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Note and Comment

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NOTE AND COMMENT.

ATTEMPT, ASSAULT, AND ASSAULT WITH INTENT.—The case of *State* v. *Lewis*, 154 N. W. 432, decided in October, 1915, by the Supreme Court of Iowa, has an interesting bearing upon the law of assault and of criminal attempts. Two men, Tropp and Cox, observed a third, Dunlevy, asleep on a cot with a pocketbook under his pillow. Tropp armed himself with a leather sap and a loaded revolver and moved quietly to the head of the cot, when Dunlevy, feeling the presence of some one in the room, sprang to his feet. Tropp fled from the room with Dunlevy after him, but fell before making his escape. Dunlevy undertook to secure him, but Cox came up from behind with a lead pipe and struck Dunlevy over the head. Tropp and Dunlevy both testified that Tropp did not speak to or touch Dunlevy, but Tropp stated that he "made a movement" under the pillow. Tropp pleaded guilty to a charge of assault with intent to commit robbery, but one Lewis, who was charged with aiding and abetting in this same crime, contended that there was no evidence that Tropp had committed an assault with intent to rob.

In holding that there was sufficient evidence of this crime to carry the issues to the jury, the court discarded the assault by Cox with the lead pipe, on the ground that there was not the requisite intent present, the intent to

rob having then been abandoned. Another solution, which seems quite tenable, might have been found in the fact that Dunlevy was awakened by the approach or presence of Tropp, and was therefore in all likelihood put in fear of injury. It is now quite generally accepted that an act which puts one in reasonable apprehension of danger is an assault. *State* v. *Shepard,* 10 Iowa, 126; McCLAIN, CRIM. L., § 233. But the court did not consider or discuss this solution. It did, however, consider the "movement" made by Tropp under Dunlevy's pillow, but concluded that this could not be an assault, because it was made "for the purpose of obtaining the money and without intention to touch or injure Dunlevy in any manner." This statement involves a confusion between intent and purpose. If Tropp touched the person of Dunlevy with intent to touch him, the fact that his purpose was to obtain the pocketbook could not affect the nature of the act done. McCLAIN, § 120; *Rex* v. *Regan,* 4 Cox C. C. 335; *Rex* v. *Gillow,* 1 Moody, 85. That the pillow was part of Dunlevy's person for the purposes considered seems fairly well established. *Clark* v. *Downing,* 55 Vt. 259; *Respublica* v. *DeLongchamps,* 1 Dall. (U. S.) 111; *State* v. *Davis,* 1 Hill (S. Car.) 45. The element of hostility, or malicious desire to injure, which is probably lacking here, cannot be said to be a necessary element of assault. The want of it appears to defeat the charge only where the facts show a spirit of play or sport. *People* v. *Ryan,* 239 Ill. 410, 88 N. E. 170.

Passing these three possibilities, the court finds the required assault in the act of Tropp in arming himself as described and in approaching the cot and sleeper. This act was held to be "a definite menace of violence against the person of Dunlevy," and indicative of the intent to take the sleeper's property by force or violence, disregarding, on the authority of *State* v. *Mitchell,* 139 Iowa, 455, 116 N. W. 808, the fact that the intent to employ violence was conditioned upon there arising a necessity for the use of violence. See also McCLAIN, § 232; *People* v. *Courier,* 79 Mich. 366, 368; and *Commonwealth* v. *Roosnell,* 143 Mass. 32. This raises the question whether an attempt to do violence to an unconscious person is an assault. Certainly no civil action would arise for such an act. COOLEY, TORTS (3rd ed.), 278; SALMOND, TORTS, 348; POLLOCK, TORTS (WEBB'S AM. ED. OF 1894), 247, 249n; I JAGGARD, TORTS, 433; I STREET, FOUNDATIONS OF LEGAL LIABILITY, 10. The contrary view is expressed by BIGELOW, TORTS (8th ed.), 324n. To allow such an action would considerably enlarge the field of actionable wrongs. There would seem to be no more reason for holding that a man has a right to be secure from attempted batteries than from attempted conversions or attempted breaches of contract. But the law of crimes everywhere recognizes the criminality of attempts, and an attempted battery, like an attempted murder or larceny, is very properly punishable. Nearly all such attempted batteries are acts which put the intended victim in fear of bodily harm, but the principal case, if we disregard the awakening, as did the court, presents the exceptional circumstances that warrant a re-examination of our premises.

One frequently meets the dogmatic statement that every battery includes an assault. In the writer's opinion, it would be more correct to say that

every battery is an assault. In the early period of our law, assault was probably limited to beating, recognition of the inchoate beating constituting a later development. See 2 POLLOCK & MAITLAND, 466, 525. The first known case of the latter sort was in 1348, when a recovery was allowed against a defendant who had thrown a hatchet at the plaintiff's wife, though she had not been hit. *I. DeS. et ux.* v. *W. De S.*, Y. B., Lib. Ass., fol. 99, pl. 60, included in I AMES, CASES ON TORTS, 1, and in I BOHLEN, CASES ON TORTS, 10. If we examine the etymology of the word "assault," and consider the class of injuries it is in principle designed to include, we must conclude that both the beating and the arousing of fear are but methods of committing the assault. When there is a beating there need logically be no putting in fear. Therefore there may quite conceivably be an attempted assault, consisting in attempted beating, which is not an assault by putting in fear. There may be a logical hiatus in calling an attempted assault an assault; yet there is obvious inconvenience in requiring a different charge to be laid according as there exist or do not exist the elements of actual beating or of putting in fear, facts which are often doubtful of proof. The question only touches procedure, for the assault and attempt are crimes of equal grade. Historically, attempts at violence to the person were assaults before the development of the law of criminal attempts. And as a matter of modern opinion, criminal assault has usually been defined as an attempt or offer of violence to the person. MCCLAIN, CRIM. L., § 231; *People* v. *Lilley*, 43 Mich. 521, 5 N. W. 982; *Chapman* v. *State*, 78 Ala. 463, 56 Am. Rep. 42.

Where, as in the case we are considering, we have to deal with aggravated assault, there seems to be justification for a yet broader conception of assault. Except for an abortive effort in the time of Lord COKE to treat attempted murder as murder, attempts at crime have been but misdemeanors at common law, whether viewed as assaults or as attempts, under the comparatively modern doctrine that every attempt to commit a crime is itself a crime. II STEPHEN, HISTORY OF CRIMINAL LAW IN ENGLAND, 221–224; RUSSELL, CRIMES (8th Am. Ed.), 46. The inadequacy of such law in the case of attempts to commit the greater crimes led to a great amount of legislation, beginning in 1682 with the COVENTRY ACT, 22 & 23 Chas. II, c. 1. This and the succeeding English statutes, instead of severely penalizing attempts to commit certain particular crimes, enumerated the many acts, as wounding, attempting to administer poison, attempting to drown, attempting to discharge loaded fire-arms, et cetera, which, if done with intent to commit murder, to maim, to disfigure, et cetera, should be severely punished. III STEPHEN, 108 et seq. Nothing could be clumsier or more inexpedient. The earlier statutes were extremely incomplete, the last contains seventy-nine sections. The advantage of the phraseology, usually employed in the corresponding American statutes, "assault with intent," should be apparent. It would therefore seem that statutes such as that involved in the principal case were designed to effect a classification of criminal attempts as to punishability by an indirect method, defining the more serious attempts as assaults with intent. Since the gist of the offense is the intent, the act-element

should be considered sufficient if it satisfies the elastic principle of the law of attempt, that is, that it be an act in execution of the intent and going beyond mere preparation. It should not be permissible to take the word "assault" from its context and subject it to the gruelling of six centuries of critical definition. We should remember the words of Justice HOLMES, "The life of the law has not been logic: it has been experience."

Such a broad reading of the word "assault" is obviously involved in those cases, representing the majority view, which hold that an attempt to have intercourse with a girl, of such age that intercourse with her would be statutory rape, is assault with intent to rape, even though the girl consents to all that is done. MCCLAIN, § 464. If it be said that the girl is incapable of consenting, a yet looser statutory construction is involved. In the absence of any statute she was capable of consenting to intercourse and to any touching of her person not endangering life or limb, and the statute making intercourse with her a crime does not say she is incapable of consenting, but simply ignores completely the matter of consent. The act of intercourse is made criminal without the elements of non-consent and force which are essential to common law rape. This leaves her capable of consenting to a touching of her person not accompanied by the intent to take sexual liberties, and to say that it deprives her of capacity to consent to a touching with such intent is to read into the statute a provision which is not there. It is not merely a broad reading of the terms used by the legislature, it is an addition to a quite specific statute, of a quite specific provision covering a different, though related, subject-matter. It would seem much more permissible to say that in the other statute, punishing the assault with intent, "assault" was used in a somewhat loose sense. See *Russell* v. *The State*, 64 Kas. 798.

Two Georgia cases have refused to come to this conclusion in regard to aggravated assault. The case of *Peebles* v. *State*, 101 Ga. 585, held that putting poison into a well, with the intention that others should be killed by drinking the water, was not an assault with intent to commit murder unless the water was in fact drunk. The court dismissed the case briefly, saying, "As there was no assault proved, the conviction cannot be sustained." This case was followed by *Leary* v. *State*, 13 Ga. App. 626, commented upon in 12 MICH. LAW REV. 230. The result is obviously unsatisfactory. The present case, though doubtful on authority, pays a real regard to the purpose of statutory aggravated assault, and seems justified by the historical and criminalogical situation of the law of criminal attempts. R. W.

PRIORITY OF LIEN OF JUDGMENT.—By a recent decision of the New York Court of Appeals (*Hulbert* v. *Hulbert, et al.*, 111 N. E. 70) there has, in effect, been a check placed upon the rights of "the diligent." In that case the court held that as between several judgments becoming liens simultaneously upon after-acquired property of a judgment debtor, one of such judgments does not acquire a preference by issue of execution and advertisement

and sale thereunder by the sheriff before proceedings are taken on the other judgments.

At common law, except for debts due the king, the lands of a debtor were not liable to the satisfaction of a judgment against him, and consequently no lien thereon was acquired by a judgment. "This was in accordance with the policy of the feudal law, introduced into England after the Conquest, which did not permit the feudatory to charge, or to be deprived of, his lands for his debts, lest thereby he should be disabled from performing his stipulated military service, and which, moreover, forbid the alienation of a feud without the lord's consent. The goods and chattels of the debtor, therefore, and the annual profits of his lands, as they arose, were the only funds allotted for the payment of his debts. This continued to be the law until the passage of the statute of Westminster 2nd, 13 Edw. I, c. 18 (1285), by which, in the interest of trade and commerce, the writ of elegit was for the time provided for. By that statute the judgment-creditor was given his election to sue out a writ of *fieri facias* against the goods and chattels of the defendant, or else a writ commanding the sheriff to deliver to him all the chattels of the defendant (except oxen and beasts of the plough) and a moiety of his lands until the debt should be levied by a reasonable price or extent. When the creditor chose the latter alternative, his election was entered on the roll, and hence the writ was denominated an elegit, and the interest which the creditor acquired in the lands by virtue of the judgment and writ was known as an estate by elegit." *Hutcheson* v. *Grubbs*, 80 Va. 254. At an early day the courts held that the statute impliedly created a lien upon the land (in most cases, from the day the judgment was entered), lest by fraudulent conveyance the writ of elegit should be defeated. This was the origin and the only foundation of the judgment lien in England. (2 Henry 4th, P. 14, Pl. 5.) This doctrine was followed in the Virginia case above quoted and in the courts of several other states. It will be at once apparent that the right thus conferred upon the creditor gave rise to a true judgment lien, although it differed materially, both in its extent and the manner of its enforcement, from the type with which we are now familiar. The ultimate basis, therefore, of the lien of a judgment on land is to be found in the authority of the statutes.

A general lien upon land by judgment does not constitute per se a property in the land itself, but only gives a right to levy on the same to the exclusion of adverse interests subsequent to the judgment. A judgment creditor has neither a *jus in re* nor *jus ad rem* in the debtor's land, but only the right to make his lien effectual by a sale under execution. I BLACK, JUDGMENTS, § 400.

The rule obtaining in a majority of the states is that, as between judgments entered of record on the same day, there is no priority, for the law cannot in this case regard fractional parts of a day, and all such judgments create equal liens. If all such judgment creditors should remain inactive the several judgments would have an exact equality of lien. But ought that equality to continue, where one creditor by his superior activity and diligence

has, at his own cost, caused execution to be levied upon property of the common debtor and advertisement and sale thereunder to be made? The New York court has, by a four-to-three decision, answered this in the affirmative, and by so doing has over-ruled two of its prior opinions. (*Adams* v. *Dyer,* 8 Johns, 347; *Waterman* v. *Haskins,* 11 Johns, 228), which have been quite generally cited and followed in other states. The court in the principal case justified itself in part as follows: "In the case now under consideration the liens of the three judgments attached simultaneously to the property of Hulbert upon his acquisition of the interest derived from his father. By virtue of the statute they were at that time equal liens entitled to share pro rata in the proceeds of the debtor's property. Such being the case, how can it be held that the issuing of the execution and the advertising by the sheriff—acts which would be an idle ceremony—should give preference to the creditors? Once a lien is acquired it is a right which cannot be lost by the performance of an unnecessary act of another creditor."

As said before, the judgment creditor has no right in the debtor's land, but only a right to make his lien effectual by a sale under execution. Is it then "idle ceremony" to be diligent and have the lien effectuated? "All judgments obtained at the same term are on an equality as to lien. The statute did not design to deprive a party of any advantage that he might obtain by the exercise of superior diligence. While the lien was made equal, diligence was left to its reward. Under the general law the lien of judgments is equal, but the vigilant creditor can acquire a preference in the payment of his judgment, although it has but an equal lien, by first issuing his execution. If one creditor, who is precisely equal to another in point of lien, shall get advantage by use of superior diligence in discovering property, making a levy and sale of it, where is the hardship or injustice? If the property is sold below its value, the right of redemption and resale remains to the other judgment creditors. There is certainly some merit in searching records, discovering property, investigating title, and procuring sale of it, and all at the creditor's costs and expense, by which he ought to profit. Both of these judgment creditors were in a position to use diligence —one only encountered the labor and expense. To him should be the reward. *Vigilantibus, non dormientibus, jura subveniunt." Smith* v. *Lind,* 29 Ill. 24. To the same effect, see *Elston* v. *Castor,* 101 Ind. 426, 51 Am. Rep. 754; *Michaels* v. *Boyd,* 1 Cart 259; *Burney* v. *Boyett,* 1 How. (Miss.) 39; *Lippincott* v. *Wilson,* 40 Ia. 425; *Shirley* v. *Brown,* 80 Mo. 244; 2 FREEMAN, JUDGMENTS, § 374; I BLACK, JUDGMENTS, §§ 450, 455; 23 CYC. 1380. The above rule has been cited with approval in *Rockhill* v. *Hanna,* 15 How. 194; *Freedman's Trust Co.* v. *Earle* 110 U. S. 717, 28 L. ed. 304. If the cases above referred to are taken for what they are worth, it might be reasonably doubted whether the New York court was justified in sweeping aside the rule of *Adams* v. *Dyer* and *Waterman* v. *Haskins,* supra, established since 1811.

H. B. S.

THE POWER OF THE STATE TO OUST CORPORATIONS FOR DOING ULTRA VIRES ACTS.—A company was incorporated by a special act of the legislature for the purpose "of constructing and maintaining a dam across X river, and one or more locks in connection with said dam; and of creating a water power to be used by said corporation, for manufacturing purposes," and to be sold or leased to the proprietors of other factories and mills. A limitation was placed upon the amount of real estate that the company might hold. Eleven years after the organization of this company, B company was incorporated by another special act of the legislature "for the purpose of upholding and maintaining the dam constructed by the A company, the locks and canals in connection with the dam, and for creating and furnishing water power." No restriction was imposed upon the right of this company to take and hold real estate, the statute simply providing that, exclusive of the property of the A company, it might acquire "any other real estate that may be required for the use of said corporation for the purposes contemplated by this act." Immediately after its organization, B company purchased large tracts of lands some parcels of which are located in the heart of the business and residential district of the city of Y, and from a half-mile to a mile and a half distant from the site of the dam, locks and canal. The company is not using these parcels of land for any purposes incidental to their corporate business, but has adopted a policy of leasing them for long terms of years, and, as a result, the city of Y is suffering greatly.

To what relief, if any, is the city entitled?

At the outset, it must be conceded that the city cannot, of its own motion, do anything to better the situation; for the doctrine is firmly established that, in cases of this character, the state alone can complain. The contract exists only between the corporation and the state; and for a breach thereof by the former it is amenable only to the sovereign power which created it. *Miller* v. *American Tobacco Co.*, 55 N. J. Eq. 352, 42 Atl. 1117; *Colorado Springs Co.* v. *American Publishing Co.*, 97 Fed. 843; *Delta Duck Club* v. *Barrios*, 135 La. 357, 65 So. 489; *Illinois Life Ins. Co.* v. *Beifield*, 184 Ill. App. 582; *Chase & Baker Co.* v. *National Trust & Credit Co.*, 215 Fed. 633; *Mansfield* v. *Neff*, 43 Utah, 258, 134 Pac. 1160; *New Hartford Water Co.* v. *Village Water Co.*, 87 Conn. 183, 87 Atl. 358; *Milton* v. *Crawford*, 65 Wash. 145, 118 Pac. 32; *Plummer* v. *Chesapeake & Ohio R. Co. of Ky.*, 143 Ky. 102, 136 S. W. 162; *Terre Haute & P. R. Co.* v. *Robbins*, 247 Ill. 376, 93 N. E. 398; *Marks* v. *Amer. Brewing Co.*, 126 La. 666, 52 So. 983; *Rachels* v. *Stecher Cooperage Works*, 95 Ark. 6, 128 S. W. 348; *Ill. Steel Co.* v. *Warras*, 141 Wis. 119, 123 N. W. 656; *Evangelical Baptist Benevolent & Missionary Society* v. *City of Boston*, 204 Mass. 28, 90 N. E. 572; *Bowman* v. *J. H. Trainor Co.*, 93 Ark. 435, 124 S. W. 1019; *Knowles* v. *Northern Texas Traction Co.* (Tex. Civ. App. 1909), 121 S. W. 232; *Puget Sound National Bank of Seattle* v. *Fisher*, 52 Wash. 246, 100 Pac. 724; 8 HARV. LAW REV. 15; V THOMPSON, LAW OF CORPORATIONS, § 5797.

But will the state, at the request of the city, interfere in this case? In the case of *People* v. *Pullman Palace Car Co.*, 175 Ill. 125, the court held that the act of the corporation in building and controlling a village for the

benefit and accommodation of its employees was an ultra vires act, as the company was incorporated for the sole purpose of manufacturing, leasing, and operating its cars. It did not appear that the company was prompted by any willful intent to violate the terms of its charter, its only object being to erect schools, churches, homes, stores, etc., for the betterment, education, and comfort of its employees. Yet the court was constrained to say that "a power which a corporation may exercise by implication must be bounded by the purposes of the corporate existence and the terms and intention of the charter, and acts which tend only remotely and indirectly to promote its interests and chartered objects cannot be justified by implication of law, but are ultra vires." It can hardly be disputed that the acts of the Pullman Company did tend "remotely and by indirection" to promote its interests and corporate object. Every one of the ultra vires acts was done by the company with the intention of enlarging and promoting the interests of the very business in which its charter empowered it to engage. The case simply illustrates how the courts will check a corporation in its endeavor to include within the "corporate objects" acts which are not incidentally and impliedly necessary to the attainment of that object. For similar cases, see *Bridgeport* v. *Railroad Co.*, 15 Conn. 475, and *Mayor* v. *Yuille*, 13 Ala. 137.

Admittedly, the parcels of land in question were, in the first instance, legally acquired by the B company; but that fact affords no proof that they are being legally used at the present time. The acts of this company certainly constitute more palpable transgressions of the corporate power than did the acts of the Pullman Company; for it is manifest that the conducting of a real estate business does not tend either remotely or by indirection to promote the interests of a corporation which was created for the purpose of furnishing water-power to its own and neighboring factories. Furthermore, the company is estopped by its own acts from insisting upon holding the parcels of land for any anticipated future corporate purposes. The land being located in the business and residential district, and the company having leased it for terms of twenty-five and fifty years, it is quite apparent that the city will have developed to such an extent before the expiration of the leases that the erection of factories on the lots will never be tolerated. *Dauchy Iron Works* v. *Gunder*, 150 Ill. App. 604.

In the *Pullman Company* case the court ordered the sale of the land and buildings which the corporation was illegally holding; but it refused to annul the charter. This decision is typical of the attitude of the courts towards corporations which have overstepped the bounds of their chartered authority. There has been an almost total departure from the doctrine of special capacity, so that today we find the courts basing their decisions squarely upon that most unsubstantial something known as judicial discretion. Happily, this dangerous innovation has not, as yet, resulted in any miscarriages of justice; due, perhaps, to the fact that the courts have adopted a very simple rule for the guidance of their discretion. Unless they discover that "there is a clear, willful misuse, abuse, or non-use of the franchises sought to be forfeited, or violation of law,—something that strikes at the very groundwork of the contract between the corporation and the sovereign

power; something that amounts to a plain, willful abuse of power or violation of law within the meaning of the statute on the subject, whereby the corporation fails to fulfill the very design and purpose of its organization,—leave will not be granted by the court to resort to the extraordinary remedy for forfeiture of its charter." This language, which was used by the court in *State ex rel. Att'y Gen.* v. *Janesville Water Co.*, 92 Wis. 496, very forcibly expresses the modern tendency of the courts. To the same effect, see *State ex rel. Prosecuting Att'y.* v. *Commercial Bank*, 10 Ohio, 535; *State ex rel.* v. *Farmers' College*, 32 Oh. St. 487; *Att'y Gen.* v. *E. K. R. Co.*, 55 Mich. 15; *State of Missouri ex rel. Att'y Gen.* v. *National School of Osteopathy*, 76 Mo. App. 439; *State of Ohio ex rel. Att'y Gen.* v. *Oberlin Bldg. & Loan Ass'n*, 35 Oh. St. 258; *State of Vermont* v. *President, Director and Company of the Essex Bank*, 8 Vt. 489; *State* v. *Tampa Water Works Co.*, 56 Fla. 858, 48 So. 639; *Big Four Advertising Co. of Phoenix* v. *Clingan*, 15 Ariz. 34, 135 Pac. 713; *State, on the inf. of Wear* v. *Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901; *State ex inf. Hadley* v. *Rosehill Pastime Athletic Club*, 121 Mo. App. 81, 97 S. W. 978; *State ex inf. Hadley* v. *Kirkwood Social Athletic Club*, 121 Mo. App. 87, 97 S. W. 980; *State* v. *French Lick Spring Hotel Co.* (Ind. App. 1907), 82 N. E. 801; *Jackson Loan and Trust Co.* v. *State*, 96 Miss. 347, 56 So. 293.

The People v. *The Pullman Palace Car Co.*, 175 Ill. 125, and *State of Mo. ex rel. Att'y Gen.* v. *National School of Osteopathy*, 76 Mo. App. 439, are the two cases that stand out pre-eminently as illustrations of the dogmatic refusal of the courts to enforce the doctrine of special capacities. In both of those cases the corporations were attempting to fulfill "the very design and purpose of their organization"; but they failed therein, because they assumed that their charters empowered them to do acts which, as a matter of fact, were ultra vires. On the other hand, the case of *People ex rel. Att'y Gen.* v. *Illinois Health University*, 166 Ill. 171, presents a set of facts which demonstrates exactly what the courts mean when they speak of a corporation which must be ousted because of its failure to fulfill "the very design and purpose of its organization." In that case the defendant, which was incorporated for the purpose of training medical students, established its "institution of learning" in two small office-rooms, and indiscriminately conferred diplomas upon all applicants provided they were prepared to pay the requisite fee.

In the case under discussion we find that the ultra vires acts of the B company, although injurious to the city, are not "so substantial and continued as to so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created." (*State of Minnesota ex rel. Att'y Gen.* v. *Minnesota Thresher Mfg. Co.*, 40 Minn. 213.) Just as in the *Pullman* case, the B company is doing acts which the state never intended that it should do. True, the acts of this company more nearly approximate a willful abuse of power, and are more remotely removed from any relation to corporate interests than were the acts of the Pullman Company; but this company, like the Pullman Company, is still actively and successfully engaged in conducting its legitimate corporate business. It is

inconceivable that more harm would result in this case by allowing the legal and disallowing the illegal than resulted in the *Pullman* case. The difference between the acts of the two companies being merely one of degree, the courts, in order to be consistent, ought to apply the same principles to both cases. There was a time when the B company would have been ousted without any hesitation or procrastination, but, under the new order of things, it is hardly possible that the court would order anything more drastic than that the B company dispose of the property which it is illegally holding and using. *Com.* v. *Newport, L. & A. Turnpike Co.*, 97 S. W. 375, 29 Ky. Law Rep. 1285, 100 S. W. 871, 30 Ky. Law Rep. 1235; *Att'y Gen.* v. *Consolidated Gas Co. of N. Y.*, 108 N. Y. Supp. 823, 124 App. Div. 401; *State* v. *Nashville Baseball Club*, 127 Tenn. 292, 154 S. W. 1151; *Louisville School Board* v. *King*, 127 Ky. 824, 107 S. W. 247, 32 Ky. Law Rep. 687. M. McL.

THE INTERPRETATION OF "DEATH" AND "SURVIVAL" ACTS.—The recent case of *Klann* v. *Minn.*, 154 N. W. 996, decided by the Supreme Court of Wisconsin, calls attention to the interpretation in the various states of the two statutes affecting the civil liability of one who through his wrongful acts causes the death of another, which has resulted in a decided conflict of authority. One statute, known generally as the "DEATH ACT" (modelled after LORD CAMPBELL'S ACT) gives a right of action for the pecuniary loss suffered by surviving relatives by reason of the death; the other statute, known as the "SURVIVAL ACT," gives a right of action to the personal representative of the deceased, for the loss which accrues to the injured person before death. *Brown* v. *C. & N. W. Ry.* 102 Wis. 137, 171.

For the measure of damages under the "DEATH ACT" see *Irwin* v. *Pa. R. Co.*, 226 Pa. St. 156, 75 Atl. 19, and cases cited in the note on that case in 8 MICH. L. REV. 501. The measure of damages under the "SURVIVAL ACT" is discussed in *Kyes* v. *Valley Telephone Co.*, 132 Mich. 281, and *Olivier* v. *Houghton County St. Ry. Co.*, 138 Mich. 242. In *Johnson* v. *Eau Claire*, 149 Wis. 194, it is said: "The damages recoverable when death occurs instantly are the pecuniary losses sustained by relatives of the deceased named in the Act, and must be paid over by the administrator to such relatives. The damages recoverable under the new right of action allows the administrator to prosecute, for the benefit of the estate, the claim that the party would have had if he had lived. These damages include: pain and suffering, permanent disability, disfigurement, moneys by him expended for medical attendance and nursing, loss of earning capacity after majority, and, in case of emancipation, loss of earning capacity during minority as well." Since the damages recoverable under the two statutes depend on different circumstances and vary so widely, it is not strange that much litigation has resulted from the endeavor to recover under one or both of these statutes.

The principal point of difference in the different jurisdictions seems to be on the question whether the two statutes give two rights of action for the same death, or whether the rights of action conferred by the two are exclusive one of the other. See 15 HARV. L. REV. 854. Michigan holds that

the remedies are mutually exclusive, and that if the death is instantaneous the action must be brought under the "DEATH ACT"; if the death from the wrongful act is not instantaneous, action can be brought only under the "SURVIVAL ACT." *Dolson* v. *Lake Shore & Michigan So. Ry. Co.*, 128 Mich. 444, 87 N. W. 629; and an article on "CONSTRUCTION OF 'SURVIVAL ACT' AND 'DEATH ACT' IN MICHIGAN" in 9 MICH. L. REV. 205. Other courts restrict the operation of the "SURVIVAL ACT" by allowing it to apply only where death results from some cause other than the cause of the injury. *Holton* v. *Daly*, 106 Ill. 131; *Martin* v. *Railway Co.*, 58 Kan. 475; *Berner* v. *Whittelsey Mercantile Co.*, 93 Kan. 769, 145 Pac. 567. A greater number of courts, however, take the view that if the death is not instantaneous, recovery may be had under both acts, one recovery for the benefit of the deceased's estate and the other for the pecuniary loss sustained by the relatives of the deceased. See *Brown* v. *C. & N. W. Ry.*, 102 Wis. 137. Still another rule is that of Oklahoma, where it is held that recovery can be had under both statutes without regard to the question of instantaneous death. *St. Louis, etc., R. Co.* v. *Goode*, 42 Okla. 784, 142 Pac. 1185. Kentucky varies the Michigan rule to the extent of holding that if death is not instantaneous, recovery can be had under either of the two statutes, but not under both. *Chesapeake R. Co.* v. *Banks*, 142 Ky. 746, 135 S. W. 285.

Under all but the Oklahoma rule it will therefore be seen that the question of whether or not the death was "instantaneous" is a vital one. This gives rise to another conflict upon the question of what constitutes instantaneous death. Michigan lays down this rule: "Where there is a continuing injury, resulting in death in a few moments, it is 'instantaneous.'" *West, Admrx.*, v. *Detroit United Ry.*, 159 Mich. 269; see for criticism of this rule the article in 9 MICH. L. REV. 205, above referred to.

Another view is that any substantial period of suffering, whether there was consciousness or not, is sufficient to enable the cause of action to vest in the deceased, and hence to survive to his personal representative. *Kellow* v. *Railway Co.*, 68 Ia. 470, 23 N. W. 740; *Capital Trust Co.* v. *Great Northern Ry. Co.*, 127 Minn. 144, 149 N. W. 14; *Hollenbeck* v. *Berkshire R. Co.*, 9 Cush. (Mass.) 478. A third rule is that there must be a period of conscious suffering between the injury and the death. *St. Louis, etc., R. Co.* v. *Robertson*, 103 Ark. 361, 146 S. W. 482; *Perkins* v. *Oxford Paper Co.*, 104 Me. 109, 71 Atl. 476; *Moyer* v. *Oshkosh*, 151 Wis. 586, 139 N. W. 378; *Melzner* v. *Northern Pac. R. Co.*, 46 Mont. 162, 127 Pac. 146.

Under the rule last mentioned another question arises, viz., how long must this period of consciousness last? In the principal case above cited (*Klann* v. *Minn.* 154 N. W. 996), action was brought by the administratrix of Arthur Klann, deceased, to recover damages based upon the alleged negligence of the defendant in causing the fire in which deceased was burned to death. The first cause of action stated was for the pain and suffering of the deceased. Defendant demurred to this cause of action, arguing that the following allegation is not sufficient to show a basis for damages for pain and suffering between injury and death: "A few minutes after he was

caught by the said flames and exposed to the said burning, he then and there died from the effect of the flames and the burns he received from them." The Supreme Court overruled the demurrer, holding that the word "few" was a relative term and of great elasticity of meaning, and the allegation therefore sufficiently showed that there was a "substantial period of suffering between injury and death." It is to be noted that the same test is applied to determine whether or not a recovery for pain and suffering will be allowed that is used to determine whether or not the action survives under the "SURVIVAL ACT." This would seem to furnish an explanation for the third rule stated above, which requires a period of conscious suffering. That is, the courts following that rule seem to have confused the survival of the entire action with the survival of the cause of action for the pain and suffering of the deceased. Under the Iowa, Massachusetts, and Minnesota rule, stated supra, even though death did not immediately ensue and the cause of action survived for that reason, recovery for pain and suffering of deceased will not be allowed without the further showing of consciousness. *Tully* v. *Fitchburg R. Co.,* 134 Mass. 499. Under the Wisconsin rule, if the action survives at all the cause of action for pain and suffering must also survive.

The facts given in *Klann* v. *Minn.,* supra, together with the allegation stated, indicate that the deceased was burned to death before being taken from the flames, and therefore the injury which caused the death was a continuing injury, continuing to operate directly until death resulted. Hence the Wisconsin court evidently rejects the Michigan rule stated in the *West* case, supra, which is that a continuing injury resulting in death makes the death instantaneous. The Wisconsin court in this case must have taken judicial notice of the fact that the first flame which reached the deceased would not cause either instant death or unconsciousness, and the time intervening after the time of his first injury from the first flame, and before the total extinction of life, was a sufficient period of conscious suffering to enable the cause of action to survive and to ground the claim for pain and suffering of deceased. Upon this point the Supreme Court of the United States and the lower federal courts have taken a different view. In *Cheatham* v. *Red River Line,* 56 Fed. 248, damages were claimed for suffering while the deceased was struggling in the water and drowning, but recovery was denied. In *The Corsair,* 145 U. S. 335, where a boat struck the bank of a river and sank in about ten minutes, and a passenger was drowned, it was held that there could be no recovery for mental and physical pains before death; that they were substantially contemporaneous with death and inseparable as a matter of law from it. In *St. Louis & Iron Mtn. Ry.* v. *Craft,* 237 U. S. 648, the rule is stated as follows: "such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for a separate estimation or award of damages under statutes like that which is controlling here." The line is a hard one to draw between pain and suffering which

may be recovered for and that which may not, but here we seem to have another point upon which conflicts will result in the interpretation of these two statutes. W. C. M.

EVIDENCE OF HABIT OF CARE, CAUTION AND PRUDENCE AS NEGATIVING CONTRIBUTORY NEGLIGENCE.—In an action for death by wrongful act, when there were no eyewitnesses and no facts susceptible of proof to disclose how the fatality occurred, the plaintiff, having the burden of proof with regard to contributory negligence, was allowed to prove the "habits of the deceased as to care, caution, and prudence, as tending to raise the presumption that he was in the exercise of due care and caution for his own safety at the time he was killed." The Supreme Court of Illinois upheld this instruction, saying: "As the proof made relative to the habits of the deceased tended to raise this presumption, it was sufficient to go to the jury." *Casey* v. *Chicago Rys. Co.* (Ill. 1915), 109 N. E. 984.

The rule that, in the absence of eyewitnesses and of proof of the circumstances surrounding the case from which the presence or absence of contributory negligence might be determined, habit of care is admissible as tending to raise a presumption that there was no contributory negligence was laid down by the Illinois court in *Chicago, Rock Island & Pacific Ry. Co.* v. *Clark,* 108 Ill. 113, and has been applied in a long line of Illinois decisions, and more often, probably, than in any other state.

There is, however, a decided conflict in the holdings of the various courts which have been called upon to pass upon the question as to whether or not habit of care and habit of negligence are admissible to prove the absence or existence of contributory negligence. The holding of the Illinois court finds support in California in *Craven* v. *Cent. Pac. R. R. Co.,* 72 Cal. 345 (habit of negligence); in Kansas in *Missouri Pac. Ry. Co.* v. *Moffatt,* 60 Kansas 113 (habit of care); in New Hampshire in *Parkinson* v. *Nashua & Lowell R. R. Co.,* 61 N. H. 416 (habit of negligence); *Evans* v. *Concord R. R. Corp.,* 66 N. H. 194 (habit of care), and *Lyman* v. *B. & M. R. R.,* 66 N. H. 200 (habit of care); and in Rhode Island in *Cassidy* v. *Angell,* 12 R. I. 447 (habit of care). The contrary view seems to be held in Connecticut in *Morris* v. *Town of East Haven,* 41 Conn. 252 (habit of care); in Pennsylvania in *Baker* v. *Irish,* 172 Pa. St. 528 (habit of negligence), and in Wisconsin in *Propsom* v. *Leatham,* 80 Wis. 608 (habit of negligence), though in all of these cases there seem to have been eyewitnesses; under such circumstances, even by the Illinois rule, the evidence would not have been admitted, but these courts do not seem to take this fact into consideration, whereas, in *Dalton* v. *Chicago, Rock Island & Pac. Ry. Co.,* 114 Io. 527, and *Zucker* v. *Whitridge,* 205 N. Y. 50, the court makes this distinction, deciding merely that such evidence is not admissible where there are witnesses. These holdings are not, therefore, contrary to the Illinois cases.

Both habit of care and habit of negligence would seem to fulfill the first requirement of admissibility, *i. e.,* they possess a distinct probative value.

In every-day affairs, such evidence is continually being considered, weighed and acted upon by men of business. Surely its probative value does not change when it is used in court. As is said by McFarland, J., in *Craven* v. *Cent. Pac. R. R. Co.*, supra, "A sensible man, called upon, out of court, to determine whether or not a certain person had on a certain occasion carelessly jumped off a moving train of cars, and finding the direct testimony as to the matter conflicting, would naturally and properly give *some* weight to the fact that the person was not in the habit of alighting from cars in that manner; and the consideration of such a fact in cases resembling the one at bar has frequently been sanctioned *in* court." True, it is the negligence or care in the particular case with which the court is immediately concerned, but evidence of habit of care or negligence is admissible only because, and in so far as, it tends to establish the one or the other; and, therefore, it must be shown to amount to a habit, and, what is more, a habit of action under similar circumstances. WIGMORE, § 376. And as is said by MCFARLAND, J., in *Craven* v. *Cent. Pac. R. R. Co.*, supra, "It may be remarked, generally, that, unless the case falls within some well-recognized class of exceptions, an evidentiary fact is relevant to the principal fact when the former tends to show that the latter probably did or did not occur; and mere remoteness usually goes to weight, and not to admissibility, of evidence."

Granting the probative value of this evidence and limiting its admissibility strictly to cases where the facts and circumstances upon which negligence or lack of negligence must be predicated (the soundness of which limitation may admit of some doubt), is there any other reason why it should not be admitted? Habit of care or negligence must not be confused with character evidence. WIGMORE, §§ 92, 97. The two are entirely different and are established in different manners, and it is conceded that evidence of character is, as a general rule, inadmissible in civil cases. The manner in which these two kinds of evidence are confused is illustrated in the case of *Chase* v. *Me. Cent. R. R. Co.*, 77 Me. 62.

It remains to be considered whether or not this evidence might be excluded as raising a collateral issue, as this is often assigned as a reason by those courts which exclude it. The mere fact that it does raise an issue which is collateral to the principal issue in the case does not conclusively establish its inadmissibility. Such evidence is many times admitted; and when it is excluded it is usually because the detriment far outweighs the benefit, *i. e.*, the confusion produced cannot be outweighed by the probative value of the evidence sought to be introduced. The probative value of the evidence in the instant case is obvious.

On principle, therefore, there seems to be no sound reason why evidence of habit or care and caution should not be admissible as tending to establish the absence of contributory negligence. The argument herein made applies equally for its admissibility under similar conditions as tending to establish the absence of negligence on the part of the defendant. The Illinois rule applied in the principal case would seem to be consonant with sound reason even if not in accord with the weight of authority. W. F. W.