THE AMERICAN LAW REGISTER AND REVIEW

PUBLISHED MONTHLY BY MEMBERS OF THE DEPARTMENT OF LAW OF THE UNIVERSITY OF PENNSYLVANIA.

SUBSCRIPTION PRICE, $3.00 PER ANNUM. SINGLE COPIES, 35 CENTS.

Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the TREASURER, Department of Law, University of Pennsylvania, Sixth and Chestnut Streets, Philadelphia, Pa.

GAMBLING CONTRACTS.—SALES ON MARGIN. The cases in which the question has been raised of the legality of sales of stocks or commodities are capable of classification into two general groups: (1) Where the parties contemplate delivery of the goods, whether actual or symbolical, unconditional or with a condition as to time; (2) where the parties contemplate no delivery, but reserve the option to demand delivery, or where they contemplate no delivery but only a settlement of the difference in price. The cases falling within the first group seem to determine that such sales are not wagers, but *bona fide* contracts: *Sawyer* v. *Taggert* (Ky.), 14 Bush, 727 (1879); *White* v. *Barber*, 123 U. S. 392 (1887); although at one time the Supreme Court of Pennsylvania seemed inclined to take a contrary view regarding contracts for the sale of stock for future delivery where the vendor has not the shares in his possession: *Ruchizky* v. *De Haven*, 97 Pa. 202 (1881).

Turning to the second class of cases we find that even where no delivery is contemplated, but one party reserves an option to require delivery if he choose, the contract is not necessarily invalid. That there is a hazard in such contracts is not denied, but it is well settled that there is nothing inherently or *prima facie* vicious about them: *Bigelow* v. *Benedict*, 70 N. Y. 202 (1877). It should be

noticed, however, that recent statutory provisions in some jurisdictions render certain contracts of this kind illegal: Ill. Cr. Code, §130. But where the intention of the parties is for a mere settlement of differences with no delivery of the things sold, the sale amounts to nothing more than a wager and neither party can enforce it: *Grizewood* v. *Blane*, 11 C. B. 526 (1851); *Benjamin on Sales*, 6 Ed. 490. This intention, however, must exist in the minds of both parties: *Warren* v. *Scanlan*, 59 Ill. App. 138 (1895); its existence is a question to be decided by the jury in each case: *Pope* v. *Hanke*, 155 Ill. 617 (1894); *Cover* v. *Smith*, 82 Md. 586 (1896); Biddle on Stock Brokers, 318; and in determining its existence all the attending circumstances of the may be taken into consideration, such as the brokers' mode of doing business, the size of the transaction in relation to the financial resources of the parties and the amount of margin put up: *Gaw* v. *Bennett*, 153 Pa. 247 (1893); *Morris* v. *Norton*, (U. S. C. C. A. 6th C.), 75 Fed. Rep. 912 (1896).

How far the court will go in order to arrive at the real intention of the parties may be seen by referring to a recent case in the House of Lords: *Universal Stock Exchange* v. *Strachan*, L. R. [1896] App. Cas. 166. The appellant brought from and sold to the respondent various stocks and shares at the "take prices" of the day. The bought and sold notes made out in each transaction. stated that they acted "principal and broker" and subject to "the terms" printed on the back. The "terms of business" were signed by respondent, and contain, *inter alia*, the statement that "every purchase or sale contracted by the company is a *bona fide* transaction for delivery on a specified settling day, and the company is always prepared . . . to deliver or take up any stock it may at any time have bought or sold, and the contracts entered into . . . are not contracts of gaming or wagering." Then followed a provision for the postponement of the settling day, if mutually agreed upon, and for the payment of interest to the company on the amount of purchase moneys. In a suit by respondent to recover securities handed to appellant the court decided that, in spite of the plain statement in the written instrument that a delivery was intended, the jury was justified in finding, from the whole nature of the agreement, and from attendant circumstances, that no delivery was really contemplated. Lord Herschell, in the course of his opinion, said (page 173): "It has been said that wherever a contract is entered into between two parties containing an obligation under any circumstances to cause property to pass from one to another, whatever else there may be in the contract, and although neither party contemplate that that provision should ever become operative, yet if it ever may become operative, the contract cannot be by way of gaming and wagering. The proposition amounts to this: that parties who intended to gamble with one another, but wanted to have the security against one another of being able in a court of justice to recover their bets, could compel a court of justice

to adjudicate and secure to them their bets by a judgment, if only they inserted in their contract a provision, which might in certain events become operative, to compel the goods to be delivered and received, although neither of them anticipated such a contingency, the purpose of inserting the provision creating an obligation being only to cloak the fact that it was a gambling transaction, and enable them to sue one another for gambling debts. . . . I should require much consideration before I gave my assent to a proposition involving such consequences." The following United States cases should be compared with the above: *Porter* v. *Viets* (U. S. C. C., N. D. Ill.), 1 Biss. 177 (1857); *ex parte* Young, 6 Biss. 53. In the English decisions we do not have an instance of the contradiction of a written contract by parol evidence, but rather a case of the interpretation of the terms of a transaction by reference to the general intent of a written instrument forming a part thereof, and to the attending circumstances, where the result is to contradict certain clauses of the instrument.

VERBAL ADMISSION.—DECLARATIONS AS TO PEDIGREE. In *Flora* v. *Anderson*, 75 Fed. Rep. 217 (1896), the complainant sued to recover a portion of the estate of one Nicholas Longworth. He claimed as the illegitimate son of Eliza Longworth Flagg, daughter of Nicholas Longworth, who had devised to Larz Anderson, his son-in-law, and to Joseph Longworth, his son, the estate here in dispute, in trust for the benefit of his daughter, Eliza Longworth Flagg, during her life, with remainder to "the issue of her body surviving her, and in default of such issue over to his son, Joseph Longworth, and his grandson, John L. Stettirius." Eliza L. Flagg died in December, 1891, without issue of her marriage.

In order to maintain his claim it was necessary first for John W. Flora, the complainant, to prove himself the illegitimate child of Eliza L. Flagg. The testimony was voluminous, that of the complainant being founded almost altogether upon rumor and hearsay. The story advanced was that some time between 1822 and 1826 the complainant was born of Eliza Longworth, and when a few days old was delivered by agents of Nicholas Longworth to James Flora and his wife, of Kentucky, to raise; that Davis Carneal, husband of an aunt of Eliza Longworth, was father of the child, and that various visits were made by the Longworth family to Flora in Kentucky, when money and clothes were furnished to him.

Almost all this evidence was upon hearsay, from persons not belonging to or related to the Longworth family, the witnesses giving statements which they said were made to them or in their hearing at times from thirty to fifty years before this bill was brought.

The defendants did not admit the competency of the evidence in respect to the taking of the child to Kentucky, the placing of him within the care of James W. Flora and wife, and showed discrepancies between various alleged statements brought forward by the

complainant; they further showed the absolute untruth of many of these assertions.

The complainant depended greatly upon a verbal admission of Carneal as to the pedigree of Flora and his transportation to Kentucky. The rule of evidence relative to verbal admissions was held to be peculiarly applicable in this case. Sage, District Judge, referred in this connection to § 200 of Greenleaf on Evidence, that all verbal admissions ought to be received with great caution. "The evidence, consisting as it does in the mere repetitions of oral statements, is subject to much imperfection and mistake, the party himself either being misinformed or not having clearly expressed his own meaning, or the witness having misunderstood him." Here the only parties who claimed to have heard Carneal, the incriminated uncle, make any statement concerning the taking of the complainant, when but a few days old, to Kentucky, undertook to detail statements made in his hearing when he was a boy of fourteen, more than seventy years before he gave his deposition.

With the exception of the alleged admission above referred to, the evidence of the complainant as to his relationship to Eliza Longworth Flagg was hearsay, being declarations made by *servants*, *friends*, and *neighbors* of the Longworth family. It was argued with force, and with not a little plausibility, that declarations of those so closely associated with a family as to be in fact almost a part of it should be admissible. In considering the law, the court laid down in a lengthy and learned opinion the following propositions as so well established that they form part of the settled law:

1. The law resorts to hearsay evidence in cases of pedigree upon the ground of the interest of the declarants in the persons from whom the descent is made out, and their consequent interest in knowing the connections of the family. The rule of admission is, therefore, restricted to declarations of the deceased persons who were related by blood or marriage to the person, and in that way interested in the succession in question: Greenleaf on Evidence, § 103; Taylor on Evidence, § 579; *Blachburn* v. *Crawfords*, 3 Wall. 175; *Fulkerson* v. *Holmes*, 117 N. S. 389; *Sitler* v. *Gehr*, 105 Pa. 577.

This well-considered opinion adds authority to the rule permitting a resort to hearsay evidence of pedigree only in cases of declarations made by persons related by blood or marriage to the person from whom succession is to be traced.

2. The rule that hearsay evidence is admissible in cases of pedigree is limited to cases of legitimate relationship. In such cases the presumption is that declarations by deceased members of the family are true, because ordinarily there is no motive for false statements, as there is likely to be in cases of illegitimacy: *Crispin* v. *Doglioni*, 3 Swab. & Tr. 44. Where a relationship is acknowledged as a matter of fact, and its lawfulness only is disputed, hearsay from members of the family may be introduced to show that such relationship was lawful or was not lawful. But hearsay cannot be in-

troduced to establish an unlawful relationship *per se*, where a lawful relationship is not claimed. There are cases in which testimony as to declarations of members of the family has been admitted to show that the claimant was a bastard. But on examination it will appear that in those cases the testimony was introduced, not to show bastardy *per se*, as a ground of claim, but to dispute a claim of legitimacy: *Vowles* v. *Young*, 13 Ves. 147; *Goodright* v. *Moss*, Cowp. 593; *Murray* v. *Milne*, 12 Ch. Div. 845; *Jewel* v. *Jewel*, 1 How. 219; *Haddock* v. *Railroad*, 3 Allen 298. In *Doe* v. *Barton*, 2 Moody & R. 28, the declarations of illegitimate relations were rejected.

TWICE IN JEOPARDY—INSUFFICIENT INDICTMENT. Is an acquittal on an insufficient indictment a bar to a subsequent prosecution for the same offence?

The above question came up in the recent case of *U. S.* v. *Ball*, 163 U. S. 662 (1896). M. F. Ball and his brother, J. C. Ball, and Boutwell were tried for murder on an indictment not stating the place of death. M. F. Ball was acquitted, and the others were found guilty. They appealed on the ground of the insufficiency of the indictment, and the indictment was quashed. A new indictment was then prepared against all three. M. F. Ball pleaded *autrefois acquit;* the plea was overruled; he was found guilty and appealed. It was held by the Supreme Court of the United States, in an opinion by Mr. Justice Gray, that his acquittal was a bar to a subsequent prosecution for the same offence, being on the merits of the case, and not because of the insufficiency of the indictment, as is shown by the fact that his co-defendants were found guilty on that indictment.

It may be contended that this decision is contrary to the rule as laid down in *Vaux's Case*, 4 Rep. 44 (1591), and the cases following it in England and America, but an examination of these cases seems to point to a clear distinction between them and the case under discussion.

In *Vaux's Case* (*supra*) the defendant was charged with murder by poison and the indictment stated that the murdered man "took and drank," omitting "said poison." On a special verdict, the judgment was *quod eat sine die*. He was tried again, and the plea, *autrefois acquit*, was not allowed. Lord Hale (2 Pleas of the Crown, 394), thinks the judgment was delivered on the defect in the indictment as much as on the verdict, and says that had the judgment been on the verdict, *quod eat inde quietus*, the defendant could not have been tried again.

This case has been supposed by some authorities to lead to the doctrine that if the indictment is so ill that a judgment on it would be reversible for error, it is too defective to be considered as putting the defendant in jeopardy: *Bishop's Crim. Law*, s. 1021; *3 Greenl. Ev.* s. 35. In *Commonwealth* v. *Purchase*, 2 Pick. 525 (1824) Parker, C. J., says of this theory: "This is because

it is presumed the court will discover the defect in time to prevent judgment. This protection is bottomed on the assumed infallibility of courts, which is not admitted in any other case."

According to the accepted rule, no man is considered twice in jeopardy until he is put on trial by a court of competent jurisdiction upon a sufficient indictment after an acquittal or conviction by a jury. Therefore, where he is discharged on the first indictment before verdict, he may be tried again. Also, where he has been discharged upon his own motion, by verdict, or in arrest of judgment, or in error, on the special ground of the insufficiency of the indictment and not on the merits of the case, he may be tried anew, for, then, the indictment and trial on it are held invalid at the special instance of the defendant, and the order for a new trial places him in the position as though no trial had been had. This principle covers the decision in *Vaux's Case* (*supra*) and the cases under it.

Also, where the defendant is acquitted or discharged on the ground of insufficiency of indictment, not on his own motion, but on that of the prosecution or by the court, it has been held he may be indicted again: *State* v. *Williams*, 5 Md. 82 (1855).

These cases show that where the acquittal is directly caused by the insufficiency of the indictment, it is no bar to a subsequent prosecution; they do not apply to cases where the acquittal is on other grounds.

In *People* v. *Barrett*, 1 Johns. 66 (1806), the defendant was tried for conspiracy in defrauding Darren of his goods. The indictment did not state the place of defrauding. During the trial a juror was withdrawn. A verdict of guilty was found, and judgment arrested by the court. The defendant was tried again, pleaded *autrefois acquit*, and the plea was overruled by a divided court on the ground that the indictment was erroneous. The majority of the court held that the case fell under the rule of *Vaux's Case* (*supra*), failing to note that the acquittal in the case under their consideration was not because of the insufficiency of the indictment, as that was not discovered till after verdict. This distinction between *People* v. *Barret* and *Vaux's Case* is pointed out by Livingston, J., in his dissenting opinion, which it is submitted is the correct one in that case. He shows the danger involved in the rule as declared by the majority of the court, as it would give the district attorney power to try *ad infinitum* an acquitted man as often as some latent defect can be discovered in the indictment. But even in this case there was no acquittal on the merits. The defendant was found guilty on the merits, and was afterwards discharged in arrest of judgment because a juror had been withdrawn, and this fact may have influenced the court on the second trial to extend the rule of *Vaux's Case* beyond what Lord Hale considered its true meaning.

Therefore, no previous case had decided the point in question in *U. S.* v. *Ball;* whether an acquittal on the merits, the indictment being insufficient, was a bar to a subsequent prosecution.

In allowing the plea of former acquittal in this case, Judge Gray refers with approval to the dissenting opinion of Judge Livingston in *People* v. *Barrett* (*supra*), and says the principle of the common law is correctly stated in the Revised Statutes of Massachusetts (1836): Public Stat. Mass. 1133. This provides that where a man has been acquitted by a jury on the facts and merits, such acquittal may be pleaded in bar of a subsequent prosecution for the same offence, notwithstanding any defect in the indictment on which he was acquitted; where he is acquitted on any exception to the form or substance of the indictment he may be tried on a new indictment, notwithstanding the former acquittal. A similar provision exists in Alabama.

Under the last clause of the Massachusetts statute fall *Vaux's Case* (*supra*), and the multitude supporting it, and under the first *Ball* v. *U. S.* (*supra*), and in no better way can the distinction be made clear than by reference to that statute.

LOCAL SELF-GOVERNMENT. The case of *Rathbone* v. *Wirth*, 45 N. E. R. 15, (Oct. 27, 1896), is one of the latest attempts of the courts to determine what is included within the limits of that indefinite term "local self-government." The scope of the power resident in each community to manage its own affairs is necessarily, from its nature, somewhat variable, but it would seem that it might be approximately arrived at. A great service will have been performed when it is authoritatively settled. In the meanwhile cases like *Rathbone* v. *Wirth* are bound to arise whenever a state legislature endeavors to regulate the affairs of any particular locality.

The action in *Rathbone* v. *Wirth* was brought to obtain a injunction restraining the common council of Albany from electing police commissioners in pursuance of the provisions of chapter 427 of the Laws of 1896, passed to amend chapter 77 of the Laws of 1870 and other acts relating to the police department of that city.

The amending act provided, *inter alia*, that the police board should "consist of four police commissioners, not more than two of whom shall belong to the same political party," that "each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners," that a vacancy "shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant," and that "no person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest or the next highest representation in the common council."

The Supreme Court at special term and in the appellate division upheld the plaintiffs in their demand for an injunction, and the

defendants appealed. The judgment was affirmed, but three judges dissented.

The view of the majority, holding the act unconstitutional, was based on the ground that it offended against section 2, article 10, of the State Constitution, which provides that "all city, town and village officers whose election or appointment is not provided for by this constitution, shall . . . be appointed by such authorities thereof, as the legislature shall designate for that purpose." The court considered that when the legislature had once acted upon this constitutional provision and had determined upon the local appointing power, that power ought not to be hampered or impeded. This was thought by Gray, J., to be the chief objection to the act. It threatened in his judgment the cardinal principle of local self-government. He says: "In the local or political subdivisions of the state the people of the locality shall administer their own local affairs to the extent that that right is not restricted by some constitutional provision." The right to administer evidently includes the right to choose the local officers, either directly by election or indirectly through appointment by the local authorities.

Other grounds for holding the act unconstitutional were that it destroyed majority rule; that it deprived citizens of rights otherwise than by the law of the land or the judgment of their peers; that it provided an additional test of qualification for an office of public trust; and that even if the obnoxious clauses were struck out, the purpose for which the act was passed, namely, to obtain a non-partisan board, would be defeated.

The dissenting judges agreed with the majority of the court in considering that the clauses which limited eligibility for office to members of the two leading political parties were unconstitutional, but thought that they could be eliminated without affecting the act; there would remain, however, the provision that not more than two commissioners should belong to the same party, which would not necessitate the appointment of holders of any particular political belief, and which was similar to provisions that have been held constitutional. They also held that the legislature could prescribe the details of procedure provided it did not deprive the appointing authority of the power to act in the premises, and they denied that such was the effect of the act.

Looking at the act with regard to its advisability, it would seem that, while the object was an excellent one in some ways, the method employed was a distinct encroachment upon the rights of the locality, and the result would probably have been a deadlock in the board, it being divided as to every question upon political lines. The experience of municipal governments seems to show that more is accomplished by an active and responsible man than by a board where political considerations have weight. The street cleaning of New York furnishes an example. For these reasons, therefore, the decision appears to be a wise one.