Atl. 339. The validity of the Iowa law was not questioned in a late case. *City of Des Moines* v. *Cutler* (Nov. 1909), — Ia. —, 123 N. W. 218. Regulations of this sort, viz., statutes providing that the *work itself* must be inspected and passed upon by inspectors appointed by law seem not to have been held invalid by any of the courts, but as to the validity of a law which provides that no *person* shall work at the business of plumbing, either as master plumber or journeyman plumber, until an examination by a board of examiners has been passed, the courts are not in accord. The objections advanced to such a law are principally that it contravenes the 14th amendment of the constitution and the right to engage in whatever occupation one desires, which latter was formulated as an inalienable right under the phrase "pursuit of happiness" in the Declaration of Independence. The principal question is whether the business of plumbing is so related to the health and welfare of the people that its regulation reasonably tends to protect the same. In *People ex rel. Nechamcus* v. *Warden*, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718, a bare majority of the court of appeals upheld the validity of the plumbing act of that state. Judge PECKHAM'S dissenting opinion has formed the foundation of many decisions which have since been rendered against the validity of such a law. A case arose in Washington recently in which the court reviewed nearly all the cases which have been decided on the point, and held that such a regulation was not constitutional, concurring in this opinion of Mr. Justice PECKHAM. *Richey* v. *Smith*, 42 Wash. 237, 84 Pac. 851, 5 L. R. A. (N. S.) 674. He said: "There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness.

But are we all on that account, at the mercy of legislative majorities? A printer, a tinsmith, * * * a cabinet-maker, a drygoods clerk, a bank's, a lawyer's or a physician's clerk, or a clerk in almost any kind of business, would all come under the power of the legislature, on the assumption. No trade, no occupation, no mode of one's living, could escape this all pervading power * * ." "The trade of the practical plumber is not one of the learned professions nor does such a tradesman hold himself out in any manner as an expert in the science of sanitation, nor is any such knowledge expected of him." Two recent cases referring to this reasoning are, *Wilby* v. *State,* (1908), 93 Miss. 767, 47 South. 465, and *Kerr* v. *Ross,* 5 App. D. C. 241.

The weight of authority, however, seems to be the other way and holds such legislation proper police regulation. The courts of Maryland, Ohio, Georgia, Texas, Wisconsin, Illinois, Minnesota, Pennsylvania, New York and California have considered such legislation favorably. *State* v. *Gardner,* 58 Ohio St. 599; *Felton* v. *City of Atlanta,* 4 Ga. App. 183, 61 S. E. 27; *Robinson* v. *City of Galveston,*—Tex. Civ. App.—, 111 S. W. 1076; *State ex rel. Winkley* v. *Benzenberg,* 101 Wis. 172, 76 N. W. 345; *Douglas* v. *People,* 225 Ill. 536, 80 N. E. 341; *State ex rel. Chapel* v. *Justus,* 90 Minn. 474, 97 N. W. 124; *Beltz* v. *Pittsburgh,* 26 Pa. Super Ct. 66; *People ex rel. Nechamcus* v. *Warden,* supra; *Singer* v. *State,* 72 Md. 464; *Ex parte Grey,*— Cal. App.—(1909), 104 Pac. 476. The argument of these courts is, that while the plumbing business is not one of the learned professions and much of it is mechanical work, yet a certain degree of training is absolutely necessary in order to properly qualify one to install pipes, tanks, fittings, traps, etc., for the conveyance of gas, waters and sewage which are destructive to health and life. It is insisted that regulations of this sort do tend to accomplish the protection aimed at, which justifies the method, although it may not fully accomplish the result. It is interesting to note the steady increase of regulation applied to the different occupations under the exercise of the police power. The question is where is the line to be drawn. The court in the Washington case above referred to, said, "We cannot close our eyes to the fact that legislation of this kind is on the increase. Like begets like and every legislative session brings forth some new act in the interest of some new trade or occupation. The doctor, the lawyer, the druggist, the dentist, the barber, the horse-shoer and the plumber have already received favorable consideration at the hands of our legislature and the end is not yet, for the nurse and the undertaker are knocking at the door." K. B. G.