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NOTES

THE LIABILITY OF A CONSPIRATOR FOR UNEXPECTED MURDER.

The following instruction by the Court in a trial for murder of a co-conspirator was given in the recent case of *State* v. *Darling*, 115 S. W. Rep. 1002 (Mo., Feb. 2, 1909): "If you further believe from the evidence that the defendant went with his brother to the scene of the killing for the purpose of and the intention, if necessary, to aid, encourage, or to abet his brother in assaulting the deceased, but that the defendant did not know that his brother intended to use a deadly weapon in making such assault, and did not know of a felonious intent on the part of the brother, but understood at the time that it

was the purpose and intention of the brother merely to whip the deceased, yet the defendant is guilty of manslaughter." In this case death was caused by a blow struck by defendant's brother with a piece of iron which he had concealed in his hand.

The general rule undoubtedly is that, when several persons conspire or combine together to commit an unlawful act, and a homicide results, each is criminally responsible for the acts of his associates or confederates if committed in furtherance, or in prosecution of the common design for which they combined.[1] This general rule is not affected by the fact that homicide was not the result intended, or within the contemplation of the parties as a part of the original design.[2] And at least one court has gone to the extent of holding that it is no defence that the defendant forbade his associates to kill, or that he disapproved of the killling, or regretted that any person was killed, if, in fact, the killing was committed in the furtherance of the common design.[3] Another court has held the defendant liable for the homicide committed by his associate when done in furtherance of the common design, though it was agreed that no killing was to be done by either party.[4] The basis of these decisions is that where one person combines with another to do an unlawful act, he impliedly consents to the use of such means, by his confederate, as may be necessary or usual in the successful accomplishment of the act, and if such means involve or result in a homicide, he is criminally liable.[5]

As to just what the true test is in cases of this character is not quite clear. It is clear that when the common design is to effect death, the means employed is of no consequence, for all are guilty if death result.[6] The same rules would seem to be applicable in all cases where the object of the common design

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[1] *Martin* v. *State*, 136 Ala. 32; *People* v. *Oleson*, 80 Cal. 122; *Butler* v. *People*, 125 Ill. 641; *State v. Morgan*, 22 Utah, 162; *Com.* v. *Campbell*, 7 Allen, 541; *State* v. *Johnson*, 7 Ore. 210; *Weston* v. *Com.*, 111 Pa. 251; *Com.* v. *Miller*, 4 Phila. 195; *Blain* v. *State*, 30 Tex. App. 702; *Hays* v. *State*, 112 Wis. 304; *U. S.* v. *Ross*, 1 Gall. 624.

[2] *Evans* v. *State*, 109 Ala. 22; *Carr* v. *State*, 43 Ark. 99; *People* v. *Vasquez*, 49 Cal. 560; *Spies* v. *People*, 122 Ill. 1; *State* v. *Walker*, 98 Mo. 95; *Com.* v. *Mayor*, 198 Pa. 290; *Mitchell* v. *State*, 136 Tex. Crim. Rep. 278.

[3] *People* v. *Vasquez*, 49 Cal. 560.

[4] *State* v. *Johnson*, 7 Ore. 210.

[5] *Williams* v. *State*, 81 Ala. 1; *Lamb* v. *People*, 96 Ill. 73.

[6] *People* v. *Lagroppe*, 90 App. Div. 219; *Carpenter* v. *State*, 62 Arch.

is to do acts of personal violence of such a nature as likely to cause death. So where several persons enter into a conspiracy to assault and beat another, and in carrying out such conspiracy the other is killed, each will be criminally liable therefor.[7] The reason given in these cases is that when people assemble themselves together with an intent to commit an unlawful act, the execution of which makes probable, in the nature of things, the commission of another crime which is incidental to that which is the object of the conspiracy, they are responsible for such incidental crime. The courts have applied the same rule also in conspiracies that have for their common object the invasion of property rights, such as to commit larceny, burglary, robbery, etc.;[8] or where the common design is to escape from confinement.[9]

In all the cases there must be shown a conspiracy or concert for the purpose of effecting a common design; and in order that the party not committing the act shall be criminally responsible for the act of his co-conspirator, the act of the co-conspirator must be one within the scope of the common design or purpose. The generally adopted test is, Did the parties act together, and was the act done in pursuance of the common design and purpose in which their minds had agreed?[10] The real difficulty comes in determining just what are and what are not acts within the common design. Shall the court restrict the rule so as to include within the scope of the design only those acts actually contemplated, or shall it be extended to include also all the proximate, natural and logical consequences of the execution of the common design? The latter seems to be the generally accepted rule.[11] The act is generally held to be within the scope of the common design if it is the ordinary and probable effect of the wrongful act contemplated, so that the connection between the acts is reasonably apparent,

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286; *Anon.* v. *People*, 31 Colo. 351; *Com.* v. *Neills*, 2 Brewst. (Pa.) 553; *Holtz* v. *State*, 76 Wis. 99; *Reg.* v. *Price*, 8 Cox. C. C. 96.

[7] *Gibson* v. *State*, 89 Ala. 121; *Williams* v. *State*, 81 Ala. 1; *State* v. *Freeney*, 41 Kansas, 115; *Peden* v. *St.*, 61 Miss. 267; *Reg.* v. *Price*, 8 Cox C. C. 96.

[8] *State* v. *Cannon*, 49 S. C. 550; *Hamilton* v. *People*, 113 Ill. 34; *Com.* v. *Mayor*, 198 Pa. 290; *Mercersmith* v. *State*, 8 Tex. App. 211.

[9] *People* v. *Wilson*, 145 N. Y. 628; *People* v. *Flanigan*, 174 N. Y. 357; *State* v. *Allen*, 47 Conn. 121.

[10] *Com.* v. *Campbell*, 7 Allen, 541; *Butler* v. *People*, 125 Ill. 641; *Powers* v. *Com.*, 110 Ky. 386; *King* v. *Plummer*, 12 Mod. 627.

[11] *Tanner* v. *State*, 92 Ala. 1; *Lamb* v. *People*, 96 Ill. 73; *U. S.* v. *Boyd*, 15 Fed. 851

and the act in question is not a fresh and independent product of the mind of the confederate outside and foreign to the common design.[12] This question is one for the determination of the jury.[13]

While it is quite impossible to lay down any definite and hard rule as to just when a homicide results from the pursuit of the common design; yet, the cases accord that a homicide resulting from a personal assault with deadly weapons, or which is likely to cause the use of deadly weapons, is an act within the scope of the common design.[14] When the conspiracy is to commit some minor offense in the execution of which the use of deadly weapons is not contemplated, nor can it reasonably be expected that they will be used, the use of such dangerous weapons cannot be deemed within the common intent and design of the parties. Thus, one who conspires with another to commit a mere misdemeanor, such as an assault with hands and fists, not dangerous to life, is not liable for the homicide, where the other uses weapons dangerous to life and kills the party assaulted.[15] This rule is not applied in a case, however, where the conspiracy was to fight with fists, and the death was caused by a blow with the fist, the killing in such case being the direct result of the conspiracy.[16] In general the cases support the rule that, where a number of persons enter into an agreement to commit a criminal act, in the execution of which a person is killed by one of them, all who enter upon the commission of the criminal act and continue in its execution up to the time of the killing are guilty of the murder, provided the act to be done is one which, from its nature, or the way in which it is to be executed, may jeopardize or be dangerous to life, or is itself homicidal in character.[17]

It is hard to see how, under any of the better decided rules, a conviction can be had in a case where the co-conspirators have beforehand expressly agreed that the use of dangerous weapons shall not be resorted to and death result from the use

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[12] *Williams* v *State*, 81 Ala 1; *State* v. *Walker*, 98 Mo. 95.

[13] *Martin* v. *State*, 136 Ala. 32; *Frank* v. *State*, 27 Ala. 37; *People* v. *Holmes*, 118 Cal. 444; *Powers* v. *Com.*, 110 Ky. 386.

[14] *Kirby* v. *State*, 23 Tex. App. 13; *Bibby* v. *State*, 65 S. W. 193; *Ferguson* v. *State*, 134 Ala. 63; *Reg.* v. *Price*, 8 Cox C. C. 96.

[15] *Powers* v. *Com.*, 110 Ky. 386; *Mercersmith* v. *State*, 8 Tex. App. 211; *Brown* v. *State*, 28 Ga., 199; *State* v. *May*, 142 Mo. 135.

[16] *Reg.* v. *Caton*, 12 Col. C. C. 624.

[17] *U. S.* v. *Boyd*, 45 Fed. 851; *Com.* v. *Neills*, 2 Brewst. (Pa.) 553; *Miller* v. *State*, 15 Tex. App. 125; *Holtz* v. *State*, 76 Wis. 99.

thereof. Such a conviction has been supported.[18] It can hardly be said as a matter of law that an act was done in pursuance of the common intent, if the parties have agreed that such act shall not be done. It might well be that such would be a proper question for a jury to consider and determine whether the expressed intent was in fact the real intent of the parties. At least to secure a conviction of murder in the first degree where premeditation and deliberation to kill must be affirmatively proved by the Commonwealth, it would seem to be error to hold as a matter of law that a party to a conspiracy was liable in that degree for a crime against which he has remonstrated.

Liability for Injury by Contact With Live Wire.

Negligence has often been defined as the absence of due care under the circumstances.[1] And it is quite well-established that he who alleges negligence on the part of another must show that there was from that other a duty owing him, the breach of which duty constitutes the negligence alleged.[2] Therefore, where there is no duty owing, there can be no negligence. It is on this ground that the occupiers of real property, although careless in the use of that which is on their land, are excused for injuries caused to trespassers as the result of such carelessness.[3]

In the case of infant trespassers, many jurisdictions make some exceptions, as in what are known as the "turntable cases," where infants, although trespassers, have been allowed to recover damages for injuries sustained while meddling with dangerous machinery on the land of the defendants, the courts holding that the latter were bound to guard against such trespassers.[4]

A slightly different question often arises where the injury occurs through the carelessness of the defendant, but not on his property. Such was the situation in *Mullen* v. *Wilkes-*

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[18] *People* v. *Vasquez*, 49 Cal. 560.

[1] *Turnpike Co.* v. *Railroad Co.*, 54 Pa. 345.

[2] *Heaven* v. *Pender*, 11 Q. B. D. 503.

[3] *Brady* v. *Prettyman*, 193 Pa. 628.

[4] *R. R.* v. *Stout*, 17 Wall. (U. S.) 57.

Barre Gas and Electric Company, 38 Pa. Superior Ct. 3 (Advance Reports), decided February 26, 1909. The plaintiff, a boy of tender years, while at play climbed a chestnut tree standing upon a sidewalk of a street, and was injured by coming in contact with a defectively insulated electric wire of the defendant company. It appeared that the tree stood on premises not belonging to the company, and that it had no property right of any kind in the tree or the premises on which it stood. It was further shown that the defective insulation of the wire in the branches of the tree had continued for a period of from four to six months before the accident; that during this period sparks had been emitted by the contact of wire and branches; and that in pleasant weather the children of the neighborhood were accustomed to assemble about the tree to play, and to climb into it. The defendant conceded its obligation to keep its wires safe as to those lawfully using the streets in the ordinary way, as well as to those who, in the exercise of some right, might be required to approach them, but contended that no such obligation existed as to children of immature age who voluntarily placed themselves in dangerous proximity to its wires stretched twenty feet above the ground.

The Court, speaking by Judge Head, held that the company's position could not be sustained. Said the Court: "The tree was the private property of the owner of the premises on which it grew and the children seem to have enjoyed, at least the permissive right from that owner, to play in its branches and gather the nuts they bore. The plaintiff, therefore, in climbing the tree was in no sense committing any trespass or infringement upon any right of the defendant; nor did his act need the aid of any invitation, permission or license from the latter to keep it in the category of wholly innocent acts."

It will be seen that the Court based its decision on the ground that the plaintiff was not a trespasser, either as against the defendant or as against the owner of the tree in whose branches its wires were stretched. But even had the Court regarded the plaintiff as a trespasser against the owner of the tree, the result reached would in all probability have been the same, under the authority of a well-known case[5] decided by the Supreme Court of Pennsylvania but a few years ago. There the Court was of opinion that even if the plaintiff, a boy ten years of age, were to be treated as a trespasser as against the owner of the premises on which was located the wire which had caused the plaintiff's injury, this fact could not be set up by

[5] *Daltry* v. *Media Light Co.*, 208 Pa. 403.

the company, which was itself a trespasser as against such owner. It would seem, however, that even had the Court regarded the defendant company as rightfully on the premises and the plaintiff a trespasser, it would have, nevertheless, held the defendant liable. "It must be presumed," said Chief Justice Mitchell, "that the company knew what the evidence disclosed as a fact, that children used the lawn of the premises near the gateway and in the vicinity of the wire, as well as the street in front of the premises as a playground." The Court reiterated what it had said in a previous case,[6] that a corporation which uses electricity of high voltage for lighting purposes is bound not only to know the extent of the danger, but to use the very highest degree of care practicable to avoid injury to everyone who may be lawfully in proximity to its wires and liable to come accidentally or otherwise in contact with them.

In jurisdictions other than Pennsylvania, under facts showing that the plaintiff was a trespasser as against a third person on whose premises the defendant's wires were stretched, and where injury resulted to the plaintiff as a result of the defective condition of such wires, the decisions are in conflict. In a comparatively recent case,[7] decided in 1907, whose facts were very similar to those before the Superior Court in the case under discussion, it was said: "The immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit which corporations stretching their wires over such trees must take notice of. This Court, so far as the exertion of its power in a legitimate way is concerned, intends to exert that power so as to secure, at the hands of these public utility corporations handling and controlling these extraordinarily dangerous agencies, the very highest degree of skill and care."

The contrary view is expressed in a case decided in the Supreme Court of Michigan.[8] Said the Court: "The plaintiff has conclusively shown a condition and relation of things which as to himself and the public generally was safe and harmless if not interfered with, has shown neither invitation nor inducement warranting or excusing interference, and has just as conclusively proven an interference, participated in by himself, the character and results of which were not to be

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[6] *Fitzgerald* v. *Edison Electric Co.*, 200 Pa. 540.

[7] *Temple* v. *McComb City Electric Light & Power Co.*, 89 Miss. 1.

[8] *Stork* v. *Muskegon Traction & Lighting Co.*, 141 Mich. 575.

reasonably apprehended or guarded against. Whether or not, under the circumstances of this case, we apply the term 'trespasser' to one of the plaintiff's years, he was certainly a wrongdoer, who, but for his acts of wrongdoing, would not have been injured."

Although the view taken in the case of *Temple* v. *Electric Light Co.* (*supra*) seems to throw a very heavy burden on corporations dealing in electricity, yet, it is submitted, it seems sound. The ultimate question raised is whether to place upon parents of young children the duty of keeping them indoors, or of allowing them to play outdoors after first thoroughly grounding them in the law of technical trespass and its consequences, and endeavoring to stifle their natural instincts to climb trees and wander on unenclosed premises, or to place upon the public utility corporation handling such a dangerous thing as electricity the duty of anticipating that children may meddle with the wires carrying it where such wires are within their reach. If we look upon the law as a system of rules for human conduct in the ordinary affairs of life, it would seem that in formulating that system account must be taken of the fact that the same degree of care cannot be expected from children who are quite young as from those who are more mature in years, or from adults. This is apparently the view of the courts of last resort in Pennsylvania in dealing with public utility corporations handling electricity respecting the liability of the latter to children injured by coming in contact with defectively insulated wires, and it is submitted that it seems to be economically and legally sound.

ATTORNEY'S LIEN AND RIGHT OF ACTION FOR COMPENSATION.

In the recent English case of *In re Road Rapid Transit Co.*,[1] the rule concerning a solicitor's lien on documents was fully stated. One Neely acted as solicitor of a company and was also retained by the liquidator thereof, who subsequently discharged him and appointed another, to whom the liquidator required that Neely hand over the documents relating to the action, which had come into Neely's hands before and after the order for winding up the company. The Court held that the solicitor had acquired a valid lien on documents that came to his hands before the winding up order, which could not be defeated by

[1] L. R. 1909, 1 Ch. Div. 96.

the order, but that he had acquired no available lien on documents that had come into his hands after the winding up order.

In England an attorney or solicitor has possessory and charging liens for compensation for his services. He has a general lien on all moneys of his client that come into his possession, unless for a specific purpose.[2] He has a general lien[3] also on documents that come into his possession in his professional capacity,[4] for professional services. This lien does not, however, extend to testamentary papers,[5] public records, or papers acquired during the liquidation of a company. This lien is passive and gives no right of sale or foreclosure. The documents can be forced to be delivered up by the client or those claiming through him only when the attorney has discharged himself and in some cases of great urgency, when the lien will be protected. But if the party seeking the production of the document be a stranger, the attorney can not resist on the ground of his lien.[6] The above liens are possessory and are lost by a voluntary surrender of possession.

In England there is also an attorney's lien on funds, assertable against the client and those claiming through him.[7] This is a charging lien and is a claim to equitable interference by the court to have held as security for the attorney's costs the judgment recovered at the close of the proceedings in which the services were rendered. This lien is special and covers only the services resulting in the judgment. This lien attaches to whatever is due the client at the close of the proceedings, with the exception of realty,[8] or trust property administered out of court, or the funds of a company wound up by the court. This equitable interference will be exercised whenever the attorney has given the opposite party notice of his lien, or, if there is fraud between the parties, in the absence of notice. The opposite party then pays the client or releases his claim without the consent of the attorney at his peril.[9] This lien cannot, however, prevent a *bona fide* compromise. If such a compromise is made the lien attaches to payments made

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[2] *Re Phoenix Life*, 1 H. & M. 433.
[3] Ex parte *Nesbitt*, 2 Sch. & Lef. 279.
[4] Atkinson, Solic. Liens, Ch. III.
[5] *Balch* v. *Symes*, Turn. & R. 92.
[6] *Hope* v. *Liddell*, 7 D. M. & G. 331.
[7] Atkinson, Solic. Liens, Ch. II.
[8] *Shaw* v. *Neale*, 6 H. L. Ca. 581.
[9] *Ross* v. *Buxton*, 42 Ch. Div. 190.

under it. The lien on funds can be lost by waiver, the attorney's discharge of himself, or neglect.

Beside the above liens, an attorney can obtain from the proper officer of the court a taxing order, which is in the nature of a judgment and can be similarly enforced. He can also bring action for his bill, whether taxed or not, one month after delivery.

In the United States a member of any branch of the legal profession has possessory and charging liens similar to those allowed in England to solicitors and attorneys. So there is a possessory lien on legal documents [10] and on moneys that come into the attorney's hands.[11] This, however, does not extend to a will, public records, or money received for a specific purpose. So, also, an attorney in the United States has a charging lien, which is an equitable right to be paid for his services out of the proceeds of the judgment obtained by him.[12] In such a case the attorney is regarded as the equitable assignee of the judgment. There is a conflict of jurisdictions as to whether notice to the judgment debtor is necessary to enforce this lien in the United States, some jurisdictions holding that actual notice is necessary,[13] and some holding that pendency of the suit is sufficient notice as against the judgment debtor.[14] Attorneys' liens in the United States can be lost just as in England.

An attorney in the United States can also recover compensation for services rendered under an express or implied contract. In some jurisdictions he must deliver an itemized bill of costs one month before the suit.

Limits of State Control of Foreign Corporations.

The Supreme Court of the United States has recently held constitutional [1] a statute of the State of Arkansas which prohibits any individual, corporation, etc., from entering into a "pool or combination, whether the same is made in this State or elsewhere," with any other individual, corporation, etc., "to regulate or fix, *either in this State or elsewhere* the price of

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[10] *McPherson* v. *Cox*, 96 U. S. 404.
[11] *Sparks* v. *McDonald*, 41 Atl. 369.
[12] *Terney* v. *Wilson*, 45 N. J. L. 282.
[13] *Patrick* v. *Leach*, 3 Fed. 433.
[14] *Newbert* v. *Cunningham*, 50 Me. 231.
[1] *Hammond Packing Co.* v. *Arkansas*, 29 Sup. Ct. Rep. 378 (1909).

any article," etc. The Act further provides for judgment by default in case of failure by any officer of the corporation to produce when required "any books, papers and documents in his possession, or under his control, relating to the merits of any suit or to *any defense therein.*"[2] In pursuance of such provisions judgment was entered by default in the case referred to.

By the proceedings in error two distinct, but equally important questions were raised, which it may be interesting to note in order:

(1) Can a State declare that certain offences committed beyond its borders by corporations engaged in business within its borders, shall disqualify such corporations from continuing to transact business within the State? No question of the interpretation of the statute was presented, since it had already been determined by the Supreme Court of Arkansas that the statute was clearly intended to embrace offences beyond its borders.[3] The question of constitutionality in view of the Fourteenth Amendment was, therefore, fairly presented. That a State can prohibit a corporation from doing business at all within the State is well settled,[4] and it would seem to follow reasonably that a State may provide upon what terms a corporation may engage in business within the limits of the State, even though some of the requirements concern qualifications beyond the borders of the State; for if a State under its acknowledged power excludes a corporation entirely, the validity of the exclusion will not be affected because the motive of the exclusion was a consideration of acts done beyond the boundaries. So here, acts done outside the State may be considered in prescribing upon what terms a corporation may engage in business in the State at all. The motive in making the enactment has always been considered immaterial, for the test of constitutionality is the *power* and not the *motive*.[5] A prescription of terms to be complied with is entirely distinct from a provision of penalties for offences committed beyond the State's borders, the latter being, of course, unconstitutional.[6] It will be noted, however, that the statute endeavored to include within its provisions not only corporations, but "indi-

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[2] Act of Jan. 23, 1905, Secs, 1, 8 and 9.

[3] *Hartford Fire Ins. Co.* v. *State*, 76 Ark. 303 (1905).

[4] *Moses* v. *State*, 65 Miss. 56 (1887); *Paul* v. *Virginia*, 8 Wall. 169 (1868).

[5] Ex parte McCardle, 7 Wall. 506, 514; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535.

[6] *State* v. *Knight*, 2 Hayw. 109; *People* v. *Merrill*, 2 Park Cr. R. 590.

viduals." By force of the very reasoning above it is clear that such provision is unconstitutional. A State cannot forbid individuals to do business within its limits;[7] *a fortiori*, it cannot discriminate against the employment of foreign-born employees, for example.[8] The Arkansas statute was, therefore, invalid in this respect, and this is conceded by the Court;[9] but since these provisions of the statute had been treated by the Supreme Court of Arkansas as separable from the rest,[10] the validity of the law as to corporations was not affected.

(2) Are the provisions constitutional which require the giving of testimony and the production of books, papers, etc., relating to the merits of any suit or *to any defense therein?*

It has been decided by the United States Supreme Court that a corporation can be compelled to produce documents, etc., and that the officers of a corporation cannot refuse to answer questions on the ground of incrimination.[11] The Court asserts that "while an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."[12] And this view is followed in *Consolidated Rendering Co.* v. *Vermont*,[13] even though the books required to be produced were outside the State at the time; while in the case of *Twining* v. *New Jersey*,[14] it was held that even in the case of individuals, exemption from compulsory self-incrimination in the State courts is not secured by any part of the Federal Constitution. Furthermore, since an action to exclude a foreign corporation from the State is a civil action, the requirement that it should give evidence against itself has been held not to be unconstitutional.[15] That such requirement does not violate the provisions against unreasonable searches has also been decisively determined.[16]

But whether such statute, applying only to those engaged in

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[7] Cooley, Constitutional Limitations, p. 570.
[8] *Juniata Limestone Co.* v. *Fagley*, 187 Pa. 193 (1898).
[9] At page 377.
[10] *Hartford Fire Ins. Co.* v. *State, supra.*
[11] *Hale* v. *Henkel*, 201 U. S. 43 (1905).
[12] At page 75.
[13] 207 U. S. 541 (1907).
[14] 211 U. S. 78 (1908).
[15] *State* v. *Standard Oil Co.*, 61 Neb. 28 (1900).
[16] *Consolidated Co.* v. *Vermont, supra.*

the offence of "pooling," etc., is a "reasonable classification" as required by law,[17] appears to be a more difficult question in that it might well be contended that it is not "equal protection of the laws" for a defendant, accused of "pooling" to be compelled to testify against himself, while a defendant accused of "rebating," for example, need not so testify; or for a corporation to be compelled to testify against itself, where admittedly an individual would not be so subject to compulsion. The latter objection to the classification, however, is met by the inherent distinctions between corporations and individuals, a corporation being the creature of the State and, therefore, amenable to those provisions which a State may deem essential to the regulation and control of such corporation. The objection that under the equal protection of the laws any one offence cannot be selected, and self-incrimination required in its prosecution while not required in the prosecution of other offenses, is more vital. It amounts to the contention that, if such legislation is constitutional, then any State may provide a different kind of trial for each kind of offense, and a burglar, for example, may receive a much more favorable method of trial than a prisoner guilty of arson, etc., etc. It is evident that such a requirement cannot be in the nature of a penalty, else it would be a penalty for being accused.

It is submitted that the true interpretation of "equal protection of the laws" is that as long as all members of the same class receive equal protection, it is quite true that the State is at entire liberty to provide distinct methods of procedure for distinct classes of crime, and this view is directly supported by the case of *Maxwell* v. *Dow*.[18] There the Court upheld a statute of Utah which provided that all crimes except capital cases should be tried with eight jurors, in the courts of higher jurisdiction, and four jurors in courts of inferior jurisdiction; all capital cases to be tried with twelve jurors.

The striking out of the defendant's pleadings and the entry of judgment by default raises the question whether such judgment was obtained by due process of law. The case of *Hovey* v. *Elliott*[19] had decided that to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law. There the Court had inflicted the penalty of its own supposed inherent power, unsanctioned by any legislative act; but, as was pointed out in that case, the

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[17] *Gulf, Colorado & Santa Fé Ry. Co.* v. *Ellis*, 165 U. S. 150 (1896).
[18] 176 U. S. 581 (1899).
[19] 167 U. S. 409 (1896).

mere authority of the Legislature could not validate such action if it was inherently unconstitutional, and, therefore, the Arkansas Court, if its action were merely a punishment for contempt, would not be protected by the statute. But there is a well recognized distinction between mere punishment for contempt, and the creation of a presumption of fact to be drawn from the failure of a party to a cause specially to set up or assert his supposed rights in the mode prescribed by law.[20] And the power of a Legislature to create such presumptions is at the basis of all judgments by default provided for in almost every jurisdiction at the present time, and is unquestioned,—in the case of the Federal Courts being bestowed expressly by statute.[21]

FORFEITURE OF CORPORATE PRIVILEGE BY COMBINATION.

The Supreme Court of Missouri recently handed down a most interesting and valuable opinion in the case of *State* v. *Standard Oil Co.* (116 S. W. 902). This was an information in the nature of a *quo warranto* brought by Wm. Hadley, at that time Attorney General of the State, to revoke the licenses of the Republic Co. and the Standard Oil Co. of Indiana to do business in Missouri, and forfeit the charter of the Waters-Pierce Oil Co., on the ground that they had formed a combination in restraint of trade, against the Anti-Trust statutes of Missouri.

These statutes were passed in 1899, and were substantially similar to those now in use in many other States. They provided, among other things, that "any person who should create or enter into a pool to fix the prices and control the supply of any commodity, should be deemed guilty of conspiracy," and provided that any corporation which should be found guilty, should forfeit its charter, if organized under the laws of Missouri, or have its license revoked, if it were a foreign organization doing business in the State.

The charge of the Attorney-General was that since 1901 the three corporations mentioned above had violated the anti-trust regulations under somewhat the following facts as found by the Master.

The Waters-Pierce Company, organized in Missouri, in 1878,

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[20] *Illinois C. R. Co.* v. *Sandford*, 75 Miss. 862 (1898); *Lawson* v. *Black Diamond Coal Min. Co.*, 44 Wash. 26 (1906).

[21] U. S. Rev. Stat., Sec. 724.

and reorganized in 1900; the Republic Company, licensed to do business in Missouri in 1901, and the Standard Oil Company of Indiana, licensed in 1897—in each of which the Standard Oil Company of New Jersey owned a large majority of the stock—entered into a business arrangement whereby the State was divided into two sections, in one of which the Waters-Pierce Company was to have entire rights of sale, in the other the Standard Oil; while in order to keep up the appearance of competition the Republic Company, which sold a peculiar kind of oil known as Palacine Oil, was to have certain limited rights in each of the two divisions mentioned. Each party agreed to buy only from the Standard Oil and its allied interests, and to sell to no independents.

It was further shown by the evidence that prices were dictated from the Standard Oil Company's St. Louis agent, and that these prices were regulated, not by any law of consumption or cost of production, but by the distance from an independent concern. And, finally, it was shown that the books of each of the companies was audited by the Standard's general auditor at New York City.

The Master found these facts to show a conspiracy, which the respondents denied, contending also that the proceedings instituted against them were unconstitutional.

The Court held (1) in answer to respondent's contention that this was a criminal prosecution, and that *quo warranto* could not be used as a criminal procedure,—that a Proceeding in the Nature of a *Quo Warranto* was the proper form of action in such a case; that the violation of the statute did not make the companies guilty of a crime to be prosecuted under indictment before court and jury before such an action as this could be maintained, this being, not a criminal prosecution, but a civil procedure on information, to oust respondents from doing business in the State; and, therefore, the Court would have jurisdiction.

(2) The Attorney-General is authorized to institute *quo warranto* proceedings against any corporation to annul its charter or forfeit its franchises whenever it has so conducted itself as to violate the laws of its being or the criminal laws of the State; and if on trial the corporation is found guilty, the decree of forfeiture must go, with the addition of penalties if the Court sees fit. "This, however, does not proceed upon the theory that the corporation has been guilty of a crime and that it is being punished therefor; but upon the idea that there is an implied agreement on the part of every corporation, by accepting its charter, that it will perform its obligations to the public, and that by failing to do so it commits an act of for-

feiture which may be enforced by the State in the present way."

(3) The statutes were found by the Court not to be penal and in derogation of the common law, though they provided for the forfeiture of charters of corporations, but were rather intended to be in aid of and supplementary to the common law, and, therefore, of a remedial nature, and as such should be loosely construed, though heavy damages were prescribed and penalties imposed for their violation.

(4*a*) The Court held that the 1st Section of the Fourteenth Amendment of the Constitution was not violated, and that this was not, as respondent claimed, the imposition of a different and greater punishment than that imposed on an individual for the same offence, the argument being that man being a natural person, has no charters to forfeit, so that the same mode of punishment cannot be meted out to both; and that to allow such a plea would practically limit the State's right against either an individual or a corporation to a fine.

(4*b*) The Interstate Commerce clause of the Constitution was likewise found not to apply, since while the State has no power to prevent corporations from engaging in inter-state trade, that being a Congressional function, it *has* the power to revoke a license which only authorized a foreign corporation to do an intra-state business.

(4*c*) The Court thought that the requirement that respondents produce their books on pain of judgment by default, was not a deprivation of property within the meaning of the Constitution, since a corporation, being a creature of the State, has no constitutional right to refuse to produce its books on trial, as opposed to the individual.

(4*d*) Nor that the statutes tended toward the impairment of contracts under the constitutional provision that no State shall enact laws which would impair the obligations of a contract. This section of the Constitution, according to the Court, had no application to a license to a foreign corporation to do business in a State, since when it accepted that license it impliedly agreed to transact business under the laws of that State in the same manner as domestic corporations, and subjected itself to the same penalties in case of their violation; and the mere fact that the licenses granted to the Indiana and Republic Companies were granted prior to the enactment of some of the provisions of the statutes in question, did not affect the legal aspect of the matter, since the enactment of the statutes was but the exercise of the police power of the State, which could not be contracted away or surrendered by legislation.

(4*e*) Finally, the Court held that the statutes in question did

not abridge the rights of respondents as prohibited by the Fourteenth Amendment to the Constitution, since that amendment does not prohibit the Legislature from the exercise of the general police power of the State, the State having right, under that power, to enact valid laws requiring each citizen to so conduct himself and so to use his property as not to necessarily injure others. The statutes contended against were bottomed on that police power which was inherent in all State sovereignty; they were enacted to restrain, not the reasonable, but only the unbridled use by a citizen of his property; and such reasonable restraint has never been held an unconstitutional deprivation of property.

The Court thus found that the statutes under which the suit was brought were not an infringement upon the provisions of the Federal Constitution.

On the last point of the case, the real crux of the question, as to whether the admitted facts amounted to a conspiracy, the Court decided, after an exhaustive review of the evidence, that the agreement did amount to an illegal pool within the meaning of the statute. "The chief consideration," said the Court in reaching its conclusion, "in determining whether a monopoly exists, is not that prices are raised and competition destroyed, but does the power exist in the combine to raise prices or to destroy competition at pleasure;" and in applying this succinct statement to the facts of the case, the Court found that the agreement, to use the picturesque language of Judge Lamm, "was born in original corporate sin, and begotten in corporate iniquity."

(5) As a result of its findings, the Court annulled the charter of the Waters-Pierce Company, and the licenses of the others, imposing a heavy fine, as well, on each of the respondents.

The case is a very interesting one as an illustration of the development of the success of a government in dealing with a powerful corporation. In the earlier years of the combat, it was usually worsted, but the tide seems to be turning, and the time may not be far distant when each jurisdiction having recognized, as Missouri has, the value of employing eminent counsel, may be able to solve the seemingly insolvable trust-problem. The statute which rendered possible the decision in question is well worth study as a curb on monopolies that has stood the test; and its language might, therefore, serve as a good model for similar legislation in other jurisdictions.