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NOTES.

LAW SCHOOL—ORDER OF THE COIF—At the annual meeting of the University of Pennsylvania Chapter of the Order of the Coif on April 7, 1916, the following members of the Class of 1916 were elected to membership:

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APPEAL—HAS A BOARD OF CENSORS THE FINAL DECISION AS TO THE PROPRIETY OF A MOTION PICTURE FILM?—Because of the extension of the domain of administrative boards and quasi-judicial tribunals, a recent decision [1] in an appeal from an order of the Penn-

sylvania Board of Censors of Motion Pictures is of importance aside from the particular subject matter involved.

It was contended that, under the statute creating the Board, the censors had the sole and exclusive authority to determine the propriety of the films, and that on appeal the court was limited to an examination of the regularity of procedure and use of discretion by the censors.[2] The court held that upon appeal the whole matter was before the court *de novo*, to be examined and tried regardless of the former examination.

At common law an appeal in the technical sense as meaning a trial *de novo*, did not exist.[3] So in the absence of statutory authorization no appeal can be taken to a judicial tribunal from the decisions and orders of administrative bodies, such as county boards.[4] Furthermore, in matters of police regulation, when decisions resting on questions of public safety are entrusted to an administrative board, the right of appeal to a judicial tribunal need not be conferred.[5] The establishment of a state board of motion picture censors with power to prohibit the exhibition of films of which it does not approve is a valid exercise of the police power.[6] It is apparent then that a legislature need not grant an appeal from such a board of censors[7] and that unless expressly granted it does not exist.

On account of the various meanings attached to the word "appeal," the mere use of the word in a statute furnishes no certain guide to its precise meaning and effect.[8] The particular statute must

[1] Franklin Film Mf'g Corp'n, 25 Dist. R. 219 (Pa. 1916).

[2] Act of May 15, 1915, P. L. 534.

"Sec. 26.—If any elimination or disapproval of a film . . . is appealed from, such film, will be promptly re-examined, in the presence of such person, by two or more members of the board, and the same finally approved or disapproved promptly after such re-examination, with the right of appeal from the decision of the board to the Court of Common Pleas of the proper county."

[3] Evansville & T. H. R. Co. v. Terre Haute, 161 Ind. 26 (1903); Fouse v. Vandervort, 30 W. Va. 327 (1887).

[4] Canal Co. v. Bright, 8 Col. 144 (1884); Bridges v. Clay County, 57 Miss. 252 (1879); *in re* Searles, 127 Pac. 902 (Mont. 1912).

Where no appeal is provided, *certiorari* or other remedy is open to injured parties to review the proceedings. State Board of Com'rs of Polk County, 87 Minn. 325 (1902).

For cases on different kinds of quasi-judicial officers, see Mechem: Law of Public Officers, §§ 636-643.

[5] Curran v. Delano, 235 Pa. 478 (1912); Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531 (1914).

[6] Mutual Film Co. v. Ohio Industrial Commission, 215 Fed. 138 (1914), affirmed in 236 U. S. 230 (1915); Mutual Film Co. v. Hodges, Gov. of Kan., 236 U. S. 248 (1915).

[7] Block v. Chicago, 239 Ill. 251 (1909); Mutual Film Corp'n v. Breitinger, 250 Pa. 225 (1915).

[8] Especially is this true in Pennsylvania. The Act of May 9, 1889, § 1,

be construed in order to determine the import of the term.[9] Resort must be had to the general policy of the law and to reasons drawn by analogy and from the practical consequences of applying one interpretation or another. The principal case furnishes an illuminating example of this method.[10] Statutes giving the right of appeal are liberally construed.[11]

The practice in "appeals" from quasi-judicial tribunals seems to favor a trial *de novo* by the court. Such is the general rule on an appeal from an order or decision of a county board.[12] In Connecticut, an appeal by a street railway from municipal authorities to the railroad commissioners, in a proceeding to locate a road, carries up the whole proceeding for review *de novo*,[13] and the same is true of an appeal to the court from a decision of the commissioners.[14] Under acts providing for appeals from certain quasi-judicial tribunals to courts, which statutes neither prescribed any course of procedure by, nor limited the power of, the appellate tribunal on such an appeal, it has been held that the legislature intended to confer upon the court jurisdiction to try and determine *de novo* all the issues of fact and law originally presented to the board.[15] The

P. L. 158, provides that all appellate proceedings heretofore taken by writ of error, appeal, or *certiorari*, shall hereafter be taken in proceedings to be called an appeal.

This Act does not extend the right or alter the modes of review, but merely changes the names of the former modes. Shoup v. Shoup, 205 Pa. 22 (1903); Katherine Water Co., 32 Pa. Super. 94 (1906).

See Monaghan: Pennsylvania Appellate Practice, § 48, Right of Review in Statutory Proceedings; *Ib.* § 182 (3), Appeal Defined.

[9] Carnall v. Crawford County, 11 Ark. 604 (1851); State v. Jacksonville Terminal Co., 41 Fla. 363 (1899).

[10] *Supra*, note 1. Barratt, P. J.—"Thus the technical meaning of the word 'appeal,' the literary construction of the sentence, and the reference to the Common Pleas, as well as the history of the statute, all point alike to a retrial. The magnitude of the interests involved, both property and otherwise, indicate the same intention on the part of the legislature."

[11] Snyder v. Circuit Judge, 80 Mich. 511 (1890); Stephens v. Cherokee Nation, 174 U. S. 445 (1898); 2 Lewis's Sutherland: Statutory Construction, § 717.

[12] Mahoney v. Shoshone County, 8 Idaho 375 (1902); Myers v. Gibson, 152 Ind. 500 (1898).

Cf. Goodnow: Principles of Administrative Law, p. 395: "Courts will not review the determination of assessors as to the value of the property, where such assessors have had jurisdiction and have applied right legal principles." Citing, McCrillis v. Mansfield, 64 Me. 198 (1875); Houston County Com'rs v. Jessup, 22 Minn. 552 (1876).

[13] Hartford v. Hartford St. Rwy. Co., 75 Conn. 471 (1903).

[14] Waterbury's Appeal, 78 Conn. 222 (1905).

[15] City of Rockford v. Compton, 115 Ill. App. 406 (1904),—appeal from board of fire and police commissioners upon removal of member of force; McMillan v. Board of County Com'rs, 93 Minn. 16 (1904),—appeal in proceeding for construction of a drainage ditch.

reasons applied in the construction of those statutes apply with equal force to the principal case.

R. K. D.

NOTE.—Since the above was written the Supreme Court of Pennsylvania has reversed the decision of the Court of Common Pleas. (April 17, 1916.)[16]

CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—PROHIBITIVE TAX ON TRADING STAMPS—The general use of trading stamps and coupons in connection with retail sales has been productive of considerable regulative legislation, the validity of which after frequent review in the state courts has now for the first time been considered by the Supreme Court of the United States. Twenty-three states have attempted either to prohibit or to impose license fees which are in effect prohibitive taxes upon the selling or use of trading stamps and coupons. Similar legislation has been enacted for the District of Columbia and the Territory of Hawaii.

In the state courts, the overwhelming weight of authority has condemned these statutes as an arbitrary discrimination against a legitimate business and as an unwarrantable interference with the liberty of the citizen, in violation of the Fourteenth Amendment.[1] In the state cases it has frequently been declared that the use of trading stamps and similar devices is but a novel means of advertising, not essentially different from other lawful methods of attracting custom; and that there is no reasonable basis for selecting this particular mode of advertising to be prohibited, or taxed out of existence.[2] Time and again have these decisions upheld the legitimacy of the trading stamp enterprise, and asserted that as there is nothing in the business detrimental to the public health, morals, safety, or welfare, the state can neither prohibit it directly

[16] In an opinion by Mr. Justice Von Moschzisker, the court said: "A careful reading of the statute convinces us it was never contemplated that the Courts of Common Pleas were to be constantly called upon to permit moving picture reels to be produced before them, and sit as supercensors thereof, in order to review the decisions of the administrative body created by the act. The evident intent was to grant a right of appeal to the Common Pleas Court so that tribunal could correct any arbitrary or oppressive orders which the Board of Censors might make, and nothing more; in other words, that the court might reverse the censors when the latter were guilty of abuse of discretion. This is the ordinary rule to which, on appeal, even this court restricts itself in reviewing an exercise of discretion, particularly of administrative officals."

[1] *Ex parte* Drexel, 147 Cal. 763 (1905); State v. Caspare, 115 Md. 7 (1911); Sperry & H. Co. v. Owensboro, 151 Ky. 389 (1912). The lower federal courts are in accord. Cottrell v. Sperry & H. Co., 227 Fed. 256 (1915).

[2] Hewin v. Atlanta, 121 Ga. 723 (1904); State v. Dodge, 76 Vt. 197 (1904).

under color of the police power nor accomplish the same result indirectly by the imposition of excessive license taxes.[3]

The United States Supreme Court, however, when finally confronted with the problem, with full realization of the gravity of the question, and complete appreciation of the great body of state authority, has now rendered a contrary opinion. The occasion was three cases in each of which merchants issuing trading stamps or premium tokens attacked the validity of state laws imposing obviously prohibitive license fees on such tokens. All three cases were considered together and decided on the same day, the decision, being, as stated, that the statutes are valid.[4]

For the purpose of the decision, the court treats the statutes as in effect direct prohibitions upon the issuance of trading stamps and coupons. Thus considered, the argument for their validity would be that they were passed under a lawful exercise of the police power of the state; and the main argument in rebuttal would be that they violated the clause of the Fourteenth Amendment which forbids any state to deprive any person of life, liberty, or property without due process of law, or to deny to any person within its jurisdiction the equal protection of the laws. It is fundamental to say that a valid exercise of the police power is not controlled or in any way affected by the provisions of the Fourteenth Amendment;[5] but the state cannot, under the guise of police regulations, arbitrarily invade private property or personal rights, or arbitrarily discriminate between individuals or classes.[6]

Whether a law is beneficial to the public health, safety or morals is primarily and fundamentally for the legislature to determine, and the courts have nothing to do with the wisdom, policy, or expediency of the laws passed under the police power.[7] But though the discretion of the legislature is very large, it is not final and conclusive; the courts have power to determine whether the law has a real and substantial relation to the public safety, health, or welfare, and whether it operates or tends in some real degree to promote or secure these objects.[8]

The courts, however, are loth to condemn a regulation, ostensibly police, as violative of the Fourteenth Amendment, and will not do so except where absolutely necessary. If it is possible to find

[3] Denver v. Frueauff, 39 Colo. 20 (1906); Nebraska v. Sperry & H. Co., 94 Neb. 785 (1913); and cases *supra*, notes 1 and 2.

[4] Rast v. Van Deman & Lewis Co.; Tanner v. Little; Pitney v. Washington (U. S. S. C., March 6, 1916).

[5] Barbier v. Connolly, 113 U. S. 27 (1885); Powell v. Penna., 127 U. S. 678 (1888).

[6] Lawton v. Steele, 152 U. S. 133 (1894); Yick Wo v. Hopkins, 118 U. S. 356 (1886).

[7] Mugler v. Kansas, 123 U. S. 623 (1887).

[8] Chicago, B. & O. Rwy. Co. v. Illinois, 200 U. S. 561 (1906).

any reasonable basis for the classification made by the legislature, the courts will refuse to declare it discriminatory; and likewise if the due process clause is invoked, the courts will do their best to uphold the statute, if they can possibly find that it bears any reasonable relation to the public welfare.

It was avowedly with this attitude of mind that the United States Supreme Court examined the trading stamp laws. Mr. Justice McKenna says in delivering the opinion of the court: "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assured."[8] This language is extremely significant, indicating as it does that the court will make an active effort to imagine some reasonable basis for the law, whether or not that basis is proved actually to exist.

Viewing the problem from that angle, the court felt itself able to find a sufficient difference between a business in which trading stamps were used and one in which they were not used, to meet the objection that the statutes were a denial of the equal protection of the laws; and in answer to the contention that the acts unlawfully infringed the business liberty of the complainants in violation of the due process clause, the court declared that it was reasonably possible to assume such deleterious effects arising from the use of trading stamps as to justify the statutes under the police power of the states. It thought that trading stamps or coupons are something more than advertising, but that even regarding their use as a means of advertising, the difference between a business in which coupons are used, and one in which they are not used, is pronounced, and that "the legislation which regards the difference is not arbitrary within the rulings of the cases".[9] The court also thought that the persistent effort of the various legislatures to wipe out the trading stamp business, exhibited since 1880, must be due to some justifiable feeling that the business is undesirable. The court apparently felt that though it might not be possible to point out any definite evil in the use of coupons, yet the constant recurrence of these anti-coupon laws must indicate some such underlying detriment.

It must be admitted that there is a good deal of force in this reasoning, and it is quite possible that, as stated by the court, the apparent giving of something for nothing by means of trading stamps or the like may tempt the public to unwise expenditures.[10]

[9] *Per* McKenna, J., rendering the opinion of the court.

[10] "They rely upon something else than the article sold. They tempt by a promise of a value greater than that article and apparently not represented in its price, and it hence may be thought that thus by an appeal to cupidity lure to improvidence. This may not be called in an exact sense a 'lottery'; may not be called 'gaming'; it may, however, be considered

But in these cases the Supreme Court has clearly shown its intention to uphold a law in spite of the great weight of other authority, where it is in any way possible to find a reasonable ground for so doing. Viewed in that light, the decision seems proper.

E. E.

CONTRACTS—VALIDITY—OUSTING THE JURISDICTION OR LIMITING THE POWER OF THE COURTS—It is universally conceded that parties to a contract may stipulate in many ways the rules of law for any legal proceedings to which they may become parties, which not only will bind them, but which the courts are bound to enforce.[1] Thus an agreement that a period less than that fixed by the statute of limitations shall be a bar to any action springing from the contract is valid.[2] Also that the action is not pursued in the particular way provided by the agreement of the parties is a valid defence to a suit at law brought in a different manner.[3]

But although the courts will allow this limited interference with their jurisdiction, they will not give validity to a contract that provides that neither party shall resort to the courts.[4] In *Doyle* v. *Insurance Company*,[5] the Supreme Court of the United States refused to sanction a contract to refrain from resorting to the courts of the United States.

The question then arises: Will the courts sustain an agreement to sue in only one certain court? This question has been answered in the negative in the recent case of *Nashua River Paper Company* v. *Hammerville Paper Company*,[6] where the Supreme Court of Massachusetts held that a stipulation in the contract that no action should be maintained under the contract in any state court or federal court other than the state court of Pennsylvania, was unenforcible and would not preclude the maintenance of an action in Massachusetts. The argument to sue in only a certain court is a stipulation concerning the remedy, which is created and regulated by law and therefore cannot be changed by the parties.

Although this mode of reasoning causes no difficulty when ap-

as having the seduction and evil of such, and whether it has may be a matter of inquiry, a matter of inquiry and of judgment that it is finally within the power of the legislature to make." *Per* McKenna, J.

[1] Matter of N. Y. R. R. Co., 98 N. Y. 447 (1885).

[2] Brown v. Insurance Co., 24 Ga. 97 (1858).

[3] Insurance Co. v. Candle Co., 31 Pa. 448 (1855).

[4] Knorr v. Bates, 35 N. Y. Supp. 1060 (1895).

[5] 94 U. S. 535 (1876).

[6] 111 N. E. 678 (Mass. 1916).

plied to the facts of the particular case, at first glance, it seems to raise a serious doubt as to the soundness of those decisions which uphold a stipulation that disputes arising on a contract shall be referred to an arbitrator, whose decision shall be final. As the right to sue in any court is a question of remedy, it is submitted that the right of going before an arbitrator is also a question of remedy. But a close survey of the cases will show that the apparent inconsistency does not exist. While as a general rule courts may be said to enforce an agreement to refer to arbitrators yet they will not enforce the contract unless the dispute refers only to questions of fact.[7] If the stipulation is that disputes as to questions of law, or as to the legal rights of the parties under the contract, shall be submitted to a referee, it is invalid.[8] As courts of law determine the legal rights of the parties as well as the questions of fact, it may be readily seen that a contract to sue in only a certain court is in effect an agreement to refer all questions of law to a certain arbitrator.

It is firmly settled in Pennsylvania that agreements to refer disputes of facts to arbitrators will be upheld, provided the power to pass upon the subject matter in dispute, is clearly given to the arbitrator by the terms of the agreement.[9] In *Ruch* v. *York*,[10] Mr. Justice Mestrezat said, "the parties to a building contract may legally provide therein that disputes arising out of the contract shall be submitted for decision to the architect, and that his conclusion or judgment shall be a final adjudication of the questions submitted. Such submission may include the power to determine the right of the parties to liquidated damages under the terms of the contract."

From this broad language it would seem that the parties to a contract may waive all right of action respecting any dispute which may arise and thereby accomplish the complete abrogation of the authority of the courts. In none of these cases, however, was the court asked to enforce an agreement to arbitrate a dispute involving a question of law. Moreover in the earlier case of *Mentz* v. *Insurance Company*,[11] Mr. Justice Sharswood said, "It is not in the power of the parties to a contract to oust the courts of their jurisdiction. The arbitrator cannot be made a judge of law and facts."

From this apparent conflict of opinion it is difficult to deduce any distinctly established rule in Pennsylvania upon the subject. It is submitted, however, that if in enforcing a contract to refer to

[7] Sanitary Dist. v. McMahon, 110 Ill. App. 510 (1903); Hager v. Shuck, 120 Ky. 574 (1905).

[8] Bannon v. Jackson, 121 Tenn. 381 (1908); Barlow v. United States, 184 U. S. 123 (1901).

[9] Reilly v. Rodef Sholem Congregation, 243 Pa. 528 (1914).

[10] 233 Pa. 36 (1912).

[11] 79 Pa. 478 (1875).

arbitration a question of law is squarely brought before the Supreme Court of Pennsylvania, it will follow the opinion of Justice Sharswood and refuse to give validity to such an agreement.[12]

G. F. D.

COURTS—JURISDICTION IN MOOT CASES—While the general principle that courts should refuse to assume jurisdiction in moot cases has long been recognized,[1] little attention has been given to the formulation of rules for determining whether or not a given case is moot within the rule. This is due perhaps to the fact that the refusal of the court to assume jurisdiction in such a case is entirely discretionary, there being no legal prohibition against the decision of such an issue, and also to the further circumstance that the very nature of the subject necessitates to a great extent the decision of each case upon its peculiar facts, and to some degree minimizes the value of precedent. The courts have, however, in the absence of any legal obligation, refrained from deciding such cases with remarkable uniformity, and from their opinions a few general principles may be collected.

At the beginning, moot cases fall into two natural classes. The first class includes those cases in which the situation upon which the court is asked to give an opinion is a purely fictitious or hypothetical one, in the sense that it at no time existed in actuality. In the second group are those cases where facts raising an issue entirely proper for decision existed when the suit was commenced, but where it appears, upon the decision of the case on appeal, that by the alteration or discontinuance of the situation upon which the issue was founded, the case, once real, has become moot.

Under the first group are those cases in which a mere colorable dispute is created between parties whose interests are not adverse, to obtain the opinion of the court upon a question of law which it is to their interest to know,[2] and also those in which an issue equally fictitious is based upon an assumed breach of an existing contract or an assumed contest of a will.[3] While it has been urged in such cases that the instrument as an existing document should be construed it seems clear that so long as the issue itself is fictitious the fact that documents upon which it is based may have

[12] This was so held by the Circuit Court for the Eastern District of Pennsylvania in Mitchell v. Dougherty, 90 Fed. 639 (1898).

[1] Cox v. Phillips, Lee Temp. Hardwicke 237 (1736); Lord v. Veazie, 8 How. 251 (U. S. 1850).

[2] Smith v. Junction Rwy. Co., 29 Ind. 546 (1868).

[3] Collins v. Collins, 19 Ohio St. 468 (1869), the court refused to construe a will where no trust was involved. In New Orleans, *etc.*, Rwy. v. Linehan Ferry Co., 104 La. 53 (1900), the court refused to construe a contract until an actual issue should arise.

a physical and not merely a hypothetical existence cannot be material. In such cases a construction of the document is uniformly refused.

Often the public interest attached to a particular question would seem to constitute a persuasive argument to justify its decision, but even in such cases jurisdiction is declined. In a recent case before the Supreme Court of the United States[4] the constitutional authority of the Secretary of War to make an order that upon any declaration of war the members of the national guard might be directed by the President to proceed to any point whether within or without the United States, was questioned. An issue would hardly arise in the matter until such an emergency as would make the remedy of judicial determination inappropriate. The court held that it could not be compelled to construe such orders for the members "notwithstanding their laudable feeling of deep interest in the general subject," and declined to give an opinion.[5]

There is a class of cases often objected to as moot without success, which, although they are clearly not to be considered moot cases, show very plainly the line of demarcation between a moot question and a real issue. Where a statute lays down a rule or prescribes a penalty, especially where the penalty is payable to the party aggrieved, a person often places himself in a position to invite its violation to make a "test case" or to obtain financial enrichment. A not uncommon form of such a statute is one providing a penalty for charging excessive fares. Whether the courts allow or refuse recovery under such a statute in the case of a person who becomes a passenger for the sole purpose of receiving pecuniary advantage from an anticipated violation,[6] such refusal or allowance is based upon considerations of public policy and statutory construction, and not upon the ground that the question is moot. These cases emphasize the true criterion for determining the existence of a moot question, namely, the presence or absence of an adverse interest. Wherever there exists, as in this latter type of cases, an interest truly adverse on the part of the claimant, the question cannot be objected to as moot.

[4] Lieutenant-Colonel Stearns v. Brigadier-General Wood, 236 U. S. 75 (1915).

[5] Many unique and interesting cases arise under this head. In Bardon v. Phila. Rapid Transit Co., 22 D. R. 942 (Pa. 1914), the counsel for the plaintiff, after a verdict in his favor, sought to contest the trial court's refusal to grant a general exception to its charge, by an appeal. The court dismissed the case without decision as purely academic.

[6] In Nicholson v. New York City Rwy. Co., 118 App. Div. 858 (N. Y. 1907), recovery was denied under these facts. In Adams v. Union R. R. Co., 21 R. I. 124 (1899), recovery was allowed. The New York case denied recovery, not because the question was moot, but because they held, as a matter of statutory construction, that the statute was intended to apply to *bona fide* passengers only.

In the second type of moot cases where a situation giving rise to an actual issue has at one time existed, but where the actuality of the situation has been removed by events intervening during the pendency of an appeal, the general tendency of the appellate courts is to treat the case as though it had been fictitious *ab initio* and to refuse to entertain jurisdiction.[7] It seems obvious that in the ordinary case the fact that it has became moot before it reaches the appellate court clearly justifies the refusal to take jurisdiction and that such cases are not to be distinguished in principle from those in which the issue has been at all times fictitious.

It may well become material, however, in determining whether when a case has been argued before the appellate court and where between the argument and the decision by that court the question becomes moot,[8] the court should refuse to give a decision. This depends largely upon the fundamental reason for which jurisdiction in moot cases is declined. If, as is generally stated, the ground is that the court's time should be devoted to the determination of actual controversies and not wasted in the consideration of hypothetical cases, the case should even under these circumstances be dismissed. If, on the other hand, the reason is that a moot case is likely to be argued and considered less thoroughly or that if collusively brought, the presentation of the merits of one side may purposely be made inadequate, thereby paving the way for the establishment of unsound and dangerous precedents, the latter objection at least is absent where the case has not until after the conclusion of the argument become moot. In *Burkett* v. *Dunlap*,[9] where this precise situation was presented, the court, while emphasizing the fact that parties could not, by a settlement after argument, deprive the court of its right to decide the question if it so desired, said that of the alternate courses the dismissal of the appeal was to be preferred.

Familiar instances of this type of moot cases are those involving the validity of elections where the dismissal of an appeal on the ground that the question has become moot often leaves unredressed what has been a valid grievance. In *James* v. *Montague*,[10] a voter sought to enjoin the canvassing of the votes at a certain election, alleging that the section of the Virginia constitution under

[7] In Faust v. Cairns, 242 Pa. 15 (1913), where a quarantine was removed while an appeal from a refusal to enjoin it was pending, the appeal was dismissed. See also Cutcomp v. Utt, 60 Ia. 156 (1882); Cheong Ah May v. United States, 113 U. S. 216 (1885). So also where a permit, the refusal of which has been appealed, would have expired. Security Life Ins. Co. v. Prewitt, 200 U. S. 446 (1905).

[8] Where it appears in the course of the argument that the case has become moot, the appeal will be dismissed. Bucks Stove Company v. American Federation of Labor, 219 U. S. 581 (1910).

[9] 72 S. E. 65 (Ga. 1911).

[10] 194 U. S. 147 (1903).

which it was held was void in that it was aimed at the disenfranchisement of colored voters. The petition was dismissed by the Circuit Court and when the case reached the Supreme Court on appeal the candidates elected were already in the House of Representatives. The court said that the thing sought to be prohibited had been done and could not be undone by the court, and refused to take jurisdiction.[11]

Under the second type of moot questions situations frequently occur which may justify the application of different principles. Thus it may be that although pending the appeal the question has become moot due to intervening circumstances, the abatement or cessation of the alleged illegal situation is of dubious or uncertain permanency. Such a situation is well illustrated in *United States* v. *Hamburg-American Company*,[12] a recent decision by the Supreme Court. A suit had been commenced by the United States against certain steamship companies in 1911 for an alleged violation of the Anti-Trust Act of 1890. The Supreme Court took judicial notice of the European war as a result of which the question had become moot, and refused to entertain jurisdiction. The case of *United States* v. *Prince Line*,[13] decided a year earlier in a district court, where under facts practically identical with those of the principal case the court assumed jurisdiction, was expressly disapproved. In that case the court after admitting that the war had necessitated a dissolution of the alleged illegal agreement and "turned this investigation into an autopsy instead of a determination of live issues," proceeded to decide the controversy on its merits.

It was urged in the principal case that in view of the probability that at the cessation of war the alleged illegal combination would be resumed, there should be a determination of the case on its merits to preclude such an attempt. In *United States* v. *Trans-Missouri Freight Association*,[14] a bill to dissolve an association alleged to be illegal having been dismissed by the lower courts,

[11] See also Richardson v. McChesney, 218 U. S. 487 (1910). In Washington an exception to the general rule is made in the case of suits to enjoin certain contracts for public work. Thus the court refused to dismiss an appeal from an order denying an injunction forbidding public officials from making a contract for public work, even though the city had pending the appeal made compliance with the injunction impossible by entering into such a contract, under which the work had actually been performed. Graff v. City of Tacoma, 112 Pac. 250 (Wash. 1910); Green v. O'Kanogan County, 111 Pac. 226 (Wash. 1910). It has been held in one case that satisfaction of a judgment entered against the appellant after his appeal had been perfected but before hearing, did not justify the dismissal of the appeal without his consent. Arnold v. Pike, 143 N. W. 662 (Wis. 1913). This case appears clearly *contra* to the general view.

[12] 36 Sup. Ct. Rep. 212 (1916); 239 U. S. 466.

[13] 220 Fed. 230 (1915).

[14] 166 U. S. 290 (1896).

before the argument on an appeal to the Supreme Court the association dissolved voluntarily, and when the case came before the appellate court it was urged that it was then moot. The court held that it was not by this voluntary dissolution deprived of the right to determine the rights of the parties and restrain future violations. The court in the principal case distinguished it from this earlier decision on the ground that in the earlier case the dissolution was purely voluntary and nothing prevented an immediate resumption of the illegal combination, while in the latter case the dissolution was due to events wholly beyond the control of the parties.

That the court in the Freight Association case made an exception to the general rule in certain of the second type of moot cases and assumed jurisdiction in a case purely moot, is undeniable, and the soundness of the exception is beyond question.[15] To hold that a defendant combination which had succeeded in the court below could dissolve the old association and immediately form a new one pending the appeal and thereby practically oust the jurisdiction of the Supreme Court by rendering every appeal moot would be such an obvious travesty on justice that there is little wonder that it was not countenanced.

It is suggested, however, that to predicate a further distinction upon the involuntary character of the dissolution is more questionable. From the standpoint of the persons aggrieved by the alleged illegal combination, whether it be the public or an individual, the permanency of the interrupting influence and not its involuntary nature is the material consideration. While it is true that a cause such as war is beyond the control of the defendants, there is no more assurance of the permanency of the interruption in that case than in the case of voluntary dissolution. An early termination of the war would permit a resumption of the arrangement complained of in the same manner as though the dissolution had been a voluntary act. The concern of the injured party is not whether the dissolution is voluntary or involuntary, but whether there is for any reason an assurance that it will not be resumed.

Having once crossed the line and properly taken jurisdiction in this class of cases, the true criterion for the assumption of jurisdiction should, it is submitted, lie in the probable permanency of the cessation, and not in the voluntary or involuntary character of the dissolving cause.

B. M. K.

[15] Another apparent exception is made in the case of orders of the Interstate Commerce Commission, which are "continuing" in their nature. It has been held that the mere fact that the period of their validity under the statute has expired pending the appeal, will not prevent the assumption of jurisdiction. Southern Pac. Terminal Co. v. I. C. C., 219 U. S. 498 (1910).

MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CONCLUSIVENESS OF DECISION OF THE BOARD—A primary object of all workmen's compensation legislation is the speedy and final settlement of claims for injuries due to industrial accidents. To secure this end it is absolutely necessary that where the administration of such a law is placed in the hands of a commission or board, its awards and decisions should be as far as possible the last expressions required. Under all the acts the decisions of the board may be appealed from because of errors of law. How far is the finding of the board final as to a question of fact?

The recent case of *Uphoff* v. *Industrial Board of Illinois*,[1] presents the question of the board's finding of a jurisdictional fact. There the board found that the employer was as a matter of fact one of a certain class included within the operation of the statute. On appeal the court held that the decision of the board was only binding when it was acting within its powers, and that it had no power to apply the act to persons or corporations who are not subject to its provisions and that if it did so the remedy was in the courts.

The board is generally considered as an administrative body, endowed with certain quasi-judicial powers.[2] The members are not judicial officers but perform a great many of the duties usually performed by such officers, such as administering oaths, holding hearings, taking testimony, examining evidence, making rulings of law and findings of fact, and rendering decisions. The Massachusetts courts consider that they are bound by the same general rules of law in the performance of these duties that govern judicial officers in the discharge of the same duties. To that extent the findings of fact of the board are considered as of the same weight and effect as those of a judge without a jury, and are not to be set aside if there was any evidence upon which they could have been made.[3] When all the evidence is reported it may become a question of law whether the evidence was sufficient to warrant the findings;[4] but where no evidence is reported it cannot be said as a matter of law that the finding was not warranted.[5] And questions as to the correctness of the board's rulings as to the admission or exclusion

[1] 111 N. E. 128 (Ill. 1916).

[2] Pigeon's Case, 216 Mass. 51 (1913); Appeal of Bond Co., 93 Atl. 245 (Conn. 1915); Reck v. Whittlesberger, 148 N. W. 247 (Mich. 1914); Borgnis v. Falk Co., 147 Wis. 327 (1911); Poccardi v. Pub. Serv. Comm., 84 S. E. 242 (W. Va. 1915).

[3] Pigeon's Case, 216 Mass. 51 (1913); Diaz's Case, 217 Mass. 36 (1914); Burn's Case, 218 Mass. 8 (1914); *In re* McPhee, 109 N. E. 633 (Mass. 1915); *In re* Doherty, 109 N. E. 887 (Mass. 1915); *In re* Savage, 110 N. E. 283 (Mass. 1915).

[4] Herrick's Case, 217 Mass. 111 (1914); Buckley's Case, 218 Mass. 354 (1914); Fisher's Case, 220 Mass. 581 (1915).

[5] Septimo's Case, 219 Mass. 430 (1914); Bentley's Case, 217 Mass. 79 (1914).

of evidence will be considered on appeal, but there will be no reversal of the decree for error in this respect unless the substantial rights of the parties appear to have been affected.[6]

Other jurisdictions have reached practically the same result,[7] although the courts sometimes give different reasons for their decisions. Thus Wisconsin courts consider it to be jurisdictional error, which is always subject to review by the courts, if there has been a clear violation of the law in reaching the result attained by the board, such as acting without evidence when evidence is required, or making a decision contrary to all the evidence.[8] In Connecticut the Compensation Commissioner is regarded as an executive officer purely. There can be no trial *de novo* on the facts, but there may be an appeal from his award on the ground that it is an original application to the court to exercise its judicial power in respect to acts done by an administrative tribunal in excess or abuse of its powers.[9]

The finality of the board's findings of fact extends, of course, to ultimate facts, that is, to conclusions of fact determined by the board from the evidentiary facts proved.[10] To hold otherwise would be to defeat the very purpose of the act and would result in a volume of unnecessary litigation and useless appeals. Such facts, however, must be based on competent evidence. While workmen's compensation boards are not usually bound by technical rules of evidence their awards cannot be based on mere guess, supposition or conjecture.[11] As stated before, the court may pass on the sufficiency, or legality, of the evidence. But it is not within the province

[6] Pigeon's Case, 216 Mass. 51 (1913).

[7] The findings of fact are final when supported by evidence: Smith v. Ind. Comm. 147 Pac. 600 (Cal. 1915); Hills v. Blair, 148 N. W. 243 (Mich. 1914); Redfield v. Ins. Co., 150 N. W. 362 (Mich. 1915); Powley v. Vivian, 154 N. Y. Supp. 426 (1915); Plass. v. Railroad, 155 N. Y. Supp. 854 (1915); Fuel Co. v. Ind. Comm., 150 N. W. 998 (Wis. 1915).

Sufficiency of evidence may be considered by the court: Power Co. v. Pillsbury, 149 Pac. 35 (Cal. 1915); Reck v. Whittlesberger, 148 N. W. 247 (Mich. 1914); Poccardi v. Pub. Ser. Comm., 84 S. E. 242 (W. Va. 1915); Hoenig v. Ind. Comm., 150 N. W. 996 (Wis. 1915).

[8] Borgnis v. Falk Co., 147 Wis. 327 (1911); Harvester Co. v. Ind. Comm., 157 Wis. 167 (1914).

[9] Appeal of Bond Co., 93 Atl. 245 (1915); Kennerson v. Thames Towboat Co., 94 Atl. 372 (1915).

[10] Western Indemnity Co. v. Pillsbury, 151 Pac. 398 (Cal. 1915); Powley v. Vivian, 154 N. Y. Supp. 426 (1915); Northwestern Iron Co. v. Ind. Comm., 154 Wis. 97 (1913).

[11] Reck v. Whittlesberger, 148 N. W. 247 (Mich. 1914); Voelz v. Ind. Comm., 152 N. W. 830 (Wis. 1915). The admission of legally incompetent evidence in a proceeding before the board is no ground for reversal of its award if there is any evidence upon which its finding could have been made. Pigeon's Case, 216 Mass. 51 (1913); Fitzgerald v. Lozier Motor Co., 154 N. W. 67 (Mich. 1915); First National Bank v. Ind. Comm., 154 N. W. 847 (Wis. 1915).

of the court to weigh the evidence which has been introduced.[12] In New York the evidence taken before the commissioners may be certified to the Appellate Division together with their findings of fact, and is before the court to supplement and explain, but not to contradict the commission's finding.[13]

It is obviously improper that an administrative body should be able to assume jurisdiction over persons or situations not contemplated to be within its purviews by the act which called the board into being. Hence, the question of jurisdiction is always open to the courts for review. The board cannot itself conclusively settle that question and thus endow itself with power;[14] which is the law of the principal case.

The Pennsylvania Workmen's Compensation Act of 1915 provides that the board's findings of fact shall in all cases be final, and from any decision of the board on a question of law an appeal may be taken to the courts.[15] It would seem illogical to suppose that this section were meant to include jurisdictional facts, and it remains to be seen how far the courts will scan the evidence to determine the legality of the board's findings.

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[12] Appeal of Bond Co., *supra*, note 9; Grove v. Paper Co., 151 N. W. 554 (Mich. 1915); Spooner v. Detroit Co., 153 N. W. 657 (Mich. 1915); Milwaukee Coke & Gas Co. v. Ind. Comm., 151 N. W. 245 (Wis. 1915).

[13] *In re* Rheinwald, 153 N. Y. Supp. 598 (1915); Gleisner v. Gross, 155 N. Y. Supp. 946 (1915).

[14] Power Co. v. Pillsbury, 149 Pac. 35 (Cal. 1915); *In re* Rheinwald, 153 N. Y. Supp. 598 (1915); Borgnis v. Falk, 147 Wis. 327 (1911).

[15] Act of June 2, 1915, P. L. 736, section 409.