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Note and Comment

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NOTE AND COMMENT.

IGNORANCE AND MISTAKE OF LAW CAUSED BY OVER-RULED CASES.—It is often said that everyone is conclusively presumed to know the law, and ignorance of it excuses no one. The fact is that it is in the nature of things impossible for anyone to know the law beyond the partial and uncertain expression of it in decided cases and in the equally vague, ambiguous, and perhaps void declarations of it in the statutes. No one knows or is supposed to know the law; the highest authority is only an opinion; and he who pretends to know is at once recognized, by all but the most ignorant, as an impostor. As to the other part of the maxim, that ignorance of the law excuses no one, this statement is as false as the first. As to this branch of the maxim, the community is divided into three classes, judges, lawyers, and laymen. Laymen are bound to know the law, and ignorance is no excuse; lawyers are bound to know a little law, the plainest and most generally understood principles, and these only; but the judges are not bound or supposed to know any law at all, and cannot be held liable in any way for the most amazing ignorance in their judicial application of it. And all this is as it should be; no other rule would be even endurable. The judge is bound to administer the law as he sees it, and is entitled to the assistance of counsel on both

sides in discovering its application to the case before him. To hold him accountable for correctly anticipating the last guess of the supreme court upon it would be intolerable. Again the man who makes the practice of the law his profession is bound, as other men are in their several callings, to possess a fair ordinary knowledge of it and to exercise ordinary skill in performing his work. No more is asked of other men, and why more of him? To demand less would permit the adventurer to impose the loss from his recklessness on those who reposed confidence in him. To demand more would not merely make the profession of law extra-hazardous, but without parallel; and those by nature and training best fitted for the work would be forced to abandon it, and leave the only recourse of the public, in need of advice and service, the sharper and impostor. On the other hand, to make the liability for duty violated to depend on the knowledge by the party that he owes the duty, would be to make the administration of law impossible; for since no one can know the whole law, the existence of the duty would be made to depend in no way on the merits of the other party's right but on the merely accidental fact of knowledge, which is easily denied, unusual in fact, and, even when possessed, almost impossible of proof. Such a rule would also make men unequal before the law, place a premium on ignorance, and put those at greatest disadvantage who most faithfully performed their duty to the state in attempting to know and obey its requirements. The rule is one of necessity and does not depend on any real or supposed knowledge of the law. It applies to both civil and criminal liability, to both common law and statute, to citizen and foreigner within our borders, and though actual knowledge of the particular law be impossible by reason of being so recently enacted that time to learn of it has not elapsed.

Yet ordinarily hardship seldom arises from the application of the doctrine, since the violation of law from which the liability springs is usually one which the defendant's conscience tells him is wrong, though he know nothing of the law, and when this is not the case the power to pardon, and the mercy of the court, are a sufficient protection in criminal cases, whatever may be said of cases of civil rights and liabilities. For example, we are not shocked by the application of the statute making it a capital offense for a sailor to attempt to kill any superior officer, to the case of a sailor who attempted to kill his captain on a voyage started before the law was enacted; wherefore it was impossible for the sailor to know the law. (*Rex* v. *Bailey*, Russell & R. 1.)

While the fact that the act was merely *malum prohibitum* and done in the utmost good faith, even on the advice of the best obtainable counsel, and after careful investigation of the statutes and decisions, is no defense, (*United States* v. *Anthony*, 11 Blatchf. 200, Fed. Cas. No. 14,459) as that serving drinks at a lunch counter is not keeping a public bar within the meaning of the statute as theretofore interpreted by the highest court of the state, (*Commonwealth* v. *Everson*, 140 Mass. 292, 2 N. E. 839); it has been thought by some courts to be going too far to hold a man criminally liable for an act merely *malum prohibitum*, if the act was done after the highest court of the state had declared the statute unconstitutional, and before the court had

discovered its error in not sustaining the statute. Such a case was *State* v, *O'Neil* (1910), — Iowa —, 126 N. W. 454. A statute made it unlawful to sell intoxicating liquors; the court had held the statute unconstitutional as to solicitation of orders for goods to be sent from a place outside of the state where the seller's main place of business was located, and later had held that the statute did not interfere with interstate commerce in such a manner as to be void in its application to such a transaction. Between these two decisions the defendant solicited orders and made sales of liquors as he supposed, in view of the first decision, he had a right to do; and the court held that a conviction for such act could not be sustained. All the judges seemed very desirous of arriving at that conclusion; but they could not agree at all as to the ground on which to put their decision. Mr. Justice McClain would put the decision on the ground that there was no criminal intent; and without intent to do wrong, there was nothing to punish any more than in the case of an act done by an infant or insane person. But Mr. Chief Justice Deemer objected that the intent to make the sale was the only intent the law required; and the reason offered would prevent conviction in any case of an act done under mistake of law; and he feared that the introduction of such a principle would be fraught with danger, and liable to be an embarrassing precedent. He would hold that the overruled decision was law till over-ruled; like the interpretation of a statute by the court, which is held to be a part of the statute for the purpose of construing contracts which must be supposed to have been made by the parties in view of the decision making such interpretation, so that the decision is one of the terms of the contract. This would make all acts lawful which were done after the statute is declared unconstitutional, and would generally avoid any opportunity to reconsider the question of the validity of the law. He was also of opinion that the same conclusion could be reached by holding that punishment for such an act would be cruel and unusual. Mr. Justice Weaver objected to these views, maintaining that it was inconceivable that a mere fine of $50, or imprisonment for 30 days is cruel or unusual punishment for a crime committed under mistake of law more than if done with knowledge of the law. He held that the one tenable ground for the decision was that there is implied in every statute the intent that it shall have a just and reasonable construction, and not one which shall lead to absurdity or manifest injustice; and it has often been held that an act clearly within the letter of a penal statute is not within its spirit; and he would say that no legislature could have intended that the statute should have application to a case occurring between the time when the statute was held unconstitutional and the time the error in that decision was discovered and the decision over-ruled. "It is a fair deduction from these authorities that the very absurdity, to say nothing of the essential injustice, involved in punishing as criminal the violation of a statute of the state which we as the court of last resort in that state were then assuring the people was unconstitutional and void, and not entitled to their obedience, is sufficient reason for saying that the legislature could not have intended any such application of its enactment. * * * On the other hand, I cannot agree with the concurring opinion by the chief justice in hold-

ing that a change in judicial interpretation of a statute becomes a part of the statute. * * * Our courts have always been quick to deny the charge of magnifying their authority or indulging in judicial legislation."

J. R. R.

THE DOCTRINE OF EXEMPLARY DAMAGES IN ITS APPLICATION TO CORPORATIONS.—During the past year, three cases have been decided by the Supreme Courts of California, Oklahoma and Wisconsin, involving the liability of a corporation to respond in exemplary or punitive damages for the malicious acts of its officers and servants. *Lowe* v. *Yolo Consolidated Water Co.* (1910), — Cal. —, 108 Pac. 297; *Chicago, R. I. & Pac. Ry. Co.* v. *Newburn* (1910), — Okla. —, 110 Pac. 1065; *Topolewski* v. *Plankinton Packing Co.* (1910), — Wis. —, 126 N. W. 554. The Oklahoma and Wisconsin courts, applying the rule heretofore prevailing in those states, held that a corporation cannot be charged with exemplary damages for the wanton and malicious acts of its servants, in the absence of evidence showing that the corporation participated in or authorized the commission of the tortious act or subsequently ratified it. In the California case, the act complained of was committed by the president and general manager of the corporation, and the Supreme Court of California held that a corporation may, because of the acts of those whom it has placed in charge of its affairs, be held guilty of oppression and malice, making it liable for exemplary damages.

Whether the doctrine of *respondeat superior* should be extended in the case of a corporation so as to render the corporation liable for more than compensatory damages for the malicious act of its agents and servants, has been the subject of vigorous controversy in this country and England. In the early part of the last century, the rule was universally announced by the courts, that, malice being the foundation of the doctrine of exemplary damages, such damages could not be charged against a corporation in any case. It was then argued that a corporation, being a mere legal entity, without a soul or animate body or moral sense, was incapable of entertaining a malicious intent, and consequently that an action for a wrong, in the constitution of which malice is an essential element, could not be maintained against a corporation. This doctrine, however, is no longer of more than historical importance, having been repudiated by English and early American decisions. *Whitefield* v. *S. E. Ry. Co.*, 96 E. C. L. 115; *Green* v. *London General Omnibus Co.*, 29 L. J. C. P. 13, 1 L. T. (N. S.) 95; *Goodspeed* v. *E. Haddam Bank*, 22 Conn. 529; *Railroad Co.* v. *Quigley*, 21 How. 204.

But although the courts of this country now universally recognize that there is nothing inherent in the nature of a corporation which should preclude the imposition of exemplary damages on the corporation for the malicious acts of its agents and servants, yet as to the *circumstances* under which a corporation may render itself so liable, the courts are at variance.

That a corporation is not liable to be punished by exemplary damages for the malicious torts of its agents or servants, unless the corporation itself has expressly or by implication of law authorized the tortious act or ratified it subsequent to its commission is the holding of the courts of California,

Colorado, Connecticut, Louisiana, Michigan, Missouri, New Jersey, New York, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Virginia, W. Virginia, Wisconsin and the United States Supreme and Federal Courts. *Turner* v. *N. Beach & Mission Ry. Co.*, 34 Cal. 594; *Mendelsohn & Coleman* v. *Anaheim Lighter Co.*, 40 Cal. 657; *Ristine* v. *Biocker*, 15 Colo. App. 224, 61 Pac. 486; *Maisenbacker* v. *Soc. Concordia of Danbury*, 71 Conn. 369; *Hill* v. *N. O. & G. W. Ry. Co.*, 11 La. Ann. 292; *Gt. Western R. Co.* v. *Miller*, 19 Mich. 305; *Rouse* v. *Metro. St. Ry. Co.*, 41 Mo. App. 298; *Ackerman* v. *Erie Ry. Co.*, 32 N. J. L. 254; *Cleghorn* v. *N. Y. Cent. etc. Ry. Co.*, 56 N. Y. 44, 15 Am. Dec. 375; *Kastner* v. *Long Island Ry. Co.*, 76 App. Div. 323, 78 N. Y. Supp. 469; *Moore* v. *Atchison, Topeka & S. F. Ry. Co.* (1910), — Okla. —, 110 Pac. 1059; *Sullivan* v. *Oregon Ry. & Nav. Co.*, 12 Ore. 392, 7 Pac. 508; *Hagan* v. *Providence & Worcester Ry.*, 3 R. I. 88; *Nashville, etc. Ry.* v. *Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Dec. 296; *Houston & T. C. Ry. Co.* v. *Cowser*, 57 Tex. 293; *Norfolk & W. R. Co.* v. *Anderson*, 90 Va. 1, 17 S. E. 757; *Ricketts* v. *Chesapeake, etc. Ry. Co.*, 33 W. Va. 433, 10 S. E. 801; *Rueping* v. *Chicago, etc. Ry. Co.*, 116 Wis. 625, 93 N. W. 843; *Bank* v. *Pac. Postal Tel. Co.*, 103 Fed. 841; *Lake Shore, etc. Ry. Co.* v. *Prentice*, 147 U. S. 101, 13 Sup. Ct. 261; *Pacific Packing Co.* v. *Fielding*, 136 Fed. 577, 69 C. C. A. 325. Slight acts of authorization or ratification will generally suffice to subject the corporation to liability for exemplary damages. *Perkins* v. *Mo. Pac. Ry. Co.*, 55 Mo. 201. If the corporation employs a subordinate agent or servant knowing that he is incompetent, and he commits a malicious tort as a result of his incompetency, or if the corporation retains such a servant in its employ after the commission of the tort, such employment and retention are tantamount to authorization and ratification respectively of the malicious act. In such cases, the malice is imputable to the corporation, and exemplary damages may be awarded against it.

It has been generally held also, that the corporation will be deemed to have participated in the commission of a malicious act in a case where the *managing officers* or *officer* of the corporation, as the directors, the president or vice-president, or general manager, etc., committed the act while within the scope of their authority; that the acts of such governing officers are to be considered *pro hac vice* the acts of the corporation, and it is liable in exemplary damages therefor. *Bingham* v. *Lipman, Wolfe & Co.*, 40 Ore. 363, 67 Pac. 98; *Funk* v. *Kerbaugh*, 222 Pa. 18, 70 Atl. 953; *Western Cottage Piano & Organ Co.* v. *Anderson*, 97 Tex. 432, 79 S. W. 516; *Arkansas Const. Co.* v. *Eugene*, 20 Tex. Civ. App. 601, 50 S. W. 736; *Cowan et al.* v. *Winters*, 96 Fed. 929, 37 C. C. A. 628; *Denver & Rio Grande Ry. Co.* v. *Harris*, 122 U. S. 597.

In many jurisdictions, however, it is the established rule that a corporation is chargeable with exemplary damages for any act of its agent or servant which would subject the agent or servant himself to exemplary damages; and that no authorization nor subsequent ratification by the corporation of the malicious act is necessary to subject it to such liability. Such has been the holding in Alabama, Arkansas, Illinois, Indiana, Kansas, Kentucky, Massachusetts, Maine, Maryland, Mississippi, Nevada, New Hampshire, North

Carolina, Ohio, Pennsylvania, and South Carolina. *Alabama, etc. Ry. Co.* v. *Sellers*, 93 Ala. 9, 9 South. 375; *Citizens St. Ry. Co.* v. *Steen*, 42 Ark. 321; *Singer Mfg. Co.* v. *Holdfodt*, 86 Ill. 455, 29 Am. Rep. 43; *Aygarn* v. *Rogers Grain Co.*, 141 Ill. App. 402; *Jeffersonville R. Co.* v. *Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Wheeler & Wilson Mfg. Co. et al.* v. *Boyce*, 36 Kan. 350, 13 Pac. 609; *Louisville & Nashville Ry. Co.* v. *Ballard*, 85 Ky. 307; *Louisville & N. R. Co.* v. *Roth* (1908), — Ky. —, 114 S. W. 264; *Ramsden* v. *Boston & Albany Ry. Co.*, 104 Mass. 117; *Goddard* v. *Grand Trunk Ry.*, 57 Me. 84; *Hanson* v. *European & N. Am. Ry. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Balto. etc. Ry. Co.* v. *Blocher*, 27 Md. 277; *Pullman Palace Car Co.* v. *Lawrence*, 74 M. 782, 22 South. 53; *Quigley* v. *Cent. Pac. Ry. Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Hopkins* v. *Atlantic etc. Ry. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Purcell* v. *Richmond, etc. Ry. Co.*, 108 N. C. 414, 12 S. E. 954; *Atlantic and Gt. Western Ry. Co.* v. *Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Lake Shore Ry. Co.* v. *Rosenzweig*, 113 Pa. 535; *Hart* v. *Railroad Co.*, 32 S. C. 427, 12 S. E. 9; *Hypes* v. *South Ry. Co.*, 82 S. C. 315, 64 S. E. 395. The prevailing principle underlying these decisions is that since a corporation can act only by its agents or servants, it would escape liability to exemplary damages altogether unless the malice and wantonness of its agents and servants were imputed to it. Authorization or ratification of the malicious act by the corporation is therefore held not pre-requisite to the imposition of exemplary damages on the corporation.

It is manifest, from an examination of the cases above cited, that great contrariety exists between the courts of the several states, as to the circumstances under which exemplary damages are chargeable against the corporation. It is the purpose of this article to determine, if possible, the correct theory of law underlying the decisions, taking into consideration the inherent character of exemplary damages, the rules pertaining to the liability of natural persons as principals, and their application to the corporation.

The foundation of the doctrine of exemplary damages is stated by Mr. SEDGWICK (1 SEDGWICK DAM. Ch. XI.) to be, "That whenever the elements of fraud, malice, gross negligence or oppression mingle in the controversy, the law, instead of adhering to the system, or even the language of compensation, permits the jury to give what it terms punitive, vindictive or exemplary damages; in other words blends together the interest of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." Exemplary damages, therefore, are awarded strictly by way of punishment to the wrongdoer, and as an example to other members of the community. In the case of a natural person as principal, it is undoubtedly the better opinion that no recovery of *exemplary* damages can be had against the principal for the malicious act of an agent or servant unless the principal expressly authorized the act as it was performed, or ratified it (*Lienkauf & Strauss* v. *Morris*, 66 Ala. 406; *Becker* v. *Dupree*, 75 Ill. 167; *Eviston* v. *Cramer*, 57 Wis. 570; *Kilpatrick* v. *Haley*, 66 Fed. 133, 13 C. C. A. 480), or was grossly negligent in hiring the agent or servant, (*Burns* v. *Campbell*, 71 Ala. 271; *Sawyer* v. *Sauer*, 10 Kan. 466), or in not preventing him from committing the act, (*Freese* v. *Tripp*, 70 Ill. 496; *Kehrig* v.

Peters, 41 Mich. 475). A natural principal, therefore, although he is liable to make *compensation* for injuries inflicted by his agent or servant within the scope of his employment, cannot be held liable for *exemplary* or *punitive* damages, unless there is proof to implicate the principal and make him *particeps criminis* of his agent's or servant's act. *Pollock* v. *Gantt*, 69 Ala. 373; *Calvin* v. *Peck*, 62 Conn. 155, 25 Atl. 355; *Grund* v. *Van Vleck*, 69 Ill. 478; *Brantigam* v. *White*, 73 Ill. 561; *Rosecrans* v. *Barker*, 115 Ill. 331; *Boulard* v. *Calhoun*, 13 La. Ann. 445; *McCarty* v. *De Armit*, 99 Pa. St. 63; *Willis* v. *McNeill*, 57 Tex. 465; *The Amiable Nancy*, 3 Wheat. (U. S.) 546; 1 SEDGWICK, DAM., § 378; 2 SUTHERLAND, DAM., § 408.

Is there any legal principle or reason of public policy by virtue of which another and different rule of liability should be imposed upon an artificial person than on a natural person? That corporations are persons within the meaning of the 14th Amendment of the United States Constitution; that they can invoke the benefit of that provision of the Constitution, which guarantes to all persons the equal protection of the laws, are propositions which have been decided affirmatively by the United States Supreme Court. *United States* v. *Amedy*, 11 Wheat. 392; *Santa Clara Co.* v. *So. Pac. Ry. Co.*, 118 U. S. 394; *Missouri Pac. Ry. Co.* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26. Moreover it has been specifically decided that a corporation is liable *civiliter* for torts committed by its servants and agents precisely as a natural person. *Philadelphia, W. & B. R. Co.* v. *Quigley*, 21 How. 202; *Denver & Rio Grande Ry. Co.* v. *Harris*, 122 U. S. 598; *Wilkinson* v. *Dodd*, 42 N. J. Eq. 234; *Mo. Pac. Ry. Co.* v. *Richmond*, 73 Tex. 568.

The two preceding paragraphs constitute the two premises of a syllogism, the necessary conclusion of which is that a corporation should not be liable to be punished by exemplary damages for the malicious torts of its agents or servants, unless the corporation itself has expressly or by implication of law committed, participated in, or authorized the tortious act, or ratified the act subsequent to its commission.

Neither law nor public policy requires, we believe, that a different and stricter rule of liability for the acts of subordinate agents and servants should be imposed on an artificial than on a natural principal. The chief argument in favor of such a discrimination is that a corporation is capable of action only through the medium of agents; and that, being an artificial creation, it touches the public only through its agents and servants, and consequently public policy requires that the malice, wantonness, and oppressiveness of the agent or servant be imputed to the corporation. However, the *directors* or *governing body* of a corporation are, in legal contemplation, deemed to be the mind and soul of the corporate entity, and constitute its thinking and acting capacity. What *they* may do as the representatives of the corporation, the corporation must be deemed to do, and the motives and intentions of the *directors*, or other *discretionary officers*, acting by and under their immediate authority, are to be imputed to the corporation. *Bingham* v. *Lipman, Wolfe & Co.*, supra, et seq. Thus the liability of a natural and artificial principal are reducible to common terms; and it seems reasonable to conclude that for

the malicious acts of *subordinate* and *ministerial agents* and servants the one should be required to assume no greater or less degree of liability than the other.

Another argument in favor of an unrestricted imposition of exemplary damages on a corporation for the malicious acts of its servants, is that advanced in *Goddard* v. *Grand Trunk Ry. Co.*, supra, to the effect that the influence of a higher degree of liability will be to cause common carriers and other quasi-public corporations to use greater diligence in the selection of their servants. Thus say the court, "when it is thoroughly understood that it is not profitable to employ careless and indifferent agents or reckless and insolent servants, better men will take their places and not before. * * It (the imposition of exemplary damages) will be an impressive lesson to these defendants of the risk they incur when they retain in their service servants known to be reckless and unfit for their places." Undoubtedly the employment by a corporation of an agent or servant known to be incompetent, or the retention of an agent or servant in its employment after the commission of a malicious act is by implication of law equivalent to authorization and ratification respectively of the resulting malicious act by the corporation. But unless evidence of such knowledge by the corporation, or the retention of the agent appear, or some circumstance making the corporation itself *particeps criminis* of the wrongful act, its liability, we believe, should be limited to compensatory damages.

Other courts which allow exemplary damages in the absence of authorization or ratification of the malicious act do so, in the case of quasi-public corporations, on the ground that such corporation owes a duty to the public, for the violation of which exemplary damages should be awarded against the corporation as a matter of public policy. Public policy undoubtedly demands that a quasi-public corporation, such as a common carrier, should use reasonable care and diligence in the selection of its servants, and the employment or retention in service of agents and servants known by the corporation to be incompetent, as we have seen, amounts to an implied authorization and ratification respectively of the resulting malicious act for which exemplary damages may be awarded. But if the corporation exercise reasonable diligence and care in selecting its agents and servants, its liability should manifestly be limited to compensation for the injuries inflicted. A common carrier by reason of its contract obligations to its passengers, is undoubtedly liable to answer in compensatory damages for injuries resulting from the wantonness of its subordinate agents and servants, notwithstanding the exercise of care on its part in selecting its servants, while engaged in performing a duty which the carrier owes to the passenger. 4 ELLIOTT ON RAILROADS, § 1638. The object of exemplary damages, however, is to prevent the repetition of a wrong; but how can an individual or corporation be deterred from doing that which cannot by reasonable diligence be prevented?

The three cases decided by the Supreme Courts of California, Oklahoma, and Wisconsin, during the past year, if our conclusions be sound, announce the correct rules of law applicable to the liability of a corporation to answer in exemplary damages for the malicious acts of its agents and servants.

Public policy no doubt requires that corporations should be divested of every feature of a fictitious character, which would tend to exempt them from the ordinary liabilities necessary to the protection of the public in its dealings with them. For acts and resulting injuries committed by their subordinate agents and servants in the scope of their authority, they should be required to make adequate compensation to the injured party. When we go beyond the limit of compensation however, and inflict punishment, we enter the domain of personal responsibility, which must be founded on the act and motive of the wrongdoer; and to inflict punishment on either an individual or corporation for the malicious acts of its subordinate agents and servants, in the absence of evidence establishing participation in, or authorization or ratification of, the malicious delictual act, is practically to require that the individual or corporation be omnipotent in controlling the motives and passions of its employees, which is unreasonable. A. J. A.

WHEN IS A WILL SIGNED "AT THE END?"—The Pennsylvania statute, like that of most of the states, requires that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof." In *In re Stinson's Estate; Appeal of Stroud et al.* (1910), — Pa. —, 77 Atl. 807, Agnes J. Stinson executed a document on a single sheet of legal cap paper, folded in the middle in the usual way along the short dimension, making four pages of equal size. The writing in question was all on the first, second and third pages, the fourth being left blank. The document was holographic, the signature of the maker, following the usual testimonium clause, was in the middle of the second page. To the left of this signature appeared those of two subscribing witnesses. The first, second and third pages contained dispositive clauses. The question was whether or not the will was signed "at the end" within the meaning of the statute; whether the end of the will is "the physical end of the writing, the point which is spatially farthest removed from the beginning, or the logical end of the testator's disposition of his property, wherever that end manifestly appears on the paper." The court concluded from an inspection of the document that the testatrix, after having written on the first page, skipped the second, proceeded to the third, and, having reached the bottom of it, returned to the second, and, when she had completed the disposition of her estate at about the middle of that page, signed her name there in the presence of two witnesses. *Held,* the will was signed "at the end" within the statute. Testator's written disposition is his *animus testandi.* When it is fully expressed, his will is finished, and the end is reached and there his signature must appear in order to fulfil the statute. What he regards as the end of his will, and what must manifestly be regarded as the end of it, from an inspection and reading of the writing, is the end of it under the statute, which contains nothing about the spatial or physical end of it.

The court expressly confirmed its dictum in *Baker's Appeal,* 107 Pa. St. 381, 52 Am. Rep. 478, where the will was written on the first and third pages of the paper and signed at the end of the third page. A devise on the third

page, indicated "4th," had been erased and the words "See next page" interlined. On the next page, that is, the fourth page, there appeared a bequest to the same person to whom the erased devise had been made, likewise indicated "4th." On identification by the scrivener of the clause on the fourth page as that referred to on the third page, and his testimony that he had written it there at testator's direction, the court allowed it to be read into the will as the fourth clause thereof, saying: "Thus the general principle has been clearly established that a will is to be read in such order of pages or paragraphs as the testator manifestly intended, and the coherence and adaptation of the parts clearly require. In writing a will upon the pages of foolscap paper, a testator may or may not conform to the order of the consecutive pages of the folio. There is no law which binds him in this respect." "In whatever order of pages it may be written, however, it is to be read according to their internal sense, their coherence or adaptation of parts. The order of connection, however, must manifestly appear upon the face of the will. It cannot be established by extrinsic proof."

It is difficult to reconcile this latter decision with the recognized rules of incorporation by reference or with the admitted object of the statute in question—to prevent fraudulent or unauthorized additions to the will. The principle has, however, been announced in several cases: *Goods of Birt*, L. R. 2 P. & D. 214, *Matter of Whitney*, 90 Hun. 138, 35 N. Y. Supp. 516. The latter case was reversed by the New York Court of Appeals, Justice BRADLEY dissenting, in *In re Whitney's Will* (1897), 153 N. Y. 259, and see *Matter of Conway*, 124 N. Y. 455 to which decision three justices dissented, *Matter of O'Neil*, 91 N. Y, 516.

Goods of Birt, supra, was a case in which reference was made to the other side of a page by means of an asterisk, followed by the words "See over." On the other side of the page was another asterisk, followed by a dispositive clause. Lord PENZANCE, in holding that the will was signed at the end within the English statute, and the clause on the back a part of the will, preceded his opinion with a remark that the heir, the only person interested in excluding the clause, consented to its admission. The clause was held an interlineation to be read in the place in which the testator intended that it should be read, as indicated by the asterisks, and therefore, preceding the signature. The decision is followed in *In the Will of Bull* (1905), 30 Vict. L. Rep. 38. See also *In the Will of Ellen Wyatt*, 21 Vict. L. Rep. 571.

There are two lines of decisions construing this and similar statutes—the one, of which the principal case is an example, liberally, on the ground that if possible the testator's evident intention should be carried out; the other, strictly, on the theory that only in this way can the purpose of the statutes be accomplished, and calling attention to the fact that it is a statute and not a testamentary instrument with which the court is dealing and that the intent of the legislature is controlling.

The earlier New York cases and the later Pennsylvania and English cases support the liberal construction, while the Ohio cases, the later New York cases and the earlier Pennsylvania and English cases support the strict construction. *Sisters of Charity* v. *Kelly et al.*, 67 N. Y. 409; *Irwin* v. *Jacques*,

71 Ohio St. 395, 73 N. E. 683; *Smee* v. *Bryer*, 6 Moore P. C. 404, 6 Notes of Cases 20; *Matter of Andrews*, 162 N. Y. 1; *Hays* v. *Harden*, 6 Pa. St. 409; *Goods of Wotton*, L. R. 3 P. & D. 159; *Sweetland* v. *Sweetland*, 4 Sw. & Tr. 6, 8; *Goods of Arthur*, L. R. 2 P. & D. 273.

Mr. WILLIAMS, in 1 WILLIAMS, EXECUTORS, 7th Am. Ed., p. *67 (108) et seq. explains the situation in England thus: "In the earlier cases SIR H. JENNER FUST put a very liberal construction on this part of the act. But afterwards that learned judge, in concurrence with the Judicial Committee of the Privy Council (*Smee* v. *Bryer*, supra) felt it necessary to take a more rigid view of this enactment, on the ground that it was intended to prevent any addition being made to the will after the deceased had executed it. And accordingly probate was refused in a great number of subsequent cases on this objection, and the intention of a great many testators unfortunately defeated. This led to the passing of the stat. 15 Vict. chap. 24."

Considering the purpose of these statutes and the clear meaning of the words used in them, it would seem to be a problem for the legislatures rather than for the courts, if any relaxation of their requirements is desirable. RUGER, C.J., in *Matter of the Will of O'Neil*, supra, in delivering the opinion of the New York Court of Appeals, at a time when that court favored the strict construction, says: "The question then arises whether the 'end of the will' referred to in the statute means the actual termination of the instrument, or that portion thereof which the testator intended to be the end of the will. While it is possible that in isolated cases the latter construction might sometimes preclude the perpetration of a wrong—it certainly would not satisfy the general object of the statute of furnishing a certain fixed and definite rule applicable to all cases. While the primary rule governing the interpretation of wills, when admitted to probate, recognizes and endeavors to carry out the intention of the testator, that rule cannot be invoked in the construction of the statute regulating their execution. In the latter case courts do not consider the intention of the testator, but that of the legislature."

"In considering the question stated upon authority, some cases are found which apparently sustain the contention of appellant's counsel (*i. e.*, for liberal construction). In all of them, however, there was a failure to observe the rules of construction, which we consider controlling. We think, however, that the weight of authority favors the theory, that the statute fixes an inflexible rule, by which to determine the proper execution of all testamentary instruments." The court here points out the change made in the English statutes by 15 and 16 Vict. c. 24, and that since that enactment the English decisions cannot be invoked to assist in the construction of American statutes not having adopted that addition; and concludes that to admit clauses of wills which follow the signature, and they must be admitted if the will be held properly executed, would open the door to all the evils which the statute was intended to prevent, and substantially abrogate its wholesome provisions.

As to whether or not the clause which follows the signature must be dispositive in order to avoid the will, the courts are not agreed. *Baker* v. *Baker*, 51 Ohio St. 217; *Sisters of Charity* v. *Kelly et al.*, supra; *Brady* v. *McCrosson*, 5 Redf. (N. Y.) 431, and *Ward* v. *Putnam*, 119 Ky. 889 hold that it must,

but see *Wineland's Appeal,* 118 Pa. St. 37; *Hays* v. *Harden,* supra, and I WILLIAMS, EXECUTORS, p. *69 (111). For requirement as to place of signature before the statutes in question, see *Adams* v. *Field Exec'r,* 21 Vt. 256; *Lemoyne* v. *Stanley,* 3 Lev. 1.

See also *In re Shearman's Estate,* 146 Cal. 455; *Wikoff's Appeal,* 15 Pa. St. 281; *Matter of Collins,* 5 Redf. (N. Y.) 20; *Goods of Coombs,* L. R. 1 P. & D. 302; *Goods of Casmore,* L. R. 1 P. & D. 653; *Goods of Woodley,* 3 Sw. & Tr. 429; *Goods of Dilkes,* L. R. 3 P. & D. 164; *Margary* v. *Robinson,* L. R. 12 P. & D. 8; *Ayres* v. *Ayres,* 5 Notes of Cases 375; 3 MICH. L. REV. 650.
A. McK. B.

CONSTRUCTION OF THE CODE PHRASE "SUBJECT OF ACTION."—Among the many problems of construction which have been presented to our courts by the adoption of the code system of pleading, none has caused as much confusion and conflict as has the provision that causes of action may be joined which "arise out of the same transaction or transactions connected with the same subject of action." This provision was designed in general terms by the legislatures in order to bring within its meaning numberless situations. However broadly the legislatures may have intended it to operate, the courts and learned text writers have struggled to determine upon a fixed signification for each phrase.

The subject has recently received a lengthy and learned treatment by the Wisconsin court in the case of *McArthur* v. *Moffett* (1910), — Wis. —, 128 N. W. 445. A complaint contained two counts, one a statutory cause of action to quiet title to certain tracts of land, the other a cause of action at law to recover damages for trespass and the cutting of timber on said land. A demurrer filed for improper joinder of causes was overruled and defendant appealed. The court held that the cases were properly joined. They say: "Evidently we are obliged to define the words 'subject of action' to reach an answer. If we say that the subject of the action is the plaintiff's alleged right alone, i. e., his title then could it be said logically that the physical trespass on the land was in anyway connected with the subject? On the other hand, if we say that the subject of the action is the land alone and not the plaintiff's title thereto, could it be said logically that the false claim of title was connected with the subject? The questions suggest that either holding would be too narrow and that with better reason it should be said in a case like the present that the subject of the action is composed both of the land and the plaintiff's alleged title taken together."

The Wisconsin court in this decision has attempted to clarify the numerous code interpretations put upon this phrase. The New York court in an early decision declined to construe the term, reaching the conclusion that as new situations arose the problem would be dealt with. *Wiles* v. *Suydam,* 64 N. Y. 173. In *Scarborough* v. *Smith,* 18 Kan. 399, the court held that the "subject of action is simply one of the elements of each of the several causes of action, uniting and combining them together." Some courts incline to the view that the legislature in using the word "subject" meant "subject matter" of the action, and the test to be applied as to the proper joinder of causes is whether

the causes relate to the same physical facts, land or chattels, concerning which the suit is brought. *Dinan* v. *Coneys*, 143 N. Y. 544, 38 N. E. 715; *Box* v. *Chicago, R. I. & P. Ry. Co.*, 107 Iowa 660, 78 N. W. 964; *Craft Refrigerator Machine Co.* v. *The Quinnipiac Brewing Co.*, 63 Conn. 551, 29 Atl. 76. POMEROY in his work on "CODE PLEADING," section 651, p. 905, holds with Justice WOODRUFF in *Xenia Bank* v. *Lee*, 7 Abb. Pr. 372, that the subject was the plaintiff's primary right. "The primary right always exists and is always the very central element of the controversy around which all the other elements are grouped and to which they are subordinate." In an action for conversion of money, the subject of the action was the "tort or wrong committed." *Scheunert* v. *Kaehler*, 23 Wis. 523. Where the action declared upon was trespass, the subject was not the land nor the title to the land but the torts that were alleged. *Stolze* v. *Torrison*, 118 Wis. 315, 95 N. W. 114. BLISS has attempted to reach a definition "Code Pleading" Ed. 3 § 126. "It is not the wrong which gives the plaintiff the right to ask the interposition of the court nor is it that which the court is asked to do for him, but it must be the matter or thing, differing both from the wrong and the relief, in regard to which the controversy has arisen concerning which the wrong has been done; and this is ordinarily the property or the contract and its subject matter or other thing involved in the dispute.

Whatever meaning the courts have read into this phrase, it is logical to believe that the makers of the code intended that the term "subject of action" should have a definite meaning of its own, differing from the terms "cause of action" and "transactions" found in the same provision. The solution of the problem was aided by the reasoning of the court in *McArthur* v. *Moffett*, supra. The basic element of the count to quiet title was the title to the property, the ultimate ownership; the basic element in the count of trespass was the physical invasion of the land or the disturbance of the plaintiff's possession. The common element, they argue, can not be the primary right involved in the controversy, for two primary rights are involved, the right of ultimate ownership, and the right of possession. The common element can not be the land for the first cause of action is based upon title. Therefore to allow the case to come within the liberal construction of the code they construe the term to mean the specific property plus the right, title or interest there involved in controversy. The court concedes that in all cases where personal actions are involved "the primary right" test is applicable, but in possessory and proprietary actions they decide upon a test composed of two elements, the primary right and the specific property. Upon this extended interpretation of the term, the plaintiff may join to his first cause of action another cause connected with reasonable directness either with the property involved in dispute or with the plaintiff's right, title, or interest therein. H. H. C.