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Note and Comment

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NOTE AND COMMENT.

UNLIQUIDATED TORT CLAIMS AS PROVABLE DEBTS IN BANKRUPTCY.—Considerable litigation has arisen in determining the limitations to be placed upon debts provable in bankruptcy as outlined and enumerated in the Bankruptcy Act of 1898, § 63 a. The reason for much of this litigation being that the provability of debts is employed as a test to determine what are preferences, and what debts are dischargeable. Not a few of the cases thus arising have been with relation to clause four of the above section which provides that debts may be proved and allowed against the bankrupt's estate which are founded upon a contract express or implied. Well illustrating the limitations to be placed upon the provability of claims founded upon implied contract are the two recent cases of *In re Southern Steel Co.* (1910), — D. C. N. D. Ala. —, 183 Fed. 498 and *Clarke* v. *Rogers* (1910), — C. C. A. 1st Cir. —, 183 Fed. 518.

In the former case the Southern Steel Company had incurred a liability for a statutory penalty imposed by the State of Alabama for cutting trees. After the company had been adjudicated a bankrupt a motion was made to liquidate the claim for the statutory penalty in accordance with the provis-

ions of § 63 b of the Bankruptcy Act. The court said that the provability of the claim depended upon whether it came within the scope of § 63 a (4) and held that it did not.

In the latter case one Shaw was testamentary trustee of a number of testamentary trusts among which was one provided for in the will of one Samuel Parsons. Shaw gave the usual probate bond with sureties. He later became insolvent and while in that condition was found by the surety on the bond not to be in possession of some of the securities belonging to the Parsons estate. There was also a shortage in all of the other trust estates held by Shaw. In order to make good the shortage in the Parsons estate, which he was asked to do by the surety, he out of his own funds, and while insolvent purchased bonds to replace those embezzled. Shaw was adjudicated a bankrupt and his trustee in bankruptcy seeks to recover from his successor under the testamentary trust in the Parsons will, the amount of the bonds purchased to replace the shortage in the Parsons estate, alleging that such constituted a preference of creditors and was therefore recoverable under § 60 b of the Bankruptcy Act. It was held that such did amount to a preference and was consequently recoverable by the trustee in bankruptcy. The court in reaching this conclusion found it necessary to determine that the conversion of the bonds was such a tort as might give the injured party a right to waive the tort and sue on implied contract, thus making him a creditor.

The general rule under our present Bankruptcy Act is, that tort claims, unliquidated, and not yet reduced to judgment, are not provable except in cases where the tort may be waived and suit had in implied contract. *Crawford* v. *Burke,* 195 U. S. 176, 12 Am. B. R. 659; *Beers* v. *Hanlin,* 99 Fed. 659, 3 Am. B. R. 745; *In re Hirschman,* 104 Fed. 69, 4 Am. B. R. 715; *Matter of John Wigmore & Sons,* 10 Am. B. R. 661; *In re United Button Co.,* 140 Fed. 495, 15 Am. B. R. 390, aff'd., 149 Fed. 48, 17 Am. B. R. 566. The usual test employed in determining when a tort claim may be waived and suit had in implied contract is that set forth in the principal case of *In re Southern Steel Co.,* viz., is the tort one which has resulted in the unjust enrichment of the wrongdoer as such. The measure of enrichment being the measure of implied contract—citing REMINGTON, BANKRUPTCY, p. 377. This test is a generally accepted principle of the law of quasi contract. *Webster* v. *Drinkwater,* 5 Greenl. 319, 17 Am. Dec. 238; *Berkshire Glass Co.* v. *Wolcott,* 2 Allen (Mass.) 227, 79 Am. Dec. 781; 15 AM. & ENG. ENCYC. LAW, 1111.

This general rule allowing tort claims when as such they may be waived and suit be had in contract is one not peculiar to our present bankruptcy law. It has long been recognized in England and also under our former American Statutes. In England we find the rule adopted at least as early as 1779 when it was involved in the case of *Johnson* v. *Spiller,* Doug. 167, and again in the later cases of *De Tastet* v. *Walker,* Buck, 153 and *Parker* v. *Norton,* 6 Term Rep. 695. It is still maintained in England under the bankruptcy statutes now in force there, which in substance provide that where from the nature of the case a claim may be made in tort or contract, the tort may be waived and proof made on the contract, provable claims embracing

only that class of torts. Stat. 46 & 47 Vict. c. 52, § 37 (8). See also *Re Hopkins*, 86 L. T. Rep. 676.

In this country the earliest recognition of the rule occurred under the Act of 1800, a statute closely following the English Laws upon the subject of Bankruptcy. Under that act the case of *Dusar* v. *Murgatroyd*, Fed. Cas. 4199 was decided, holding that an action arising ex delicto for damages, to be provable before a commission in bankruptcy must be one from which the law will imply a promise to pay. Under the Statute of 1841 it was recognized in the case of *Spalding* v. *State of N. Y.*, 4 How. 21, where an attempt was made to show that a fine imposed by a court for the violation of an injunction was a provable claim and therefore one of which the bankrupt was discharged. The Act of 1867 was more definite upon this point than its predecessors; it provided that, "all demands against the bankrupt for and on account of any goods or chattels wrongfully taken, converted or withheld, may be proved and allowed as debts to the amount of the value of the property so taken and withheld." Act of Mar. 2, 1867 (14 Stat. 517), § 19.

The particular holding in the principal case of *In re Southern Steel Co.* to the effect that a penal liability is not a provable claim arising upon an implied contract, appears to be well supported by the decisions arising under both the Act of 1867 and that of 1898.

Under the former act it was held in the case of *In re Sutherland*, Fed. Cas. 13,639, that the liability for a fine imposed for the commission of a crime was not provable. In *James, Adm'x.* v. *Atlantic Delaine Co.*, 11 N. B. R. 390 a statutory liability of a corporate shareholder under a Rhode Island statute, which was held to be in the nature of a penalty, was not provable. *Garret* v. *Sayles*, 1 Fed. 371 (R. I.) was a similar case arising under the same statute and the same decision was reached. In *Wilson* v. *National Bank*, 3 Fed. 391, the liability for a statutory penalty for usury was held not provable.

Under the present Act of 1898, it was held in the case of *In re Alderson*, 98 Fed. 588, 3 Am. B. R. 544, that a judgment rendered against a bankrupt for a fine upon an indictment for unlawful retailing, was a provable debt. This holding was supported upon the ground that it was a debt amounting to a fixed liability evidenced by a judgment as provided in § 63 a (1) of the Act of 1898. The fact of a judgment having been rendered for the amount of the fine would appear to distinguish it from the case of *In re Southern Steel Co.* *In re Alderson* has however been criticized to the effect that if fines are provable and therefore dischargeable, the discharge would become in effect a pardon of the offense committed, a rather remarkable construction of legislative intent. See note, 3 Am. B. R. 544. This criticism is certainly applicable in support of the holding in *In re Southern Steel Co.*, or in any case involving a statutory liability penal in its nature. The doctrine of *In re Alderson* seems to have been doubted in the later case of *In re Moore*, 6 Am. B. R. 590, which also involved a fine imposed in a criminal suit. It was there held that such was not a debt provable in bankruptcy, the court saying that the provisions of the bankruptcy law have reference alone to civil

liabilities, as demands between debtor and creditor as such, and not punishments inflicted pro bono publico for crimes committed. In the case of *In re Rouse*, 1 Am. B. R. 393, a statutory liability of corporate shareholders, was held to be a debt provable in bankruptcy. The statute involved was an Ohio Statute which had been held not to be penal in its nature but partook rather of the nature of a contract and so the case was distinguished from those decided under the law of 1867 and cited supra. In *Patterson* v. *Thompson*, 86 Fed. 85, the court said that statutes making officers and directors of a corporation responsible to its creditors for losses growing out of the negligent, wrongful, or fraudulent conduct of its officers, are considered by most courts as of a penal nature and not arising out of contract. Evidently the Ohio statute is among the minority, but the decision of the bankruptcy court could not well have been otherwise, in view of the practice of these courts to follow the interpretation placed by the state courts upon their own statutes.

The case of *Clark* v. *Rogers*, supra, presents a somewhat simpler situation as to claims provable; which are founded upon implied contract. There the question was, as to whether the conversion of the securities composing part of the trust estate, was such a tort as would give the injured party a claim against the tort-feasor, recoverable in either tort or contract. Applying the test of unjust enrichment, and benefit to the tort-feasor, as above stated, it would seem to readily follow that the injured party had such a claim, and being such, it was provable in bankruptcy against the estate of the tort-feasor. The court held that there was an express contractual obligation upon the probate bond bringing the case within § 63 a (4) of the Act of 1898. Yet aside from this it held that there existed an obligation of a contractual nature resting upon the defaulting trustee to restore the value of the property he had embezzled.

The court having determined that the claim was a provable one, found the injured party to be a creditor. See Act of 1898, ch. I, § 1 a (9). A conveyance therefore by one who is insolvent, of part of his assets to a creditor, operating as a preference, brings the case within the provisions of § 60 b of the Bankruptcy Act and this was the ultimate proposition to be determined. The case of a return of a part of the funds of a trust estate by a trustee who had embezzled the funds of a number of trusts held by him, the return being made while the trustee was insolvent, is a unique instance of a preference of creditors.

These cases appear to be fair illustrations of situations constantly bound to arise, which though not apt to cause any contrariety of opinion upon the fundamental principles involved, are yet certain to be puzzling enough to test to their utmost the rather mechanical rules applied. J. C. M.

MAY A STATE, IN THE EXERCISE OF ITS POLICE POWER, REGULATE INSURANCE RATES?—The first case ever decided in this country involving the validity of state legislation regulating the rates of insurance was recently rendered by the United States Circuit Court. *American Surety Company of New York* v. *Shallenberger, et al.* (1911), — C. C. D., Neb., L. D. —, 183 Fed. 636.

The legislature of Nebraska in 1909 passed an act which declared it to be the duty of the Governor, Attorney General and Auditor of Public Accounts to fix the maximum rates of premiums which any fidelity or surety company transacting business in the state might charge for furnishing surety and fidelity bonds. The state officers designated, in pursuance of the statute, fixed the maximum rate of premium for such insurance, and complainant thereupon brought an action to enjoin the enforcement of the statute. *Held,* that the business of a corporation engaged in furnishing surety bonds is not one affected by any public interest nor a monopoly, but is purely a private business, and a state has no power to prescribe the maximum rates to be charged by such corporation.

If the act in question had been imposed on foreign insurance corporations alone, it would doubtless have been sustained, in accordance with the doctrine declared in *Doyle* v. *The Continental Ins. Co.,* 94 U. S. 535; *Security Mut. Life Ins. Co.* v. *Prewitt,* 202 U. S. 246, 26 Sup. Ct. 619, whereby discriminations of this nature were upheld as valid conditions precedent to the right to engage in business in the state imposing them. The Nebraska statute, however, applied, in express terms, to both foreign and domestic companies, and consequently its validity was considered on strict principles of constitutional law, the critical question being whether the act, in violation of the Fourteenth Amendment, deprived the complainant of liberty to contract. The case, while dealing only with that branch of insurance transacted by surety companies, may fairly be said to be an adjudication relating to the business of insurance in general; the court in fact stated, by way of dictum at least, that the case involved the "power of a state to fix the rates to be charged for insurance."

The right of a state to impose regulations on the conduct of business enterprises, within the Fourteenth Amendment, is conceded by the courts in cases where the particular business is devoted to a public use or affected by a public interest. This control by the state, commonly known as police power, assumes one of the following forms: the regulation of charges, the requirement of equal service, requirements in the interest of public convenience and requirements and restraints in the interest of financial security. FREUND, POLICE POWER, § 373.

Legislation regulating prices and charges in this country has been upheld in cases affecting railroad, telephone, telegraph, gas and electrical companies, warehouses, stockyards, canals, bridges, turnpikes, ferries, etc. The principal case on the subject is *Munn* v. *Illinois,* 94 U. S. 113, which announced the principle that "when one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created." The basis of the decision in *Munn* v. *Illinois* was that the business of storing grain in warehouses in a commercial center constitutes a de facto monopoly, and since competition is absent, state regulation of the rates which may be charged is necessary for the prevention of oppression. This case was followed in *Budd* v. *New York,* 143 U. S. 517, 12 Sup. Ct. 468.

When, however, no monopoly exists, either virtual or de jure, the power to regulate rates and charges presents serious difficulties. What circumstances operate to clothe an occupation or business with a public interest is not determinable by any exact formula or rule. It certainly does not follow from the mere fact that the public has an interest in a particular business undertaking, that that business is "clothed with a public interest," for that would subject the business of the merchant, the manufacturer, and other occupations recognized as juris privati to public regulation. As stated by the Court of Appeals of New York in *People* v. *Budd*, supra, no general power resides in the state legislature to regulate private business, to prescribe the conditions under which it should be conducted, to fix the price of commodities or services, or to interfere with the freedom of contract. The merchant, manufacturer, artisan and laborer, under our system of government, are left to pursue their way, untrammeled by burdensome and restrictive regulations.

Judge COOLEY, while stating that any generalization is necessarily inadequate, said that property in business is affected with a public interest: (1) Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. (2) Where the state, on public grounds, renders to the business special assistance, by taxation or otherwise. (3) Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. (4) Where exclusive privileges are granted in consideration of some special return to be made to the public. COOLEY, CONST. LIM. (Ed. 6), p. 738.

To revert to the principal case: it would seem impossible for any court to declare valid a statute regulating the rates of insurance on any ground heretofore recognized. The controlling doctrine of *Munn* v. *Illinois* clearly does not apply, for the insurance business is strictly competitive. Nor do any of the criteria suggested by Judge COOLEY find application. As stated by the Circuit Court in the principal case, individuals and partnerships are free to furnish surety bonds in competition with the complainant and to make any or no charge for furnishing such insurance. Insurance companies have no exclusive franchise; they commonly receive no assistance by taxation—quite the contrary; in short, none of the special reasons seem to exist for considering the interest of the public in the business of insurance as any different in kind from its interest in any large mercantile or manufacturing corporation, whose capital, experience and facilities may enable it to have a widely extended patronage. In some states, however, notably, Pennsylvania, the right to carry on the business of insurance has been by statute expressly restricted to corporations, and denied to individuals and unincorporated associations, and the constitutionality of such legislation has been upheld, although in the face of vigorous dissent. *Commonwealth* v. *Vrooman*, 164 Pa. St. 306, 80 Atl. 217, 25 L. R. A. 250. When an exclusive franchise is thus conferred on a corporation by the state, the reciprocal power of the state to regulate the compensation to be received by the corporation for its services would seem unquestionable. As a general rule, however, the right to engage in the business of insurance in this country is not restricted to corpor-

ations, and the constitutionality of legislation imposing such a restriction is open to serious doubt. VANCE, INSURANCE, § 34.

The United States Supreme Court has recognized that, for some purposes, the business of insurance is a proper object of police regulation by the states. Thus in *Eagle Ins. Co.* v. *Ohio*, 153 U. S. 446, this court held that a state may, in the exercise of its police power, compel an insurance company to make reports to the proper state officers of its business condition, liabilities, premiums, dividends and expenses, etc., without depriving the company of any of its constitutional rights. This decision, however, did not in terms treat the business of insurance as one affected with a public interest. It proceeded on the grounds that a corporation created by the state is subject to such reasonable regulations as the state may prescribe, as to the general conduct of its affairs, serving to secure the ends for which it was created, and not materially interfering with the privileges granted to it.

Two other states beside Nebraska have statutes similar to the one by this case declared unconstitutional. Laws of New Hampshire, 1899, c. 85; Laws of Kansas, 1909, c. 152. In view of the great importance of the question, it is inevitable that the United States Supreme Court will be called upon finally to decide as to the constitutionality of these statutes. Whether that court will extend the doctrine announced in *Eagle Insurance Company* v. *Ohio* and recognize the power of a state to regulate the rates which may be charged by insurers is problematical. A. J. A.

INTEREST UPON LEGACIES WHICH ARE NOT PAYABLE UNTIL LEGATEE ATTAINS CERTAIN AGE.—Testator bequeathed to his son, who was thirteen years of age at the death of the testator, a pecuniary legacy to be paid him on his attaining twenty-five, and a further legacy on his attaining thirty, and also a share of the residue for life. The legatee petitioned for interest on the legacies from the death of the testator. *Held*, that the legacies do not carry interest even up to the time of attaining the age of twenty-one. *In re Abrahams; Abrahams* v. *Bendon* (1910), 80 L. J. Ch. 83.

The rule of law is well established that contingent legacies do not carry interest while in suspense. An equally well established exception to this rule is that contingent legacies to infant children, where the testator has provided no other fund for their maintenance, carry interest from the testator's death until the happening of the contingency. *Bowlby* v. *Bowlby* (1904), 73 L. J. Ch. 810. As thus stated the exception would extend to every case where the legatee is an infant, irrespective of the question whether the contingency is the attaining the age of twenty-one or the happening of any other event, and no statement of it has been found which is not substantially the same as that above. In WILLIAMS, EXECUTORS, Ed. 7, 745, it is thus stated: "Whether the legacy be vested or contingent, if the legatee be not an adult, interest on the legacy will be allowed, as a maintenance, from the time of the death of the testator, if there is no other provision for that purpose." *Lowndes* v. *Lowndes*, 15 Ves. 304, *Cary* v. *Askew*, 1 Cox 244,

Crickett v. *Dolby*, 3 Ves. Jr. 10, *Cox* v. *Corkendall*, 13 N. J. Eq. (2 Beasl.) 138, *Hepburn* v. *Hepburn*, 2 Bradf. Sur. (N. Y.) 74, *Allen* v. *Crosland*, 2 Rich. Eq. (S. C.) 68, *Sullivan* v. *Winthrop*, Fed. Cas. No. 13,600, (1 Sum. 1), *White* v. *Donnell*, 3 Md. Ch. 528, *Keating* v. *Bruns*, 3 Dem. Sur. (N. Y.) 233.

The court first eliminates from the case the contention that the gift of a share of the residue will prevent the operation of the above exception, since the decision in *Moody, In re; Woodroffe* v. *Moody* (1895), 04 L. J. Ch. 174, is binding on this court and is clearly to that effect. The court, however, expresses a personal opinion to the contrary.

The only remaining question, then, is: Does a legacy to an infant child, contingent upon his attaining the age of twenty-five, where no other provision is made for his maintenance, carry interest from the death of the testator? EVE, J., in answering this question says: "But this much I think is clear from the historical examination of the cases, that the exception had its origin in the desire of the Court to give effect to the presumed intention of the testator—that is to say, to provide for the maintenance of the infant —an intention which might well be presumed in cases where the suspensory period was limited to the years when the infant would in the ordinary course require to be maintained, but which could not be presumed so readily, if indeed at all, where the legacy was made contingent upon events having no reference to the infancy of the legatee; and in this connection it is certainly remarkable that in all the cases brought to my attention the contingencies have been the attainment by the child of full age, or marriage under that age. There is no case in which the exception has been held to apply when the contingency is other than the attainment of full age, or marriage under that age. In that state of things, and bearing in mind that I am dealing with an exception grafted on the general rule, ought I to be the first judge to hold that the exception extends so as to include contingencies of every description and having no relation to the attainment of full age? I do not think I ought. I think I ought to treat the exception as limited to those cases in which the contingency is the attaining of full age, or previous marriage, and to hold that where the testator has made a legacy payable upon a contingency which has no reference whatever to the attainment of full age the case ought to be treated as governed by the general rule, and not as coming within the exception. Accordingly I hold that neither of the legacies carries interest, and I think that must apply to the whole of the interest. * * * In my opinion, the testator must be taken to have so framed the bequest as to keep the legacies outside the exception and I think I would be creating confusion were I to treat the bequest as partly within and partly without the exception."

The case raises a question which seems never to have been raised in any previous case reported in either England or America—must the contingency upon which the legacy is given bear some relation or have some reference to the infancy of the legatee in order that the exception shall operate? No such condition is required by any statement of the exception in any previous

case found, though such relation or reference does in fact exist in nearly all of them. Moreover, the case is clearly within the reason which gave rise to the exception—the necessity of maintenance for the legatee while the legacy is in suspense—and so long as within the reason, it can scarcely be said to be an extension of it.

The tendency of some of the courts is to greatly extend the exception—the Supreme Court of New York, in *Thorn* v. *Garner,* 42 Hun 507, allowed interest from the date of testator's death on a legacy to an adult son who had always been supported by testator, was in feeble health and wholly dependent on testator. The decision was, however, reversed on appeal, as an unwarranted extension of the exception. Same title, 113 N. Y. 198, 21 N. E. 149.

In *Lyon* v. *Industrial School Ass'n.,* 127 N. Y. 402, a legacy was given to an adopted child to be paid on the legatee's attaining twenty-five. Interest was denied on the ground that there was no moral obligation on the testatrix to support the legatee, since the husband of testatrix was living, was an uncle of the legatee and a man of wealth. No question was raised as to the inapplicability of the exception because of the lack of relation between the contingency and the infancy of the legatee.

In *Descrampes* v. *Tomkins* (1784), 4 Bro. C. C., note 149, legacies were given to five maternal grandchildren of testator to be paid them at their respective ages of twenty-three years and in case of death before that age, the legacies were to sink into the residue. Here again, interest was denied on another ground, but no question was raised regarding the age at which the contingency was to happen. The court, however, seems to regard the case as in the same class as cases in which the contingency is the attaining twenty-one, since it is there said: "The case of *Nicholls* v. *Osborn* (1727), 2 P. Wms. 419, is the only case applicable to this," and in that case the legacy was payable at twenty-one.

So in *Churchill* v. *Lady Speake* (1694), 1 Vern. 251, a legacy was given to testator's granddaughter to be paid over when and as his executrix "should think fit and best for his said granddaughter." The legatee was nine years old at the death of the testator. The executrix died twenty years after testator without having paid the legacy. The court allowed interest from the death of testator, though the contingency need not have happened on attaining majority, nor did it happen before that time, nor did it have any relation to the infancy of the legatee.

It seems, therefore, since the precise point had never before been raised, and the exception had invariably been stated generally, and such a limitation upon it never before suggested, and the reason for the exception applied in the principal case, that the Court might better have put the question in another form: Ought I to be the first judge to limit the application of the exception to contingencies having relation to the attainment of full age?

Perhaps the opinion of the Court as to the effect which the gift of a share of the residue should have had in removing the case from the operation of the exception slightly influenced the decision. A. McK. B.

VALIDITY OF A CLASSIFICATION OF BANKS BASED UPON THE AMOUNT OF THEIR AVERAGE ANNUAL DEPOSITS.—Laws exacting a license for the privilege of engaging in the banking business are proper, as providing for a regulation of the business under the general police power of the State. License laws usually attempt a classification of the occupations affected, which classifications are often assailed under the Fourteenth Amendment to the Constitution of the United States, as being unjust, unequal, and arbitrary.

The legislature of the State of New York recently passed an amendment to the general business law in relation to private banking. Laws, 1910, c. 348. In a suit to restrain its enforcement, the Supreme Court, Special Term, New York County, granted the injunction, holding the amendment void, on the ground that the classification therein made, denied to the plaintiff the equal protection of the laws guaranteed by the Fourteenth Amendment. *Lee* v. *O'Malley et al.* (1910), 126 N. Y. Supp. 775. In a separate, but similar, suit in the Federal courts, involving the same law, the Supreme Court of the United States held the law valid, declaring that the classification therein made no unconstitutional discriminations. *Engle* v. *O'Malley et al.* (1911), 31 Sup. Ct. 190; affirming 182 Fed. 365.

The law in question provides that no person shall engage in the business of receiving deposits of money for safekeeping or for the purpose of transmission to another or for any other purpose, without a license, to be granted at the discretion of the State Comptroller. Section 29 d of the act exempts from its provisions five classes: the fourth class exempted comprises private bankers where the average amount of each sum received on deposit or for transmission in the ordinary course of business shall have been not less than $500 during the fiscal year preceding an affidavit to that effect; the fifth class exempted consists of private bankers who file a bond, approved by the Comptroller, for $100,000, when the business is in cities of the first class, or of $50,000, elsewhere.

In both the State and Federal Courts, it was urged that the act is invalid, in that it makes unconstitutional discriminations, imposes unequal conditions, creates arbitrary classifications, and otherwise denies the equal protection of the law to the bankers it affects.

It is not the purpose of the Fourteenth Amendment to prevent the States from classifying the subjects of legislation or from making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated are treated alike in privileges conferred or liabilities imposed. 9 FED. CASES ANN. 546; *Field* v. *Barber Asphalt Pav. Co.*, 194 U. S. 618; *Tinsley* v. *Anderson*, 171 U. S. 101; *Walston* v. *Nevin*, 128 U. S. 578. When there are reasonable economic or political or social reasons for doing so, certain occupations or industries or even certain classes of persons may be selected for special regulation. 2 WILLOUGHBY, THE CONSTITUTION (1910), 886. Where a distinction is made, however, there should be a reasonable ground therefor, one based on administrative or political necessity or commerce or on economic needs. 2 id. 881. Equality of operation, moreover, does not mean indiscriminate operation on persons merely as such, but on persons according

to their relations. *Magoun* v. *Illinois Trust Co.*, 170 U. S. 283. The power of classification is upheld whenever such classification proceeds upon any difference that has a reasonable relation to the object sought to be accomplished. *Atchison, etc. R. Co.* v. *Matthews*, 174 U. S. 103; *Heath & M. Mfg. Co.* v. *Worst*, 207 U. S. 338; *G., C. & S. F. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *K. C. Stock Yards Co.*, 183 U. S. 79; 62 CENT. L. J. 124, et seq.

To be obnoxious, the classifications must be arbitrary and destitute of reasonable basis. *Fidelity Mut. L. Assoc.* v. *Mettler*, 185 U. S. 308, 325; *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557, 562, 43 L. ed. 552, 19 Sup. Ct. 281. Necessarily, there must be great freedom of discretion, though it may result in ill-advised, unequal, and oppressive legislation. *Mobile County* v. *Kimball*, 102 U. S. 691, 26 L. ed. 238. That is to say, there is always a strong presumption that such legislation is valid. *Hawthorne* v. *People*, 109 Ill. 302. The question, what regulation shall be made, if any, is a question for the States to determine, within the police power; and unless the regulations are so utterly unreasonable and extravagant in their nature and purposes that the property and personal rights of the citizens are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed, without due process of law, they do not extend beyond the power of the States to pass, and they form no subject for Federal interference. *Gundling* v. *Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. 633.

But granting that persons in different callings may be legally classified under separate heads, which is, of course conceded, yet the cases are certainly near the border line, when discriminations are made among those engaged in the same occupations. *Vermont* v. *Harrington*, 68 Vt. 622. The Fourteenth Amendment undoubtedly means that no impediment shall be interposed to the pursuits of any one except as applied to others under like circumstances; that no greater burdens shall be laid upon one than are laid upon others in the same calling and conditions, said Mr. Justice FIELD, in *Barbier* v. *Connolly*, 113 U. S. 27, 31. A State cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class, engaged in the same domestic trade, to do the same things with impunity. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *M., K. & T. Ry.* v. *Haber*, 169 U. S. 613, 626; *Sinnott* v. *Davenport*, 22 How. 227, 243; *Fox.* v. *M. & H. Soc.*, 165 N. Y. 517, 59 N. E. 353, 51 L. R. A. 681, 80 Am. St. Rep. 767; *State* v. *Hinman*, 65 N. H. 103, 18 Atl. 194, 23 Am. St. Rep. 22; *Sams* v. *St. L. etc. R. R. Co.*, 174 Mo. 53, 73 S. W. 683, 61 L. R. A. 475; *Soon Hing* v. *Crowley*, 113 U. S. 703, 708, 709.

Nevertheless, persons engaged in the same trade have, for the purpose of State regulation, been divided into different classes, and such classification has been upheld on certain occasions. For example, retailers and wholesalers are grouped separately. *Cook* v. *Marshall*, 196 U. S. 261, 25 Sup. Ct. 233. In *St. Louis Consol. Coal Co.* v. *Illinois*, 185 U. S. 203, 46 L. ed. 872, 876, a classification of coal mines for the purpose of inspection, etc., into those employing five or less than five and those employing over five was held reasonable, on the ground that the smaller mines would not be likely to need

the careful inspection required by the larger mines. A similar classification was upheld in *McLean* v. *Arkansas*, 211 U. S. 539. Likewise, in *Musco* v. *United Surety Co.*, 196 N. Y. 459, 466, 90 N. E. 171, 134 Am. St. Rep. 851, the New York Court of Appeals intimated that they could find sufficient reason to justify the legislature in distinguishing between steamship companies possessing large capital and credit, and individuals of the class to which the appellant's principal belonged, who frequently might be expected to be without either.

On the contrary, however, in *Cotting* v. *Goddard*, 183 U. S. 79, 46 L. ed. 92, the court said that there can be no pretense that a stock-yard that receives ninety-nine head of cattle per day is not doing the same business as one receiving one hundred head. It would seem to follow that a banker, receiving average annual deposits to the value of $499, is doing practically the same business as one receiving deposits to the value of $501. Speaking of classifications among persons engaged in the same business, based simply upon the amount of business that each may do, the Supreme Court, in the last mentioned case, went on to say: "If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would." They cited *State* v. *Haun*, 61 Kan. 146, 59 Pac. 340, 47 L. R. A. 369, where a statute was held unconstitutional that required corporations or trusts employing more than ten persons to pay wages in cash only.

Legislatures, therefore, may define classes of property and individuals that actually exist, but they can not create them. They should not be allowed to classify men engaged in the same business simply according to the wealth or the amount of business they do. GUTHRIE, THE FOURTEENTH AMENDMENT (1898) 136. There is a long note on classifications in COOLEY, CONST. LIMITATIONS, Ed. 7, 568 et seq., which cites, among numerous other cases, *State* v. *Mitchell*, 97 Me. 66, 53 Atl. 887. That case involved a hawkers and peddlers act requiring those paying less than $25 taxes on stock to pay a license fee, and exempting those paying that amount or over. The classification therein made was declared merely arbitrary discrimination, not based upon any inherent difference of kind. The Court said: "No one now questions that these constitutional provisions (Federal and Maine) prevent a State from making discriminations as to their legal rights and duties between persons on account of their * * * wealth or poverty, or on account of the amount of business they do."

Coming now to the reasoning of our two principal cases, we find the New York Court saying: "I can see that from certain points of view, in the banking business, as for example in considering ability to issue credits, the possession of wealth may be regarded as some guaranty of responsibility and stability. Still in the last analysis it is the integrity and sound business judgment of the banker which afford to a mere depositor the assurance of the safety of his funds. * * * Moreover, relief is here sought by a plaintiff who is a 'curb broker.' It is true that defendants do not concede in so many words that the statute covers his case; but the plaintiff so alleges, and it is not denied, and the argument has proceeded before me on the theory that the provisions of the act do indeed cover his business. None of the facts

adduced by the Commission of Immigration in its report, none of the considerations relating to inexperienced foreigners recently arrived, and none of the many other distinctions which correctly or incorrectly are attributed to immigrant depositors with private bankers have any relation to customers of brokers."

The court thereupon held there was no reason for imposing upon brokers a requirement of wealth or a classification based upon the amount of the average annual deposits of their customers.

In the Supreme Court of the United States ,the basis of the decision upholding the law, was as follows: "Legislation which regulates business may well make distinctions depend upon the degree of evil." *Heath & M. Mfg. Co.* v. *Worst*, 207 U. S. 338, 355, 356, 52 L. ed. 236, 244, 28 Sup. Ct. 114. "It is true, no doubt, that where size is not an index to an admitted evil, the law cannot discriminate between the great and the small. But in this case size is an index. Where the average amount of each sum received is not less than $500, we know that we have not before us the class of ignorant and helpless depositors, largely foreign, whom the law seeks to protect." The court then cited *Musco* v. *United Surety Co.*, 196 N. Y. 459, 465, 134 Am. St. Rep. 851, 90 N. E. 171 and *McLean* v. *Arkansas*, 211 U. S. 539, 551 53 L. ed. 315, 321, 29 Sup. Ct. 206.

Do not the very facts that the curb broker's business was found not to be within the evil aimed at, that the statute apparently covers the good as well as the evil, do not those facts indicate that the attempted classification was not based upon the cause of the evil complained of, but upon a mere accompanying circumstance, the amount of business done? That, while perhaps covering the evil, it is quite likely to go further and to work hardship and injustice upon persons coming within its terms, but not within its reason? Even where the selection is not obviously unreasonable and arbitrary it has been held that if the discrimination is based upon matters that have no relation to the object sought to be accomplished, it is unconstitutional. *Atchison, etc. R. Co.* v. *Matthews*, 174 U. S. 96, 104. And, similarly, if one person is treated differently from others who are in the same relation to the purpose of the statute, he is deprived of the equal protection of the law. *Ohio* v. *Dollison*, 194 U. S. 447.

Finally, then, a classification based upon wealth alone or upon the amount of business transacted would seem likely to fail for two reasons. First, because an amount, necessarily arbitrary, is fixed, and burdens are imposed or benefits conferred upon persons doing an amount of business one dollar above or below that amount, although those persons are doing practically the same business and under the same conditions, as the other persons, just across the line. Secondly, because some other reason—not at all depending upon the amount of business done—is quite likely to be the real reason for the regulation. The result will be that, in operation, the statute will cover cases outside of the reason of the law, and, as to those cases, it will be arbitrary and unreasonable, as having no relation to the object sought to be accomplished or to the evil sought to be eradicated. C. L. C.

CONSTITUTIONALITY OF THE TORRENS SYSTEM OF LAND TITLE REGISTRATION. —The courts of a number of the states have been called upon to pass upon the constitutionality of the so-called Torrens system of registering land titles. In the following cases: *Title, etc. Restoration Co.* v. *Kerrigan,* 150 Cal. 289, 88 Pac. 356, 119 Am. St. Rep. 199, 8 L. R. A. (N. S.) 682; *People* v. *Simon,* 176 Ill. 165, 52 N. E. 910, 44 L. R. A. 801, 68 Am. St. Rep. 175; *State* v. *Westfall,* 85 Minn. 437, 89 N. W. 175, 57 L. R. A. 297; *Tyler* v. *Judges,* 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433; *People ex rel.* v. *Crissman,* 41 Colo. 450, 92 Pac. 949, the system has been held constitutional. On the other hand in Ohio and Illinois the acts under consideration were held unconstitutional. *State* v. *Guilbert,* 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 756, 38 L. R. A. 519; *People* v. *Chase,* 165 Ill. 527, 46 N. E. 454, 36 L. R. A. 105. A very recent decision of the United States Supreme Court is of special interest because that court held constitutional a California act which to all intents and purposes is a Torrens act. *American Land Co.* v. *Zeiss* (1910), 31 Sup. Ct. 200.

In that case, the court considered the constitutionality of a law enacted by the legislature of California in June, 1906, which provided for the registering of land titles in those places where the earthquake a d fire of that year had destroyed the public land records, by a method similar to that of the Torrens act of that state (Code Civ. Pro., §§ 749-751), except that it did not require an abstract of title to be filed with the petition, that being impossible under the circumstances.

The act was attacked on the ground that it deprived persons of property without due process of law, contrary to the Fourteenth Amendment to the Federal Constitution. The court, speaking through Chief Justice WHITE, in upholding its constitutionality, divided the question as follows: (a) the authority of the state to deal with the subject with which the statute is concerned, and (b) upon the hypothesis of the existence of power, the sufficiency of the safeguards provided in the statute.

In regard to the former the court held that as it is indisputable that the general welfare of society is involved in the security of titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that the government possesses the power of remedying the confusion and uncertainty as to registered titles arising from a disaster such as took place in California in 1906.

As to the adequacy of the safeguards which the statute provides, it was held that the statute not only requires a disclosure by the petitioner of all known claimants and service upon them, but moreover, it contains words of limitation to the effect that no one not in the actual and peaceable possession of property, either personally or through an agent, can maintain the action which it authorizes. To argue, say the court, that the provisions of the statute are repugnant to the due process clause because a case may be conceived in which rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the state to deal with the subject. The criterion is not the

possibility of conceivable injury, but the just and reasonable character of the requirements, having reference to the subject with which the statute deals. The laws of a state come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights. The law cannot give personal notice of its provisions or proceedings to every one. Of what concerns or may concern their real estate, men usually keep informed, and on that probability the law may frame its proceedings. *Ballard* v. *Hunter*, 204 U. S. 241, 51 L ed. 461, 27 Sup. Ct. 261.

In Ohio the act which was declared unconstitutional in *State ex rel.* v. *Guilbert*, supra, as taking property without due process of law, did not provide that a person known to claim a title to the land adversely to the petitioner need be named in the application or notice, nor that he receive a copy of the notice even though his place of residence be known and within the county. The court, in passing upon the act, held that to authorize a court to determine the adverse claims of parties touching their rights in things, judicial process is indispensable. In Illinois an early law (Laws of 1895), page 107) was declared unconstitutional in *People* v. *Chase*, supra, which held that the act conferred judicial powers upon the registrar of titles contrary to the constitution requiring a division of powers. Under that act the entire proceedings were had before the registrar, who passed upon all claims which were had against the estate, and settled them. The statute under consideration in the principal case, as well as those of other states which have stood the test of the courts, does not contain the clauses which were objectionable in the Illinois and Ohio laws. In the former the petitioner is required to name all the adverse claimants whom he knows, and to serve them with notice, while the proceedings are conducted in either a court of chancery or a special court.

Almost every conceivable objection to these laws has been urged in the different courts, for among those seeking to make the laws void we find the powerful interest of the Title Insurance Companies, whose very existence is threatened by the enactment of these statutes. The different acts being on the whole very similar, it is interesting to note some of the points which were raised against them. The contention argued in the principal case, that the act deprived one of property without due process of law, was argued in nearly every one of the above mentioned cases and for the most part was settled in much the same manner. In regard to that contention Chief Justice HOLMES in *Tyler* v. *Judges*, supra, said that if the notice does not satisfy the constitution, a judicial proceeding to clear titles against all the world is hardly possible, for the very object of such a proceeding is to get rid of unknown as well as known claims—indeed, certainty against the unknown may be said to be its chief end—and unknown claims cannot be dealt with by personal service upon the claimant (citing *Arndt* v. *Griggs*, 134 U. S. 316 and *Hamilton* v. *Brown*, 161 U. S. 256).

It was contended against a statute passed in Illinois after the case of *People* v. *Chase*, supra, had declared the former act invalid, that by the proceedings subsequent to the initial registration, an owner might be deprived of his property without due process of law. *People* v. *Simon*, supra. The

court held that the right to alienate or inherit property is always dependent upon the law, and the state has the absolute power to regulate the tenure of real property within its limits and the modes of the acquisition and transfer thereof. In this case, also, it was contended that the duties of the registrar were judicial in nature in the proceedings after the initial registration, but the court held that even though they might be quasi-judicial they were only the duties of the ordinary registrar in a land office.

It is interesting here to notice that in a California case, *Title etc. Restoration Co.* v. *Kerrigan,* supra, in which the same statute was under consideration that is considered by the principal case, it was argued that the entire proceeding of registering titles is not a judicial act but an administrative proceeding and therefore contrary to their constitution. The court in that case held that whenever the law confers a right, and authorizes an application to a Court of Justice to enforce that right, the proceedings under such application are to be regarded as of a judicial nature (citing *Cooper's Case,* 22 N. Y. 67).

In the Colorado case, *People* v. *Crissman,* supra, it was claimed that by having an examiner examine the title and report, before the hearing is had, the case is partially tried and disposed of by the court before persons adversely interested are brought into court and made parties to the proceeding, but it was held that the report of the examiner was in no way binding upon the court in the hearing of the cause. In the same case it was further objected that the act was invalid in that no judgment could be rendered in favor of a defendant regardless of the showing made, and in the Minnesota case, *State* v. *Westfall,* supra, it was urged that the act was unconstitutional in that it conferred the power of appointment of an examiner upon the judge. Many other minor objections might be mentioned, but it is sufficient to say that undoubtedly now that the Supreme Court of the United States has passed upon the constitutionality of the so-called Torrens act, that phase of the law will not further be disputed, and it will pave the way for the enactment of such a law by other states.

It may be interesting to note that in chapter 627 of the Laws of 1910 there is found a complete method of registering land titles in the state of New York. See Article XII of the Real Property Law as thus amended.

L. F. M.