Michigan Law Review

Volume 9 | Issue 7

1911

# Note and Comment

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# MICHIGAN LAW REVIEW

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

SUBSCRIPTION PRICE $2.50 PER YEAR. 35 CENTS PER NUMBER



## NOTE AND COMMENT.

THE CORPORATION TAX DECISION.—Seldom, if ever, in the history of the country has the Supreme Court been called upon within a comparatively short period of time to decide so many questions of widespread interest and vital importance as has been the case during the last year or two. Attempts on the part of the state and national governments to regulate and control corporations, which in recent years have come to exercise such a large and not always wholesome influence upon affairs generally, have been the occasion for the consideration by the court of many of the important cases recently presented. Among these are the so-called "Corporation Tax Cases," reported in 31 Sup. Ct. 342, under the name of *Flint* v. *Stone Tracy Co.* In newspapers and periodicals, legal and otherwise, the questions involved attracted a great deal of attention, and many articles *pro* and *con* as to the constitutionality of the tax were prepared and printed. That the members of the court themselves considered the questions as of great and vital importance is evidenced by the fact that when the court's numbers had been reduced by death and resignation a reargument of the cases was ordered so that the decision might be by the full bench, although apparently the re-

maining members of the court were unanimous in considering the tax valid.

Section 38 of the Act of Congress approved August 5, 1909, which contains the corporation tax law, provides as follows: "Every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association or insurance company equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year, exclusive of amounts received by it as dividends upon stock of other corporations, joint stock companies or associations or insurance companies subject to the tax hereby imposed, etc." The validity of the provision was challenged on every ground that able and astute counsel could suggest. Mr. Justice DAY in an opinion concurred in by all the members of the court disposed of all the objections raised, and in unmistakable terms declared the power of Congress to levy a tax of the nature under consideration.

After shortly disposing of the contention that Section 38 did not originate in the House as required by § 7 of Article I of the Constitution, and after having reached the conclusion that the true construction of the Act is "that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to 1 per centum, etc.," the court proceeded to a consideration of the constitutionality of the provision. A number of the supposed objections were discussed, the chief ones being the following: (1) that the tax is "direct" within the rule as laid down in the income tax cases and therefore requires apportionment; (2) that there is an interference with or infringement of the sovereignty of the states, in that it taxes the exclusive right of the states to create corporations; and (3) that the tax is arbitrary and unjust.

As to the first objection the court pointed out that the tax is not a tax upon property solely because of its ownership, that "In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity," which "is made the occasion for the tax, measured by the standard prescribed." It is pointed out that the tax under consideration in the income tax cases was held direct "because imposed upon property solely by reason of its ownership," a tax upon the income of property being equivalent to a tax upon the property itself, but that the power of the Federal government to tax business, privileges and employments had been therein expressly conceded. Thus it being determined that the corporation tax is a tax upon the *privilege* of doing business in a corporate capacity, the income tax cases instead of being authority against the validity of the tax are in their dicta at least authority for its constitutionality. Reference was made to *Knowlton* v. *Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. 747, and to *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. 376, as taking the same view of the income tax cases. Having reached the conclusion that the tax does not lay a burden upon real or personal property

because of its ownership and so therefore not a "direct" tax, it was unnecessary for the court to go further in classifying the tax, for under the Constitution only capitation and direct taxes need be apportioned. The court however added that the tax imposed is an "excise," and in support of this conclusion cited and quoted from the opinion of Mr. Chief Justice FULLER in one of the income tax cases (157 U. S. 557), the opinion of the same Chief Justice in *Thomas* v. *United States*, 192 U. S. 363, 48 L. ed. 481, 24 Sup. Ct. Rep. 305, and from COOLEY, CONST. LIM., Ed. 7, 680.

The suggestion that the tax in order to be upheld must be apportioned is based upon an express constitutional limitation of the power of Congress to levy taxes, but as has been seen there is no necessity for the apportionment of the tax under consideration for the reason that it is not a "direct" tax. The second objection above stated that the tax is bad because it lays a tax upon the exclusive right of a state to grant corporate franchises, in that it taxes franchises which are the creation of the state in its sovereign right and authority is rested upon the implied limitation upon the powers of the national and state governments to take action which encroaches upon or cripples the exercise of the exclusive power of sovereignty in the other. After reviewing the cases Mr. Justice DAY said: "The cases unite in exempting from Federal taxation the means and instrumentalities employed in carrying on the governmental operations of the state. The exercise of such rights as the establishment of a judiciary, the employment of officers to administer and execute the laws, and similar governmental functions, cannot be taxed by the Federal government. *The Collector* v. *Day*, 11 Wall. 113, 20 L. ed. 122; *United States* v. *Baltimore & O. R. Co.*, 17 Wall. 322, 21 L. ed. 597; *Ambrosini* v. *United States*, 187 U. S. 1, 47 L. ed. 49, 23 Sup. Ct. 1, 12 Am. Crim. Rep. 699. But this limitation has never been extended to the exclusion of the activities of a merely private business from the Federal taxing power, although the power to exercise them is derived from an act of incorporation by one of the states. We therefore reach the conclusion that the mere fact that the business taxed is done in pursuance of authority granted by a state in the creation of private corporations does not exempt it from the exercise of Federal authority to levy excise taxes upon such privileges." It was also urged that the tax imposed was invalid because Congress might so exercise its power, if the power of the Federal government to levy such a tax be found to exist, that the right of the states to create corporations would be practically destroyed. Mr. Justice DAY answered this argument with the observation that where a tax is levied upon a proper subject of taxation it cannot be urged as an objection to the validity of such tax that the power may be so exercised as to become oppressive or that the subject of the tax may be thereby destroyed. "The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice." This argument perhaps should not be discussed under the interference-with-sovereignty objection. There could be no interference with the sovereign right of the states to *create* corporations, and such is not the effect of the corporation tax even though the tax were of such an amount as to drive

corporations out of existence; the tax operates not upon the *creation* of corporations but upon the corporation *after it has come into existence,* and not then unless it is carrying on business.

It was also insisted that the tax is "so unequal and arbitrary in the fact that it taxes a business when carried on by a corporation, and exempts a similar business when carried on by a partnership or private individual, as to place it beyond the authority conferred upon Congress." To this argument Mr. Justice DAY said: "As we have seen, the only limitation upon the authority conferred is uniformity in laying the tax, and uniformity does not require the equal application of the tax to all persons or corporations who may come within its operation, but is limited to geographical uniformity throughout the United States." The court then considered the effect of the 14th Amendment upon uniformity in taxation and upon the classification of subjects of taxation, and pointed out that the amendment applies only to state legislation. And "it could not be said, even if the principles of the 14th amendment were applicable to the present case, that there is no substantial difference between the carrying on of business by the corporations taxed, and the same business when conducted by a private firm or individual." If the tax were upon business, then it might properly be said that a classification so as to impose the burden only upon corporations would be arbitrary, for business is the same whether carried on by individual, firm or corporation. But the corporation tax is not upon *business* but upon *the privilege of doing business in a corporate capacity,* and there is a clear difference between the right to engage in or carry on business as an individual or firm and as a corporation with all the rights and privileges that come with incorporation. This distinction is pointed out by Mr. Justice DAY. Even if the tax were upon business and even if it be conceded that a classification so as to burden only corporations with its payment would be arbitrary in the sense that the business is the same whether carried on by an individual or corporation, it is by no means clear that the court would be warranted in declaring the tax unconstitutional, for business is a proper subject of taxation and geographical uniformity is the only uniformity required by the Constitution.

A number of other arguments against the constitutionality of the tax were considered by the court. It was pointed out that so long as the tax was upon a subject within the power of the Federal government to tax, it was no objection thereto that the basis of measurement was the income received from all sources, that on the contrary that method of measurement was perhaps the most satisfactory and just. That in the income used as the basis of measurement might be included interest upon government and municipal bonds and other non-taxable securities and the receipts from real and personal property not used in the business was held to be unobjectionable. It was also held that public service corporations and corporations engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing oré lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of the statute and subject to the tax.

In the January (1910), number of this Review (8 MICH. L. REV. 204), there was published an article on "The Constitutionality of the Federal Corporation Tax." This article was reprinted in 40 National Corporation Reporter 798. The conclusions there reached are substantially in accord with the view taken by the Supreme Court. R. W. A.

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THE RIGHTS OF PASSENGERS IN AN UNREGISTERED AUTOMOBILE.—The State of Massachusetts by statute requires automobiles to be registered, and prohibits the operation of unregistered machines upon any public highway. While this law was in force, a party of persons went riding in an automobile whose registration had expired four days before. While they were in the act of crossing a railroad track, the automobile was struck by a locomotive, and several of the party were injured and one killed. Five actions were brought against the railroad company. There was evidence that the whistle of the locomotive had not been blown nor the bell rung as the locomotive approached the crossing, although a statute required both of these things to be done for the protection of travellers.

The Supreme Court of Massachusetts held that the plaintiffs had no actions against the defendant for negligence, because when hurt they were riding in an unregistered machine. The failure to register the automobile had put them outside the pale of the law of negligence. *Chase* v. *New York Central R. R. Co.* (March 1, 1911), — Mass. —, 94 N. E. 377.

The principle upon which the case was decided was thus stated by the court: "If there is an unlawful element in an act, which in a broad sense may be said to make the act unlawful, this will not preclude recovery unless the unlawful element or quality of the act contributed to the injury, so that, if the act of a plaintiff may be considered apart from a certain unlawful quality that may enter into it, and if so considered there is nothing in it to preclude recovery, the existence of the unlawful quality is of no consequence unless in some way it had a tendency to cause the injury." And this was the application made to the facts in the case: "The operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. * * * In going along the way and entering upon the crossing the machine is an outlaw. The operator, in running it there and thus bringing it into collision with the locomotive engine, is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury by bringing the machine into collision with the engine."

This case sounds like an echo of the old Sunday law doctrine of Massachusetts, according to which it was held that a person riding for pleasure upon the Lord's day, who was injured by the negligence of others, had no right of action, because his own unlawful act contributed to the injury. *Lyons* v. *Desotelle*, 124 Mass. 387. That puritanical rule was finally abolished by statute. But the judicial temperament or habit of thought which originally developed the rule, could not be repealed. The doctrine was congenial to the court; and now, when a new situation arises, to which the old doctrine may or may not be applied, the Massachusetts judicial mind naturally and perhaps

unconsciously slips into the familiar groove. Every court of last resort tends to develop an individuality of its own. In a very real sense judges never die, but sit forever upon the bench from which their opinions were delivered, so that a court changes only by gradually adding new members to its roll, never by dropping old ones.

The principle announced in the case under review would probably be accepted in any jurisdiction as a clear and correct statement of the law. But it has always been recognized that in this class of cases the difficulty lies in the application of the principle. When is the plaintiff's wrongful act to be looked upon as a cause and not as a mere condition of the injury? If the automobile had been registered it would have been of the same size, with the same passengers, in the same place, going at the same speed. How can the mere absence of an entry in a registration book be deemed to have a tendency to cause a collision at a railroad crossing? Seemingly, to no greater extent than the fact that the day happens to be Sunday can be looked upon as the cause of an injury occurring on that day. *Illinois Railroad Co.* v. *Dick*, 91 Ky. 434, 15 S. W. 665; *Philadelphia etc. Co.* v. *Towboat Co.*, 23 How. (U. S.) 209; *Carroll* v. *Staten Island R. R. Co.*, 58 N. Y. 126.

E. R. S.

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NATURE OF BENEFICIARY'S INTEREST IN ENDOWMENT INSURANCE POLICY.—The respective rights of the beneficiary in an endowment policy of insurance and of the insured who has in the policy reserved to himself the power to surrender the policy before maturity, furnish the subject for an interesting discussion and decision by the Massachusetts Supreme Court in the recent case of *Blinn* v. *Dame* (1911), — Mass. —, 93 N. E. 601. The case is particularly interesting and noteworthy because, according to SHELDON, J., who delivered the opinion of an apparently unanimous court, there is no reported case bearing directly on the point involved.

The facts of the principal case briefly are these: Warren Dame made application for and was granted a policy of life insurance in the Penn Mutual Life Ins. Co. The policy provided for the payment by the company of $10,000 to the insured, his executors, administrators or assigns on the tenth of July, 1918; or if he should die before that time, then the company agreed to pay the amount of the policy to Irving Dame and Mildred Dame, children of the insured "if they survived the insured (with power to the insured to surrender the policy to the said company at any time); otherwise to the insured's executors, administrators or assigns." Subsequently the insured made a general assignment for the benefit of creditors, sufficiently sweeping to cover the life insurance policy if it were assignable. The action was brought in equity to determine the rights of the assignee to the surrender value of the policy, as against the children named as beneficiaries in the policy.

The court held that the right of surrender reserved to the insured was a valuable property right, which was capable of assignment, even as against the beneficiaries of the policy, and that the assignee for the benefit of creditors was entitled by virtue of the covenant for further assurance which accompanied the assignment, to an execution of any written surrender by Warren

Dame, the insured, as might be necessary to enable the assignee to collect the surrender value of the policy. In reaching its conclusion, the court (after reference to the Massachusetts statute which enables the beneficiary of a life insurance policy to maintain an action thereon in his own name) held: (1) That by virtue of the terms of the policy, containing as it did a reservation of a power to surrender, the insured retained a valuable right in the policy which was paramount to the right of the beneficiaries. (2) That therefore whether the right of the beneficiaries in this case were vested or contingent, it was dependent upon three contingencies, among which was the failure of the father to exercise his right to surrender. (3) That since the insured might himself have exercised the right of surrender and thus have barred the rights of the beneficiaries, the right was a valuable contract right which passed by the assignment for the benefit of creditors.

Obviously the decision of the Massachusetts court is in accord with well accepted general principles, although the Kentucky court, in a case based on practically identical facts, held differently on what seems to have been an unwarranted technicality. In the case of *Townsend's Assignee* v. *Townsend,* 127 Ky. 230, it was held that where a policy provided for the surrender of the policy, that right of surrender must be exercised before the right of the beneficiaries could be barred. Accordingly a mere assignment, without a previous surrender of the policy, was held there to be insufficient to affect the rights of the beneficiaries.

The beneficiary in an ordinary life insurance policy takes such a vested interest therein that its surrender to the company for cash is unauthorized without his or her consent, even though provision for a cash surrender value has been made in the policy itself; (*People* v. *Globe Mut. Co.,* 96 N. Y. 675); and a policy for the benefit of insured's wife and children is payable to them on insured's death and the fund is not assets recoverable by the administrator. However, in the case of an endowment policy payable to a designated beneficiary on the death of the insured before the lapse of a specified time, but to the insured himself if he survive such period, the right of the beneficiary to the proceeds of the policy is dependent on the death of the insured before the lapse of the specified time. *Tennes* v. *Northwestern Mut. Life Ins. Co.,* 26 Minn. 271, 3 N. W. 346; *Miller* v. *Campbell,* 2 Misc. Rep. 518, 22 N. Y. Supp. 388. And if the policy reserves to the insured the right to change the beneficiary with the assent of the insurer the beneficiary does not take a vested interest. *Robinson* v. *U. S. Mut. Life Assn.,* 68 Fed. 825.

While it is true that the right of the beneficiary cannot be divested by assignment without his or her consent, even though the contract be an endowment policy payable to the beneficiary only in case the insured fails to live the stipulated period (*Union Central Life Ins. Co.* v. *Woods,* 11 Ind. App. 335, 37 N. E. 180, 39 N. E. 205; *Hubbard* v. *Stapp,* 32 Ill. App. 541; *Continental Ins. Co.* v. *Palmer,* 42 Conn. 60), the theory of the principal case still is consistent both with this principle and with sound reasoning.

In the principal case no attempt was made to assign the interest of the beneficiaries. Clearly that could not have been done. But by the very terms of the insurance policy the interest of the beneficiaries was made subordinate

to the interest of the insured. Although expressly refusing to decide whether the right that the beneficiaries took in the policy in question was a vested or a contingent right, the court held that the right was dependent upon the concurrence of three conditions: (1) That the insured die before July 10, 1918; (2) that the beneficiaries survive the insured; and, (3) that the insured should not have exercised during his lifetime the power of surrender reserved to himself. If these three contingencies concurred, then the right of the beneficiaries became indefeasible; but in the absence of any one of them, the right of the beneficiaries, if vested, would be defeated, and, if contingent, never would vest.

Possibly much of the confusion has arisen over the construction of the term "vested right" as applied to the interest of the beneficiary. Unquestionably it is the correct view that the beneficiary has a vested right in one sense, namely, in that whatever rights are given him by the policy may not thereafter be divested by either the insured or the insurer without his consent. *Brockhaus* v. *Kemna,* 7 Fed. 609; *U. S. Casualty Co.* v. *Kacer,* 169 Mo. 301, 69 S. W. 380, 58 L. R. A. 436, 92 Am. St. Rep. 641. But such a vested right cannot be said to include any greater interest than the policy itself gives him, from which it of course follows that he ought not to be allowed to object if the interest of the insured is assigned, so long as his rights, secured to him by the policy, remain unaffected.

With this in view the decision in *Hubbard* v. *Stapp,* 32 Ill. App. 541, which at first blush seems inconsistent with the view taken by the court in the principal case is seen to be not at all in conflict. There it was held that all that Hubbard (the insured) could assign was his own interest, which was contingent upon his living fifteen years, and as he had died within that time his interest had expired and the right of the beneficiary had become absolute. In that case there was no power of surrender reserved to the insured as in the principal case, so that in reality the holding of the court was predicated upon the theory which is enunciated with approval by the Massachusetts court, but within which the facts of the principal case do not precisely bring it. The same is true of *Insurance Co.* v. *Woods;* supra, in which the court said: "In a certain sense it is true, she (the beneficiary) may be said to have no interest in the policy until her husband's death, for it is upon this contingency that her interest in the policy depends. But in another sense, she does have an interest in the policy from the time of its delivery, although it be only a contingent interest and one which may or may not become absolute. Of that interest, contingent though it may be, she cannot be divested without her consent." See also *Ins. Co.* v. *Armstrong,* 117 U. S. 591.

As suggested at the outset, there seems to be no ground of reconciliation between the principal case and the case of *Townsend's Assignee* v. *Townsend,* supra, but if it be conceded that in a case similar to the principal case the insured reserved a right of surrender which is paramount to the rights of the beneficiaries, it is at least highly technical to say that the insured himself must exercise the right of surrender before the rights of the beneficiaries can be barred; while as a matter of fact, there would seem to be no good reason why the power to surrender, being a valuable contract right, may not

be the subject of a valid assignment as well as may any other chose in action. The beneficiary under a policy of life insurance takes a vested right that cannot be divested without his consent, but the extent of that right is limited by the instrument creating it, viz., the policy itself. C. E. E.

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EXPERT TESTIMONY IN MICHIGAN.—Perhaps no other feature of our judicial system has contributed more to bring into disrepute the administration of justice and to engender in the popular mind a widespread (and in some respects an apparently justifiable) distrust and disrespect for the methods employed and the results obtained by judicial investigations in this country, than have the principles and considerations, or rather the lack of these, which are permitted to govern and determine the competency of expert witnesses and the methods and safeguards under which they are allowed to give in evidence in our courts their expert opinions in cases involving questions pertaining to their respective sciences. The general public regards expert testimony, as it is permitted to be given in the majority of our courts at the present day, as almost a farce, and considers it a disgrace to our system of arriving at the truth of a disputed question, which system we like to think of as being fair, enlightened, impartial and efficient. This feeling has in the past taken definite form in the oft-expressed belief of the layman that the expert always comes prepared to testify in favor of the side which has the most money, without regard to what the facts may be, and that in a case in which experts are called to testify upon each side of a disputed proposition, the issue will be determined favorably to the side which can pay the most and whose experts can swear the hardest. It can scarcely be questioned that these beliefs and sentiments are entertained by a considerable number of the general public and have served to bring this phase of judicial inquiry into disrepute.

With a view to remedying some of the evils arising from the present methods of giving expert testimony in courts of law, statutes have, from time to time, been enacted in the several states, which attempt generally to render less intimate the relation which was popularly supposed to subsist, and in many cases did subsist, between the compensation paid the expert and the nature and effect of his testimony. A statute of this general class was that passed by the Legislature of the State of Michigan in 1905, entitled, "An Act to regulate the employment of expert witnesses," (Pub. Acts 1905, No. 175.) The nature of its provisions seemed eminently calculated to remedy some of the evils toward which the statute was manifestly directed, § 3 of the Act providing that, "In Criminal cases for homicide where the issues involve expert knowledge the court shall appoint one or more *disinterested persons,* not more than three, to investigate such issues and testify at the trial; and the compensation of such person or persons shall be fixed by the court and paid by the county in which the indictment was found, and the fact that such witnesses have been so appointed shall be made known to the jury. This provision shall not exclude either prosecution or defense from using other expert witnesses at the trial." The usefulness of this act, and

particularly of this section, has been brought to an abrupt and lamentable termination, and the evils which it sought to remedy are given an opportunity to continue without let or hindrance, by a recent decision of the Supreme Court of Michigan, rendered by BROOKE, J., in the case of *People* v. *Dickerson* (1910), — Mich. —, 129 N. W. 199, in which the third section, above quoted, was declared unconstitutional and void.

The case of *People* v. *Dickerson,* supra, was a prosecution for homicide in which the defendant interposed the plea of insanity, whereupon the court, pursuant to § 3 of the above act, proceeded to appoint two disinterested persons to investigate, who were permitted, over the objection of the defendant's counsel, to testify as to defendant's sanity. From a conviction the defendant appealed, on the ground that § 3 of the statute, under which the experts were appointed by the trial court, was unconstitutional and void. In declaring the section unconstitutional, the court indulges in reasoning which is far from being altogether satisfactory and convincing.

The first ground of objection against the validity of the section of the statute under discussion is based on the premise that it deprives the defendant of his life and liberty without "due process of law," which from time immemorial has contemplated that in criminal prosecutions the parties are the state or people, represented by the prosecuting attorney, on the one hand, and the accused on the other; and that the statute violates the spirit of this immemorial usage and revolutionizes the nature of criminal prosecutions by injecting therein a new and incongruous element, charged with selecting and calling witnesses, which, says the court, it has always been the exclusive right and duty of the prosecuting attorney to determine upon and call to give testimony for the people. Against this argument at least three objections may be raised. In the first place the court apparently loses sight of the fact, that a criminal prosecution, in principle at least, is not to the same extent as a civil action, a purely adversary proceeding, but is rather a proceeding in the nature of an inquest or investigation, conducted on behalf of both the state and the accused for a common end, namely, to inquire into the circumstances surrounding the alleged commission of an offence, with a view of determining whether a crime has in fact been committed and, if so, who is responsible therefor, or to quote from the opinion of CHRISTIANCY, C. J., in *Hurd* v. *People,* 25 Mich. 405, "It is an investigation to show the whole matter as it is, whether the tendency be to convict or acquit." It is manifest that in such a proceeding the judge, a public officer charged with the preservation of the peace and security of the community, is equally responsible with the prosecuting officer in developing the truth, and therefore this statute, which confers upon him duties eminently conducive to that end, is not so incompatible with the theory of a criminal prosecution as to render it open to the objection of revolutionizing criminal proceedings. In a civil suit the situation is quite different. The parties there are working at cross purposes, each attempting to establish opposing propositions instead of working in theory for a common end, as is the case in a criminal prosecution. In such a case the court must necessarily be more or less of an umpire between disputing interests, and to confer upon him powers in aid of one would necessarily

prejudice the other and change the whole position and function of the judge. But it was not with a civil case that the statute was dealing or toward which the argument of the court was directed. Secondly, the argument of the court that the prosecuting attorney, and he alone, has the right to determine who shall be called and sworn as witnesses for the people is certainly inconsistent in principle with the repeated decisions of this same court, that the prosecution must call and swear as witnesses all persons present at the commission of a crime. *People* v. *Germaine,* 101 Mich. 485; *Hurd* v. *People,* 25 Mich. 405; *Wellar* v. *People,* 30 Mich. 16; *People* v. *McCullough,* 81 Mich. 25; *People* v. *Harris,* 95 Mich. 87; *Thomas* v. *People,* 39 Mich. 309; *People* v. *Deitz,* 86 Mich., 419; *People* v. *Gordon,* 40 Mich. 716; *People* v. *Swetland,* 77 Mich. 53. That the trial court may compel the prosecutor to call a witness to testify for the people, see *People* v. *Kenyon,* 93 Mich. 19. Clearly, if the prosecutor may be compelled to call certain witnesses, it does not rest entirely within his option to call whom he pleases, and any argument against this statute based on this premise must necessarily fail. Thirdly, it may be urged against this argument that the court assumes that the witnesses appointed under the statute are necessarily witnesses for the people. The statute does not provide that they be sworn as such, and it would very probably work out in actual practice that their testimony would be found to be in favor of the accused in quite as many instances as against him. Hence they do not fall necessarily within that class of witnesses over which the court declares that the prosecution from time immemorial has had exclusive jurisdiction.

As a second ground of unconstitutionality of this statute, the court declares that it operates to cast a purely administrative and executive function upon a judicial officer, contrary to the spirit of our institutions, which demands that a sharp distinction be preserved between the various departments of government. In reply to this argument it may be said that much confusion of thought exists, and considerable lack of unanimity is to be found, in the adjudicated cases involving this question. In the practical administration of the government, moreover, it is safe to say that the officers of each department daily exercise powers and functions which in their essential nature pertain to officers of the other departments. A few instances of statutes conferring powers on judicial officers inherently of a more administrative and executive nature than those conferred upon the court by the Michigan statute and which were judicially declared not unconstitutional on that ground may be cited: Appointment of commissioners to make assessments of damages, *City of Terre Haute* v. *Evansville & T. H. Ry. Co.,* 149 Ind. 174; Appointing board of commissioners for a charitable institution, *Wilkison* v. *Board of Children's Guardians,* 158 Ind. 1; Presiding over disputed election returns, *Johnson* v. *Jackson,* 99 Ga. 389; Appointment of guards to protect property from mobs, *Cahill* v. *Perrine,* 105 Ky. 531; Duty of collecting inheritance tax, *Union Trust Co.* v. *Durfee,* 125 Mich. 487; Powers relating to issuance of liquor licenses, *State* v. *Bates,* 96 Minn. 110; Appointment of park commissioners, *Ross* v. *Board of Chosen Freeholders,* 69 N. J. L. 291; Duty to evaluate the amount of inherited property and assess inheritance tax, *Nunnemacher* v. *State,* 129 Wis. 190. Besides, is the duty conferred by the third

section of the Michigan statute under discussion administrative or executive at all? Clearly, if any function is judicial in its nature, it is that of determining the competency of witnesses who are to give testimony in a judicial proceeding. That the statute contemplates that the court shall exercise this function is evident, for its very terms are, "the court shall proceed to appoint one or more *disinterested persons*," thereby requiring the court to pass upon their competency, so far as interest or bias is concerned, before appointing them. Is this a duty different in nature and principle from that exercised by the court with regard to any witness? If the duty imposed upon the court by this statute be not judicial, it would seem difficult to imagine one more so.

The court next proceeds to attack the statute upon the ground that the names of these witnesses cannot be indorsed upon the information, as required by Mich. C. L. (1897), § 11934 thereby depriving the defendant of a substantial right. It is clear that the statute does not forbid their indorsement, nor is there any reason why the court may not upon the filing of the information proceed to appoint the witnesses pursuant to the statute and indorse, or cause to be indorsed, their names thereon, in cases where the facts set forth in the information involve expert knowledge, and in cases where the facts calling for expert opinion are brought out as matter of defence, the court might appoint the experts and indorse their names on the information when the issues are raised. That is as much as can be done at the present time, where the defendant raises a defence involving expert testimony, as for example the defence of insanity, for in the nature of the case the state cannot anticipate the defence until it is raised. Moreover the Supreme Court of Michigan has held in several cases, that the names of material witnesses may be indorsed on the information even after trial begun, when the names of such witnesses were then learned for the first time, or, upon reasonable showing by the prosecutor that they were not known to him when the information was filed, their names may be indorsed subsequent to filing the information. *People* v. *Howes*, 81 Mich. 396; *People* v. *Perriman*, 72 Mich. 184; *People* v. *Machen*, 101 Mich. 400; *People* v. *Baker*, 112 Mich. 211; *People* v. *Luders*, 126 Mich. 440; *People* v. *Gregory*, 130 Mich. 522. It would seem in view of these cases that this objection to the statute finds little support in reason or authority and that no substantial objection exists to construing together this section of the statute under discussion and the statute requiring the names of the witnesses for the prosecution to be indorsed on the information when filed, with a view to sustaining and reconciling the provisions of both.

Lastly the court declares that this section of the statute, (§ 3), is invalid in that it tends to give undue weight in the eyes of the jurors to the witnesses appointed under it, and that the court, by informing the jury that he had appointed these witnesses and that they were disinterested, would indicate to the jury the opinion of the court as to the merits of the case, which the jury would seize and act upon to the prejudice of the defendant. But why should not a witness who has been found by the court to be free from the prejudicing influences and interests to which experts are usually subjected, be given greater weight than other witnesses? Is not the very purpose of

judicial inquiry to ascertain truth by the testimony of disinterested witnesses, and if any means can be devised by which disinterested witnesses can be obtained, ought it be denied validity and legality merely because the jurors would be inclined to accord to such witnesses the weight to which they, by reason of their disinterested character, are justly entitled? It can hardly be urged that the present situation of the jurors with regard to experts and expert testimony is to be preferred; a situation in which, after hearing expert witnesses of apparently equal credibility come to diametrically opposite conclusions upon the basis of the same state of facts, the jurors without any means of determining which of the witnesses are entitled to greater weight, naturally come to the conclusion that the side upon which the most experts testify must represent the truth of the issue. It would seem that any device for remedying, even in part, a procedure so fatal to the intelligent investigation and ascertainment of truth ought to be welcomed and sustained, rather than to be declared invalid. Moreover is the fact, that the court informs the jury that he has found the persons appointed to be disinterested, objectionable as indicating to the jury the opinion of the judge as to the issues? We submit that it is not. Manifestly for a judge to say to a jury, "This man is a disinterested witness," is far different from his saying, "this man is disinterested and knowing his testimony I think it is true." In the first situation, being the one contemplated by the statute, the court merely passes upon the witness's competency without expressing any opinion on his testimony, a thing which the court could not do in the nature of the case, for at that time the witness in question has not yet testified; while in the second situation the court expresses an opinion both as to the character of the witness and the truth and reasonableness of his testimony, a proceeding which could not arise under the statute in question. It would seem that the objection of the court based on the argument just discussed is without much foundation in reason.

In conclusion it may be said that it is to be regretted that the court in *People* v. *Dickerson*, supra, felt constrained to declare unconstitutional a statute of so useful and beneficial a character as the one involved in that case and to do so upon grounds, which upon examination would seem to be so unsubstantial and inconclusive, both upon reason and authority. It is to be hoped that the evils sought to be remedied by this statute will not long be suffered by the legislature to continue uncurbed, and that when any further legislation looking to their abolition comes before the court for construction, the court will not be impelled to go to so great lengths in declaring it invalid.

McK. R.

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FEDERAL SUPREME COURT'S JURISDICTION UNALTERABLE.—In the recent decision of *Muskrat et al.* v. *United States*, 31 Sup. Ct. 250, the Federal Supreme Court shows its intention not to depart from the early established rule expounded in *Marbury* v. *Madison*, 1 Cranch 137. Congress by act of Mar. 1, 1907 (37 Stat. at L. 1015, Chap. 2285), attempted to confer jurisdiction upon the court of claims and by appeal upon the Federal Supreme Court, of certain suits by David Muskrat and others in behalf of certain of the Chero-

kee Indians, said suits to be brought for the purpose of determining the validity of acts of Congress passed since an act of July 1, 1902 (32 Stat. at L. 716, Chap. 1375), in so far as such act affected the rights of alienation, etc., and the number of persons entitled to the Cherokee lands. The court declared that it had no jurisdiction, because the act was not within the judicial power conferred by the Federal Constitution and because it would require of the Supreme Court action not judicial in its nature within the meaning of the Constitution.

Indirectly they thereby strengthen the argument of certain economists who contend that the court has come to be a drag on the development of the country. Yet they but reiterate and apply a doctrine which, with possibly the single exception of *United States* v. *Yale Todd* (note to case *U. S.* v. *Ferreira*), 13 How. 52, where a contrary view seems to have been taken, has always been the accepted law of the federal courts. *Marbury* v. *Madison*, 1 Cranch 137.

The specific application has to do with the question of "Advisory Opinions" or as called in England, "Consultative Opinions." It is a relation which like many others under the English system, has not become a part of our scheme of government. In England it has been the custom, growing out of the early position of the judges as assistants to the House of Lords, to obtain from them opinions on questions submitted. This custom can be traced in the records at least to the period of Richard II. 1 THAYER'S CONST. CAS. 175. But this act is regarded in England as clearly not an exercise of the judicial function; and the opinions are not considered as judicial decisions. *Head* v. *Head*, 1 Turn. & R. 138; *O'Connell's Case*, 11 Clark & Fin. 155. In that respect the English view is the same as the majority view in the United States. The idea is constitutional with them, and in Massachusetts, which gave the pattern to most of the United States which have adopted it, it is also, following the English system, constitutional. *Opinion of the Justices*, 126 Mass. 567.

When the United States Constitution was written nothing was said as to this subject. The government was divided into three branches with the judicial power vested in one supreme court and such inferior courts as Congress might ordain and establish (Art. III, Sec. 1), and its power was to extend over all cases in law and equity arising under the constitution, laws and treaties and to certain other expressed classes. (Art III., Sec. 2.) It does not extend to every violation of the Constitution which possibly may occur, but *only* "to a case in law or equity in which a right under such law is asserted in a court of justice." *Cohens* v. *Virginia*, 6 Wheat. 264. Or as said by Mr. Chief Justice MARSHALL in *Osborne* v. *Bank of the U. S.*, 9 Wheat. 738, 747, in speaking of the clause relating to the judiciary, "this clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties of the United States *when* any question respecting them shall assume such a form that the judicial power is capable of acting on it; that power is capable of acting *only* when the subject is submitted to it by a party who asserts his rights in the form prescribed by law."

Consequently when a matter is presented to the courts such as that in the *Muskrat* case, they find no jurisdiction under the judiciary power clause because: 1st, the subject is not contained in the jurisdiction there conferred and that jurisdiction as to judicial matters cannot under the decision in *Marbury* v. *Madison,* supra, be enlarged by any act of Congress. 2nd, the court under this clause is not given any jurisdiction or duty except of a judicial nature and the matter presented in the *Muskrat* case is not of that nature. The award of execution, the process of execution and the conclusiveness of the judgment are essential parts of every judgment passed by a court exercising judicial power. Note on *Gordon* v. *U. S.,* 117 U. S. 697. Nor could the fact that this case comes up from a lower court change the situation. For "although the inferior federal courts * * * are first created by law, they are nevertheless constitutional courts, *i. e.,* they are made by this article (Art III., Sec. 1), co-bearers of the judicial power of the United States." VON HOLST'S CONST. LAW OF U. S., Mason's ed., 98, note.

But a deeper and more powerful reason applies. As Story points out in his Commentaries on the Constitution, (2nd Ed. Ch. 7,) it was undeniably the view of the men who wrote the constitution, as shown by the views expressed in the Federalist and contemporary works and based as they were on the theories of Montesquieu and others of that school, that the three departments of the government should be entirely separate. The court is one of the three departments. It owes nothing to the legislature for its creation. Each has independent duties and fields. That of the court is essentially judicial. This clear-cut division is one of the most distinctive features of our constitution. In England this essentially separate existence is not found. "The courts cannot declare an act of Parliament void because in the opinion of the court it is inconsistent with the principles of Magna Charta or the Petition of Rights. Yet [even] in that country, the independence of the judiciary is invariably respected and upheld by the King and Parliament as well as by the courts; and the courts are never required to pass judgment in a suit where they cannot carry it into execution." Note to *Gordon* v. *U. S.,* 117 U. S. 697. Especially then, where the line between departments and the independence of each *is* clearly defined, and where the evident intention of the makers of the constitution was to have it so, should no duties except those of a judicial nature be placed upon the courts.

That the constitution was clearly drawn with a basis of division of duties, is nowhere better shown than in the fact that wherever it desired either department to assume in the least, any of the duties of another, it stated these encroachments expressly, as in Art. II., Sec. 2. Excluding these special cases the duties of the courts are expressly judicial and Congress may not impose any other duties which are not judicial in nature. *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 38 L. Ed. 1047.

Clearly then when Congress either directly or indirectly asks for an opinion of the federal courts, it asks for that which the constitution does not provide; which its manner of construction does not warrant; which the spirit and theory of our government do not agree with. And on this, the court has always agreed. *Gordon* v. *United States,* 2 Wall. 561; note to 117 U. S.

697, by TANEY, C. J.; *Cohens* v. *Virginia,* 6 Wheat. 264; *La Abra Silver Mining Co.* v. *United States,* 175 U. S., 423, 44 L. Ed. 235; *District of Columbia* v. *Eslin, Admr.,* 183 U. S. 612, 46 L. Ed. 85; *In re Sanborn,* 148 U. S. 222, 37 L. Ed. 429; *United States* v. *Ferreira,* 54 U. S. (13 How.) 40-46, 14 L. Ed 40-42.

A majority of the state courts follow the rule of the federal courts. The only exceptions are: 1st, Those in which there is a constitutional provision imposing such duty upon the courts; 2nd, those in which it has been done by the courts on request, without any statute or other requirement. *Trevett* v. *Weeden,* (R. I.), THAYER'S LEGAL ESSAYS, p. 52; *Respublica* v. *de Longchamps,* I. Dall. III; Appendix, 3 Binney (Pa.) 598; *Power of the Governor,* 79 Ky. 621; *In re Board of Public Lands and Bldgs.,* 37 Neb. 425, 55 N. W. 1092.

The following states have constitutional provisions: Massachusetts (1780); New Hampshire (1784); Maine (1820); Rhode Island (1842); Florida (1868); Colorado (1886); South Dakota (1889). Missouri had such a provision from 1865 to 1875, and Oklahoma has recently provided one. A few statutory provisions have existed at various times, but have had very little bearing on the subject because of their restricted and limited character. Where required to give such opinions most of the state courts have held that they were not binding decisions. *Opinion of Westcott, J.,* 12 Fla. 664; *Taylor* v. *Place,* 4 R. I. 324; *Report of Judges,* 3 Bin. (Pa.) 595; Appendix, 95 Me. 556; *Opinion of Judges,* 55 Mo. 295; *State* v. *Johnson,* 21 Okla. 40, 96 Pac. 26; *Opinion of the Judges,* 25 Okla. 76, 105 Pac. 684. The English decisions are also in accord on this point; *Head* v. *Head,* 1 Turn. & R. 138.

Practically only one state gives to these opinions the force of a decision; *Matter of Senate Bill No. 65,* 12 Col. 466, 21 Pac. 478; and Appendix No. 1, 7 Greenl. (Me.), intimates that Maine may be on the same side. But see 7 Greenl. 491. Yet even in Colorado, a tendency to limit and restrict the application of the rule is seen. 12 Col. 466, supra; *In re Senate Bill No. 416,* 45 Col. 394, 101 Pac. 410. And also in those states having non-binding opinions, this same tendency to narrow the field is observed. *In re Executive Communication,* 23 Fla. 297, 6 South. 925; *Advisory Opinion to Governor,* 39 Fla. 397, 22 South. 681; *In re Advisory Opinion to Governor,* 50 Fla. 169, 39 South. 187; *In re Opinion of Justices,* — N. H. —, 75 Atl. 99; *In re Opinion of Judges,* 54 Fla. 136, 44 South. 756.

In general, then, it is apparent that the courts are following the rule as stated in the *Muskrat* case. Wherever there is found a different rule, it is because of special circumstances and even there the tendency to restrict the application is very evident. J.