Michigan Law Review

Volume 8 | Issue 8

1910

Note and Comment

Horace LaFayette Wilgus
University of Michigan Law School

Horace LaFayette Wilgus
University of Michigan Law School

Ralph W. Doty

Lee M. Gordon

MICHIGAN LAW REVIEW

PUBLISHED MONTHLY DURING THE ACADEMIC YEAR, EXCLUSIVE OF OCTOBER, BY THE
LAW FACULTY OF THE UNIVERSITY OF MICHIGAN

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER

NOTE AND COMMENT.

STATE REGULATIONS AFFECTING INTERSTATE COMMERCE.—The line between regulations of intrastate and interstate commerce is difficult to draw and hard to maintain. This is well illustrated in the recent case of *St. Louis Southwestern Railway Company* v. *Arkansas*, decided by the Supreme Court of the United States April 4, 1910, Advance Sheets, May 1, 1910, p. 476, 30 Sup. Ct. 476.

This was an action by the prosecuting attorney against the railway company to recover penalties for alleged violation of the rules of the railroad commission of Arkansas and certain statutory provisions, making it the duty of railroad companies to furnish shippers with cars upon proper demand, and subjecting them to a penalty for failure.

One Reinsch had made written demand of the company for cars to ship hay between places in the state from October 30, 1905 to January 20, 1906, and was furnished 51 less than he demanded. He complained to the railroad commission who found the company had violated the rule and the statute and directed the prosecuting attorney to sue for the penalty. The company defended on the ground that it was engaged in interstate shipments of freight over its lines in Arkansas, Illinois, Louisiana and Missouri, and by connect-

ing lines throughout the United States; that its equipment was ample for its freight traffic both state and interstate; that in anticipation of greater demand it had made an effort to buy 2000 more cars but had been unable to get them, and had therefore begun to construct shops of its own to build its cars; that at the time of the alleged default there was an extraordinary demand for cars for both interstate and local traffic upon its own and connecting lines; that it had equally distributed its cars to shippers along its line giving no preference to interstate over local shippers; and that "it would have been impossible to comply with the rule without discrimination against its interstate commerce shippers, and therefore obedience to the rule would have resulted in a direct burden upon interstate commerce," and the rule and statute were therefore in conflict with the Constitution of the United States conferring power to regulate commerce among the states upon Congress. This defense was insisted upon in various ways but overruled by the trial court, and a verdict of $1,350, with judgment thereon was rendered against the company. This was affirmed by the Supreme Court of the state, 85 Ark. 311, 107 S. W. 1180, 122 Am. St. Rep. 33.

The facts as stated in the opinion of the State Supreme Court were that 70 per cent of the freight traffic of the road originated on its own line; that it had 9517 freight cars; 3982 of these were in daily use upon its own line, and 5525 off its line, while only 2519 foreign cars were upon its line, with a daily balance of exchange of 1473 cars, and a daily shortage of about 650 cars; that the number of cars owned was larger than the average freight carrying road had, and sufficient to meet the demands of its own traffic, if its cars could be kept at home; and that "its failure to furnish cars was wholly due to an inability to regain its cars which were sent to other roads carrying freight from its own line." Also that the company was a member of the American Railway Association (as were 90 per cent of the railways of the United States) which makes rules for the interchange of cars; that such association is lawful, and a system of interchange of loaded cars, instead of reloading and reshipping, is essential to the public convenience and conforms to the policy of both Federal and state legislation, and that "for one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers"; but further that the rules made by the railway association for the return of cars,—a charge of 25 to 50 cents per day per car,—were totally inadequate to secure their prompt return in case of congested traffic, and that prior to 1905 the company had lost control of its cars, knowing that the rules of the association were insufficient to secure their return within a reasonable time.

The State Supreme Court therefore by HILL, C. J., ruled, that although it may be better for the company "to suffer these ills than to sail under a black flag and refuse to send its cars beyond its lines," yet until it "shows reasonable rules and regulations for the interchange of cars, it cannot avail itself of these rules of interchange as causing and excusing its default to the public, for the rules here shown have proved unreasonable and inefficient before this default occurred."

Mr. Justice WHITE in reversing the decision of the state court says: The

company "was powerless, of its own motion, to change the rules thus generally prevailing, and therefore was necessarily either compelled to desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce, or to conduct such business with the certainty of being subjected to the penalties which the state statute provided for.*** It needs but statement to demonstrate that the ruling of the court below involved necessarily the assertion of power in the state to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right.*** If the rules of the railway association governing 90 per cent of the railroads and a vast proportion of the interstate commerce of the country are inefficient to secure just dealing as to cars moved by the carriers engaged in interstate commerce, that fact affords no ground for conceding that such subject was within the final cognizance of the court below, and could by it be made the basis of prohibiting interstate commerce or unlawfully burdening the right to carry it on. In the nature of things, as the rules and regulations of the association concern matters of interstate commerce inherently within Federal control, the power to determine their sufficiency, we think was primarily vested in the body upon whom Congress has conferred authority in that regard." Chief Justice FULLER dissents.

Mr. Justice WHITE cites no authority for his ruling, and no reliance is placed upon the rule that the subject has been regulated by Federal legislation, or by any rule of the Interstate Commerce Commission, nor upon the rule that, because Congress has not acted upon the matter, it is to be assumed that the subject is to be left free and untrammeled by any state regulations. Neither is there any finding of facts as to the proportion of interstate and intrastate traffic,—only that 70 per cent of the traffic originates on its line, and 30 per cen off, but how much of either is interstate traffic is not stated. The lower court ruled that the statute only imposed a penalty for negligently failing to perform the common law duty to furnish cars promptly upon demand, whether for state or interstate shipments, and the known inadequacy of the association rules to enable the company to comply with this duty was negligence. The association rules for return of cars necessarily directly affected both state and interstate shipments. If they were inadequate, and had been known to be so generally, does the supreme court mean to hold that conformity to them would not be negligent, just because 90 per cent of the roads are parties to them?

In *Missouri P. R. Co.* v. *Larabee Flour Mills Co.* (1909), 211 U. S. 612, 29 Sup. Ct. 214, Mr. Justice BREWER says: "The roads are engaged in both interstate commerce and that within the state. In the former, they are subject to the regulation of Congress; in the latter, to that of the state; and to enforce the proper relation between Congress and the state, the full control of each over the commerce subject to its dominion must be preserved," and Mr. Justice MOODY, dissenting, says: "The commerce clause vests the power to regulate interstate commerce exclusively in the Congress, and leaves the power

to regulate intrastate commerce exclusively in the states. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested." If these statements are correct, and the same regulation had been made by Congress or the Interstate Commerce Commission as to an *interstate* shipment, and the company had pleaded that it would have been impossible to comply without discrimination against its state traffic, because its cars were negligently allowed to be away from home so that it could not adequately supply either its interstate or state shippers, would the Federal regulation have been held *unconstitutional,* as beyond the Federal power, because directly affecting *state* commerce, or would the company have been held liable because of its negligence, when the only case before the court was one of *interstate* commerce, and not state commerce? Or to put the matter in another way, is it possible that where a railway association makes ineffective rules relating to the return of cars to one of its members, which knows they are notoriously inadequate, and shippers, therefore cannot get cars promptly, the state can not impose a penalty for not furnishing the cars to a state shipper, because that would directly affect interstate commerce, and the Federal government cannot impose a penalty for not furnishing cars to an *interstate* shipper, because that would directly affect state traffic? Such certainly cannot be the rule.

In *Houston and T. C. R. Co.* v. *Mayes* (1906), 201 U. S. 321, 26 Sup. Ct. 491, plaintiff sued to recover a penalty for failing to furnish him cars for an *interstate* shipment, contrary to a statutory provision penalizing the company for its failure to furnish cars within a specified time after demand, and making the duty an absolute one, admitting of no excuse whatever. This was held, Mr. Justice BROWN, delivering the opinion (Chief Justice FULLER, Mr. Justice HARLAN, and Mr. Justice MCKENNA, dissenting) "as applied to *interstate* commerce," to be unconstitutional. In *McNeil* v. *Southern R. Co.* (1906), 202 U. S. 543, 26 Sup. Ct. 722, a state railway commission ordered cars containing *interstate* shipments to be delivered beyond its right of way to a private siding. The suit was to enjoin the collection of the statutory penalties for violating the orders of the commission. This order the court by Mr. Justice WHITE, held to be an unlawful interference with interstate commerce, whether considered as a general power to regulate carriers engaged in interstate commerce, or to make an order in a particular case.

On the other hand in the *Larabee case* supra the plaintiff brought mandamus to compel the railroad company to resume the transfer of cars loaded and unloaded from the line of a connecting carrier to his flour mill upon payment of the customary charges. Three-fifths of plaintiff's shipments were *interstate,* the defendant was a member of a car service association which regulated the interchange of cars; plaintiff refused to pay a demurrage charge on certain cars furnished by the defendant, because the delay was caused by it instead of by the plaintiff; the car service association demanded payment, and upon refusal directed the defendant to discontinue furnishing cars to plaintiff as before; it was found that the delay for which the demurrage charge was made was due to the fault of the company. There was

no state regulation involved,—only common law duties. The defendant claimed that it was subject to the control of Congress only, since the shipments were partly or mostly interstate. The court, by Mr. Justice BREWER (MOODY and WHITE, dissenting) held that the state court could enforce the common law duty not to discriminate between shippers in such a case,—"at least until Congress or the Interstate Commerce Commission takes action, although both carriers are engaged in interstate commerce, and three-fifths of the output of the mill is shipped out of the state," and the mere delegation by Congress to the Interstate Commerce Commission of power over interstate commerce" is not equivalent to specific action by Congress in respect to the matter involved which prevents a state from making regulations conducive to the welfare and convenience of its citizens that may indirectly affect commerce." This case reviews the cases upholding state regulations. Compare also *Atlantic C. L. R. Co.* v. *Mazursky* (1910), 216 U. S. 122, 30 Sup. Ct. 378.

In *Mississippi Railroad Commission* v. *Illinois Cent. R. Co.* (1906), 203 U. S. 335, 27 Sup. Ct. 90, after reviewing the cases the court by Mr. Justice PECKHAM, says: "A state railroad commission, under a state statute, may order the stoppage of trains if the company does not otherwise furnish proper and adequate accommodation to a particular locality, and in such cases the order may embrace a through *interstate* train actually running, and compel it to stop at the locality named. In such case, in the absence of Congressional legislation covering the subject, there is no illegal or improper interference with the interstate commerce right"; but if reasonable accommodation is otherwise furnished, a regulation requiring interstate trains to stop would be void. See also *Missouri P. R. Co.* v. *Kans.* (1910), 216 U. S. 262, 30 Sup. Ct. 330.

In view of these decisions, it seems that the case under review ought to have passed upon the point of the negligence of the company, rather than held the statute (which made no absolute requirement as the state court held to furnish cars at all events, without reference to its effect upon interstate commerce) to be an unconstitutional and direct interference with interstate commerce. It seems fair under all the facts of the case to hold, contrary to what the lower court held, that the railroad company, considering its duties to both its state and interstate shippers was not negligent, and therefore not liable for any damages or penalty; and because the question of negligence in such cases of apportioning cars necessarily involves the relative duties to state and interstate shippers, and therefore raises a question under the *federal* law, the federal courts would have jurisdiction to determine whether there had been negligence or not, and if such court found there was negligence in the performance of the common law duty to a *state* shipper, then should not the state law imposing the penalty be upheld? H. L. W.

RULES OF PROCEDURE AND SUBSTANTIVE LAW GOVERNING THE UNITED STATES COURT FOR CHINA.—The difficulties encountered in evolving a body of consistent laws for the government of American citizens in countries where we have extra-territorial jurisdiction, are well illustrated in the cases of *United*

States v. *Englebracht* and *Sexton* v. *United States* which have just been reported from the United States Court for China. It will be remembered that our extra-territorial rights in China are derived from the treaty of Wanghia, negotiated in 1844. In 1860, Congress provided for the exercise of this jurisdiction in China and other countries by investing consuls and ministers appointed to those countries with judicial powers. The act further provided that the law administered in these consular and ministerial courts should be the laws of the United States, so far as they were adapted to the conditions; where such laws were not adapted, or were deficient in any of the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty should be applied; where none of these afforded sufficient and appropriate remedies the respective ministers of the United States in these foreign countries should by decree and regulation supply the need.

In conformity with these regulations the American minister to China in 1864 decreed a set of regulations for the use of consular courts. These regulations, 106 in number, not only determine matters of procedure but contain enactments on a number of subjects of substantive law. With this scant attention, consular courts were allowed to shift for themselves.

It was not until 1906 that Congress again interested itself in judicial matters in Asiatic countries. In that year was enacted the law creating the present United States Court for China. Section four of this act provides that the jurisdiction of the Court should be exercised in conformity with the laws of the United States now in force in reference to American consular courts in China. Section five provides that the procedure shall be in accordance, so far as it is practicable, "with the existing procedure prescribed for consular courts in China in accordance with the Revised Statutes of the United States."

United States v. *Englebracht* was a criminal action for embezzlement. Defendant filed a plea in bar, relying upon the three years' limitation for the prosecution of offenses contained in Section 1044 of the Revised Statutes. This section was originally enacted in 1794. Section 82 of the ministerial regulations above referred to provided a limitation of six years. The queston before the court was which provision to apply.

In view of the fact that Section 1044 of the Revised Statutes had already provided a limitation for the prosecution of crimes, it was doubtful whether there was such a deficiency in the laws of the United States as called for the exercise of legislative power by the minister to China, and whether, as a consequence, a ministerial regulation was not void. The court held, however, that this question was set at rest by the phraseology of the fifth section of the act of 1906, providing that the procedure of the court should be in accordance "with the existing procedure prescribed for consular courts in China *in accordance with the Revised Statutes of the United States.*" The words in italics were held to be words of description, and not of limitation, and as having the effect of enacting into law all existing regulations, regardless of their original validity.

The confusion of laws confronting the United States Court is still better illustrated in *Sexton* v. *the United States*. The defendant was arrested on a

charge of vagrancy and the question was to what law to apply for a definition of this offense. The United States minister had, in 1907, made a regulation defining vagrancy. The court questions the power of the minister, since the act of 1906, to make such a regulation, but places its decision finally on the ground that the laws already provided a definition of the offense and that there was, therefore, no room for the exercise of ministerial power. The court calls attention to the fact that in finding a law for any particular case, the court may, under section four of the act of 1906, and section 4086 of the Revised Statutes, have recourse to the codes enacted for any territory of the United States, and for the District of Columbia, and finally to state laws—the last by virtue of the act of July 7, 1878, providing for the utilization of state laws in Federal Courts for the punishment of offenses committed within the states in any place over which the national government exercises exclusive jurisdiction, the punishment of which is not provided for by any law of the United States. In the case before it, the court availed itself of the Alaskan code.

It will be seen from the foregoing that the laws governing American citizens in China are indefinite, and that the court has a wide territory from which to select the rules to be applied in cases coming before it. Section five of the act of 1906 further gives the judge of the United States court power to modify the existing rules of procedure. The present judge of the United States court for China is an alumnus of this university. He occupies a unique position and it will be interesting to observe how logical and consistent a system of law he can evolve out of this chaos. He certainly has the good will of every Michigan graduate. G. O.

WHAT IS INTERSTATE COMMERCE?—In the case of *International Text-book Company* v. *Pigg*, Advance Sheets May 1, 1910 (30 Sup. Ct. 481) the Supreme Court of the United States, decided April 4, 1910, that a "corporation engaged in imparting instruction by correspondence, whose business involves the solicitation of students in other states by local agents, who are to collect and forward to the home office the tuition fees, and the systematic intercourse between the corporation and its scholars and agents, wherever situated, and the transportation of the needful books, apparatus, and papers," is engaged in interstate commerce, and a state statute which makes the filing of a statement of the financial condition of such a corporation a prerequisite to the right to do such business in such way in the state and to maintain a suit in the state court upon a contract connected therewith, is an unconstitutional interference with interstate commerce.

Mr. Justice HARLAN delivered the opinion, and Chief Justice FULLER, and Mr. Justice MCKENNA dissented. "The executive offices of the company, as well as the teachers and instructors employed by it, reside and exercise their respective functions at Scranton [Pa.]. Its business is conducted by preparing and publishing instruction papers, text-books, and illustrative apparatus for courses of study to be pursued by correspondence, and the forwarding, from time to time, of such publications and apparatus to students. In the

conduct of its business the company employs local or traveling agents, called solicitor-collectors whose duties are to procure and forward to the company at Scranton, from persons in a specified territory, on blanks furnished by it, applications for scholarships in its correspondence schools, and also to collect and forward to the company deferred payments on scholarships. *** The scholarship and instruction papers, text-books and illustrative apparatus called for under each accepted application are sent directly to the applicant, and instruction is imparted by means of correspondence through the mails, between the company at its office in that city, and the applicant, at his residence in another state." In this case the company had no office in Kansas; the solicitor-collector was employed by the company upon a salary and commission, and he kept and maintained at his own expense an office in Topeka. The contract for a scholarship was signed by the defendant in Kansas, and was accepted by the company at Scranton.

Mr. Justice HARLAN held, as did the state supreme court, that this was *"doing business"* in the state of Kansas, within the meaning of the statute forbidding doing business unless conforming to the statute. "Its transactions in Kansas, by means of which it secured applications from numerous persons for scholarships, were not single transactions, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted in many states for the benefit of its correspondence schools,"—following *Cooper Manufacturing Company* v. *Ferguson,* 113 U. S. 727. Justice HARLAN quotes Chief Justice MARSHALL,—*Gibbons* v. *Ogden,* 9 Wheat 1,—"Commerce, undoubtedly, is traffic; but it is something more; it is *intercourse,"* and relies largely on the telegraph cases, *Pensacola Tel. Co.* v. *Western U. Tel. Co.* 96 U. S. 1, and *Western U. Tel. Co.* v. *Pendelton,* 122 U. S. 347, holding that *"the transmission* of intelligence," carrying "only *ideas, wishes, orders,* and *intelligence"* across state lines is interstate commerce, and says "If intercourse between persons in different states by means of telegraph messages conveying intelligence or information is commerce among the states, which no state may directly burden or unnecessarily encumber, we cannot doubt that intercourse or communication between persons in different states, by means of correspondence through the mails, is commerce among the states, *** especially where such intercourse and communication really relate to matters of regular, continuous business, and to the making of contracts and the transportation of books, papers, etc., appertaining to such business."

Commerce includes the *subject matter* of traffic and intercourse, the *fact* of traffic and intercourse, and the *instrumentalities* by which it is carried on. The *subject matter* may be "things, goods, chattels, merchandise, persons," telegraph or telephone messages, (*McCall* v. *California,* 136 U. S. 104; *Lottery Cases* 188 U. S. 321), and now apparently *instruction* or *knowledge* by mail, as above stated.

The *fact* of intercourse includes the negotiation of the *sale* of goods, wares and merchandise, which are in other states whether by solicitor or sample (*Stockard* v. *Morgan,* 185 U. S. 27; *Caldwell* v. *North Carolina,* 187 U. S. 622); the *purchase* of goods between citizens of different states, made

in either state (*McNaughton* v. *McGirl*, 20 Mont. 124, 63 Am. St. Rep. 610; *Buttfield* v. *Stranahan*, 192 U. S. 470); communication by telegraph or telephone (cases *supra*, and *Muskogee Tel. Co.* v. *Hall*, 118 Fed. 382); the *transit* of persons (*Crandall* v. *Nevada*, 6 Wall. 35; *Covington Bridge Co.* v. *Kentucky*, 154 U. S. 204, 218); the *transportation* of persons or property by boat, rail, or express (*The Passenger Cases*, 7 How. 283; *The Daniel Ball*, 10 Wall. 557; *Crutcher* v. *Kentucky*, 141 U. S. 47); the *piping* of oil or gas (*State* v. *Indiana &c. Co.*, 120 Ind. 575); *driving* of cattle (*Kelly* v. *Rhoads*, 188 U. S. 1), in completion of a commercial transaction across state lines, and the written documents whereby such transactions are effected (*Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 24 Sup. Ct. 563).

As to the *instrumentalities*, the commerce powers extend to interstate bridges (*Luxton* v. *North River Bridge*, 153 U. S. 525), and "from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph, as these new agencies come into use. They were intended for all times and all circumstances,"—(Chief Justice WAITE in *Pensacola Tel. Co.* v. *Western U. Tel. Co.* supra). In due time the flying machines will undoubtedly be included.

Insurance (*Hooper* v. *California*, 155 U. S. 648; *New York Insurance Co.* v. *Cravens*, 178 U. S. 389), loaning money, (*Nelms* v. *Mortgage Co.*, 92 Ala. 157), dealing in lands in other states (*Honduras &c. Co.* v. *State Board*, 54 N. J. L. 278), or in foreign bills of exchange (*Bamberger* v. *Schoolfield*, 160 U. S. 149), or in futures, *Ware and Leland* v. *Mobile County*, 209 U. S. 405, 121 Am. St. Rep. 21, 24, 28 Sup. Ct. 526), or carrying on a building and loan association business (*Southern Building & L. Ass'n* v. *Norman*, 98 Ky. 294), or a brokerage or commission business (*United States* v. *Hopkins*, 171 U. S. 578), or the transfers of corporate shares, (*New York* v. *Reardon*, 204 U. S. 152, 27 Sup. Ct. 188), or the sale or transportation of the waters of one state into another state, (*Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 28 Sup. Ct. 529) is not *interstate* commerce, in such a sense as to prevent state regulation. Neither is mining (*Utley* v. *Mining Co.*, 4 Colo. 369), nor the production or manufacture of things intended for interstate commerce, (*United States* v. *E. C. Knight Co.*, 156 U. S. 1; *Kidd* v. *Pearson*, 128 U. S. 1, 9 Sup. Ct. 6), nor gathering them together for the purpose of sending them to other states (*Diamond Match Co.* v. *Ontonagon*, 188 U. S. 82), or after sending them there keeping them there for the purpose of use or sale (*Brown* v. *Houston*, 114 U. S. 622; *Pittsburg Coal Co.* v. *Bates*, 156 U. S. 577) if not in the original package (*May* v. *New Orleans*, 178 U. S. 496). H. L. W.

WAIVER OF CONDITIONS IN INSURANCE POLICY BY KNOWLEDGE OF AGENT WHERE POLICY ATTEMPTS TO PROVIDE THE ONLY WAY IN WHICH WAIVER SHALL TAKE PLACE.—The difficulty of this subject is illustrated by the recent decision of the Federal Supreme Court in *Penman* v. *St. Paul Fire and Marine Ins. Co.* (1910), 30 Sup. Ct. 312. The facts are practically as follows:

Plaintiff insured a building used for dwellings with defendant company against fire. One of the conditions of the policy provided against the keeping on the premises of benzine, benzole, dynamite, etc., "or other explosives." There was also a covenant that no agent, officer, or other representative of the company could waive conditions except by a writing attached to the policy. At the time he issued the policy defendant's agent knew that blasting powder was to be kept on the premises, because miners were to occupy them during the term of the insurance, and as the keeping of powder in the mines was forbidden by statute of necessity they kept it in their houses. For that reason he charged an increased premium rate. Later a special agent approved the risk. It was held that these circumstances did not amount to waiver by the defendant. The court says, citing with approval *Northern Assurance Co.* v. *Grand View Bldg. Ass'n.*, 183 U. S. 308, 46 L. Ed. 213, "We think the policy furnishes the only way by which its terms can be waived. * * * No agent had power to change or modify that contract except in the manner provided. * * * Any other ruling would take from contracts the certain evidence of their written words and turn them over to the disputes of parol testimony." The principal case is not nearly so extreme as the *Northern Assur. Co.* case, supra, because the facts do not show that there was powder on the premises at the time of the issuing of the policy while in the latter case it was clear that there was additional insurance already issued. However there was what might be called practical certainty that the condition would be broken. So even if the miners were not already in possession it would seem that the insurance was to take effect on the premises as they were when occupied, and it might be argued that these circumstances would prevent a valid inception of the contract unless the insurer consented or the equivalent. It is believed that the following line of reasoning supported by the majority of decisions, of which a few will be cited, presents a fair answer to the general language of the principal case on this point, at least so far as it applies to conditions affecting the inception of the contract.

If an agent may make such a condition he may also dispense with it. *Aetna Life Ins. Co.* v. *Fallow,* 110 Tenn. 720. If "no agent, officer, and no other representative could waive a stipulation, who was left to waive it for the corporation?" *Home Ins. Co.* v. *Gibson,* 72 Miss. 58; *Long Island Ins. Co.* v. *Great Western Mfg. Co.,* 2 Kan. App. 377; *Farnum* v. *Phoenix Ins. Co.,* 83 Cal. 246. An agent authorized to issue policies may generally waive conditions. *Continental Ins. Co.* v. *Brooks,* 131 Ala. 614; *Westchester Fire Ins. Co.* v. *Earle,* 33 Mich. 143. In other words the conditions of the policy amount to notice of the agent's limited powers. But clearly there can be no notice of matters affecting the inception of the contract, before the delivery of the policy, and very often then merely constructive notice. *Wood* v. *American Fire Ins. Co.,* 149 N. Y. 382, 52 Am. St. Rep. 733; *Bartlett* v. *Fireman's Fund Ins. Co.,* 77 Iowa 155; *Crouse* v. *Hartford Fire Ins. Co.,* 79 Mich. 249; *Eagle Fire Co.* v. *Lewallen,* 56 Fla. 246; *Fair* v. *Met. Life Ins. Co.,* 5 Ga. App. 708; *German American Ins. Co.* v. *Hyman,* 42 Colo. 156; *Dulany* v. *Fidelity and Casualty Co.,* 106 Md. 17; *Wisotskey* v. *Niagara Ins.*

Co., 189 N. Y. 532; *Virginia Fire & Marine Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429. The true theory of cases like the principal case should be that of estoppel, and waiver and estoppel seem to be exceedingly closely connected in such situations. It really amounts to fraud to accept a contract with full knowledge of the facts and later try to defeat it by setting up those facts. *Wood* v. *Ins. Co.*, supra. Under this principle there is no breach of the parol evidence rule. *Insurance Co.* v. *Wilkinson*, 13 Wall. 222. For a good comment on the *Northern Assur. Co.* case see *Virginia Fire and Marine Ins. Co.* v. *Richmond Mica Co.*, 102 Va. 429. So far as we have been able to ascertain the doctrine of the principal case as applied to conditions affecting the inception of the contract is in force only in Oklahoma, Massachusetts, and New Jersey. Rhode Island and Connecticut reach a similar result by different reasoning. *Liverpool & London & Globe Ins. Co.* v. *Richardson Lumber Co.*, 11 Okl. 585; *Sullivan* v. *Mercantile Town Mut. Ins. Co.*, 20 Okl. 460; *Oakes* v. *Ins. Co.*, 135 Mass. 248; *Dimick* v. *Met. Life Ins. Co.*, 69 N. J. L. 384, 62 L. R. A. 774; *Franklin Fire Ins. Co.* v. *Martin*, 40 N. J. L. 568; *Wilson* v. *Ins. Co.*, 4 R. I. 141; *Ryan* v. *Ins. Co.*, 41 Conn. 168. For a good case *contra* see *Medley* v. *German Alliance Ins. Co.*, 55 W. Va. 342.

If it is admitted, however, that the knowledge of the agent in the principal case related to a condition which would avoid the contract in the future only, the conclusion reached by the Court is probably sound, as the insured then had notice of agent's limited power and, as there was practically no evidence that the company did in fact permit parol waiver by its agents. *Insurance Co.* v. *Wolf*, 95 U. S. 326; *Insurance Co.* v. *Fletcher*, 117 U. S. 519; *Ripley* v. *Ins. Co.*, 30 N. Y. 136; *Phoenix Ins. Co.* v. *Moxson*, 42 Ill. App. 164; *Dulany* v. *Fidelity and Casualty Co.*, 106 Md. 17; *United Firemens' Ins .Co.* v. *Thomas*, 53 U. S. App. 517; *Northwestern Nat. Ins. Co.* v. *Mize*, (Tex. Civ. App.) 34 S. W 670 This is a logical view and is probably the basis of the decision in spite of the general language used.

For an admirable discussion of this subject along these lines with very complete citation of authorities see 4 COOLEY'S BRIEFS on the LAW OF INSURANCE, pp. 2459-2658; also VANCE, INSURANCE, pp. 355-385. As to election and not waiver being the true doctrine see 18 HARVARD L. REV. 364.

R. W. D.

THE RIGHT OF A TRUSTEE IN BANKRUPTCY TO SUE FOR INJURIES TO THE BANKRUPT'S PROPERTY.—It is provided by § 70 of the Act of 1898, that "The trustee of the estate of a bankrupt * * * shall be vested by operation of law with the title of the bankrupt to (5) property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, * * * and (6) rights of action arising upon contracts or from the unlawful taking or detention of, or injury to his property." One of the principal difficulties under this provision is to determine what are injuries to property, within subdivision (6) supra. Although subdivision (5) is broad enough to include (6), it has not thrown much light upon the latter clause, since the test of assignability

of an action in most jurisdictions is, whether it be for an injury to property, as distinguished from an injury to the person.

Obviously state law is to govern in determining whether there has been "an unlawful taking or detention of, or injury to" a bankrupt's property; hence it is not surprising that there should be some apparent conflict in the decisions of the various districts.

The most recent case upon the subject is *In re Harper* (1910),—D. C., N. D. N. Y.,—175 Fed. 412. Here the Peninsular Paint & Varnish Company, of Detroit, Michigan, had sold a large quantity of paint to one Harper, of Troy, New York. Prior to Harper's being adjudged a bankrupt about one-third of the purchase price had been paid. The creditor then filed its claim in the bankruptcy court for the balance due. The bankrupt's trustee sought to set off a counterclaim for damages to the bankrupt's estate, resulting, it was claimed, from fraudulent statements by the vendor as to the quantity of business formerly done by the company in the bankrupt's territory, and failure to furnish an expert salesman as agreed. It was urged on behalf of the creditor that such a counter-claim, if proved to exist, was not an injury to the bankrupt's property, within subdivision (6) supra, and therefore did not pass to the trustee as assets of the estate. The presence of a state statute (Code Civ. Proc. N. Y. § 3343, subd. 10) expressly providing that "An injury to property is an actionable act whereby the estate of another is lessened, other than a personal injury, or the breach of a contract," and the decision of the state court (*Stewart* v. *Lyman*, 62 App. Div. 182, 185, 70 N. Y. Supp. 936), holding that an action for false representations in inducing the purchase of stock was an injury to property under § 3343 supra, relieved the court of the usual difficulty of passing upon the question as to what is an injury to property, since, as stated above, a state holding upon this point is binding upon the bankruptcy court.

Having determined that the right of action passed to the trustee, the court had further to determine whether it was such a "debt" as could be set off against the creditor's claim under § 68 of the Bankruptcy Act. Being an unliquidated tort, it is clear that it could not be set off by a creditor in an action brought against him by the trustee. Bankruptcy Act § 68 b, *Brown & Adams* v. *The United Button Company*, 149 Fed. 48, 79 C. C. A. 70. But § 68 applies only to the right of a creditor to set off demands against the estate, and does not limit the trustee's right to exercise this privilege against a creditor. Indeed, it is very improbable that the bankruptcy act contemplates a separate action in such cases, where the rights of the parties may easily be adjusted in the bankruptcy court. Nor does the enumeration of certain things that a debt shall *include*, in § 1, subd. 2, indicate that other things are *not* to be included. Accordingly, the court held that the counterclaim could properly be set off. It leaves the anomalous result, however, that a trustee can set off an unliquidated tort claim against a creditor, while a creditor cannot set off a like demand against a trustee.

The usual test of assignability is whether the right of action survives to the personal representatives. *Hedgerick* v. *Keddie*, 99 N. Y. 258; Case Note, 44 L. R. A. 177, and cases cited. In this connection, it is held practically

without dissent that injuries to the deceased's property survive, while those to his person are governed by the maxim, "Actio personalis moritur cum persona." 2 WILLIAMS, on EXECUTORS, 7th Am. Ed., p. 7. Since the same test ordinarily determines what passes to the trustee in bankruptcy, these cases are in point in determining what passes to the trustee under § 70.

Certain torts are clearly injuries to property, and as such would pass to an assignee or trustee anywhere. Thus the right of action has been held to pass in the case of conversion. *Burns* v. *O'Gorman Co.*, 17 Am. B. R. 815, 150 Fed. 226.

It is equally clear that other torts are personal and would not pass. Thus it has been held that a right of action for personal injuries resulting from negligence was personal and remained in the bankrupt. COLLIER, BANKRUPTCY, Ed. 7, p. 830, and cases cited. Of course it is competent for the legislature to change this rule. *Francis* v. *Burnett*, 84 Ky. 23. There is a middle class of cases, however, that gives rise to considerable difficulty. Rights of action for malicious prosecution are usually held to pass. *Cleveland Coal Co.* v. *Sloan*, 90 Ky. 308, 14 S. W. 279; but see *contra*, *In re Haensell*, 91 Fed. 355. In accordance with *In re Harper*, supra, it is usually held that an action for fraud and deceit passes, but see *contra*, *In re Crockett*, Fed. Cas. 3402. The question has also arisen where part of the injury is to the person and part to property. Here it is held that if the injury to the estate is merely incidental the right of action remains in the bankrupt. *Rose* v. *Buckett*, [1901], 2 K. B. D. 449; *In re Haensell*, supra. What would be the result where the injury to both is substantial and it is held that such is only one cause of action, and as such cannot be "split" under the usual Code provisions, seems not to have been decided.

Another phase of the subject has developed in connection with corporations. Obviously a corporation can receive no purely personal injury, and if slander and libel and the like are held to be so far personal in nature that they do not pass to the trustee, these torts seem likely to go unpunished. *Hansen Mercantile Co.* v. *Wyman*, 105 Minn. 491, 117 N. W. 926, 21 L. R. A. (N. S.) 727, and note.

L. M. G.