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THE RIGHTS OF TESTAMENTARY DISPOSITION AND OF SUCCESSION TO THE ESTATES OF INTESTATES, AND LEGISLATIVE POWER OVER THEM. In the Direct Inheritance Tax cases recently argued in the Supreme Court of the United States involving the validity of an Illinois statute, and in the Supreme Court of Pennsylvania involving the validity of a statute of that state, some stress was laid by counsel for the commonwealth upon the argument that the above-mentioned rights are not "natural," but are conferred by the state, which can at its pleasure do away with them altogether, and therefore can of course take any step short of this; for example, lay any taxes, duties, or imposts upon them without regard to uniformity. This position, if it can be maintained, must cause civilized communities to look about them, and I doubt not, in many of them,

constitutional provisions amply and specifically preserving these rights will be forthcoming in large numbers. But the organic law should not be overstocked with provisions—many constitutions now contain articles which have no place in them, and are really proper subjects for legislative action. And I shall hope to be able to show that the position taken on behalf of the commonwealth is utterly untenable; and that these rights are quite as much entitled to the benefit of the constitutional safeguards already existing, as are any other rights of property or of transfer and acquisition of it.

As long as man has dwelt in civilized or semi-civilized communities, the right of succession has existed. Intestate succession antedates testamentary succession, but both have long been fully recognized rights, standing on an equal footing with other rights of acquisition and transmission of property—and the right to transmit by intestacy, or by will, is one of the ingredients of complete "dominion" over material things. If the literal sense of the word "natural" is to be taken as that in which the supporters of the doctrine that succession and testamentary disposition are not "natural" rights use it, their proposition is in strictness true. There is no such "natural" right, nor is there a natural right to transfer material things *inter vivos*, or any right of property in them apart from possession; and even coupled with possession, this "natural" right is in a very precarious condition unless accompanied with power to maintain it. The right of a dog to his bone depends strictly upon his possession of it. In the days of

> "The good old rule,
> The simple plan,
> Let each one get who has the power
> And let him keep who can"

the "natural" rights were all that men had, and amounted, practically speaking, to very little. So far back that the date is lost in the darkness of ages unillumined by history or tradition, mankind emerged from this ultra natural state, if it ever existed, and property rights, *resting upon convention*, were recognized as essential to the well being and happiness of the race. Far from being as complete, and as complex as they are to-day, they were nevertheless the *fontes et origines* of those of our own times, which are as much the result of evolution as is the horse of to-day from the three-toed horse, or whatever it is called, of untold centuries ago.

All these rights are *habitual*—"second-natural," we might say, the right of succession no more so and no less so than the others. I shall not, in the course of this paper, cite authorities for every statement that I shall make, but I shall carefully abstain from making any statements which can be successfully challenged. And I must refer those who are interested to the general and well-known authorities on jurisprudence and kindred subjects.

It will not be disputed that the individualism of to-day is, historically speaking, of recent date. In fact, it is maintained by some that the "family" is, or certainly ought to be, still the social unit. Even the "robust title" of occupancy seems to have been

by a family or group, and it is only with families or groups that very early laws concern themselves. I do not mean that every acre of land, every sheep, or other piece of property which came under man's dominion, was seized upon by all the individuals of a group—this is highly improbable, of course—but that as far as we can trace property rights in their earlier stages, they seem to have been enjoyed by groups, and not by individuals. And as noticed by Sir Henry Maine, the Russian village community of to-day very closely resembles the ancient type. (These village communities are most interestingly described in Wallace's Russia.) The head of the family was clothed with power to dispose of and generally to administer its property, but he was in no true modern sense the owner; at his death these rights and duties devolved upon his successor, as a matter of course, and the death of any head of a family was, practically speaking, a mere incident without really altering property rights. The head of such a family or community was a sort of "corporation sole," holding his large power over the goods and business of the clan *virtute officii*. While this was still true, and while on the death of any of these heads, the next in succession of his family or clan succeeded to the property he had controlled, it was not in the same way, or with the same idea that obtains in succession to-day. It was rather a succession to *rights and duties of administration*. A taking up by A, so to speak, of the general *status* of B. The "*universum jus*" of the Romans. The power to designate these successors in this sense, seems to have been exercised in India, Greece, and possibly Egypt.

It was from these beginnings that the rights of testate and intestate succession, as we know them to-day, have been gradually evolved, as the clan was disintegrated into the family, the family into the individual by the solvent processes of time. Now, if there be one thing which the courts have declared repeatedly to be within constitutional protection, it is the right of persons *sui juris* to make their own contracts, and the preservation of these contracts inviolate when made. The liberty and sacredness of contract as we know it to-day were utterly unknown in ancient times. And while, in very early stages of society, there was a rudimentary conception of contracts, there was no intervention of the law to compel their performance, to say nothing of a denial of the right of the community to violate them. It jumps at the eyes, that contracts as we know and protect them to-day, are the concomitants of individualism, of a state of society evolved from but wholly unlike that of early ages. And likewise, the "property" of which a man is not to be deprived, etc., had no existence—I mean, of course, the "*right* of property"—the "dominion." As has already been said, early ownership or possession, enjoyment of things material, was by groups. "Ancient Law," says Maine, "knows next to nothing of individuals."

In short, so far as history can enlighten us, ownership never was usufructuary merely, and on the other hand it has become *individual*

comparatively late in the day. Transfer *inter vivos* by individuals is quite as late as succession after death, and both have been for many centuries before our modern constitutional law, ingredients of the absolute right of property we so fully recognize, subject only to the right of the state for public purposes. It is, therefore, the rankest absurdity to distinguish between the right of testate and intestate succession, and other property rights, on the ground that the latter are more "natural" and therefore more indefeasible.

Can it be argued that the provisions in the Constitution of the United States forbidding Congress or the States to deprive a man of his property without due process of law, and the similar provisions in the various State constitutions, still leave the door open for the reduction of all property rights to a mere usufruct? Such constitutional provisions would be almost idle, if that were so. Deprive a man of the right to dispose of his property, and you have well-nigh destroyed its value. And how is the right to "acquire property" to be protected (an expression in the Pennsylvania Constitution) if others may be deprived of the right of parting with it? So long as the right of individual property is recognized as within the protection of the constitution, so long is it impossible in any just view for the law-making agencies of the government to reduce that right to mere usufruct, or, indeed, possessory right; for if the legistature can take away succession they can take away transfers *inter vivos*. This surely would not be held to be due process of law. As has been strongly and convincingly said by Mr. Justice Matthews, *Hurtado* v. *California*, 110 U. S. 516, "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power;" and the same thing had been said long before by Mr. Webster, *arguendo*, in the Dartmouth College case. And, again, Mr. Justice Miller, in *Loan Assoc.* v. *Topeka*, 20 Wall. 655, said "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, a government which held the lives, the liberty and the property of its citizens subject at all times to absolute disposition and unlimited control of even the most democratic depositary of power, is after all but a despotism" And the right of the legislature to do away altogether with the succession, and escheat a man's whole property at the time of his death, is expressly denied, *obiter*, in *Minot* v. *Winthrop*, 161 Mass. 113. No authority should be required for the proposition that confiscation of property, either at a man's death or during his life, as soon as he parts with it voluntarily or involuntarily, is abhorrent to our constitutional principles, and destructive of the very foundations upon which our modern social structure is built. That great jurist, Mr. Chief Justice Marshall, has well said in *Fletcher* v. *Peck*, 6 Cranch. 87: "It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, and if any be prescribed, where are they to be found if the property of an individual,

fairly and honestly acquired, may be seized without compensation?"

In the extremely able brief of argument for the appellants in the Illinois cases in the Supreme Court of the United States, which it has been my privilege to read, and which would make this article a work of supererogation if it were accessible to the profession at large, Messrs. Harrison, Guthrie and Prussing, say: "When the question is presented as to whether or not a state has the absolute, unrestrained power to escheat or confiscate the property of a decedent, the court will have no difficulty in denying the existence of any such arbitrary and despotic power." And Mr. Guthrie said, *arguendo*, "The position of our adversaries is that a state legislature has absolute power to deny the right of inheritance and of testamentary disposition, and escheat whatever private property a man may have accumulated as a result of a life's labor or a life's economy. That such a policy, that the possibility of the exercise of such a power, would take away all incentive to labor, shake society to its very foundations, and destroy our civilizations, cannot be doubted for a moment. Is there such legislative power in any of the United States? Can it be asserted that the legislatures of the states can deprive us of rights which have been recognized and enjoyed by our race for centuries before the Continent was discovered? There is not a civilized, if indeed there be a barbarous, state in the world to-day that does not recognize the rights of inheritance and of testamentary disposition . . . It is a right exercised everywhere subject only to the limitation which we all recognize and concede, that the government may step in on grounds of public policy and ordain that natural heirs shall not be disinherited or that property shall not pass to aliens or to foreign corporations, or to such corporations as it deems should not be allowed to hold or accumulate property. The state in making such regulations derives its power not from the idea that the property escheats and belongs of right to it on the death of the decedent, nor from any notion that the ownership is in the state, but from that *suprema lex* which justifies every society in reasonably protecting itself according to its public policy—a power it may exercise as to the property of the living as well as of the dead." This could not be better put. It is full and completely unanswerable. Mr. Guthrie states that his opponents urge that he has shown no "authority"—*i. e.*, adjudicated case—for the proposition that these rights are fundamental and natural, and beyond the power of the legislature to deny, but only cites historians of the law. His reply that this is for the obvious reason that no legislature has ever attempted to deny the right and that, in the words of Judge Patterson in *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304, 310, "Such an act would be a monster in legislation, and shock all mankind" is quite sufficient. But the taunt was a clinching argument against the taunter. If *legal historians* are not the best authorities as to the origin and fundamental character of rights, who are? Certainly not judges who may at this late date arbitrarily and in defiance of

history assert that as a *fact* which is not a fact, and this is a good illustration of the prevalent "case-law." How few to-day deserve the compliment paid by the late Judge Cadwalader to Andrew Hamilton, the great lawyer of Revolutionary days, when he said that Hamilton asserted the law to be thus and so from principles, and cited cases as illustrations!

The whole argument on the other side is a dish of false premises garnished by a *non sequitur* or two. It is a false premise that these rights are not as "natural" or "fundamental" as other property rights. Conceding, however, these premises, it is a *non sequitur* that the legislature can destroy them or abridge them unequally. Again, conceding that the legislature can destroy or abridge them unequally—a false premise—it is a *non sequitur* that it can pass a law of escheat under the guise of a *revenue* or *tax* law. In short, the whole contention is, to use the words of Austin on another subject, "an absurdity which has no example, and which no example can extenuate. *Lucius S. Landreth.*

Philadelphia, March, 1898.

INTERNATIONAL LAW; HUSBAND AND WIFE; FRENCH RULE OF COMMUNITY GOODS. *DeNicols* v. *Cuslier*, 14 Law Times Rep. 206 (Feb. 3, 1898), raises an interesting and most novel question. Two citizens of France intermarried at Paris in 1854. At the marriage they were asked, as the French law requires, whether they had made any marriage contract, and they declared that they had not, so that, under the French law, community of goods obtained between them. In 1863 the couple removed to England and the husband became a naturalized Englishman. He amassed a considerable fortune, and at his death in 1897 the question arose as to what passed under the will.

Kekewich, J., after stating that there were no decisions but only *dicta* on the question, said: "These spouses were French people and they intermarried in France. It was open to them to marry according to one or more regulations affecting matrimonial property—property which they might acquire during coverture. They had some choice in the matter. They might have elected to marry according to the rule as to community of goods, a rule that was applicable to their proprietary rights in the absence of any express election to the contrary; and that was, so far as was known, what took place. . . ."

Since, then, they married under the community of goods rule, there was nothing about their change in domicile to alter the rule concerning their property. At no time was there a surrender on the part of the wife of any of the rights to which she was entitled under the matrimonial contract. Nor was there any law to force her to such a surrender. Hence the court held that the husband by his will disposed only of such property as was properly his, and the wife's rights were unaffected.

BILL OF EXCHANGE; NOTICE OF DISHONOR. The Court of Appeal of England has decided in the case of *Fielding & Co.* v. *Corry et al.*, 1 Q. B. 268 (Nov. 13, 1897), that in giving notice of dishonor, provided notice reach the defendant in time, it is immaterial that there is a break in the chain of notices. In reaching this conclusion the court disregarded precedents and relied on the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61) s. 49, sub-ss. 12 (b.), 13. A very strong dissenting opinion is filed by Collins, L. J., in which the authorities are stated and some trenchant criticisms given of the decision of the majority. He also points out that even under the Act of 1882 the notice was ineffective. The question arose under the following state of facts: A bill of exchange had been left for collection with the Cardiff branch of the Gloucester County Bank. It was forwarded to the L. & W. Bank, in London, by whom it was presented for payment, and was dishonored. The notice of dishonor was sent by mistake to the wrong branch of the Gloucester County Bank. On the next day, the mistake having been discovered, the London Bank telegraphed notice of dishonor to the branch from which they had received the bill. All subsequent notices, including that to the defendant were sent in due time. The court held that sufficient notice of dishonor had been sent by the London Bank to comply with the provisions of the Act, viz.: (Sub-s. 5) Notice may be given in writing or by personal communication and in any terms which sufficiently identify the bill and intimate that it has been dishonored by non-acceptance or non-payment. (Sub-s. 12). Notice may be given as soon as the bill is dishonored, and must be given within a reasonable time afterward.

The court in its opinion denied any intention of overruling *Clode* v. *Bayley*, 12 M. & W. 51 (1843); *Prince* v. *Oriental Bank Corporation*, 3 App. Cas. 325 (1875); and the cases which hold that there must be no break in the chain of notices, but rested the decision upon the ground that "under the circumstances it was impossible to say that there was a failure in one of the links of the chain of notices."

It has been held that if the fact of laches on the part of the holder of the bill is established, prior endorsers are discharged: *Smith* v. *Mullett*, 2 Camp. 208 (1809); *Turner* v. *Leech*, 4 B. & A. 451 (1821); and that where a bank is giving notice, each of its branches is to be considered a separate holder: *Clode* v. *Bayley* (*supra*).

MALICE IN PREVENTION OF CONTRACT; "CONSPIRACY;" INJUNCTION; HOPKINS V. OXLEY STAVE CO; ALLEN V. FLOOD. May A with impunity advise B not to enter into a contract with C? There seems to be doubt of this in two cases. First, when A joins with others in his action. The "advice" by combination becomes a "conspiracy" and may be enjoined before its object is accomplished, or may be punished afterwards. Second, when A is actuated not by an honest conviction as to the good results of his

advice, but by wicked and malicious motives. His advice, then, becomes "oppression of third persons" or "unwarranted interference in the conduct of another's business" and is punishable as such. The first of these "rules" has recently been enforced in the United States; in England the second has been denied.

In *Hopkins* v. *Oxley Stave Co.*, 83 Fed. 912 (U. S. C. C. A., Eighth Circuit, November, 1897), a Cooper's Union was fighting the use of certain barrel hooping machinery, and in combination with another labor union proposed to notify the plaintiff's customers and other persons not to purchase machine-hooped barrels, and to induce members of labor organizations generally and their sympathizers to refuse to buy provisions or other commodities which were packed in such barrels. The majority of the court pronounced this an unlawful conspiracy and confirmed the Circuit Court injunction.

There was no evidence of intended violence, yet the court, per Circuit Judge Thayer, uses this rather remarkable language in reference to it:

"It may be conceded that, when the defendants entered into the combination in question, they had no present intention of resorting to actual violence for the purpose of enforcing their demands; but *it is manifest that, by concerted action, force of numbers and by exciting the fears of the timid, they did intend to compel many persons to submit to the dictation of others in the management of their private business affairs*" (italics ours).

The court was apparently influenced by the fact that the "conspiracy" was directed toward an object unreasonable and opposed to public policy, being intended to deprive the public of the benefits of labor-saving machinery. Says the majority opinion:

"If a combination to that end is pronounced lawful, it follows, of course, that combinations may be organized for the purpose of preventing the use of harvesters, threshers, steam looms and printing presses, typesetting machines, sewing machines and a thousand other inventions which have added immeasurably to the productive power of human labor and the comfort and welfare of mankind" (p. 921).

It follows, then, as nearly as can be gathered from this language, that equity interference with such a combination is largely because the equity judge considers the workmen to be unreasonable in their demands, and the irresistible inference is suggested that an injunction may or may not lie, according as the merits of the particular controversy appear to him in whose power it is to issue the injunction. Conclusions such as this lead others than populists and labor agitators to declare that "government by injunction" substitutes for settled principles of law the whims of the Eastern cadi, for the Anglo-Saxon trial by jury the ukase of a Federal judge issued on the *ex parte* representations of a corporation attorney.

The words of Lord Herschell in *Allen* v. *Flood* [1898], A. C. 1, 118, are of application here: "I can imagine no greater danger to

the community than that a jury should be at liberty to impose the penalty of paying damages for acts which are otherwise lawful, because they choose without any legal definition of the term to say that they are malicious. No one would know what his rights were. The result would be to put all our actions at the mercy of a particular tribunal whose view of their propriety might differ from our own." And if it would be dangerous for a jury to have such power, how much more dangerous for the judge without the jury to have the punishment of such actions by writs of injunction and commitments for contempt. This, no doubt, would be the conclusion of Circuit Judge Caldwell, who dissented in *Hopkins* v. *Oxley Stave Co.* His opinion is one of the most unique and able we have seen for many a day, and we should like to quote from it at length if space allowed. He refers to the historic cases of William Penn, the Seven Bishops and others to show "that it was through the good sense, courage and love of liberty of the sturdy English juries who stood out against the judges, that the right of the people to assemble for lawful purposes, and the right to address them when they were assembled, the right of free speech, and the freedom of the press, and the right of petition for the redress of grievances, were secured to the English people" (p. 928). With reference to the theory that combination *per se* makes a lawful act unlawful, Judge Caldwell says: "Under this asserted rule, what a man, when acting singly, may lawfully do, he may not do in concert with his neighbor . . . What each individual member of a labor organization may lawfully do, acting singly, becomes an unlawful conspiracy when done by them collectively. Singly, they may boycott; collectively, they cannot. The individual boycott is lawful, because it can accomplish little or nothing. The collective boycott is unlawful, because it might accomplish something." And later the judge remarks . . . "All great improvements in social conditions [are] achieved by the organization and collective action of men."

The case of *Allen* v. *Flood* [1898], A. C. 1 (Dec. 14, 1897), did not involve directly the question of combination or conspiracy, as several of the judges were careful to say, though the questions discussed were very similar to those of the Stave Company case, and the decision in *Temperton* v. *Russell* [1893], 1 Q. B. 715, which was a case of combination, was expressly disapproved. In *Temperton* v. *Russell* a trades union committee, by threatening to call out their employes, induced third parties not to enter into contracts with the plaintiff. It was held that the plaintiff had a right of action against the members of the committee for maliciously conspiring to injure him by preventing persons from having dealings with him. The decision was largely founded on *Bowen* v. *Hall*, 6 Q. B. D. 333 (1881), and *Lumley* v. *Gye*, 2 E & B. 216 (1853).

All these cases must now be regarded as very much shaken by *Allen* v. *Flood*. In the latter case, two shipwrights, Flood and

Taylor, who had formerly been guilty of working on both wood and iron, a practice opposed by the trades unions, were discharged by procurement of Allen, a "walking delegate" of the Boilermakers' Union. The jury found that Allen had "maliciously" prevented these shipwrights from obtaining further employment, and thus from pursuing their occupation, and all the courts up to the House of Lords held, with very little dissent, that Flood had a right of action. There was no question of breach of contract, as Flood was hired subject to discharge at any time, but the lower courts held with *Temperton* v. *Russell* "that it is immaterial that the act induced is not the breach of a contract but only the not entering into a contract, provided that the motive of desiring to injure the plaintiff, or to benefit the defendant at the expense of the plaintiff, is present."

At the hearing before the Lords, eight of Her Majesty's judges were invited to sit, and assist by their opinion the determination of the Lords. Six of the eight were for affirming the lower court, but the Lords by a very large majority reversed it. The reasons adduced by those judges in favor of affirmance may be given in the words "every one has a right to the free pursuit of his own occupation." Lord Herschell sums the matter up in this way: "I do not doubt that everyone has a right to pursue his trade or employment without 'molestation' or 'obstruction,' *if those terms are used to imply some act in* itself *wrongful.*" The noble and learned lord points out that most of the cases cited for plaintiff involve nuisance, trespass, violence, obstruction or some other act which would be wrongful without reference to its effect on the plantiff's trade or occupation. If B fires guns by A's decoy, or overturns by cannon shot a canoe load of negroes going to A's ship, or frightens back to their homes scholars on their way to A's school, he will be liable, though A keeps the decoy not for trade, but for sport, though the vessel is a pleasure yacht and not a trading ship, though the building from which are frightened away those proceeding thither on the public highroad, should be not a school but only a dwelling-house.

Lord Davey thus disposes of the question of malice: "An employer may discharge a workman (with whom he has no contract) or may refuse to employ one, from the most mistaken, capricious, malicious or morally reprehensible motives that can be conceived, but the workman has no right of action against him. It seems to me strange that the principal who does the act is under no liability, but the accessory who has advised him to do so, without any otherwise wrongful act, is under liability."

Lord Macnaghten says that it is urged that disapproval of the decisions in *Temperton* v. *Russell* and kindred cases "will be attended with dangerous consequences as extending the power of trades unions or combinations beyond the limits which these cases laid down. I am not insensible of the truth of the observation that a certain amount of restraint which these cases introduced will

be removed . . . If the force of combination should be harshly or oppressively used—if it should be used in circumstances in which right-minded men should deplore its use—it must be observed that those against whom combination is so employed have precisely the same liberty of action for resisting oppressive measures, and for causing those who use them to desist from that course of action."

This brings us almost exactly to the question discussed in our former case—*Hopkins* v. *Oxley Stave Co.* It seems that the exercise of the wide judicial discretion employed in the American case might, to advantage, have been a little circumscribed by some such considerations as those advanced by Lord Macnaghten. Another quotation from Lord Herschell will enforce what we mean: "The truth is, this suggested test makes men's responsibility for their actions depend on the fluctuating opinions of the tribunal, before whom the case may chance to come, as to what a right-minded man ought or ought not to do in pursuing his own interests."

GOVERNMENT CONTROL OF TRANSPORTATION CHARGES; THE NEBRASKA FREIGHT TAX CASE. In *Smyth* v. *Ames*, an appeal from the Circuit Court of the United States for the District of Nebraska, decided March 7, 1898, the United States Supreme Court held the Nebraska Maximum Freight Tax unconstitutional. Mr. Justice Harlan, delivering the opinion of the court said: "A state enactment . . . establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment." In order to determine whether any given rates are or are not such as to allow the carrier reasonable compensation, the basis of calculation must be "the fair value of the property" used by the corporation. "And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, *the amount and market value of its bonds and stock* (italics ours), the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case." Advocates of the kind of legislation here pronounced void have pointed out that the method of calculating which takes into account "the market value of the bonds and stock" involves reasoning in a circle, because such market value depends upon an earning capacity determined by the rates charged—the very thing it is proposed to restrict. These advocates also occupy themselves in wondering what rates the legislature *can* prescribe, since any

imaginable tariff must necessarily fail to give a net profit to some road. They ask whether, under this decision, it would not be to the advantage of the wealthier railways to keep one road always on the verge of bankruptcy, so as to require high rates for that road and thus for all? Or, they ask, is it supposed that a separate tariff could be established for each railway, based on "what the traffic will bear," the maximum rates being such as to allow a comfortable profit on more or less watered stock? Finally, they ask, when the decision is boiled down to its real essence, does it not mean that the legislature may decide whether rates shall be regulated, but that the courts must do the regulating? And at this juncture they quote from Chief Justice Waite, in *Munn* v. *Illinois*, 94 U. S. 113, 133, 134 (1876), "... it has been customary, from time immemorial, for the legislature to declare what shall be a reasonable compensation ... We know that this is a power which may be abused, but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

On the other hand, it is asserted that capital invested in enterprises of the greatest moment, not only to particular states but to the country at large, cannot be exposed to the caprices of populistic legislatures in Western communities. These legislatures may pass laws commanding the railways to haul without compensation, or practically that, and thus rob their owners as effectually as Richard I. did the Jews.

The question is most puzzling. In 1890 Chairman Crocker, of the Committee on Railway Legislation, speaking to the second annual convention of railroad commissioners held at Washington, wondered "whether it is or is not true that the states, by allowing their railroad corporations to take part in interstate commerce, have thereby parted with all but a shadow of control over the subjects of their creation ...," and still the wonder grows. It is possible that the end will come through general corporate bankruptcy followed by state ownership of the roads. As Mr. A. G. Warner says (Railroad Problems in the West, VI. Pol. Sc. Q. 89 Mar. 1891). "It does not strike a legislator with very profound awe to tell him that a certain law will drive the roads into bankruptcy. He has seen many roads in that condition in consequence of the whims or selfish interests of their managers, and he fails to be appalled at the idea that a few more of them may become insolvent through his attempt to act in the interests of the general public."

STATUTE LAW REVISION IN ENGLAND. A new edition of the revised statutes of England has just been completed. It is in twelve volumes and takes the place of ninety-one volumes of the former edition. The Lord Chancellor recently stated the steps taken in such revisions. "The work is done, in the first instance, by the most competent and experienced draftsman we can obtain, and his work is checked by a second draftsman. The drafts are

then referred to every department which appears to be affected by any of the repeals proposed, and are afterwards supervised by the Government draftsman. They then come before the Statute Law Committee, consisting of persons of the greatest skill and experience in departmental matters. The Bill is finally submitted to the Lord Chancellor of the day, who satisfies himself respecting it and introduces it to the House. During its passage it is subjected to the special ordeal of a Joint Committee of both Houses, comprising what I may be allowed to call the highest authorities in either House on the questions likely to be raised in a measure of this kind. It is the business of the Joint Committee to certify that no amendment of the law is contained in any Bill referred to it." The Revision Bill is in the hands of that Committee.

ANTI-TICKET SCALPER'S LAW IN NEW YORK. In view of the bill now pending before Congress in reference to ticket-scalping, it is interesting to note the opinion of a New York court on the New York law on the same subject.

Chapter 506 of the laws of 1897, known as the Anti-Ticket Scalper's Law, forbids the selling of any tickets except by the authorized agents of the owners or consignees of vessels or of railroad companies upon which the transportation purports to be sold, and requests written authority from a transportation company in order to constitute an agent. It is, in form, an amendment of the Penal Code, offences against it being punishable by imprisonment in a state prison.

Under this law one Tyroler was arrested for selling a ticket from New York to Norfolk, Va., without being a duly authorized agent. *Habeas corpus* was refused, and from that decision the relator appealed. (*The People ex rel. Tyrole* v. *the Warden of the City Prison, etc.*, Mo. Decided Feb. 25, 1898.) The relator admitted he was not an authorized agent of the companies over which the ticket was sold, but he contended that the act was unconstitutional in that it violated §§ 1 and 6, art. i, of the Constitution of New York, and § 1, art. i, of the Constitution of the United States.

Mr. Justice Patterson held that the act did not contravene any of the constitutional provisions invoked. In the course of the opinion he said: "It will scarcely be questioned that it is within the power of the legislature of the state to pass laws to prevent, within its territory, the commission of frauds upon passengers; and it cannot be denied that the particular provisions of the chapter referred to are directed to that end."

. . . . . .

"The statute does not infringe any of the provisions of the Constitution of the United States, with reference to the deprivation of a person of his liberty or property, without due process of law; nor deny to him the equal protection of the law secured by that Constitution. This act does not deprive a person purchasing a

railroad ticket from a carrier of his special property in that ticket; nor does it impair the obligation of a contract, for the ticket is not the contract of carriage, nor does it confer an exclusive privilege upon any class of persons . . . Nor is there any exclusive privilege accorded by this act in the authorization of agents to sell tickets. There is no discrimination against any class of citizens; the provision that the corporation shall sell only through its agents, is merely a declaration that the corporation itself shall sell its tickets . . . Tickets can only be sold by individuals acting as the agents of the corporations or other carriers, and it is no discrimination causing an unequal operation of the law for the corporate body to select the persons who shall act as its agents . . . There is no monopoly in the business of selling tickets accorded by that feature of the act."

The conclusion is that the purpose and scope of the law are within the police power of the state for the protection of persons seeking transportation, and that the law is free from the constitutional objection taken to it.

(NOTE—We are indebted for the report of this case to the New York *Evening Post.*)

PRINCIPAL AND BAIL; POWER OF BAIL; OFFICE OF BAIL PIECE. The right of bail to remove principal from one state to another has recently been considered and sustained by the Circuit Court of the United States for the Western District of Pennsylvania. One who had been arrested upon a capias in an action of trespass, brought in the Court of Common Pleas of Allegheny County, gave bond in the usual condition, but, after judgment against him in that action, did not pay or surrender. His bail took out a bail piece, duly certified by the judge and prothonotary, and by endorsement authorized the respondent in the present writ to seize and surrender the defendant. In pursuance of such authority the respondent took the petitioner into custody at St. Louis, in the State of Missouri, and by force brought him to Pittsburgh, in the State of Pennsylvania, for delivery to the sheriff. The defendant sued out a writ of *habeas corpus* in the Federal Court, alleging that he was a citizen of Missouri; that no legal proceedings, if any such could have been had, were begun to warrant any such arrest in the State of Missouri, and that contrary to Article V, of the Constitution of the United States, he was deprived of his liberty without due process of law. The opinion of the Court, Buffington, J., was as follows:

"Of late years we have grown so accustomed to the proceedings by requisition that we have come to regard it as the only means by which a person can be arrested and removed from one state to another. An examination of the authorities, state aud federal, shows, however, that under certain circumstances bail have the right to arrest their principals wherever they find them and remove them to the forum from which they have been released and to

which they have obligated themselves to surrender. By these authorities, to which we shall refer, it would seem settled that when one is arrested and bail is given, such principal is regarded as delivered into the custody of such bail; that the bail has the right to arrest or take the principal into custody at any time or place in order to surrender him; that such arrest is not made by virtue of the process of a court, but is the exercise of a right arising from the relation between the parties; that a bail-piece is not the authority for such an arrest, but is simply evidence of the relationship between the parties. Such being the distinction clearly drawn in the decisions, it will at once be seen that there is a fundamental difference between the right of arrest by bail, and arrest under warrant where such right to arrest is based upon a court process, which *per se* can have no extra-jurisdictional power or efficacy. The latter right depends upon the process of the court which issued it, and necessarily such process confers no power outside that jurisdiction. The former arrest—viz., of principal by bail—is based upon the relationship which the parties have established between themselves, and consequently, as between the parties, is not confined to any locality or jurisdiction." The court, after reviewing a number of cases, gave decisive effect to *Taylor* v. *Taintor*, 16 Wallace 371, and remanded the petitioner to the custody of the respondent. *In re Petition of Von der Ahe*, 7 Pa. Dist. Rep. 132. *John W. Patton.*

SLEEPING CAR COMPANY; LIABILITY FOR LOSS OF PASSENGERS' BAGGAGE. In *Belden* v. *Pull. Pal. Car Co.*, 43 S.W. 22 (Court of Civil Appeals of Texas, Nov. 17, 1897), plaintiff had taken passage on defendant's sleeping car and entered his berth, leaving his valise by the side of it, as is customary with travellers. When he arose the next morning about two hours after the train had arrived at its destination, the valise was gone. Plaintiff brought this action against the Pullman Palace Car Company for its value.

It was shown on trial that defendant had two servants in the car during the night in order that none of the passengers' effects might be stolen; that they watched in turn; that when one of them relieved the other about 3.30 A. M. (two hours before Austin was reached) the valise was in its place; that no one left the car before it reached Austin; that several passengers left before plaintiff, taking with them their valises; and that defendant's servants could not tell whether one of them took plaintiff's valise or not.

On these facts the court held that the company was not liable for the loss of the valise, applying the rule that although it was defendant's duty to use reasonable care in guarding the property of passengers from thieves while they slept, yet that high degree of care applicable to carriers generally did not apply to a sleeping car company. "Circumstances might arise which would call for the exercise of more than usual or reasonable diligence on the part of the employes in guarding the effects of the sleeping passengers.

But there was nothing in the condition and circumstances existing on the coach when at Austin which made it the duty of the servants to inspect and identify the baggage which the passengers carried with them. It is simply a question whether the servants exercised reasonable care in not observing the taking of the valise under the circumstances then existing, and this, we conclude, could be properly resolved in the affirmative from the evidence." Several previous cases in Texas were to the same effect: *Car Co.* v. *Pollock*, 69 Tex. 121 (1887); *Car Co.* v. *Matthews*, 74 Tex. 654 (1889); *Stevenson* v. *Pull. Pal. Car Co.*, 26 S. W. 112 (1894).

The view has been advanced that the liability of a sleeping car company for the baggage of its passengers is that of an innkeeper for personal effects. This was held in the case of *Pull. Pal. Car Co.* v. *Love*, 28 Neb. 239 (1889), and this position was supported by an ably written article by Hon. Samuel Maxwell, in the *American Law Review*, Vol. XXVII, p. 24. However, it is difficult to support this contention upon principle, since none of the recognized incidents of an innkeeper's situation are to be found in the case of a sleeping car company, such as a lien on baggage for the charges, etc. It may be definitely said that, at the present date, the position of the Nebraska court is untenable, and that to support a recovery from the sleeping car company negligence on the part of the latter's servants must be proven. See *Carpenter* v. *N. Y., N. H. and Hart. R. R.*, 124 N. Y. 53 (1891); *Pull. Pal. Car Co.* v. *Gavin*, 93 Tenn. 53 (1893); *Pull. Pal. Car Co.* v. *Smith*, 73 Ill. 360 (1894); Hutchinson on Carriers, sec. 617 d.

Negligence will not be presumed on the part of the sleeping car company from the mere loss of the baggage; there must be a *prima facie* case of negligence on the part of the company's employes: *Tracy* v. *Pull. Pal. Car. Co.*, 67 How Pr. 154 N. Y. (1884); *Pull. Pal. Car. Co.* v. *Gaylord*, 6 Ky. Law Rep. 279 (1884).

However, the sleeping car company must have a watchman in the car to protect the valuables of the passengers, or else the burden of proof will be upon it to show that it was not negligent. This rule was first laid down by a *per curiam* decision of the Supreme Court of Pennsylvania (*Pull. Pal. Car Co.* v. *Gardner*, 3 Pennyp. 78, 1882), and has been consistently followed. The court said: "A duty rests on the company to provide reasonable care and precaution against the valuables of a passenger being stolen from his bed or from the clothes on his person . . . . Unless a watchman is kept constantly in view of the centre aisle of the car, larceny from a sleeping passenger may be committed without the thief being detected in the act." See in accord with this view *Woodruff Sleep. Car Co.* v. *Diehl*, 84 Ind. 474 (1882); *Lewis* v. *N. Y. Sleep. Car Co*, 143 Mass. 267 (1887); *Root* v. *N. Y. Cent. Sleep. Car Co.*, 28 Mo. App. 199 (1888); *Wilson* v. *B. & O. R. R.*, 32 Mo. App. 682 (1889); *Carpenter* v. *N. Y. R. R.*, 124 N. Y. 53 (1891).

THE INHERITANCE TAX IN ENGLAND. The rather extravagant language of brief of appellant, in the Illinois Direct Inheritance Case, quoted by Mr. Landreth in this number of the LAW REGISTER, to the effect "that such a policy, that the possibility of the exercise of such a power, [as that of taxing inheritances] would take away all incentive to labor, shake society to its very foundations, and destroy our civilization," leads us to remember that England is a country the civilization of which by good judges is considered to be in many particulars almost as high as our own, and to be of a solidity and an "unshakenness" that will bear a good deal of comparison with ours. In that country, the home of Adam Smith, Richard Cobden, and Herbert Spencer, whose free trade doctrines are thought by orthodox Pennsylvanians to be individualism run mad, not only is there an inheritance tax, but O populism! O socialism! a *graduated* inheritance tax! The scale (see Vol. 3 Chitty's English Statutes, 1894, Title Death Duties, p. 131) provides for the payment of a tax of 1 per cent. on an estate of £100, of 4 per cent. on £10,000, 5 per cent. on £50,000 and so on up to 8 per cent. on £1,000,000. This means that an estate of $10,000,000 or $12,000,000, such as some we have in Philadelphia, would have to pay nearly a *million dollars* to the state. And the British Constitution still endures.

BURCHINELL V. BENNETT, 52 Pac. (Colo.) 51, Jan. 10, 1898. In this case the puzzling "trust-fund" doctrine has again come to the front under very interesting circumstances. The San Francisco Tea Company, doing business in Denver, had as its board of directors Mrs. Donnelly, her daughter, and her son-in-law, and was indebted to the first-mentioned on a promissory note for $5000, the consideration for which was not stated in the case. The concern getting into difficulties, Mrs. Donnelly transferred all her stock and resigned her directorship. Immediately afterwards she received a mortgage of all the stock of the company to secure the note held by her, and went into complete possession and control of the business. To use the language of the learned court, "*on these circumstances alone, and without any other proof of fraud or bad faith*, the *transaction is attacked*" by the other creditors. The mortgaged property was levied on, and in an action by Mrs. Donnelly to recover possession, the lower court rendered judgment for the plaintiff. The court of appeals, in affirming the judgment, repudiated the "trust fund" doctrine, and ignored totally the circumstances under which the mortgage was created. In deciding that a corporation may deal with its assets like an individual, reliance was placed on four cases decided outside of Colorado. *Fogg* v. *Blair*, 133 U. S. 534 (1889), did not raise a question of preferences. *Henderson* v. *Ind. Trust Co.*, 143 Ind. 561 (1895), conceded the right of a corporation to prefer its *creditors*. *Gottlieb* v. *Miller*, 154 Ill. 44 (1895), expressly denies the right of directors to gain any advantage through a preference, and the last case relied on,

Richardson's Ex'r v. *Green*, 133 U. S. 30 (1889), deals with the right of an officer of a corporation to enforce bonds obtained by him before insolvency, as follows: "A court of equity will refuse to lend its aid to their enforcement unless satisfied that the transaction was entered into in good faith, with a view to the benefit of the company, as well as of its creditors, and not solely with a view to his own benefit." These citations are not all fully in harmony with the decision of the principal case, for while Mrs. Donnelly was not at the time either a stockholder or director, yet in the language of the court she had ceased to be "just prior to the execution of the security" The decision might have been placed on entirely safe ground if the court had avowedly adopted the English rule as laid down *In re Wincham Ship-Building, Etc., Co.*, 9 Ch. Div. 309 (1878), where the preference of directors is fully approved, but that it did not intend to adopt the English rule is shown by its recognition of the fact that a preference would be invalid if "there be some element of bad faith or fraudulent preference, or the *transaction is between persons who sustain a fiduciary relation to the company* under circumstances which ought to preclude them from asserting the preference, and who have taken advantage of the situation to their own benefit." But Mrs. Donnelly's entire good faith and want of fiduciary relation were never questioned—were not even noticed by this court. For further discussions and citations of cases concerning the "trust fund" doctrine, see THE AMERICAN LAW REGISTER AND REVIEW for February 1893, p. 175; May 1894, p. 402; and July 1895, p. 448.