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NOTES.

CONSTITUTIONALITY OF STATUTES REQUIRING CORPORATIONS TO PAY EMPLOYES' WAGES IN MONEY.

The so-called "Store Order," or "Truck" System means the payment of wages otherwise than in lawful money. As all exchange springs primarily from barter, or the exchange of one commodity for another, independent of any circulating monetary medium, theoretically there would seem to be no economic objection to an employer's giving goods rather than money in return for an employee's services.[1] Practically, however, the great economic advantage possessed by the large labor-employing agents over their employees may result in forcing the em-

[1] See *Fraier* v. *People*, 141 Ill. 171 at p. — (1892.)

ployee to asquiesce in whatever terms of employment the employer may dictate, in order that the necessary means of subsistence may be procured, and in compelling the employee to take in payment for his services goods of an inferior quality at a high price. The system may also have the effect of limiting the variety of commodities which the employee might enjoy to those supplied by the "Company Store," since it may cut off his only source of money with which to purchase in the markets of the world such articles as his desires or necessities may prompt him to acquire.

It is to this objectionable phase of the system that hostile legislation has been directed, and that the situation is not a new one may be observed from the fact that as early as 1464 the English Parliament attempted to cope with it.[2] Many other acts were passed in the three and a half centuries following the 4 Edward IV,[3] and finally these miscellaneous statutes were repealed and their provisions embraced and re-enacted in a statute passed at the beginning of the reign of William IV, which prohibited miners of coal, salt, etc., and manufacturers of iron, etc., from paying their employees in anything but lawful money of the realm.[4]

The system has also flourished in the United States, and its alleged abuses have, as in England, called forth inimical legislation. But while in England the transcendent power of parliament has given efficacy to this legislation, in this country its effect has been modified by the constitutional restrictions of a state's power to abridge personal rights and liberty of contract contained in the Fourteenth Amendment of the Constitution of the United States. These restrictions have resulted in a contrariety of judicial opinion in the construction of similar statutes.

Indiana has sustained an act requiring mine owners to pay employees every two weeks, and declaring unlawful every contract by which the right to receive wages otherwise than in money was waived, the legislature having power thus to enact in order to protect and maintain the lawful money of the realm.[5] West Virginia has sustained an act requiring mining

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[2] 4 Edw. IV., C. 1 (1464); cited in *State* v. *Coal Co.*, 36 W. Va. 802, at p. 833 (1892), and in *State* v. *Loomis*, 115 Mo. 307, at p. 325 (1893).

[3] Acts enumerated in *State* v. *Coal Co.* 36 W. Va. 802, at p. 833 (*supra*).

[4] Truck Act, 1 and 2 Wm. IV, CC. 36, 37; 22 St. at Large, 484, 490 (1830-31); cited in *State* v. *Coal Co.* 36 W. Va. 802, at p. 832 (*supra*).

[5] *Hancock* v. *Yaden*, 121 Ind. 366 (1889).

and other corporations to pay employees in lawful money only, on the ground that corporations are licensees of the state, possessing peculiar privileges, and hence, subject to general supervision and regulation by the sovereign power;[6] but in two earlier cases the same state court declared invalid a statute which prohibited manufacturing and mining companies from selling goods to employees at a greater per cent. profit than to others,[7] and which prohibited payment in store orders and the like,[8] on the ground that such legislation was an unwarrantable interference with the liberty to contract and that it was class legislation. Tennessee sustained a store order act applying to mining companies, and its action has been affirmed by the United States Supreme Court, holding it to be a valid exercise of the police power, regardless of the reserve power to alter, amend or repeal the charter of a corporation.[9] A case recently decided by the Supreme Court of Vermont[10] sustains a statute providing for payment of wages in money only, under the reserve power, but intimates that exclusive of this power such legislation would be sustainable as a valid police regulation.

On the other hand, Pennsylvania flatly refuses to accept this doctrine, and holds that an act requiring mining and manufacturing companies to pay employees in money only, is unconstitutional and void as an attempt to prevent persons who are *sui juris* from making their own contracts.[11] Illinois takes the same stand on the ground that such legislation exceeds the scope of the state's police power, and that an adult could not be denied the right to make a contract in respect to labor and property under the guise of giving him protection.[12] Colorado is in accord with this view, on the ground of interference with the freedom of contract.[13] and Missouri also, because the act in question was held not to apply to a business affected with a public use and because of unreasonable classification.[14]

The Vermont case[15] sums up the law exhaustively, and the

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[6] *State* v. *Coal Co.*, 36 W. Va. 802 (*supra*).

[7] *State* v. *Coal Co.*, 33 W. Va. 188 (1889).

[8] *State* v. *Goodwill*, 33 W. Va., 179 (1889).

[9] *Knoxville Iron Co.* v. *Harbison*, 183 U. S. 13 (1901).

[10] *Lawrence* v. *Rutland R. R. Co.*, 67 Atl. Rep. (Vt.) 1091 (Nov. 16, 1907).

[11] *Godcharles* v. *Wigeman*, 113 Pa. St. 431 (1886).

[12] *Fraier* v. *People*, 141 Ill. 171 (*supra*).

[13] *In re* House Bill No. 203, 21 Colo. 27 (1895).

[14] *State* v. *Loomis*, 115 Mo. 307 (*supra*).

[15] *Lawrence* v. *Rutland R. R. Co.* 67 Atl. Rep. (Vt.) 1091 (*supra*).

statute involved is held not to be a deprivation of liberty or property without due process of law; nor a denial of the equal protection of the laws; nor an invalid classification as to companies properly included, because others may be improperly included; nor an unlawful interference with the employee's liberty to contract, inasmuch as it operates on him but indirectly, while the direct restriction upon the employer's right is unobjectionable.

EQUITABLE JURISDICTION TO RESTRAIN LEGAL PROCEEDINGS UNDER ALLEGED UNCONSTITUTIONAL STATUTE.

The jurisdiction of equity to restrain proceedings at law to collect penalties imposed by an alleged unconstitutional statute —when the constitutionality of the statute could be determined in a suit at law—was recognized in the recent case of *Consolidated Gas Co.* v. *City of New York* (Circuit Ct. of U. S. for South. Dist. of N. Y., opinion filed Dec. 20, 1907). In so holding, the decision is in accord with the majority view.[1] This view rests upon the jurisdiction of equity to prevent a multiplicity of suits.

In general, there are two classes of cases in which equity takes jurisdiction to prevent a multiplicity of suits: (1) where a single plaintiff or defendant in order to secure redress must bring or defend a number of suits; (2) where a number of plaintiffs or defendants are parties to a litigation which presents but one issue of law or fact. According to the majority view above-mentioned, the first class is further divided into cases (a) where a suit at law will not finally determine the rights of the parties, as in ejectment and nuisance, and (b) where a suit at law does determine the rights of the parties, but where a multitude of suits may arise before any single suit is determined.[2] In the first sub-division equity will not interfere until the plaintiff's right has been established at law, and this, because the multiplicity of suits does not generally arise until *after* the plaintiff's right has so been established; in the second, however, it is not requisite that the plaintiff's right should first have been established at law, since the multiplicity of suits here arises *before* his right has been established. The minority view has ignored the second sub-division, and has

[1] City of Beckham, 118 Fed. Rep. 339; *Schlitz Brewing Co.* v. *City*, 117 Wisc., 297; *Sylvester* v. *Lewis*, 130 Mo. 323; *Davis* v. *Fleming*, 128 Ind. 271.

[2] Pomeroy's Eq. Jurisp. Sec. 254.

therefore announced the doctrine that as between two parties equity will not interfere to prevent a multiplicity of suits, until the plaintiff has established his right at law.[3] Such a result, it is submitted, violates a principle of the equitable doctrine regarding multiplicity of suits and arbitrarily denies relief to a suitor whose equity is as strong as in any instance falling within this field of equity jurisdiction.

Another and broader ground suggested for the interposition of equity in this class of cases is the prevention of irreparable injury, and if this be recognized, then the suitor might obtain relief even in those jurisdictions which deny a remedy under the doctrine regarding multiplicity of suits.[4] In a similar class of cases, *i. e.,* those involving the jurisdiction of equity to enjoin proceedings at law under an invalid tax ordinance, the courts have acted not only upon the ground of preventing a multiplicity of suits, but also of preventing irreparable injury,[5] *e. g.,* where the tax is collected by the state, against whom no legal proceedings could be maintained. If this analogy is to prevail in the class of cases under consideration, the question remains as to what constitutes such an irreparable injury. In general, such an injury would seem to be any substantial interference with the plaintiff's business, as where the statute provided for the arrest of the plaintiff's agents, for the seizure of property, or where, as in the case of a public service corporation, disturbances on the part of the public might result from the plaintiff's attempted exercise of his alleged legal rights.[6] If, as in the recent case under discussion, the statute merely provides for the collection of a penalty, the question as to whether there would exist the danger of irreparable injury is more difficult, although there is some authority to the effect that this would be sufficient to give equity jurisdiction.[7] Since, however, the defense of the unconstitutionality of the statute could be interposed in the suit brought at law to recover the penalty, it is difficult to see why the refusal of equity to assume jurisdiction would submit the plaintiff to irreparable injury.

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[3] *West* v. *Mayor,* 10 Paige, (N. Y.) 539. This case is the basis of the minority view. *Ewing* v. *Webster,* 103 Iowa 226; *Poyer* v. *Village,* 123 Ill. 111.

[4] *Ewing* v. *Webster City,* 103 Iowa 226, where the court after denying jurisdiction to prevent a multiplicity of suits took up the question of irreparable injury; it was decided that such injury did not exist in that case.

[5] *Dows* v. *City,* 11 Wall. 108.

[6] *Milwaukee Ry.* v. *Bradley,* 108 Wisc. 467.

[7] *Schlitz Brewing Co.* v. *City,* 117 Wisc. 297; cf. *Chicago Ry.* v. *Dey,* 35 Fed. Rep., 866, at p. 882.

EQUITY PLEADING: THE MANNER OF OBJECTING TO A BILL FOR DISCOVERY OBJECTIONABLE ON ITS FACE.

In the United States, constitutional provisions as a rule protect against self-incrimination.[1] The provisions of the various constitutions were, however, nothing more than enactments of the chancery rules as they existed in England at the time of their adoption. For more than two centuries at least it has been the admitted rule of the English courts that no witness could be compelled to give discovery in equity if the tendency of such discovery would be to incriminate himself.[2] This general proposition has never been doubted, and it would certainly seem to make no difference in the rule that the civil suit was based on facts, which also would give rise to a criminal liability as well, and so it has been generally held.[3] In the light of this rule the recent case of *National Association of Operative Plasterers* v. *Smithies*[4] might seem an anomaly. The point of the decision is, however, the manner in which, under the present English practice, objection against incriminating discovery should be formally made. The case was a civil action for damages for a conspiracy to induce workmen to break their contracts with the plaintiff. The plaintiff called on the defendant to produce certain documents relating to the conspiracy which the defendant refused to do on the ground that they contained matters which would tend to incriminate him by making him subject to a criminal action for conspiracy. The master made the usual order for relevant documents under the English practice. It would seem that the objection of the defendant to producing the documents was not made upon oath. The court overruled the defendant's objection to complying with the master's order and compelled the production of the documents. The opinions of the various judges are brief and unsatisfactory to one unfamiliar with the English practice

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[1] Fifth Amendment to the Constitution of the United States; Article I, Sec 9, of the Constitution of Pennsylvania, both of which have been interpreted to apply to testimony in civil as well as criminal actions.

[2] *Oliver* v. *Haywood,* 1 Hust. 82; *Claridge* v. *Hoare,* 14 Ves. 59; Mitford's Equity Pleadings by Jeremy, 194; Story's Equity Pleadings (5th Ed.) Sec. 575-98; Bispham's Principles of Equity (7th Ed.) Sec. 562.

[3] *Chambers* v. *Thompson,* 4 Bro. Ch. 434 (1793); *Thorpe* v *Macauley,* 5 Madd. 218, 229 (1820); *Glynn* v. *Houston,* 1 Keen Ch. 329 (1836); *Marsh* v. *Davison,* 9 Paige (N. Y.) 580 (1842); Story's Equity Pleadings (5th Ed.) Sec. 597.

[4] L. R. 1906 A. C. 434.

and seem to show that the basis of the decision of the court was that the objection was not taken under oath.[5]

The court in its decision relies mainly on the cases of *Allhusen* v. *Labouchere*[6] and *Spokes* v. *Grosvenor Hotel Co.*[7] In the former[8]—quoted from in both the subsequent cases[9]—James, L. J., said, "Nobody was ever allowed to object to a relevant question because that question tended to incriminate himself. He might object to answer it, but it was never a ground of demurrer to an interrogatory, or a ground for striking it out, that the answer might involve him in a crime." It is submitted that this statement largely relied on for the decision in the main case[10] is essentially untrue. Under the old chancery practice a demurrer was always a proper mode to object to a bill like that in *Allhusen* v. *Labouchere*[6] where the objection was apparent on the face of the bill.[11] That the objection was so apparent in the main case[10] is evident since the facts alleged gave rise to both a civil and criminal action for conspiracy, hence, any material relevant to the plaintiff's case in the civil action would also be relevant in a criminal action against the defendant. Indeed, it has been several times held in England that the court will strike out interrogatories objectionable on their face though the defendant specifically refused to answer them under oath.[12] These latter cases, which are on their facts exactly in point, would seem to control the case in hand. The court in its decision cites no statute, though a statute or positive rule of court would of course control the decision, and evidently relies on what it considers to have been the practice in the old court of chancery—its interpretation of which, it is submitted, is far from accurate.

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[5] Lord Macnaghten on 437 quoting from *Allhusen* v. *Labouchere* (*infra*) says: "But then he must take the objection on his oath, and if he does raise that objection on his oath in the proper way he is not bound to answer the interrogatory."

[6] L. R. 3 Q. B. D. 654 (1878).

[7] (1897) 2 Q. B. 124.

[8] *Allhusen* v. *Labouchere*, L. R. 3 Q. B. D. at 660.

[9] *Spokes* v. *Hotel Co.* (*supra*); *National Association of Plasterers* v. *Smithies* (*supra*).

[10] *National Association of Plasterers* v. *Smithies* (*supra*).

[11] *Chambers* v. *Thompson* (*supra*); Kent. Ch. in *Sharp* v. *Sharp*, 3 John. Ch. (N. Y.), 407 (1818); *Glynn* v. *Houston* (*supra*); *Marsh* v. *Davison* (*supra*); *N. W. Bank* v. *Nelson*, 1 Gratt. (Va.) 108 (1844); Bray on Discovery (1885) 318.

[12] *Hill* v. *Campbell*, L. R. 10, C. P. 222 (1875); *Atherley* v. *Harvey*, L. R. 2, Q. B. D. 524 (1877); *Tupling* v. *Ward*, 6 H. & N. 749 (1861); cf. also Hare on Discovery 149 (1849).

Liability of Agent in Tort for Breach of Fiduciary Duty.

Among the obligations of an agent to his principal, are the duties, (1) to obey instructions, (2) to exercise care and skill, and (3) at all times to act in good faith and be loyal to his principal. A breach of any of those duties is a tort, and the principal can recover for any proximate damage. It is well established that an agent must obey to the letter all instructions of his principal, unless the act commanded is illegal or immoral, or unless obedience is prevented by unavoidable necessity. It is no defense to a non-performance or to a deviation that he exercised reasonable care and skill in the course pursued, and acted in good faith, thinking he was doing that which was best for the interests of his principal. He has no discretion in the matter, and adopts a contrary course at his own risk. Accordingly, where an agent, thinking that the price was about to drop, did not follow his instructions to buy, he was compelled to make good for the loss sustained by the subsequent rise.[1]

It is also well established that in executing his instructions, and in discharging the duties of his agency, it is his duty to exercise a reasonable degree of skill and care, such as is reasonably demanded by the nature and circumstances of the transaction. He is presumed to warrant that he possesses such a degree of skill. If the principal knows of the deficiency, the presumption is rebutted.[2] The agent does not undertake an absolute liability. He is not liable for loss due to his mistake of law or fact. Accordingly, where an agent is instructed to loan money, he is liable if he shows such a lack of skill or care as to loan upon worthless or imprudent securities.[3]

But illustrations of holding an agent liable in tort for a breach of the third class of duties are not so numerous. This principle is well established that it is the duty of an agent at all times to act with the best of good faith in the furtherance of his principal's business. The relation is called a fiduciary one. This principal relies upon the fidelity and intergrity of the agent; and the latter should act with the single purpose of advancing his principal's interest, and should never take any position which is antagonistic to those interests, or use his position and authority for his own private gain. Generally this breach of the duty affords a remedy in equity, where the

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[1] *Heineman* v. *Heard*, 50 N. Y. 27 (1872).
[2] *Pelt* v. *School Dis.*, 24 Vt. 297.
[3] *Whitney* v. *Martine*, 88 N. Y. 535.

agent has represented two principals, or where he acted both for himself and his principal—*e. g.*, where, being ordered to sell, he became the purchaser—a bill in equity is brought to rescind. Where the agent has misused his position for his own private profit, equity makes him a constructive trustee. Yet there are cases when the agent has received no profit, and where there is no contract to set aside; but because of a breach of his fiduciary duty, a loss has occurred to his principal. It is well settled that such a breach of a fiduciary duty is a tort. Accordingly, where an agent, with authority to lend, loaned money to an irresponsible person, in an enterprise in which he was interested, he was compelled to make good the loss.[4] In a recent case, an agent disregarded instructions to renew a lease, and instead got others to try to obtain it for his own profit; the principal was compelled to renew the lease at a higher rental, and recovered from the agent. *Acker, Merrall & Condit Co.* v. *McGaw,* 68 Atl. (Md.) 17 (1907). In another case, a chairman of a commission, authorized to buy land, gave information as to proposed purchases to a third person, who bought up the land. The chairman was made liable.[5] These cases are perfectly sound. They generally state that a breach of a fiduciary duty is a tort. Of course, if this is intended to cover breaches of duty on the part of an express trustee, it is inaccurate. Such cases are, however, of interest in causing the query whether there has been or is likely to be a tendency in courts of law to recognize and compensate for the breach of duties which may at one time have been recognized by courts of equity alone.

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[4] *First Nat. Bank of Sturgis* v. *Reed,* 36 Mich., 263 (1877).

[5] *City of Boston* v. *Simmons,* 150 Mass. 461, 1890. Also *Hegenmeyer* v. *Marks,* 37 Minn. 6 (1887); *Talbot* v. *Scripps,* 31 Mich. 268.