University of Pennsylvania Law Review

And American Law Register

FOUNDED 1852

Published Monthly, Except July, August and September, by the University of Pennsylvania Law School, at No. 8 West King St., Lancaster, Pa., and 34th and and Chestnut Streets, Philadelphia, Pa.

SUBSCRIPTION PRICE, $2.50 PER ANNUM; SINGLE COPIES, 35 CENTS

NOTES

CONFLICT OF LAWS—DIVORCE—DOMICILE—It is now well settled that marriage is not a contract, but a status,[1] and that a state, in the exercise of its undoubted right to regulate the domestic and social condition of those domiciled within its borders,[2] may determine the commencement, continuation, and determination of such marriage relation.[3] A recent case in Delaware[4] illustrates the application of these established principles. The parties were citizens of and resident in Russia at the time of their marriage. They removed to this country, settled in Delaware,

[1] Bishop on Marriage and Divorce, §11: "Marriage, as distinguished from the agreement to marry and from the act of being married, is the civil status of one man and one woman legally united for life, with the rights and duties, which for the establishment of families and the multiplication and education of the species, are, and from time to time thereafter may be, assigned by the law to matrimony." Wharton on Conflict of Laws, § 126, III Ed.; Ditson v. Ditson, 4 R. I. 87 (1856).

[2] Shader v. Graham, 10 How. 82 (1851).

[3] Maynard v. Hill, 125 U. S. 190 (1887); Wade v. Kalbfleisch, 58 N. Y. 282 (1875); State v. Walker, 36 Kan. 297 (1887); Baity v. Cranfill, 91 N. C. 293 (1884); Francais v. State, 9 Tex. App. (1880).

[4] Cohen v. Cohen, 84 Atl. Rep. 122 (Del., 1912).

and the plaintiff took out his first papers. Before becoming fully naturalized and while still retaining his foreign allegiance, the plaintiff was deserted by his wife in such fashion as to give him ground for divorce under the local statute; he thereupon brought suit, having obtained personal service on the defendant. The court in entering a decree *nisi* said that the plaintiff had acquired a domicile within the state, that marriage was a status over which the state had control in respect to its domiciled residents, and that therefore the plaintiff was entitled to a divorce although an alien whose marriage had been performed according to the laws of a foreign sovereign.

As nationality and citizenship are entirely distinct from domicile[5] the decision in the principal case would be equally applicable if the parties had been citizens of another state and not aliens. Conceding that a state may determine the status of its domiciled residents, the most frequent and important resulting question in this country of forty-eight separate jurisdictions is as to the extra-territorial effect of such a decree on the status and property of the parties.

When neither party is domiciled within the state, it is clear that the court has no jurisdiction and that a decree so rendered will have no binding force as to either party in another state.[6] A few courts have held that when both parties, although not residents, have appeared at the trial, a decree there rendered should be binding in the state of residence in a controversy between the parties,[7] but not in a suit between the state and one of the parties.[8] This distinction, which seems to disregard the fact that marriage is a status and not a contract, has been repudiated by the Supreme Court of the United States.[9] A recent case in England similarly holds that appearance will not cure lack of jurisdiction.[10]

When both parties are domiciled and there has been proper service as required by the local statute, the court has jurisdiction of both the subject matter and the persons. It is settled that a decree rendered under such circumstances will be binding everywhere as to the status of both parties, not only by principles of

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[5] Wharton, Conflict of Laws, § 8, III Ed.; Dicey on Conflict of Laws, 2nd Ed., p. 115.

[6] State v. Armington, 25 Minn. 29 (1878); Hood v. State, 56 Ind. 263 (1877); Hardy v. Smith, 136 Mass. 328 (1884); People v. Smith, 13 Hun. 414 (N. Y., 1878). The cases cited dealt with the validity of Utah divorces under a statute authorizing the grant of divorces to those who merely desired to become residents of the state.

[7] *In re* Ellis' Est., 55 Minn. 401 (1893); Waldo v. Waldo, 52 Mich. 94 (1885).

[8] People v. Dawell, 25 Mich. 247 (1872); Van Fossen v. State, 37 Ohio 317 (1882).

[9] Andrews v. Andrews, 188 U. S. 14 (1902); Loan Society v. Dormitzer, 192 U. S. 125 (1903).

[10] Armitage v. Atty.-Gen., (1906) Prob. 135.

international law,[11] but by virtue of the "full faith and credit" clause of the Federal Constitution.[12]

When either the libellant or the libelee is domiciled within the state, but not both of them, the fundamental difference in this branch of the law between England and this country arises in determining whose domicile shall be the criterion. English courts conceive of a woman as having a separate domicile only when she is in the domicile of matrimony and has been deserted;[13] otherwise her domicile is that of her husband, and she must bring suit wherever that may be.[14] In this country it is generally held that for purposes of divorce a wife may acquire a separate domicile not only at the previous matrimonial domicile,[15] but also in a different state or country.[16] In some jurisdictions it is held that the separation must have taken place without fault in the wife for her to acquire a separate domicile;[17] in others only the actual facts of a separate residence are regarded.[18] This distinction is chiefly of importance in those states which consider service by publication sufficient as regards an absent resident, but insufficient in the case of a non-resident, for then a court in refusing to recognize a divorce granted in another state on such service would have to look behind the finding of the trial court, and hold that the wife was not justified in fact in living apart from her husband.[19]

As intimated above, the international status of the party not domiciled in the divorce jurisdiction will depend upon the view each particular court may take as to the sufficiency of service, and in this country upon the interpretation of the "full faith and credit" clause of the Constitution, jurisdiction of the person as well as the subject matter being essential to give a decree of a court any extra-territorial force. When the suit is brought at the libellee's domicile and the latter is resident within the state, general principles of international law concede that whatever service is provided by local statute, whether personal or con-

[11] Hood v. Hood, 11 Allen 196 (Mass., 1867).

[12] Cheever v. Wilson, 9 Wall. 108 (U. S., 1870).

[13] Dicey on Conflict of Laws, 2nd Ed., p. 263; Armytage v. Armytage, (1898) Prob. 178.

[14] Dicey on Conflict of Laws, 2nd Ed., p. 261; Le Suer v. Le Suer, 1 P. D. 139 (Eng., 1876).

[15] Turner v. Turner, 44 Ala. 437 (1870); Watkins v. Watkins, 135 Mass. 83 (1884); Bowman v. Bowman, 24 Ill. App. 165 (1888).

[16] Harteau v. Harteau, 14 Pick. 181 (Mass., 1836); Harding v. Allen, 9 Me. 140 (1835); Ditson v. Ditson, 4 R. I. 87 (1856); Cheever v. Wilson, 9 Wall. 108 (U. S., 1870).

[17] Sutor v. Sutor, 72 Miss. 345 (1895); Cheely v. Clayton, 110 U. S. 701 (1884); Burleu v. Shannon, 115 Mass. 438 (1875).

[18] Johnson v. Johnson, 57 Kan. 343 (1896); McGrew v. Ins. Co., 132 Col. 85 (1901); Irby v. Wilson, 21 N. C. 568 (1 Dev. & B. Eq., 1837).

[19] Atherton v. Atherton, 155 N. Y. 129 (1898), also in Supreme Court 181 U. S. 155, where it is held that a state may treat a wife who is unjustifiably absent from the matrimonial domicile as if she were in fact domiciled therein, and render a decree on service by publication entitled to recognition in all states under the "full faith and credit" clause.

structive, will be sufficient extra-territorially;[20] when he is domiciled, but non-resident, it is usually held that constructive or substituted service is enough to subject him to the jurisdiction of the court.[21] When the libellee is a non-resident and absent from the state, a number of jurisdictions hold that service by publication is sufficient,[22] but the weight of authority seems to be opposed to this view.[23] A curious result of the latter opinion, generally known as the New York doctrine, is that one party may be legally divorced while the other is still considered as married. That is, if A is domiciled in Nevada and B in New York, a divorce in the former state will in New York be held valid as to A, but not as to B on whom there was no personal service. The Supreme Court of the United States has held that such a situation is not cured by the "full faith and credit" clause, and that while another state may, it is not obligatory that it should recognize such decree.[24] In the principal case[25] the libellant was domiciled within the state and there was personal service on the libellee who was non-resident; assuming that the service on the libellee was technically correct, that is, she was within the state when served,[26] or assuming that she appeared at the trial,[27] the decree rendered should, under the principles discussed above, be entitled to international recognition as to the status of both parties.

No matter what may be its effect extra-territorially, the validity of a divorce decree within the state rendering it, provided that the local statutes have been followed, never seems to be questioned by courts testing such decree collaterally. While it may seem inconsistent for a state to refuse to recognize the decree of another jurisdiction and at the same time itself issue a similar decree under like circumstances, the reasoning of the courts seems sound: that locally they are bound by their statutes, but that collaterally they may apply the settled principles of international law.[28] It has been stated that the constitutional

[20] Fleming v. West, 98 Ga. 778 (1896); Beckerdyke v. Allen, 157 Ill. 95 (1911).

[21] Hunt v. Hunt, 72 N. Y. 217 (1879); Rigney v. Rigney, 127 N. Y. 408 (1891).

[22] Butler v. Washington, 45 La. Ann. 279 (1857); Shafer v. Bushnell, 24 Wis. 372 (1870); Thomas v. King, 95 Tenn. 60 (1895); Thompson v. State, 28 Ala. 12 (1856).

Whether service by publication is sufficient or not depends principally upon the view taken of the nature of the action; if analogous to an action *in rem*, such service gives jurisdiction as held by the above cases; if *in personam*, it does not.

[23] Love v. Love, 10 Phila. 453 (1873); McGeffert v. McGeffert, 31 Barb. 69 (N. Y., 1859); People v. Baker, 76 N. Y. 78 (1879); Doughty v. Doughty, 28 N. J. Eq. 581 (1 Stew., 1877); Sheets v. Sheets, 6 Lanc. Law Rev. (Pa., 1889).

[24] Haddock v. Haddock, 201 U. S. 562 (1906).

[25] Cohen v. Cohen, *supra*.

[26] In a jurisdiction which holds that a wife cannot acquire a separate domicile when at fault, the libellee in the principal case would still be domiciled in Delaware inasmuch as she deserted her husband without cause. Therefore personal service would be unnecessary, and anything amounting to constructive or substituted service would be sufficient.

[27] Kumier v. Kumier, 45 N. Y. 535 (1872); Kinigan v. Kinigan, 15 N. J. Eq. 146 (1867).

[28] Wharton on Conflict of Laws, 3rd Ed. p. 500.

provision of "due process of law" has not been applied to divorce actions, and that if it were, as for instance in *Pennoyer* v. *Neff*,[29] there would be no reason for the unfortunate standard by which there is one test as to validity within the state and another as to validity without the state.[30] It is submitted that it would be more accurate to say that, as the action of divorce differs from other actions, conclusions as to what constitutes "due process" in such other actions are not applicable, and that as a matter of fact courts have considered that there is "due process" as intended by the Constitution in a divorce action whether service on the libellee be personal or substituted.[31] Property may be affected by a decree of divorce, but it is affected by the changed status of the parties, and is not proceeded against in the action. For instance, the dower rights of A in certain land depend upon whether or not she is the wife of B. Consequently it is incorrect to draw analogies from actions in which property rights are in question; it should not be concluded that divorces granted on service by publication are without due process of law because the Supreme Court in *Pennoyer* v. *Neff* held that a personal judgment against a non-resident on such service was invalid, and that no title to property passed by a sale under an execution issued upon such a judgment. *S. A.*

DAMAGES—LOSS OF FUTURE PROFITS—Damages for the loss of future profits, as a general rule, cannot be recovered in an action for the breach of a contract,[1] not so much due to the fact that they are profits as to the fact that there are said to be no adequate criteria which will make certain a reasonably accurate measurement.[2] Consequently, since the fault lies not in the profits themselves, but in ascertaining them, the courts are uniformly willing to allow loss of profits to be included in the damages whenever there are facts sufficient to make the verdict more than mere guesswork. For instance, if either party refuses to complete a contract of sale the measure of damages is the difference between the contract price and the market value.[3]

In the frequently cited case of *Hadley* v. *Baxendale*,[4] it is stated that profits can be recovered where they arise from the contract itself and may reasonably be supposed to have been in the contemplation of the parties when the contract was made, or where they arise from extraordinary circumstances depending

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[29] 95 U. S. 714 (1877).

[30] Wharton on Conflicts of Laws, 3rd Ed. p. 502.

[31] See reasoning of court in Ditson v. Ditson, 4 R. I. 87 (1856). Maynard v. Hill, 125 U. S. 190 (1887), which held valid a legislative divorce, there being no notice to a non-resident libellee.

[1] Howard v. Stillwater etc. Co., 139 U. S. 199 (1890).

[2] Brigham v. Carlisle, 78 Ala. 243 (1887).

[3] Lincoln v. Alshuler, 142 Wis. 475 (1910).

[4] 9 Exechequer 341 (1854).

upon the fulfillment of the contract and of which the party to be charged had notice at the time of its execution.[5] Of the latter class are the well-known cases involving contracts of carriage of goods of immediate necessity and peculiar value to the owner, as, for instance, a theatrical outfit. There the loss of profits due to failure to deliver in time or in good condition is included in the damages, providing the carrier has notice of the nature of the goods.[6]

Of that class of profits coming under the heading of profits that arise naturally from the contract and are in contemplation of the parties, quite prominent are those arising from contracts of agency which provide for the compensation of the agent by a fixed proportion of the profits from sales made by him. As a rule such profits, or rather the compensation measured by a percentage of the probable profits, can be recovered, on the theory that the action is for the value of the contract broken and that it can be determined only by ascertaining the probable sales during the remainder of the term of the contract, and from them the profits.[7] On the other hand, in several jurisdictions the recovery has been confined to "earned" profits, *i. e.* those arising from sales actually negotiated by the agent, but repudiated by the principal when he broke the contract.[8] The authority of two of the decisions in support of the latter view is in doubt. *Washburn* v. *Hubbard*[9] was called to the attention of the court in *Wakeman* v. *Wheeler*, etc., Co.,[10] but it was ignored, and recovery was allowed for both actual and probable profits. *Howe etc. Co.* v. *Bryson*[11] was questioned in a subsequent case in the same jurisdiction and its conclusion in this respect practically pronounced *dictum*.[12]

The insurance agency cases are frequently cited as being in accord with the opinion that recovery should be limited to actual earned profits, since the damages are limited to a percentage of the premiums arising from renewals, but not from possible new policies. The accuracy of the life and actuary tables make the former sufficiently certain.[13]

A recent Massachusetts case extends the right to the recovery

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[5] For cases applying and approving this rule see Masterson v. Brooklyn, 6 Hill 61 (N. Y., 1845); Gagnon v. Sperry, 206 Mass. 547 (1910).

[6] Weston v. B. & M. R. R., 190 Mass. 298 (1906).

[7] Dennis v. Maxfield, 10 Allen 438 (Mass., 1865); Wakeman v. Wheeler, 101 N. Y. 205 (1886); Pittsburgh Guage Co. v. Ashton Valve Co., 184 Pa. 36 (1898); Schumacker v. Heineman, 99 Wis. 251 (1898); Cranmer v. Kohn, 7 S. D. 247 (1895); Hickhorn, etc. Co. v. Bradley, 117 Iowa 130 (1902).

[8] Union Refining Co. v. Barton, 77 Ala. 148 (1884); Bates v. Diamond Salt Co., 36 Neb. 900 (1893); Howe, etc. Co. v. Bryson, 44 Iowa 159 (1876); Washburn v. Hubbard, 6 Lansing 11 (N. Y., 1872).

[9] 6 Lansing 11 (N. Y., 1872).

[10] 101 N. Y. 205 (1886).

[11] 44 Iowa 159 (1876).

[12] Hickhorn, etc. Co. v. Bradley, 117 Iowa 130 (1902).

[13] Wells v. Mutual Life Ins. Association, 99 Fed. 222 (1900); Lewis v. Atlas Ins. Co., 61 Mo. App. 534 (1876).

of profits to an extreme degree.[14] The contract was one of agency for the sale of automobiles in a certain district. The contract was broken by the principal before any sales had been made by the agent. Nevertheless the latter was allowed to recover for loss of possible profits. Standards pointed out to aid the jury in arriving at the damages were the sales made by the defendant in the same district subsequent to the breach of this contract, and sales of other cars made by the plaintiff. Attention was called to the growth of the industry and the increased demand for motor driven vehicles. There is lacking, however, one important element: past profits earned under prior contracts or under the contract in question before it was broken. It is true that past profits are said to be too unreliable to warrant an attempt to assess damages for loss of future profits.[15] Nevertheless, they are invariably cited by the appellate courts as being of considerable importance in determining the proper damages. For this reason, *i. e.* that the element of past profits is lacking in the case given above, it would seem from remarks made in one case that loss of profits under these circumstances would not be included in the damages, even in those jurisdictions where it could ordinarily be recovered.[16] Another case involving the same situation is flatly contrary, but its jurisdiction takes a contrary view on the general question.[17]

It is interesting to note that in another Massachusetts case on facts quite similar, except that it was the agent who broke the contract, the principal was denied recovery of damages for the loss of future profits on the ground that they were too remote and too contingent.[18]

J. S. B.

FOREIGN CORPORATIONS—PERSONAL LIABILITY OF AGENT ACTING FOR UNREGISTERED CORPORATION—Under the Pennsylvania Act of Assembly of 1874,[1] a foreign corporation is required to establish an office in the state, with an appointed agent, and also to register with the Secretary of the Commonwealth, before it may transact any business. The Act provides a punishment in the way of fine and imprisonment for anyone who undertakes to act as agent for such a corporation before it has registered. There is no mention of civil liability of the agent in the statute, but the Pennsylvania courts have decided that he is personally

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[14] Randall v. Peerless Motor Car Co., 99 N. E. Rep. 221 (Mass., 1912).
[15] Sutherland on Damages (3d edition), Vol. 1, Section 69.
[16] 7 S. D. 247 (1895).
[17] 78 Ala. 243 (1887).
[18] Hetherington & Sons v. Firth & Co., 210 Mass. 821 (1911).

[1] Act of April 22, 1874, P. L. 108 (Pa.).

liable to the same extent that the corporation itself would have been, had it been properly registered.[2]

It is clear that a state may make a statute such as this. In the words of Mr. Justice McCollum in the leading case of *Lasher* v. *Stimson*:[3] "The right of the state to dictate the terms on which a foreign corporation shall be permitted to transact business within its jurisdiction cannot be doubted, if the conditions imposed are not repugnant to the Constitution of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each state from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence."[4]

But when the state has once imposed the conditions under which it will allow the foreign corporation to come within its jurisdiction, should the courts, by judicial legislation, be allowed to add whatever further penalties they see fit? The Pennsylvania courts evidently think they have that power, for in addition to the criminal liability imposed by the Act itself, the Supreme Court of Pennsylvania has added the personal, civil liability of the agent. The line of reasoning by which this new liability is found, is logical enough. The steps are,—first, the corporation, not having the legal sanction of the state to operate within it, has no existence at all within that state; second, the corporation being non-existent, the agent who undertakes to act for such a principal, must himself be liable.[5] Admitting that the result is strictly legal, its expediency is at least questionable. The injured party had never intended to look to the agent for redress in case of loss. It was the principal corporation that he had in mind in concluding the contract, and he should have taken steps, in protecting himself, toward ascertaining that the principal existed in legal contemplation. That many states have taken this view of the matter is shown by the fact that they have incorporated express provisions in their statutes imposing liability on the agent in such a case.[6] There is even some direct authority *contra* to the Pennsylvania decision on a similar statute.[7]

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[2] Raff v. Isman, 84 Atl. Rep. 352 (Pa., 1912), reaffirming Lasher v. Stimson, 145 Pa. 30 (1891). In the Raff v. Isman case, the defendant signed a building contract "as agent for Hepner Hair Emporium Co.," an unregistered corporation. He was held personally liable for the unpaid balance of the contract price.

[3] 145 Pa. 30 (1891), at p. 34.

[4] See Lafayette Ins. Co. v. French, 18 Howard 404 (U. S. S. C., 1855).

[5] Kroeger v. Pitcairn, 101 Pa. 311 (1882); McConn v. Lady, 10 W. N. C. 493 (Pa., 1881). The English law is clear that where a corporation, not having the power to do a certain act, authorizes an agent to perform that act and he does it, the agent is personally liable. Commercial Bank v. Kitson, L. R. 12 Q. B. D. 157 (1883). Agent is also personally liable on an implied contract where he wilfully represents that he has certain authority which, in fact, he has not. Randell v. Trimen, 18 C. B. 786 (1856).

[6] Texas Rev. St., Arts. 3093, 3095; Virginia Code, Sect. 1105; Minnesota Code, Sect. 87.

[7] Jones v. Horn, 78 S. W. Rep. 638 (Mo., 1904) and cases there cited.

A more equitable solution of the problem than that reached in the Pennsylvania courts would be to make the contract voidable at the election of the other contracting party, but not wholly void. Some western jurisdictions have adopted this expedient.[8] The Wisconsin statute covering this point is practical and rational. It provides that "every contract made by or on behalf of any such (foreign) corporation . . . affecting the personal liability thereof or relating to property within this state, before it shall have complied with the provisions of this section (requiring registration, etc.), shall be wholly *void on its behalf* . . ., but shall be *enforceable against it.*"[9] Thus, although the foreign corporation is not recognized as a legal entity within the state, yet its contracts can be enforced against it in the courts of that state. The plaintiff also has the further remedy, if he wants to make use of it, of going into the courts of the corporation's home state and there suing it, contract actions being transitory. A corporation, like a natural person, is suable *in personam* in any state into which it migrates and settles, and in which service of process can be lawfully had upon it under the governing statutes.[10]

In view of the fact that nearly all the state statutes prohibit foreign corporations from "doing or carrying on business within the state," unless they have complied with the conditions imposed by the statute, it is interesting to note what constitutes "doing business" in violation of such prohibitions. It is almost universally conceded that isolated transactions between a foreign corporation and the citizens of a state are not a doing of business within the state by the foreign corporation.[11] A few illustrations of such isolated transactions are, receiving subscriptions for a newspaper published in another state;[12] purchasing a piece of real estate;[13] taking security for debts due the corporation;[14] making a single sale or contract for the sale of goods.[15] These statutory prohibitions cannot, of course, interfere with or restrict the freedom of interstate commerce nor conflict with the settled interpretation of the commerce clause of the Federal Constitution.[16]

J. F. N.

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[8] Ames v. Kruzner, 1 Alaska 58 (1902); Insurance Co. v. Winne, 20 Mont. 20 (1897).

[9] Wisconsin Statutes 1898, sect. 1770 b, as amended by Laws of 1899, ch. 351.

[10] See 19 Cyc. 1326 and cases there cited under note 69.

[11] Delaware River Quarry Co. v. Passenger Ry. Co., 204 Pa. 22 (1902); Canal Co. v. Mahlenbrock, 63 N. J. L. 281 (1899); Schillinger v. Brewing Co. 107 Ill. App. 335 (1903).

[12] Beard v. Publishing Co., 71 Ala. 60 (1881).

[13] Louisville Property Co. v. Nashville, 84 S. W. Rep. 810 (Tenn., 1905).

[14] Insurance Co. v. Sawyer, 44 Wis. 387 (1878).

[15] Canal Co. v. Mahlenbrock, 63 N. J. L. 281 (1899); Wile v. Onsel, 10 Pa. Co. Rep. 659 (1891).

[16] Cooper Manuf. Co. v. Ferguson, 113 U. S. 727 (1889).

MASTER AND SERVANT—CONSTITUTIONALITY OF A LAW PROHIBITING EMPLOYER FROM CONTRACTING WITH EMPLOYEE THAT THE LATTER SHALL WITHDRAW FROM A LABOR UNION—In *State* v. *Coppage*,[1] such a statute[2] was declared valid, and as the case is contrary to all previous cases upon the point, a study of those cases and of the conditions leading to the passage of such a statute may bring forth reasons for sustaining it.

After the Civil War the power of the masters of the large industries which slowly began to develop, to dictate any terms of employment, and the helplessness of the individual laborer because of economic pressure, impelled the laboring classes of the country to adopt means to enable them to meet the employers upon an equal footing. Labor organizations of all kinds, strikes, and boycotts were the result, and to repel this advance the masters adopted the blacklist of employees, and employers associations, and discharged or refused to employ laborers who were connected with labor organizations. Legislation to restrict the powers of the master class and thus indirectly aid the weaker class and also to avert the frequent clashes between them with the usual destruction of life and property seemed indispensible.

Statutes providing that it was unlawful for an employer to discharge an employee because he was a member of a labor organization were passed and were in every case held unconstitutional.[3] The ground of those decisions is that by the constitutional guaranty of life, liberty and property, an employer has the right to discharge an employee with or without cause, subject only to a civil action for damages in a proper case, and the employee has the corresponding right to labor or to refuse to labor for another. Judge Cooley said: "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."[4]

Statutes which require an employer to give the reason or cause of dismissal have been held invalid on the ground that "the liberty to remain silent is correlative with the freedom to speak."[5]

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[1] 125 Pac. Rep. 8 (Kan., 1912).

[2] Gen. Stat. of 1909 sections 4674 and 4675; the former section reading, "That it shall be unlawful for any (employer) to coerce, require, demand or influence any person or persons to enter into any agreement, either written or oral, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such (employer)."

[3] State v. Kreutzberg, 114 Wis. 530 (1902); Brick Co. v. Perry, 69 Kan. 297 (1904); Adair v. U. S., 208 U. S. 161 (1908).

[4] Cooley on Torts, 1st. ed. p. 278; 2nd. ed. p. 328. The passage quoted is cited with approval in each of the cases in note 3 (*supra*).

[5] Quoted from Atchison, etc. Ry. v. Brown, 80 Kan. 312 (1909). Wallace v. Georgia Ry. Co., 94 Ga. 732 (1894); N. Y. R. R. Co. v. Schaffer, 65 Ohio St. 414 (1901), accord. A statute making it a misdemeanor for any person who has contracted in writing to serve another for any given time, to quit in breach of said contract and to make a second contract of similar nature with another person, without giving the second employer notice of the existence of the first contract, was held unconstitutional in Toney v. State, 141 Ala. 120 (1904).

Statutes providing that it shall be unlawful for an employer to coerce or require any person to enter into an agreement not to become or remain a member of any labor union, as a condition of that person securing employment or continuing in the employment of such employer, have been held unconstitutional in every decided case except the principal case. *State* v. *Julow*[6] is a leading case; it held that the statute of Missouri was unconstitutional because it made that a crime which was the exercise of a constitutional right, to wit, the termination of a contract, and also because the statute did not tend to promote the public health, welfare, comfort or safety—a characteristic essential to an exercise of the police power. These two reasons are given in all the decisions in accord with that case.[7]

It may be conceded that a state legislature may designate as a crime any act the commission of which tends to injure the safety, health or moral and general welfare of the public; if the coercion of an employee by his employer, in the opinion of the legislature, is against public policy because of such injurious tendency upon the public, it would logically follow that a statute, which made such coercion a crime, would be perfectly valid. The principal case alone goes to that extent. The courts have taken different views as to the effect to be given to the words "coerce or compel" in the statutes, and as to whether an employer does coerce an employee by a threat of discharge. One court[8] held that "the words 'coerce or compel' were not intended to refer to physical violence or interference with the person of the employee . . . The mandate of the statute is the substantial equivalent of an enactment that a person shall not make the employment, or the continuance of an employment, of a person conditional upon the employee not joining or becoming a member of a labor organization." Another court[9] held that "the words 'coerce' and 'attempt to coerce' are to be considered as the mere statutory names of the offense." A recent case[10] holds that a criminal complaint which merely alleged that the employer required the employee to make an agreement not to remain a member of a labor organization did not state a criminal offense. The dictum of that case is the only authority which supports the principal case, for the court intimated that if coercion had been alleged a crime would have been charged. The following language is very pertinent: "Theoretically, the employer and employee are on an equality, so that one is free to employ, the other to accept the

[6] 129 Mo. 163 (1895).

[7] People v. Marcus, 185 N. Y. 257 (1906); State v. Bateman, 7 Ohio Nisi Prius 486 (1900), overruling Davis v. State, 30 Ohio W. L. B. 342 (1893); Goldfield Consol. Mines Co. v. Goldfield Miners' Union, 159 Fed. 500 (1908); State v. Daniels, 136 N. W. Rep. 584 (Minn., 1912). The latter two cases deal with statutes which do not contain the words "coerce" or "compel."

[8] People v. Marcus, *supra.*

[9] State v. Bateman, *supra.*

[10] State v. Daniels, *supra.*

employment, as he sees fit; but in practice it is to the employee very often a matter of compulsion, and not of free choice . . . his necessities may easily be made use of as a means of coercion." Most courts refuse to recognize that economic pressure can be the means of coercion, relying upon the theoretical equality of employer and employee. The principal case reflects the important changes that are occurring in the industrial world. Laws of the state seeking to remedy evils and establish harmony between the classes should be upheld even where the liberty of the individual is subjected to certain restraints, provided such restraints are not arbitrary.[11]

I. B.

TORTS—DOCTRINE OF THE LAST CLEAR CHANCE—An interesting variation of the application of the so-called doctrine of the "last clear chance" is found in a recent decision of the Connecticut court of last resort. In *Nehring* v. *Connecticut Co.*[1] the plaintiff negligently placed himself in a dangerous position and carelessly continued to remain therein until he was injured by the defendant company, who, however, owing to gross negligence, failed to observe the plaintiff's situation until too late to avoid the injury. The Supreme Court, in a well-considered decision, held that the proximate cause of injury was the plaintiff's want of due care and not the lack of due care on the part of the defendant and accordingly, in offering a non-suit, declared that the doctrine of the "last clear chance" did not apply.

Few rules of law appear to be more difficult to apply correctly than this principle referred to. Fundamentally, it is the result of the revolt of the early nineteenth century courts against the hardship involved by the contributory negligence rule as it then existed and is predicated on the theory that an act of negligence or trespass committed by the plaintiff should not deprive him *ipso facto* of all rights to safety and security by removing all legal redress for whatever should subsequently befall him at the hands of the defendant. The theory just stated is clearly shown in the early leading cases of *Lynch* v. *Nurdin*[2] and *Bird* v. *Holbrook*,[3] and the doctrine of the "last clear chance" finally crystallized out in concrete form in the famous "donkey case" of *Davies* v.

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[11] In McLean v. Arkansas, 211 U. S. 539, 547 (1909), the court, in a decision sustaining an act requiring coal to be measured for payment of miners' wages before screening, said, "It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health and welfare of the people. It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution."

[1] 84 Atl. Rep. 301 (Conn., 1912).
[2] 1 A. & E. (N. S.) 35 (1841).
[3] 4 Bing. 268 (1828).

Mann[4] where Lord Abinger, C. B., said, "As the defendant might, by proper care, have avoided injuring the animal . . . he is liable for the consequences of his negligence, though the animal may have been improperly there."[5] Thus it clearly follows that this negligence or omission of the party last in fault, must be regarded as constituting, the sole proximate cause of the injury, and the antecedent negligence of the plaintiff must be disregarded as being too remote.[6] Thus, the real function of the doctrine of the "last clear chance" is merely to strip from the negligence of the plaintiff the attribute expressed by the word "contributory" by finding that the defendant's acts were the sole proximate cause of the accident;[7] and unless it is so found, the doctrine can never apply.

While easily formulated, the rule is in reality of such an abstract metaphysical character as to furnish considerable difficulty in practical application; and upon some of its subdivisions the cases are in great confusion. It is true that practically all jurisdictions[8] allow recovery for an injury caused by the defendant's negligence, notwithstanding the fact that the plaintiff's own negligence exposed him to the risk of injury, if such injury was more immediately caused by the defendant's omission, after[9] becoming aware of the plaintiff's danger, to use ordinary care[10] for the purpose of avoiding injury to him. When, however, this principle has been extended in any way, the decisions become at variance.

In considering the various situations which arise under the rule, the first question which naturally arises is as to whether or not the negligence of the defendant is sufficient to bring the case within the rule if it consists of some act or omission occurring

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[4] 10 M. & W. 545 (1855); see also Radley v. R. R. Co., L. R. 1 App. Cas. 754 (1876).

[5] Or, as stated by Lord Penzance in Radley v. R. R. Co., *supra:* "If the defendant could in the result by the exercise of ordinary care and diligence have avoided the mischief, then the plaintiff's negligence will not excuse him."

[6] "The party who has the last opportunity of avoiding the accident is not excused by the negligence of anyone else. His negligence and not that of the one first in fault is the sole proximate cause of the injury." 1 Shearm & Redf. Neg. (5th Ed.) sec. 99.

[7] "The one that had the last clear opportunity to avoid the accident . . . is solely responsible for it . . . his negligence being deemed the direct and proximate cause of it." 1 Thomp. Neg. 230.

[8] See summary of cases given in Shearm & Redf. Neg., sec. 99, where the rulings of all the American jurisdictions are collected.

[9] It is a fundamental principle of the doctrine that the defendant's negligent act must be after or his omission must continue subsequent to the plaintiff's negligence. Thus no recovery can be allowed for the killing of a trespasser due to lack of adequate brakes on a train, since this negligent condition was prior to the plaintiff's act. Smith v. Norfolk, etc. R. Co., 114 N. C. 728 (1894); and *vide* Sullivan v. Miss. Pac. R. Co., 117 Mo. 214 (1893).

[10] It seems settled that a charge that the defendant is liable unless its servants did everything in their power to prevent the accident is too narrow and is good cause for a new trial. Mobile R. Co. v. Watly, 69 Miss. 145 (1891); Norfolk etc. R. C. v. Dunnaway, 93 Va. 29 (1898).

before the discovery of the plaintiff's peril. If the negligent act of the defendant occurred before the plaintiff's negligence the cases seem to hold that the doctrine of the "last clear chance" cannot be raised; but there is a great conflict of cases as to the true rule when the defendant has been guilty of some omission of duty which prevented the plaintiff's part from being noticed in time to avoid the injury. Many of the cases take the view that here the doctrine of the last clear chance is founded upon actual knowledge of the plaintiff's danger, irrespective of whether or not it was the defendant's duty to have provided means of knowledge[12] and a few jurisdictions hold that under this doctrine the defendant is liable only if chargeable with wanton fault or recklessness.[13] It is submitted that both these views are not only incorrect from the point of view of law and logic, but are also extremely discreditable to civilized jurisprudence. The violation of a duty owed to the plaintiff to exercise care to discover his exposed situation should certainly not be permitted to defeat his subsequent recovery—a man should not profit by his own wrongful act. The better view and the weight of authority accordingly holds the defendant liable if the injury results from the omission of an act which constituted a breach of duty owed[14] to the plaintiff, whether this breach occurred before or after the discovery of the plaintiff's danger, if it intervened or continued after the negligence of the plaintiff had ceased.[15] In the principal case *ante*, it is true that the breach of duty owed to the plaintiff continued practically up to the time of the injury, but the plaintiff's own negligence also continued until the accident occurred and consequently the Connecticut court rightly decided that the defendant's negligence was not the sole proximate cause and accordingly affirmed the non-suit of the lower court.

P. C. M. Jr.

TRUSTS—BANK DEPOSIT BY TRUSTEE—*Smith* v. *Fuller*,[1] in the Ohio Supreme Court, is a recent case denying the right of a trustee winding up the affairs of a defunct savings fund to deposit the

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[11] *Vide* note 9, *supra*.

[12] N. Y., N. H. & H. Ry. Co. v. Kelley, 93 Fed. 745 (1899); Sweeney v. N. Y. Steam Co. 117 N. Y. 642 (1890); Milwaukee etc. Co. v. Torch, 108 Wis. 593 (1901); Barnett v. Chicago & N. W. Ry. Co., 132 N. W. Rep. 973 (Ia., 1911); and the decisions in Arkansas, Colorado and Montana.

[13] Frazer v. Ala. R. Co., 80 Ala. 105 (1886); Mulhein v. D. L. & W. R. Co., 81 Pa. 366 (1877); and cases in Indiana, Louisana and Oregon.

[14] Some of the courts have gone astray on this point, and have failed to distinguish between a breach of a duty owed and conduct amounting to wanton fault or recklessness.

[15] Smith v. N. & S. R. Co., 114 N. C. 728 (1894); Richmond v. Sacramento Valley R. Co., 18 Cal. 351 (1861); Battesbull v. Humphreys, 64 Mich. 514 (1889); Edgerly v. Street R. Co., 67 N. H. 312 (1894); Virginia Md. R. Co. v. White, 84 Va. 498 (1889); and the decisions in Kansas, Kentucky, Maryland, Mississippi, Nevada, Utah and W. Virginia.

[1] 99 N. E. Rep. 214 (Ohio, 1912).

trust fund, as a general deposit, in another bank. The trustee left the money with the bank, upon a certificate of deposit, in his name as trustee. The account was not subject to check. No agreement was made to pay interest. There was no stipulation for the return of the identical money. The bank failed, and the trustee was allowed to maintain an action for the whole sum, as a preferred creditor, on the theory that the deposit was special. The court remarked that the trustee was without power to make a general deposit, because that established the relation of debtor and creditor, and therefore amounted to a loan. Since the bank knew of the trust, from the form of the certificate, the parties must have intended to act within the limits of the trust and make a special deposit.

The holding of the court, that a trustee may not make a general deposit in a solvent bank, is clearly against the weight of authority.[2] True, a trustee must at all times keep the trust *res* under his control,[3] and may not make a loan of the funds on merely personal security, but, where the subject of the trust is money, a right to deposit that money temporarily in a responsible bank is recognized almost everywhere.[4] Such a deposit is not regarded as a loan in violation of the trust, though the relation of debtor and creditor exists between the bank and the trustee. The distinction drawn in *Law's Estate*[5] expresses very well the underlying thought of the cases. A deposit is a temporary disposition of the money for safe keeping. When not made for safe keeping, but for a fixed period, it is a loan. It is upon this ground of safety that a trustee is justified in making a general deposit of the trust money in a solvent bank, and upon this ground a deposit is distinguished from a loan or investment.

A trustee who keeps a large sum of trust money about his person can hardly be said to be managing his trust according to the general usage of prudent persons. He may be charged with the interest that would have been earned had the money been deposited,[6] and accordingly, it would seem that he would be chargeable with any consideration paid for a special deposit. If no consideration is paid, the depositary, as a gratuitous bailee, is liable only for gross negligence[7]—*quaere*, whether this would therefore be a prudent and proper disposition of the trust fund.

It is, of course, a question of sound common sense, to de-

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[2] Trustee v. Cockrell, 106 Ky. 578 (1899); Law's Est., 144 Pa. 499 (1891); Officer v. Officer, 120 Ia. 389 (1903); McAfee v. Bland, 11 S. W. Rep. 439 (Ky., 1899).

[3] Law's Est., *supra*; Frankenfield's App., 102 Pa. 589 (1883); Lewin on Trusts, 12th ed., p. 330; Salway v. Salway, 2 Russ. & M. 215 (1831).

[4] Lewin on Trusts, 12th ed., p. 330 and citations.

[5] *Supra*.

[6] Dalrymple v. Gamble, 68 Md. 156 (1887).

[7] Foster v. Essex B'k., 17 Mass. 479 (1821); B'k. v. Graham, 85 Pa. 91 (1877); Whitney v. B'k., 55 Vt. 154 (1882).

termine just when a so-called deposit is really a loan—just how long a temporary disposition for safety might be.[8]

Upon the question whether or not this was in fact a special deposit, it may be said that ordinarily, when money, whether a trust fund or not, is deposited in a bank, it is deemed a general deposit, unless there is an express agreement that it shall be a special deposit or there are circumstances clearly implying such an agreement, for instance, that the money is in packages not to be opened.[9] This is entirely consistent with the nature of a banking business. Is this presumption overbalanced by the fact that no agreement had been reached relative to paying interest?

There are any number of cases holding that the addition of the word "clerk," or "judge of probate, license money," or "trustee" to the title of an account does not create a special deposit, in the absence of an obligation to return the specific money,[10] nor does the taking of an interest-bearing certificate of deposit,[11] or making a deposit as the money of a third person.[12] The trust relation is not carried over when there is no misappropriation.[13] The chose in action becomes the *res* of the trust, and attempts to secure priority upon the ground that the money itself is impressed with a trust, have failed.[14] Cases holding that the depositary cannot refuse to pay to the *cestui qui trust* are often cited as controlling in such attempts. While the language used may sometimes seem to imply that a trust is imposed on the money, nevertheless, those cases only decide that the *debt* created by the trustee, belongs to the *cestui qui trust*,[15] and cannot be pressed to the extent of holding that the *cestui qui trust* should be a preferred creditor.

Deposits in violation of a statute stand upon an entirely different footing, and the depositary is held to be a trustee.[16] To hold otherwise in such a case would be to ratify a wilful violation of the law.

J. C. D.

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[8] Law's Est., *supra.*

[9] Morse on Banks and Banking, § 186; Brahm v. Adkins, 77 Ill. 263 (1875); Dawson v. Bank, 5 Ark, 297 (1841).

[10] McLain v. Wallace, 103 Ind. 562 (1885); Otis v. Gross, 96 Ill. 612 (1880); Alston v. Alabama, 92 Alabama 124 (1891); Officer v. Officer, *supra;* Paul v. Draper, 158 Mo. 197 (1900); Law's Est., *supra.*

[11] Ruffin v. Commissioners, 69 N. C. 498 (1873).

[12] Henry v. Martin, 88 Wis. 367 (1894).

[13] Rhineland v. New Madrid Co., 99 Mo. App. 381 (1903); Fletcher v. Sharpe, 108 Ind. 276 (1886); O'Connor v. Mech. Bank, 124 N. Y. App. 324 (1891).

[14] Officer v. Officer, *supra.*

[15] O'Connor v. Mech. Bank, *supra;* Jaffray v. Towar, 63 N. J. Eq. 530 (1902); National Bank v. Ins. Co., 104 U. S. 54 (1881).

[16] McAfie v. Bland, *supra;* District v. King, 80 Ia. 497 (1890); 52 Nebr. 1 (1897). *Contra:* Lowry v. Polk Co., 51 Ia. 50 (1879).