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NOTES.

LAW SCHOOL—DEATH OF HON. ROBERT RALSTON—In the loss of Hon. Robert Ralston, Judge of the Court of Common Pleas of Philadelphia County, and an Auxiliary Lecturer in the Law School, whose death occurred in the Jefferson Hospital on January twenty-third as a result of cerebral meningities which had developed from a severe attack of pneumonia, the Law School has lost a devoted alumnus and friend.

Judge Ralston, who was the son of Francis W. Ralston and Elizabeth C. Meredith, and a grandson of William M. Meredith, a distinguished member of the Philadelphia Bar, was born in Philadelphia on March 11, 1863. He was graduated from the Law School of the University of Pennsylvania in 1885, after having won the Faculty Prize for the best examination in all subjects in 1884, and

the Sharswood Prize in 1885, for the best essay by a member of the graduating class.

From 1892 until 1896 he served as Assistant United States Attorney for the Eastern District of Pennsylvania. In 1901 he was elevated to the Bench, and from that time until his death served the Commonwealth with distinction. He was for years interested in the scientific development of the law and was largely instrumental in the passage of the recent Practice Act of 1915. He was an earnest student of criminal law and procedure and in 1915 served as President of the American Institute of Criminal Law and Criminology.

Since 1907 Judge Ralston delivered lectures each year in the Law School on the Trial of Criminal Causes, which were attended by a large number of students. He was a frequent contributor to the LAW REVIEW and was ever willing and anxious to give to others the benefit of his suggestions and advice. His loss will be keenly felt, not alone by those who knew him personally, but as well by all who have an interest in the welfare of the Law School.

CONFLICT OF LAWS—EXTRA-TERRITORIAL EFFECT OF FOREIGN JUDGMENTS—There is a mass of decisions on the subject of foreign judgments, but it is surprising to learn how few, from the point of view of international law, touch upon the interesting and unique question decided in the recent English case of *Harris* v. *Taylor*.[1]

The problem presented was: Does a non-resident served with process outside the jurisdiction, by entering a conditional appearance, thereby submit to the jurisdiction and law of the court out of which the process issues for all purposes, when the law of that forum considers a conditional appearance as conferring jurisdiction over the person?

The plaintiff brought an action in the Isle of Man against the defendant, a domiciled Englishman, claiming damages for criminal conversation with the plaintiff's wife. Service was obtained in England. The defendant then caused a conditional appearance to be entered to set aside the writ for lack of proper service. This contention was overruled and the writ adjudged to have been duly served. A judgment was subsequently obtained, the defendant not having further answered nor appeared in the proceedings. This judgment was then sought to be enforced in England. It was held by the English Court of Appeals that the defendant by entering an appearance had submitted to the jurisdiction of the Isle of Man since by that law such an appearance was converted into a general appearance. The defendant was bound thereby and the judgment subsequently rendered was valid and would be enforced in England.

It is fundamental that in order that effect may be given abroad

[1] 113 L. T. 221 (Eng. 1915).

to a judgment, the court rendering it must have the requisite jurisdiction. If the judgment or decree be *in rem*, it is only necessary that the *res* be within the jurisdiction and that a general publication of notice of the suit be given. If *in personam*, it is essential that the court should have obtained jurisdiction of the defendant's person, either by his voluntary appearance and submission, or by personal service of process upon him within the territorial limits of the court's authority.[2] No court can lawfully adjudge rights of persons or property in the absence of such jurisdiction. At least such judgments will not be given extra-territorial effect.[3] This principle is firmly established in the English law.[4]

Nothing is more clear, therefore, than that the service of process in the case under discussion was insufficient. Was there a voluntary appearance and submission to the court's jurisdiction? It is submitted that there was. It is perfectly obvious that if the defendant had done nothing at all in the matter, after having been so served, any judgment obtained against him would have been a mere nullity in another jurisdiction, but instead of this he entered a conditional appearance and contested the jurisdiction of the court.[5] He thereby became bound by the law of the Isle of Man, which converted a conditional appearance into a general appearance. He placed himself in such a position that it became his duty to obey the judgment of the foreign court, which judgment is enforceable against him in any country where it is sought to be enforced.

Of course, it is not contended that a state can by a statute give jurisdiction to its courts over a citizen of another state who has not been served with process within the jurisdiction and who does not appear in the action. At least a judgment rendered pursuant to such a statute, upon substituted service, would be void in every other jurisdiction. The theory is, however, that when the defendant chooses to appear, when not bound to do so, he becomes subject to the consequences of the statute. The only argument to the contrary would seem to be that in the absence of such a statute,

[2] For the historical development and a résumé of the enforcement of foreign judgments, see Wharton, Conflict of Laws, pp. 518-539.

[3] Such judgments are not protected by the Constitution of the United States from attack for want of jurisdiction in another forum. Thompson v. Whitman, 18 Wall. 461 (U. S. 1873).

[4] Schibsby v. Westenholz, L. R. 6 Q. B. 155 (Eng. 1870); Voinet v. Barrett, 55 L. J. Q. Div. 39 (Eng. 1885).

[5] The appearance was not for the purpose of protecting property in the Isle of Man, in which case different considerations might have arisen. It is settled in England that, while an appearance by the defendant in a court of a foreign country for the purpose of protecting his property already in the possession of that court, may not be deemed a voluntary appearance, yet an appearance solely for the purpose of protecting other property in that country from seizure is considered as a voluntary appearance. De Cosse Brissac v. Rathbone, 6 H. and M. 301 (Eng. 1860); Schibsby v. Westenholz, *supra;* Voinet v. Barrett, *supra*, note 4.

such an appearance is not considered a voluntary submission to the jurisdiction, and, therefore, the mere presence of such a statute cannot alter the character of the appearance from the defendant's point of view. This might be answered by the contention that even in the absence of such a statute the conditional appearance is in fact a voluntary submission, though not considered as such by the courts, which do not attach to it the consequences imposed by the statute. Whether this be an answer or not, however, the fact remains that that theory has had little weight with the courts.

There are comparatively few cases in the United States which touch upon the problem involved. The Supreme Court of the United States failed to decide the question in the case of *York* v. *Texas*.[6] But there is one case, not referred to by the English court, which apparently raises the same kind of question, and the reasoning and opinion of the court applies with great force to the problem presented.[7] A statute of the State of Texas authorized service on a non-resident outside the limits of the state. By this same statute the filing of an answer was constituted an appearance of the defendant. The defendant, a non-resident, was served outside the state, but proceeded to file an answer, in which he first set up the lack of jurisdiction and then proceeded to answer the demand. His contention as to lack of jurisdiction of his person was overruled and judgment was subsequently rendered against him. The validity of this judgment was thereafter questioned in New York, where the defendant resisted, on the ground that the Texas court had never acquired jurisdiction, and that his special appearance, although coupled with an answer, did not preclude him from raising the question of jurisdiction at any subsequent time.[8] The court in its opinion, after admitting the defendant's contention in the absence of statute, said, "We think the judgment of the Texas court became, and is a binding adjudication on the defendant herein, for the reason that the defendant, by filing an answer, became bound by the statute law of the state." He was, therefore, bound by the consequences which the statute affixed to such a proceeding.

[6] 137 U. S. 15 (1890). The case does not raise the question as to the effect to be given a foreign judgment since it was not sought to be enforced in another jurisdiction.

[7] Jones v. Jones, 108 N. Y. 415 (1888).

[8] In the absence of a statute such as existed in Texas, there are many decisions to the effect that a party not properly served with process, so as to give the court jurisdiction of his person, does not waive the obligation or confer jurisdiction by answering over and going to trial on the merits after he has ineffectually objected to the jurisdiction and his objection has been overruled. Harkness v. Hyde, 98 U. S. 476 (1878); Steamship Co. v. Tugman, 106 U. S. 118 (1882); Walling v. Beers, 120 Mass. 548 (1876). But there is some authority *contra*. McCullough v. Railway Mail Assn., 225 Pa. 118 (1909). See note to Corbett v. Casualty Association, 16 L. R. A. (N. S.) 177 (1908).

It may safely be stated, therefore, that both authority and logic support the view taken by the court in *Harris* v. *Taylor*, that where a statute of this character is in operation such conditional appearance is to be considered a voluntary appearance and submission to the jurisdiction of the court.

L. W.

CONSTITUTIONAL LAW—AN ARGUMENT TO SUPPORT THE CONSTITUTIONALITY OF THE WEBB-KENYON ACT—The Webb-Kenyon Act of 1913[1] provides in substance that it shall be unlawful to transport into any state intoxicating liquor which is intended by any person interested therein to be received, sold or in any manner used, either in the original package or otherwise, in violation of any law of the state into which it is shipped. Any discussion concerning the constitutionality of this act must of necessity have for a background its predecessor, the Wilson Act of 1890,[2] and the case *In re Rahrer*,[3] in which the constitutionality of the latter act was upheld. An Iowa statute prohibiting the sale of liquors, except for medicinal purposes, had been held unconstitutional as applied to liquor brought from other states and sold in the original packages.[4] The inability on the part of the states to control the sale of liquor in this form was removed by the Wilson Act, which made liquor transported into any state, upon its arrival in such state, subject to the operation of the laws of that state enacted in the exercise of its police powers, to the same extent as though produced in that state, and regardless of whether it still remained in its original package. The act was held not to constitute a delegation of power to the states and was declared constitutional.

It is obvious, at the beginning, that the objection to the validity of the state statute in *Leisy* v. *Hardin*[5] cannot have been a constitutional one, since had it violated the Constitution of the United States, Congress could not later, by its assent, give a similar state act validity, which would be, in effect, an alteration of the Constitution by an act of Congress. The alternative is that the former statute was in conflict with the assumed will of Congress, which objection was removed by the Wilson Act.

The power of Congress to provide that an object of interstate commerce shall be divested of its interstate character at a point earlier than it otherwise would be is considered in *In re Rahrer* and the right affirmed. It would seem, however, that the case should

[1] Act Mar. 1, 1913, c. 90, 37 Stat. 699 [U. S. Comp. St. 1913 § 8739].
[2] Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St. 1901, p. 3177].
[3] 140 U. S. 545 (1890).
[4] Leisy v. Hardin, 135 U. S. 100 (1890).
[5] *Supra*, note 4.

be sustained upon some other and sounder theory. For if Congress, as it was there intimated, does possess the power to define interstate commerce and what constitutes objects of interstate commerce, it is apparent that it might, by a broad and all-embracing definition, greatly augment its powers; or, by adopting the opposite extreme, it might consummate a practical delegation of its power to regulate interstate commerce to the states.

While the constitutionality of the Webb-Kenyon law as yet remains to be passed upon by the Supreme Court of the United States, its validity has been the subject of considerable discussion among the lower courts. Perhaps the most recent of these opinions is in *Southern Express Company* v. *Whittle*,[6] where it was stated that the power to regulate commerce necessarily comprehends the power to define it, and likewise to distinguish "between things deleterious and things beneficial and innocuous," and to deny absolutely or conditionally entrance into such commerce to those things which are deleterious. The power to do the latter Congress undoubtedly possesses, but there appears to be an essential difference between a conditional or absolute exclusion prescribed by Congress that is uniform throughout the United States, and a delegation to each state of the right to determine, in the exercise of its police power, which, among articles of commerce generally conceded to be legitimate, it conceives to be deleterious, and to exclude such articles from interstate commerce. It is upon this power if exclusion, absolute or conditional, that another recent case, *State of West Virginia* v. *Adams Express Company*,[7] purports to sustain the Webb-Kenyon Act.

Indeed, the act is entitled: "An act divesting intoxicating liquors of their interstate character in certain cases." In a lengthy and well-considered opinion, Mr. Chief Justice Pennewill, in *State* v. *Grier*,[8] upheld the act with the following argument: "If an article of commerce can be divested of its interstate attributes and shorn of its protection, in part, by an act of Congress, it is difficult to see why it cannot be wholly divested of such attributes in a state whose laws seek to control it for the good of its citizens. If it is possible, under a federal act, to legally prevent its sale in the original package at the point of destination, why cannot its transportation within the state to such point be equally prevented?"

It seems clear that if it be assumed that Congress has power to define interstate commerce, and that *In re Rahrer* went to the extent of so holding, the force of this argument is irresistible. But in view of the possible practical consequences, already indicated, of the exercise of such a power by Congress, principle as well as

[6] 69 So. 652 (Ala. 1915).
[7] 219 Fed. 794 (1915).
[8] 88 Atl. 579 (Del. 1913).

authority opposes such an assumption.[9] The definition of interstate commerce is a judicial and not a legislative function, and its definition cannot be qualified or limited by Congress.

The act under discussion admittedly goes a step further than the Wilson Act in that it prohibits the transportation rather than the sale of articles under certain conditions. One is reminded of the early variance of opinion as to the meaning of the word "exclusive" when applied to the power of Congress to regulate interstate commerce, Mr. Chief Justice Marshall taking the view that it had reference to the power exercised,[10] and Mr. Chief Justice Taney taking the position that it had reference to that upon which the law operated.[11] The act under discussion unquestionably sanctions the interference by states with interstate commerce in a matter of national concern and the imposition of a direct burden upon it, which, in the absence of congressional action, would have been invalid.[12] The decision in *In re Rahrer* seems to indicate a harking back to the conception of Mr. Chief Justice Marshall, that the assertion that the power of Congress in this particular is "exclusive" has reference to the power exerted and not to the effect of its operation. And very recently the power of Congress to regulate interstate commerce has been characterized by the Supreme Court as "exclusive."[13] Taken altogether, these cases furnish some ground, at least, for the belief that the court is returning to this earlier conception which, though open to the objection pointed out by Mr. Chief Justice Taney that all state laws are in a sense police regulations, and that the importance of a state act from the constitutional viewpoint lies not in the motive of the legislature enacting it, but in the effect of the act in its application, is a theory on which *In re Rahrer* is clearly sustainable.

It would seem, therefore, that the only impediment to the imposition by a state of a direct burden on interstate commerce in the *bona fide* exercise of its police power, is the assumed will of Congress. The assent of Congress given in advance, being an unequivocal expression of its will, permits state legislation of this type, the safeguard against the actual delegation of power by Congress lying in the qualification that the state's action may not be a regulation of interstate commerce *as such,* but must be an exercise of its police power.

The decisions involving the Webb-Kenyon Act have been concerned with its application more often than with its constitutional-

[9] Brown v. Maryland, 12 Wheaton 419 (1826).
[10] Williamson v. Black Bird Creek Co., 2 Peters 245 (1829).
[11] License Cases, 5 Howard 504 (1846).
[12] Cooley v. Board of Wardens, 12 Howard 299 (1851).
[13] Sligh v. Kirkwood, 237 U. S. 52 (1914).

ity, some interesting situations having arisen.[14] It is submitted, however, that under the above theory, the constitutionality both of this act and of the Wilson Act is sustainable.

B. M. K.

INTERNATIONAL LAW—WHAT IS THE PRESENT STATUS OF ENEMY SHAREHOLDERS IN ENGLISH COMPANIES?—In view of the magnitude and extensiveness of modern commercial enterprises, it may seem surprising that there are very few reported cases dealing with the effect of the outbreak of the present war upon the rights and obligations of persons, resident in one country, who hold stock in corporations doing business in an enemy country. The absence of litigation on this question is principally accounted for by the fact that each of the belligerent countries has its own municipal law on the subject, contained in executive proclamations and statutory enactments. Occasionally, however, situations arise that are not specifically provided for by the municipal law, and then the rules of international law, such as they are, must be relied upon.

An alien, not an enemy, is, of course, not prevented from being a stockholder in a corporation.[1] On the other hand, a person cannot become a stockholder after war has broken out between his country and the country where the corporation is chartered and conducting its business. In legal contemplation, the subjects of two hostile countries are enemies, and so long as the war lasts, they are unable to enter into any binding contracts with one another. Consequently, it is clear that during the continuance of the war, an agreement by a German to become a member of an

[14] In James Clark Distilling Co. v. Western Maryland Ry. Co., 219 Fed. 333 (1914), a statute of West Virginia prohibited the sale of intoxicants within the state and declared that as to liquor shipped into the state, the sale should be deemed to be made at the place of delivery. The District Court held that the state could not forbid the sale of liquors in another state nor say that what by the general law was a completed sale in Maryland was a sale in West Virginia. The court construed the statute as being intended merely to make certain the county in which offenders were to be prosecuted. But in considering the same statute the Circuit Court of Appeals later held that the legislature had power to provide that the place of delivery should be the place of sale, which under the circumstances was tantamount to a prohibition against receipt and delivery. State of West Virginia v. Adams Express Co., *supra,* note 7. In Hamm Brewing Co. v. Chicago, *etc.,* Ry. Co., 215 Fed. 672 (1913), a statute of Iowa prohibited the transportation by any common carrier of liquors unless the consignee had a permit. It was held that the carrier was not justified in refusing a shipment consigned to one who had no permit. It was pointed out that the Webb-Kenyon Act prohibits the transportation only when it was intended to be received, used, *etc.,* in violation of the law, and does not prohibit *transportation* in violation of the law.

[1] Reg. v. Arnauld, 16 L. J. Q. B. 50 (Eng. 1847).

English company, or of an Englishman to become an *actieninhaber* of a German *gesellschaft,* cannot be enforced.[2]

The effect of war upon the status of an alien enemy, holding stock in a corporation before the outbreak of hostilities, was, until very recently, never judicially decided in this country or Great Britain.[3] Moreover, fundamentally different conclusions are reached by the few writers on international law who discuss the situation.[4]

Some authorities declare that an alien enemy shareholder forfeits his membership as soon as the war breaks out, that he is entitled to be paid the value of his shares estimated as of the time of the commencement of the war, and that this claim is collectable upon the termination of hostilities. A French writer asserts that the rule prohibiting intercourse applies equally *"aux associations commerciales formées entre les sujets des deux nations avant ou après la déclaration de guerre."*[5] The leading exponent of this point of view today, Dr. T. Baty,[6] applies the doctrine of non-intercourse with utmost rigor. The rights of shareholders in a corporation are contractual. The contracts upon which they are based are executory, contemplating a continuing liability on the shareholders for calls on shares, a continuing obligation on the

[2] See note in 64 UNIV. OF PENNA. L. REV. 81 for a survey of the rules as to trading with the enemy.

[3] The case of *Ex Parte* Boussmaker, 13 Ves. 71 (Eng. 1806) has been considered to have decided that the rights and liabilities of an alien enemy shareholder would be suspended during the war, and that such a person does not *ipso facto* cease to be a member of the company. Lindley: "Law of Companies," vol. I, p. 53 (Ed. 1902). It is submitted that this case does not go to that extent, but only decides that an alien's right to recover a dividend in bankruptcy revives on the restoration of peace, the liability having arisen out of a contract entered into before the outbreak of the war. The case of Continental Tyre and Rubber Company v. Daimler Company, 1 K. B. 893 (Eng. 1915) has a remote bearing, if any, upon the problem. It was there decided that a company formed under English laws and doing business in England could recover a debt due the company notwithstanding the fact that its directors and shareholders were alien enemies, on the ground that the entity alone could be regarded and that in no circumstances could the debt be treated as a debt to the individual shareholders.

[4] It should be noted at the outset that whether a person is to be regarded as an alien enemy depends not upon his nationality, but rather upon whether he is voluntarily resident in the land of the enemy. See Albrecht v. Sussman, 2 Ves. & B. 323 (Eng. 1813); Wells v. Williams, 1 Salk. 46 (Eng. 1697). A doubtful question arises as to the enemy character of a corporation holding stock in another corporation, the difficulty lying in the question as to whether the corporation has but one "residence" or whether it may be regarded as "resident" wherever it has any place of business. See Lindley: Companies, vol. I, p. 54; Jones v. Scottish Accident Ins. Co., 17 Q. B. D. 421 (Eng. 1886). The enemy character of a company will not be determined by ascertaining whether the majority of its shareholders are enemies. See Jarson v. Dreifontein Mines, Ltd., A. C. 484 (Eng. 1902).

[5] C. Calvo: "Le Droit International" (Paris, 1888-1896), § 1930.

[6] T. Baty: "International Law in South Africa" (London, 1900), p. 94.

corporation to pay periodical dividends, and a continuing right in the shareholders to help manage the business of the corporation. The war, consequently, should abrogate and dissolve absolutely the relationship of the shareholders with the corporation.

The advocates of this theory hold that the effect of war upon the shareholder's status should be treated as analogous, to a certain extent, to the case of partnerships. It is well settled that commercial partnerships between the subjects of opposing belligerents are *ipso facto* dissolved by the declaration of war.[7] This rule is based upon the fact that the power of mutual control of the partners is gone, and that one should not derive any profit out of his partner's trade in an enemy's country. Furthermore, since it is difficult for the partners to continue the business, when the war is ended, at the point where it was abandoned, it is held that the partnership is dissolved, and not merely suspended. Dr. Baty suggests that while the corporation should continue to exist, the enemy shareholders should be dropped from membership.

A contrary view is taken by other modern writers, notably by Mr. Norman Bentwitch,[8] who points out that the essential differences between corporations and partnerships require that the effect of war be different in the two cases. Shareholders, as distinguished from partners, are limitedly liable, they have no substantial power of control over the corporation, and they constitute, theoretically, a distinct legal entity. It is hardly likely, this author thinks, that it would be detrimental to national security to allow an enemy shareholder to retain his rights and liabilities during the war. "The structure of modern commerce," he says, "and the vast number of companies which comprise shareholders of all nations, demand that the old thumb-rule about the abrogation of executory contracts, which was never meant to apply to these new circumstances, should not arbitrarily and unreasonably be extended to them."[9] The only necessary measure, therefore, is to suspend merely the payment of dividends until the resumption of peace, allowing interest to accrue until that time, and it is inadvisable to interfere with the slight control that an enemy shareholder may have in a corporation.

The single case that flatly decides what the rights of a Ger-

[7] Griswold v. Waddington, 15 Johns. 57 (N. Y. 1818), 16 Johns. 438 (N. Y. 1819); Esposito v. Bowden, 7 E. & B. 785 (Eng. 1857); Planter's Bank v. St. John, 1 Woods 585 (U. S. 1869).

[8] Bentwitch: "War and Private Property," p. 58. See also R. A. Chadwick: "Foreign Investments in Time of War," 20 L. Q. R. 167 (1904).

[9] Compare the language of Mr. Justice Gray in Kershaw v. Kelsey, 100 Mass. 561 (1868): "At this age of the world, when all the tendencies of the law of nations are to exempt individuals and private contracts from injury or restraint in consequence of war between their governments, we are not disposed to declare such contracts unlawful as have not been heretofore adjudged to be inconsistent with a state of war."

man shareholder in an English company during the war are has just been decided. In *Robson* v. *Premier Oil and Pipe Line Company, Ltd.*,[10] Lord Justice Pickford, who delivered the opinion for the Court of Appeals, holding that German shareholders have not the right to vote for directors of an English company, nor to exercise such a right by proxy. The court adopted the view of Professor Westlake,[11] who takes a middle-ground, holding that the shareholder continues to be a member of the company, but his rights and liabilities are suspended during the continuance of hostilities. This is essentially a compromise.

It is difficult to see how the exercise of the voting power by the shareholders in an English trading company may be detrimental to the interests of Great Britain or to the advantage of her enemies. While patriotism may be confined within the borders of one's native land, modern business does not know such narrow limitations. The network of commercial relations has become world-wide, and it is necessary, in order to maintain stability of credit, to afford foreign investors in time of peace such security as will encourage them to supply capital for extensive business enterprises. It would seem advisable, therefore, to refrain from interfering with international trade relationships, unless absolutely essential to safeguard the interests of the nation.

L. E. L.

LIBEL—PRIVILEGED COMMUNICATIONS—GRAND JURORS—The foundation for the immunity of privileged communications in slander and libel is public policy. Sometimes it is so much to the public interest that one should be able to speak one's mind freely, without fear of the consequences, that the law will excuse even intentionally and wilfully false and harmful statements concerning another. At other times, the interest of the public at large does not demand so sweeping an immunity, but requires merely that one be absolved from responsibility only so long as his statements are made in good faith, and without actual evil intent. In the former the immunity is absolute; in the latter it is qualified.

An important form of privilege is that accorded to persons taking part in the administration of justice. The exact extent of the privilege may vary according to the person who claims it and

[10] 113 L. T. Rep. 523 (Eng. 1915). In Rex v. London County Council, 113 L. T. Rep. 118 (1915), Lord Chief Justice Reading intimated that an alien enemy should not be allowed to vote by proxy on his shares in an English company. This opinion, which was merely *obiter dictum*, was put on the ground that the alien enemy did not have the capacity to give authority to a proxy in England.

[11] Westlake: "International Law," Part II, p. 53. See also Phillipson: "Effect of War on Contracts," p. 102.

the jurisdiction in which it is claimed, but it may be stated broadly that judges, parties, counsel and witnesses may not be sued for defamatory words uttered during the course of judicial proceedings.[1] So also it is held that whatever may be said by one juror to another in the jury room while the verdict is being considered, cannot be the subject of a civil action.[2]

It is also settled that presentments, indictments and reports made by a grand jury under the authority conferred upon that body by the law of the particular jurisdiction, cannot be the basis of a civil action.[3] This is so no matter how erroneous the act of the jury may be, or how malicious the motive which inspired it.[4] The acts of the grand jury in discharge of their duties are absolutely privileged. An interesting question arises, however, where the grand jury takes some action which is not authorized by the powers granted to it.

On this point there is a recent decision of the Court of Civil Appeals of Texas, which is of interest.[5] The grand jury, regularly impaneled for the purpose of discharging its ordinary duties, turned into court a written report of its findings, containing a statement that the sheriff of the county was guilty of immoral conduct unbecoming his office, but no indictment was presented against him. By the law of the state, such a proceeding was not a part of the duties of the grand jury. The sheriff sued the members of the grand jury for libel, but was met with a demurrer, which was sustained by the trial court on the ground that the report of the jury was a privileged communication, and could not be made the basis of a suit for libel. On appeal, however, it was held that the lower court had erred in sustaining the demurrer.

This case is similar to the earlier case of *Rector* v. *Smith*, decided in Iowa in 1860.[6] There it was expressly stated by the court that a grand jury's report which was unauthorized by law was not a privileged communication; but the actual decision was that as the grand juror who was sued asserted that he had acted without malice or ill-will toward the plaintiff, and in the belief

[1] Judges: Scott v. Stansfield, L. R. 3 Ex. 220 (Eng. 1868). Parties: McDavitt v. Boyer, 169 Ill. 475 (1897); Badgley v. Hedges, 2 N. J. L. 233 (1807). Counsel: Munster v. Lamb, 11 Q. B. D. 588 (Eng. 1883); Hollis v. Meux, 69 Cal. 625 (1886). Witnesses: Buchsbaum v. Heriot, 5 Ga. App. 521 (1908).

[2] Durham v. Powers, 42 Vt. 1 (1869).

[3] Sidener v. Russell, 34 Ill. App. 446 (1889); Fisk v. Soniat, 33 La. Ann. 1400 (1881).

[4] Turpen v. Booth, 56 Cal. 65 (1880); Hunter v. Mathis, 40 Ind. 356 (1872).

[5] Rich v. Eason, 180 S. W. 303 (Tex. 1915).

[6] 11 Ia. 302 (1860).

that the report was within the scope of his duty, he was not liable. This amounts, however, to holding that the report was qualifiedly privileged.[7]

The exact view of the court in the principal case[8] is difficult to ascertain. It does not appear whether the grand jury acted in good faith and without ill-will in making the objectionable report, and the court does not refer to that point. This would lead to the belief that the court deemed it unimportant, and meant to deny all privilege whatsoever, both absolute and qualified, in cases where a grand jury publishes a defamation outside the scope of its duties. On the other hand, the court quotes with approval the case of *Rector* v. *Smith*,[9] which would indicate that it merely refused to grant absolute privilege, and that it was assumed that the grand jury had acted with actual malice.

The reason that grand jurors are not liable for their words or acts, no matter what their motives, while acting as members of the grand jury within the legitimate scope of their duties, as stated by an early writer, is that "it would be of the utmost ill-consequence in any way to discourage them from making their inquries with that freedom and readiness which the public good requires."[10] It would seem, however, that the same reasoning applies where the grand jury through a mistake as to its powers acts in a matter beyond its authority. Would not a contrary rule retard the administration of justice, which public policy most strongly requires to be unfettered and untrammelled? At least where they exceed their powers through an honest but erroneous conception of their duties, should not grand jurors be exempt from liability?

But does public policy demand an absolute immunity even where they knowingly exceed their authority? If grand jurors are perfectly aware that they are not empowered to take a certain action, but wilfully do so from some improper motive, it seems perfectly just to hold them liable. The difficulty, however, lies in the fact that it is necessary to ascertain the state of mind of the members of the grand jury, and to determine whether or not they acted knowingly and wilfully. As this would have to be passed upon

[7] That the court so meant to hold is further indicated by the fact that it quoted as follows from Bradley v. Heath, 12 Pick. 163 (Mass. 1831): "Where words imputing misconduct to another are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty . . . no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases without proof of express malice." This is but a form of the rule of qualified privilege

[8] *Supra*, note 5.

[9] *Supra*, note 6.

[10] 1 Hawkins' P. C., ch. 73, sect. 10 (ed. 1777). See also *id.* ch. 72, sect. 5.

by another jury in the event of a grand juror being sued, grand jurors would perhaps be hampered by the fear that their motives, though entirely honest, might be misconstrued, with consequent liability to themselves. If their motives could be infallibly determined, they should be held to accountability; but inasmuch as this is not possible, it may be argued that they should be given absolute immunity.

It is not certain, however, that public policy requires so extensive a privilege. It may be that the public interest is sufficiently conserved by allowing grand jurors a qualified privilege where they mistakenly exceed their duties;[11] but it is submitted that at least a conditional immunity is imperative.[12]

E. E.

PROPERTY—TENANCY BY THE ENTIRETY—At common law, husband and wife did not take, under a conveyance of land to them jointly, as tenants in common or as joint tenants, but each became seized of the entirety, *per tout, et non per my;* the consequence of which was that neither could dispose of any parts without the assent of the other, but the whole remained to the survivor under the original grant.[1] They were said to take a tenancy by the entireties because there were no moieties between husband and wife. The reason for the rule was founded on the legal fiction of the unity of husband and wife.

As a result of the various married women's acts, the question soon arose as to whether this legislation had destroyed the legal unity of husband and wife. A few jurisdictions have taken the position that by these acts conferring upon married women the legal right to acquire property and to hold and enjoy it free from the husband's control, the rule that a conveyance to a husband and wife made them tenants by entirety ceased to exist.[2] But it is still the law in a majority of jurisdictions that regardless of the married women's acts, that where the conveyance is to husband and wife without any words prescribing, qualifying or characterizing

[11] This is no doubt the view of the court in Rector v. Smith (*supra*, note 6).

[12] The principal case, Rich v. Eason, *supra*, note 5, and Rector v. Smith, *supra*, note 6, are the only reported cases in which the exact point discussed is the subject of decision. The question is referred to *obiter* in Poston v. Washington, *etc.*, R. R. Co., 36 App. D. C. 359 (1911), and in Parsons v. Age-Herald Pub. Co., 181 Ala. 439 (1913). In the former case, there is a *dictum* that the grand jury has no protection at all against action if it exceeds its authority; in the latter case, no definite ruling is made as to the liability of the jurors themselves under such circumstances.

[1] 2 Blackstone 182; 2 Kents Comm. 113.

[2] Clark v. Clark, 56 N. H. 105 (1875); Hoffman v. Stigers, 28 Iowa 302 (1869).

the kind or quality of the estate which each shall take, the grantees take as tenants by the entirety.[3] These courts take the view that the design of the legislature in passing the acts was not to destroy the unity of husband and wife, but to protect the wife's property, by removing it from the control of the husband. Furthermore, there is the theory that the acts did not have in view the force and effect of the instrument by which an estate may be granted to a wife; but that they operate upon her property rights only after such rights have accrued.

May the grantor defeat this common law rule and give to the husband and wife a different estate, by using express words in the grant? Although there is some respectable authority for the position that at common law husband and wife could not take as tenants in common even though words to that effect were used in the conveyance to them,[4] the great weight of authority seems to be that if apt words were used husband and wife could take such an estate even before the passage of the married women's acts.[5] But whatever may have been the rule at common law today the courts are unanimous in holding that as a result of the acts, the rule as to tenancy by entirety may be avoided by the intention of the grantor, if such intention is shown by express words in the grant.[6]

Until recent years Pennsylvania was the one exception. By a long line of decisions following the case of *Stuckey* v. *Keefe*[7] the courts adhered so strictly to the legal fiction of the unity of husband and wife, that they held that even after the Married Woman's Acts it was impossible to convey to a husband and wife as tenants in common or as joint tenants. But in the recent case of *Blease* v. *Anderson*[8] that court by express words overruled its former decisions and Pennsylvania is now in accord with the general rule.

In this connection it is interesting to note a recent New York case.[9] A man deeded property to himself and his wife to hold as tenants of the entirety. Later he willed all his property to his wife and died in her lifetime. Under a direct inheritance tax the state sought to levy a tax on half the property. Three of the judges after pointing out that the grantor by express words in the grant set forth a tenancy by entirety and that the Married Woman's Acts had not abolished that form of tenancy, held that half the property

[3] Bertles v. Numan, 92 N. Y. 156 (1883); Fulper v. Fulper, 54 N. J. E. 431 (1896); Diver v. Diver, 56 Pa. 106 (1867).

[4] McCurdy v. Canning, 64 Pa. 133 (1870).

[5] Preston Estates, vol. I, p. 132; Hunt v. Blackburn, 128 U. S. 464 (1888); Miner v. Brown, 133 N. Y. 308 (1892).

[6] Carroll v. Reidy, 5 App. D. C. 59 (D. C. 1896); Brown v. Brown, 133 Ind. 476 (1893); Stulcup v. Stulcup, 137 N. C. 305 (1904).

[7] 26 Pa. 397 (1856).

[8] 241 Pa. 198 (1913).

[9] In re Klatzl's Estate, 110 N. E. 181 (1915).

was subject to the tax, because the grantor having failed expressly to declare that the grantees were to take as joint tenants, created a tenancy in common under a statute of the state.[10] In other words, unless a grantor by express words grants a joint tenancy, the grantees shall take as tenants in common. Under this decision it is impossible to create an estate by the entirety.[11]

Three dissenting judges based their opinion upon the reasoning that mere implication drawn from a statute is not sufficient to warrant a destruction of a principle of the common law. They, therefore, held that the grantees took as tenants by the entirety, even though the words "to hold as joint tenants" were not used in the deed.

Even though it may seem that because of modern innovations respecting the property rights of married women, estates by entireties have outlived the purpose of their creation and are out of harmony with present conditions, yet courts have wisely held that these estates shall not be changed by mere implication. It is submitted that the reasoning of the court in the principal case may eventually result in abandoning the theory of the legal unity of husband and wife by mere implication from legislative action. This change of the long established rules governing title to real property should be brought about only by express legislative enactment.

G. F. D.

[10] 3 R. S. (7th Ed.), p. 2174, sec. 44. The statute provides: "If a conveyance is made to two or more persons, unless it is expressly declared that they are to take as joint tenants, they shall take as tenants in common."

[11] The Chief Justice, while dissenting from the reasoning of these judges as to question of grantees not taking a tenancy by entirety, was in favor of allowing the tax because of a liberal construction of the "Tax Law."