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NOTES.

CARRIERS—LIMITATION OF LIABILITY—TIME-LIMIT FOR PRESENTING CLAIMS—For many years the law has been well established that a common carrier can in its contract with a shipper demand that notice of any loss of or damage to the shipment be given within a specified time, otherwise the carrier's liability for the same to cease. While this principle has been universally recognized, there have always been two questions primarily involved which have produced a wide range of dissension among the courts. In the first place there has been considerable disagreement as to the reasonableness of time allowed for presenting notice,[1] some courts holding

[1] Central, *etc.*, Ry. Co. v. Soper, 59 Fed. 879 (1894).

five days sufficient, others considering even thirty days unreasonable. In the second place there has been difficulty in determining whether the requirement had been waived by the carrier by certain conduct on its part, and, if so, whether it were permissible. In the past decade the old rules have been broken down by the regulations of commerce authorized by the Constitution and effected by Congressional act and the rulings of the Interstate Commerce Commission, so that the law of shipper and carrier has been considerably altered.

Under the Interstate Commerce laws it is probably unlawful today for a carrier to waive the requirements for presenting notice when once it is included in its tariff. This was clearly shown a few years ago by a Commission report: In the Matter of Bills of Lading.[2] Several railroads sought to be excused from enforcing the condition as to time-limit because of a general misunderstanding of the effect of state laws on the provision in their new bill of lading. While the Commission granted the request from the necessity of the situation when to do otherwise would "leave uncorrected grossly unjust and widespread discriminations," it insisted that its position in the matter was against such toleration of excuse by the railroads. "When it becomes apparent to carriers that they can not, ought not, or will not enforce the provisions contained in their established tariffs, whether in regard to matters of the kind here involved, demurrage, reconsignment, or other like practices, as well as to rates, they should change their tariffs in the manner prescribed by law so that their practices may be in conformity thereto. The Commission has not the authority under the law to order them to disregard their tariffs. . . ."[3]

This position of the Interstate Commerce Commission was strengthened by that taken by the Supreme Court of the United States in the recent case of *Georgia, Florida and Alabama Railway Company* v. *Blish Milling Company*.[4] In that case, although notice of loss had been given by telegraph, which the court deemed sufficient, the carrier denied this, insisting that its sole notice was the commencement of action by the shipper. The latter had urged that the carrier in making a misdelivery of his flour had converted it and thus abandoned the contract. The court declared that the effect of the stipulation could not be escaped by the mere form of the action. The opinion of Justice Hughes is significant: "The parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act;[5] nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to

[2] 29 I. C. C. 417 (1914).
[3] P. 419.
[4] 241 U. S. 190 (1916).
[5] Act to Regulate Commerce.

a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." [6]

Considering these recent expressions of law by high judicial authority, it would seem that in future no carrier can ever waive the time-limit condition. Both carrier and shipper are absolutely bound by this as well as the other provisions in the tariff.

Furthermore, it is not improbable that it is now an administrative question for the Commission whether the time allowed for presenting notice is unreasonable. In any event the Supreme Court of the United States has recently sustained a very short period in the case of *Chesapeake and Ohio Ry.* v. *McLaughlin*,[7] there having been no attack of the provision by the Commission. A unanimous court held that a shipper who accepted a bill of lading which required that notice of loss or damage be filed with the company's claim agent within five days from the time of the removal of the stock shipped was bound absolutely by his agreement, which was on its face unobjectionable and reasonable. This decision affirmed the position taken by the court in two previous cases involving cattle shipments. Thus, in *Northern Pacific Railway Co.* v. *Wall*,[8] it was held that such a time-limit for the presenting of notice was a condition precedent to the shipper's right of recovery, and it had to be strictly complied with, although under the Carmack Amendment notice to the connecting or delivering carrier was sufficient, since it acted as agent for the initial carrier.

While the Commission and the Supreme Court of the United States are thus developing the law in the field opened to their jurisdiction by the Constitution and Acts of Congress, the state courts are continuing to handle the difficulties of this subject where intrastate shipments are involved. For them the old law is little changed; each court must decide for itself what is reasonable time and whether or not the carrier can waive the provision. So recently, in *Phillips et al.* v. *Seaboard Air Line Ry.*,[9] a ten day period was held an unreasonable time-limit for presenting notice for depreciation in value of delayed carloads of berries. In such cases as this the courts apply the test set forth by Morton, J., in *Cox* v. *Vermont Central Railway Company*:[10] "The question of reasonableness or unreasonableness does not depend on the possibility of giving notice in a particular case within the time limited, but on the course and

[6] P. 197.

[7] October Term, 1916. Decided December 4.

[8] 241 U. S. 87 (1916). See also Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Rankin, 241 U. S. 319 (1916).

[9] 89 S. E. 1057 (N. C. 1916).

[10] 49 N. E. 97 (Mass. 1898).

nature of the business, and on the time which ordinarily might be expected to elapse, in the usual course of business before the shipper or the consignee, with ordinary diligence, would be in a position to make a demand on the defendant. If, applying these considerations, the time within which the notice was to be given was reasonable, it would furnish no excuse that in a particular instance it proved insufficient."

It would seem, however, that with the gradual standardization of the bills of lading and other forms of contract used between shipper and carrier, the state courts would conform closely with the decisions of the Interstate Commerce Commission and the Supreme Court in deciding those cases where the Carmack Amendment has not denied them jurisdiction.

H. D. S.

CORPORATIONS—*Ultra Vires*—POWER TO LEND MONEY—The term *ultra vires* as to acts of a corporation or acts purporting to have been done by it, has been loosely used in several senses.[1] Sometimes an act is said to be *ultra vires* with reference to the rights of certain persons when the corporation can not legally act without their consent, and it may be held *ultra vires* with reference to some specific purpose when the corporation can not perform it for the purpose. It is said that in these two cases the right of the corporation to avail itself of the defence will depend upon the circumstances of the case,[2] but the courts by resorting to the doctrine of estoppel have held the corporation which has received the benefits of a transaction to be precluded from setting up the defence in so many instances as practically to make the doctrine a mere nullity.[3] A recent Georgia decision[4] exemplifies this class of case. There a statute provided that notice of stockholders' meeting for the purpose of issuing bonds should be published in some newspaper in the town or city where the principal office was located, once a week for four weeks prior to said meeting, and that stockholders should be duly notified. The court held that even though statutory notice of meeting was not given and one or possibly two persons holding but one share of stock were not present at the meeting, the company would be estopped, as to innocent purchasers for value, from setting up the defence that the bond issue was void, all the statutory requisites being set forth on the face of the bonds. It is patent that this act was one which the

[1] Miner's Ditch v. Zellerbach, 37 Cal. 543 (1869).

[2] Georgia Granite Co. v. Miller, 87 S. E. 897 (Ga. 1916).

[3] Western & Southern Fire Ins. Co. v. Murphy, 156 Pacific 885 (Okla. 1916).

[4] Georgia Granite v. Miller, *supra* (note 2).

legislature expressly authorized it to do, rather than an act *beyond its* powers, the only matter sought to be taken advantage of, being an irregularity in the exercise of the granted powers. Thus, where a corporation gave notes for the purchase of stock from its president, in consideration of his resignation, the court, though holding that the purchase was authorized by statute, said that even if there had been a lack of consent of the stockholders, since the payee could not be restored to *statu quo,* stock being reissued to the new president and par value of stock reduced, the corporation benefited by the deal was estopped to set up the defence of *ultra vires.*[5] The United States Supreme Court has clearly laid down the rule that a corporation may be estopped to set up an irregularity in the exercise of its granted powers in a case where the board of directors of a railroad corporation had power upon the petition of a majority of its stockholders to direct a guaranty of negotiable bonds of another corporation. Such negotiable guaranty executed by directors without assent of stockholders, was held valid in the hands of *bona fide* purchasers for value.[6] The court pointed out that there was a distinction between the doing of an act beyond the scope of powers granted to it by law, and an irregularity in the exercise of the granted powers.

In the primary sense of the term, an act *ultra vires* is an act beyond the chartered powers of the corporation, express or implied;[7] and since the act is outside the purposes of its creation and consequently beyond powers bestowed upon it by the legislature, it is a void act, and no action can be maintained thereon by either party against the other.[8] This was the view taken by a recent Illinois case in which a concern was incorporated to construct a canal and maintain docks, piers, *etc.,* possessing the power to purchase and sell real estate and to "employ it in such manner as it should determine." It sold a lot to one Conkling, at the same time loaning him a sum of money, taking a trust deed to secure payment for the lot and loan. In a foreclosure bill against the borrower's trustee in bankruptcy, the defence of *ultra vires* prevailed as to the money loaned, the court holding that since the company had not built a canal, and in selling its land it was taking steps to wind up the business, the loan did not further the specific purposes for which the corporation was created, thus excluding the power to loan from being deemed an implied power.[10] Three judges dissented on the ground that the loan was

[5] Western Ins. Co. v. Murphy, *supra* (note 3).

[6] Louisville Ry. Co. v. Louisville Trust Co., 174 U. S. 552 (1899).

[7] Strickland v. National Salt Co., 79 N. J. Equity 188 (1911).

[8] Mercantile Trust Co. of Ill. v. Kaster, 112 N. E. 988 (Ill. 1916).

[9] Calumet and Chicago Canal and Dock Co. v. Conkling, 112 N. E. 982 (Ill. 1916).

[10] North Ave. Building and Loan Ass'n v. Huber, 110 N. E. 312 (Ill. 1915).

valid, since adapted to promote lawful corporate purposes, and even if the act were held *ultra vires,* that defense could not be invoked to work an injustice.[11]

It will readily be seen that the canal company was deprived of its property and of any remedy to recover the extent of the loan, and it is submitted that the force of the dissenting opinion is set forth in the language of the New York Court of Appeals, "That kind of plunder which holds on to the property but pleads the doctrine of *ultra vires* against the obligation to pay for it, has no recognition or support in the law of this state.[12] Although the Federal courts are in accord with the doctrine of denying an action upon the *ultra vires* act, they permit a restitution to *status quo,* the party receiving the benefit being compelled to return the value of the property received albeit for an unauthorized purpose."[13] This view was followed in the jurisdiction of our principal case, the court saying "Where a contract is *ultra vires,* and a corporation has received money under it which in equity and good conscience belongs to another and which it ought to pay over, it is liable for it in an action for money had and received, with interest after demand."[14] The court that laid down the Federal rule said about this right to recover, "To maintain such an action is not to affirm, but to disaffirm the unlawful contract."[15]

A stockholder may avoid the difficulties surrounding the commission of an act *ultra vires* by enjoining same, as shown in the case where the directors of a corporation organized to manufacture cotton, were enjoined from paying insurance premiums on the life of the president of the concern,[16] likewise a stockholder may invoke the aid of a court of equity to enforce a statutory right accruing to a dissenting stockholder, upon stockholders voting to amend a concern's corporate purposes, the contemplated acts being beyond the granted powers of the corporation. But where all the stockholders have consented to the borrowing of money for a wrongful purpose, *viz.,* to pay debt of a corporation in which it had no interest and the execution of a mortgage to secure it, the corporation was held liable as the aggregation of its stockholders.[18] It will be noted that this is the class of case adverted to in this article as being *"ultra vires* with reference to some specific purpose when the corporation can not perform it for that purpose," and that the corporation was estopped from asserting the defence, it having received a valuable

[11] Leslie v. Lorillard, 110 N. Y. 519 (1888).

[12] Seymour v. Spring Forest Ass'n, 144 N. Y. 333 (1895). Cook on Corporations, Vol. 3, Sec. 681, 7th Ed.

[13] Central Transp. Co. v. Pullman, 139 U. S. 24 (1890).

[14] Lehigh v. Brake Beam Co., 205 Ill. 147 (1903).

[15] Transp. Co. v. Pullman, *supra* (note 13).

[16] Victor v. Cotton Mills, 61 S. E. 648 (N. C. 1908).

[17] Teele v. Rockport Granite Co., 112 N. E. 497 (Mass. 1917).

[18] Taylor Feed Pen v. Taylor Nat'l Bank, 181 S. W. 535 (Texas 1915).

consideration for the execution of the note and mortgage and not having tendered back same. In this case, the right to borrow money was properly held an implied power of the private trading corporation. Some courts, however, carry the doctrine of implied powers very far, holding any lawful act done by the accredited officers with a view to serving corporate ends, not prohibited by charter, *ultra vires*.[19] This view was specifically applied to a subscription to a fund for locating new industries in a city by a brewing concern having its factory and principal place of business therein, the corporation being compelled to pay its subscription.[20] It is submitted that this attitude, though getting away from the strict construction of corporate powers laid down in the Calumet Dock Co. case, is, after all, the better view, since tending to obviate difficulties and injustice resulting from a holding that such an act were *ultra vires*.

C. B. W.

DAMAGES—MEASURE IN CONTRACT ACTIONS—In an action for damages for a breach of contract, it may be laid down as a fundamental principle of the American and English systems of law that the basis of recovery is compensation for the loss suffered by the plaintiff.[1] This basis, however, is subject to two qualifications: the loss must come as a natural consequence of the breach—or be in the contemplation of the parties when the contract was formed[2]—and must be capable of reasonably certain proof, both as to amount and cause.[3] With these principles in existence the courts have possessed a comparatively sure rule for the measure of damages in contract actions; and with such a *modus operandi* have attained a greater uniformtiy in its application to particular circumstances than would have been possible had the matter rested entirely in the discretion of either the judge or the jury. This was one of the difficulties of the early English courts,[4] when the Anglo-Saxon system was in use—there was no certain rule, and it was even variable as to whether the matter of compensation was wholly in the hands of the judge or the jury. So, too, the civil law is open to the same criticism.[5] The damages rest in the discretion of the court, and each case must be decided solely on its own facts.[6]

[19] Winterfield v. Brewing Co., 71 N. W. 101 (Wis. 1897).

[20] Huntingdon Brewing Co. v. McGrew, 112 N. E. 534 (Ind. 1916).

[1] 1 Sedgwick, Damages (8th Ed.), p. 29.

[2] Hadley v. Baxendale, 9 Exch. 341 (Eng. 1854).

[3] 1 Sedgwick, Damages (8th Ed.), p. 245.

[4] *Ibid.*, p. 20.

[5] *Ibid.*, p. 25 ff., citing Domat, Loix Civiles; and Pothier, Traite des Obl.

[6] It would appear that in Scotland, profits may be recovered on much the same theory as in the civil law—the jury looks at all the circumstances.

Even though they have this more definite rule, the American and English courts are still faced with the difficulty of its application. And in no case is this better illustrated than in the matter of profits.

Are profits recoverable in a contract action? And if so, is the recovery unlimited? There can be little doubt that in the early part of the nineteenth century it was generally considered that profits did not form a part of a plaintiff's schedule of damages.[7] Yet even in the early cases there is at least a hint of the distinction that later was made between gains that surely would have resulted had there been no breach, and those which were merely speculative. This distinction is now drawn, more or less sharply.[8] Since the question of damages now rests on the broad principles of being naturally resultant from the breach, and being reasonably certain, whether profits are recoverable has become largely a question of certainty of proof.[9]

This requisite of certainty does not necessarily arise in proving the amount of the profits. Often the principal discussion centers around the point of whether there would have been any profits.[10] So that the fact that a plaintiff can name and prove a certain sum does not mean that he will necessarily recover that sum. Thus, the anticipated profits from a speculation which has been prevented through the negligent conduct of a railroad or telegraph company are generally considered too uncertain—not as to amount, but as to their being attained by the plaintiff.[11] In this connection, two cases are worthy of special attention. One,[12] an English case, is generally cited as standing for this principle—that speculative profits are too remote to be recovered. Yet that was merely intimated by the court, not being argued, and as a fact the plaintiff recovered the value of a prize for which the defendant's neglect prevented him from competing. The other case,[13] which was based on the former, seems to stand for the abstract principle that under similar conditions there can be a recovery of the value of the prize. These

Watt v. Mitchell, Cas. in Ct. of Session 1157 (Scotland 1839); Dunlop v. Higgins, 1 H. L. 381 (Eng. 1848)—decided according to the law of Scotland.

[7] Archer v. Williams, 2 C. & K. 26 (Eng. 1846); The Amiable Nancy, 3 Wheat. 546 (U. S. 1818); Hale, Damages (2d Ed.), p. 103.

[8] Sherman Center Town Co. v. Leonard, 46 Kan. 354 (1871); Stevens v. Yale, 113 Mich. 680 (1897).

[9] 1 Sedgwick, Damages, p. 251 ff.

[10] Brown v. Smith, 12 Cush. 366 (Mass. 1853); Aber v. Bratton, 60 Mich. 357 (1886).

[11] Leonard v. N. Y. A. & B. Electro-Magnetic Tel. Co., 41 N. Y. 544 (1870); W. U. Tel. Co. v. Hall, 124 U. S. 444 (1887).

[12] Watson v. Ambergate N. & B. R. Co., 15 Jur. 448 (Eng. 1851).

[13] Adams Express Co. v. Egbert, 36 Pa. 360 (1860).

exceptions are interesting in that they typify the difficulties of courts in deciding this question without any definite rules.[14]

A recent case on a particular branch of this subject is *Johnson* v. *Braham*.[15] There the question arose between the principal and her agent as to whether the latter was liable, by his negligence, for the profits she might have made save for his act. And it was there held that the true measure of damages is the loss that would have been avoided save for the agent's negligence, and not the amount the principal might have made.[16] In cases of this character the agent must pay the actual loss which necessarily results.[17] While in this case the principal was allowed to recover for loss of time, that would come under the general principles applicable to contract actions generally—that the measure is the actual and proximate results, provable with some certainty, arising from the breach of the contract.

R. T. B.

EVIDENCE—OFFICIAL RECORDS—CORONER'S INQUEST—In a very recent case not yet reported the verdict of a coroner's jury was sought to be introduced as evidence that the deceased had met his death in the manner alleged by the plaintiff. Upon the point at issue the authorities, while by no means equally divided, are conflicting.

The reasons for the admission of the verdict of the coroner are thus stated by Starkie:[1] "Such inquisitions are of a public nature, and, taken under competent authority to ascertain a matter of public interest, are, upon principles already announced, admissible in evidence against all the world. They are very analogous to adjudications *in rem* being made on behalf of the public; no one is properly a stranger to them and all who can be affected by them usually have the power of contesting them." Such seems to be the English practice today.

In America the result of the cases can be thus summarized. (1) In homicide cases the verdict of the coroner is clearly inadmissible in every state in the Union except Louisiana. In the last they are merely admitted as proof of death. The verdict of the coroner,

[14] While these rules were formulated in Hadley v. Baxendale, *supra*, they have been generally accepted since that time, with little, if any, addition. See, Cory v. Thames Shipbuilding Co., L. R. 3 Q. B. 181 (Eng. 1868); Griffin v. Colver, 16 N. Y. 489 (1858); Clyde Coal Co. v. P. & L. E. R. R. Co., 226 Pa. 391 (1910).

[15] 115 L. T. 76 (Eng. 1916).

[16] In *acc.* Chr. Salvesen Co. v. Rederi Aktiebolaget Nordstjernan, 92 L. T. 575 (Eng. 1905); Bell v. Cunningham, 3 Pet. 69 (U. S. 1830).

[17] Cassaboglou v. Gibbs, 48 L. T. 850 (Eng. 1883); Mayne, Damages (8th Ed.), p. 641 ff.

[1] Treatise on Evidence, 10th Ed., p. 403.

it is generally held, is merely advisory to the officers charged with the execution of public justice. . . . It has no probative effect and is binding upon no one as a judgment. It can prejudice the rights of no one and is therefore not subject to be reversed, set aside or quashed in a superior court, either at the instance of the party accused by it or by any other person.[2] A verdict of guilty by a coroner's jury is of equal value with the indictment of a grand jury or a sworn complaint before a magistrate. It is not even *prima facie* evidence against the accused on trial.[3]

The chief objections to its admission in a criminal action are obvious. The inquest is an *ex parte* proceeding; it affords no opportunity to the accused to cross-examine the witnesses against him, and, in the last analysis, it is merely the opinion of a petty judicial or *quasi*-judicial officer upon a fact in issue before the court.[4] Testimony rendered before him will be reiterated before the court, besides a great deal of other evidence which the passage of time and the diligence of counsel may bring forth. "To admit the verdict of a coroner rendered in the absence of the accused, without the aid of counsel and often in the absence of the most material witnesses . . . to influence and perhaps to control the verdict of the jury, would lead to a subversion and a final overthrow of the jury system." [5]

(2) In life insurance cases the great majority of states, Illinois, Iowa and Mississippi excepted, reject the coroner's verdict. The Illinois doctrine is best summarized in *The United States Life Insurance Co.* v. *Bocke*.[6] In that case, it may be noted, the Supreme Court reversed because of the failure of the lower court to admit the verdict. The Illinois decisions, however, have been put by some of the text writers on the Illinois practice of sealing the record of the inquest and filing it with the court.[7] The courts which have rejected the verdict have done so on various grounds. They have distinguished the American inquisition from the English and have pointed out that the former is not a judicial proceeding.[8] In addition, it has been urged that as a matter of evidence a coroner's proceeding is *res inter alios acta*, and upon no rule of evidence should

[2] Smalls v. State, 101 Ga. 570 (1897).

[3] Cresfield v. Perrine, 15 Hun 200 (N. Y. 1878).

[4] Colquit v. State, 107 Tenn. 381 (1901).

[5] Whitechurst v. Commonwealth, 79 Vt. 556 (1907).

[6] 129 Ill. Sup. 557 (1889).

[7] Foster v. Shepherd, 258 Ill. 164-182 (1913).

[8] In Germania Life Ins. Co. v. Lewin, 24 Col. 43 (1897), the court said: "It is claimed that the requisitions by coroners were admissible in evidence at common law, and hence now admissible in jurisdictions where the common law rule has not been changed by statute. The English rule, however, grew out of the fact that the inquisition was a judicial proceeding authorized by statute, but this reason is without force under our systems

it be admissible against a third party, stranger to the proceeding.[9] The purpose of the inquest is merely to detect crime and to take the preliminary steps to secure a trial of the supposed offender.[10] It may not be public; none but counsel for the state and for the accused have a right to examine the witnesses, and there is no means by which the findings may be reversed or set aside.[11] "In case of death under suspicious circumstances or resulting from an accident, the rule permitting inquisitions to be used in evidence would result in a race and scramble to secure a favorable coroner's verdict that would influence and perhaps control in case suits should be instituted against life insurance companies upon policies of insurance and in cases of accidents occurring as a result of negligence on the part of corporations operating railroads, street car lines, mining of coal or precious metals, *etc.* Law writers of late have frequently animadverted upon the carelessness with which such inquests are frequently conducted, and to allow inquisitions to be used in a suit between private parties upon a cause of action growing out of the death of the deceased would introduce an element of uncertainty into the practice which would be contrary to public policy and pernicious in the extreme." [12] A number of the courts have stressed the fact that the purpose of the American inquisition is merely to ascertain the cause of death with a view to a criminal prosecution should the jury find that death had been caused by unlawful violence.[13]

It is submitted that upon no principle of law or of public policy should such a verdict be admitted in a civil suit. The question must be decided ultimately in any jurisdiction with reference to the functions of the coroner under the local statutes. The curious evolution of the coroner's office, from a judicial post of no mean importance to a petty administrative position, must be kept in mind. In a few states it still retains something of its former usefulness; in a large majority of American jurisdictions, however, it has been relegated to insignificance in the administration of the criminal law. In not a few, its total abolition has been seriously urged by Bench and Bar.

B. W.

of government. Moreover, under our constitution no part of the judicial power of a state could be vested in the coroner, and hence the inquisition sought to be introduced into this case was extra-judicially taken and should have been excluded."

[9] Boehme v. The Woodmen of the World, 85 S. W. 445; affirming 84 S. W. 422 (Texas 1904).

[10] State v. The County Commission, 54 Md. 426 (1880).

[11] Boehme v. The Woodmen of the World, *supra*, n. 9.

[12] Germania Life Ins. Co. v. Lewin, *supra*, n. 8.

[13] Miller v. Cambria County, 29 Pa. Super. Ct. 166 (1905).

STATUTES—INTERPRETATION—PRACTICE OF MEDICINE—CHRISTIAN SCIENCE—What is meant by the practice of medicine and surgery within the meaning of state statutes controlling and regulatin the right to engage therein, and whether a Christian Science healer is comprehended, must depend in most instances upon the words of the statute and the nature of the treatment given. Where the statute defines the practice of medicine or surgery to be the "prescribing, directing, or recommending any drug or medicine or other agency for the treatment or relief of regulating the right to engage therein, and whether a Christian Science healer, consisting of prayer for divine assistance and the encouragement and direction of the thoughts of the patient, is not practicing medicine within such statute and does not render the party liable for the penalties prescribed for non-compliance with its provisions. The ordinary meaning of the words, "practice of medicine and surgery," when used alone and not enlarged by additional terms, has been held not to include the practice of Christian Science healing.[1] The statute may, however, enlarge the ordinary and usual meaning of the words to include other persons. Thus, a statute, regulating the practice of medicine which provides that "any person shall be regarded as practicing medicine within the meaning of this act who shall operate on, *profess* to heal, or prescribe for or *otherwise treat*, any physical or mental ailment of another," has several times been held to include Christian Science healers.[2] If the words of the statute are "treatment of whatever nature," it would seem that it is sufficiently broad to include the mental treatment of a Christian Scientist.[3]

In *People* v. *Cole*, which came before the Appellate Division of the Supreme Court of New York a few years ago,[4] a Christian Science healer was convicted of a violation of the statute regulating the practice of medicine.[5] The statute defined one who practices medicine as being "a person who holds himself out as being able to diagnose, treat, operate or precribe for any human disease, pain, injury, deformity or physical condition, and who shall either offer or *undertake, by any means or method*, to diagnose, *treat*, operate or prescribe for any human disease, pain, injury, deformity or physical condition."[6] In a well-considered opinion the court con-

[1] Evans v. State, 6 Ohio N. P. 129 (1898); State v. Mylod, 20 R. I. 632 (1898). In Kansas City v. Baird, 92 Mo. App. 204 (1902), a statute requiring all physicians to report cases of contagious diseases was held not to apply to a Christian Science healer.

[2] State v. Buswell, 40 Neb. 158 (1894); Smith v. People, 51 Col. 270 (1911).

[3] State v. Marble, 72 Ohio St. 21 (1905), in which the court said: "If its followers call it treatment they ought not to be heard to say it is not."

[4] 163 App. Div. 292 (N. Y. 1914).

[5] New York Public Health Law, Sec. 161.

[6] *Ibid.*, Sec. 160, subd. 7.

cluded that, although the defendant denied the material existence of disease and said it was merely mental, yet he undertook to treat the people he called patients for what they told him was the matter with them, and was comprehended by the words of the act. But a further complication arose in that the act specifically provided that it should not be construed to affect the practice of the religious tenets of any church.[7] On this point the court decided that the exercise of the art of healing for a compensation, whether exacted as a fee or expected as a gratuity, could not be classed as an act of worship done in the performance of a religious duty. One has no authority to go into healing commercially for hire, using prayer as the curative agency or treatment, under the cover of religion or a religious exercise. As the court said: "Defendant was engaged in a business venture, not a religious exercise, and religion cannot be used as a shield." Under this construction, the exception of the practice of the religious tenets of any church would only be applied to such doctrines and beliefs as are carried out under the roof of the church itself.[8] The results reached by the court had already been arrived at in a number of earlier cases involving much the same definition of the practice of medicine and containing the same exception of the practice of the religious tenets of any church.[9]

People v. *Cole* was taken on appeal to the Court of Appeals of New York, and the decision that the Christian Science healer was practicing medicine under the statute and was not saved by the exception made of the practice of the religious tenets of any church, was recently reversed by that court.[10] The higher court agreed that the defendant was within the broad wording of the statute which defined the practice of medicine,[11] because he did "treat" the patient by "any means or method." But they were of the opinion, without much argument, that he was specifically protected by the

[7] *Ibid.*, Sec. 173.

[8] But in People v. Spinella, 150 N. Y. App. Div. 923 (1913), the defendant, who held himself out as curing all sorts of diseases through miraculous power, had a church of his own and gave his treatment in front of the altar. Upon appeal counsel squarely raised the point that defendant's acts had been done in the practice of the religious tenets of a church and invoked the exception contained in Section 173 of the Public Health Law, but the conviction was unanimously sustained. A possible explanation might be that the defendant was considered a fraud and his religious belief a mere sham. The case is not reported fully, but the facts are stated in the first opinion of People v. Cole, *supra*, note 4, at p. 310.

[9] State v. Peters, 87 Kan. 265 (1912), a practitioner of Suggestive Therapeutics: Smith v. People, 51 Col. 270 (1911), a healer of the sick and member of the Divine Scientific Healing Mission. The decisions of these cases would apply equally to the case of a Christian Science healer. Also, note 3, *supra*.

[10] 113 N. E. 790 (Oct. 1916).

[11] Sec. 160, subd. 7.

exception made thereto,[12] and that it was for the jury to determine whether or not he was in good faith practicing the tenets of the Christian Science church. The court practically took the view that it was the intention of the legislature to relieve members of the Christian Science and other churches from the provisions of the statute.

The questions presented by the few cases which have arisen on this subject are not without difficulties. Should Christian Science healing be considered to be the practice of medicine and thus be controlled by state statutes regulating such practice? If it should be, then is it not excluded from the state statutes by a provision that the act shall not be construed to affect the practice of the religious tenets of any church? And again, if it should be, then will the state be powerless to punish a father for violation of a statute requiring him to provide medical attention for his sick child, if he has called in a Christian Science healer and the child has died? While if it should not be considered practice of medicine, then are we not neglecting the primary object of state laws regulating medical practitioners, namely, to secure the safety and protect the health of the public by providing competent persons to determine the nature of, and prescribe remedies for, disease?

After having taken the affirmative stand, the first difficulty mentioned above, and the one upon which the New York case was finally decided, presents much to be said on either side. In support of the view that such a provision does exclude a Christian Science healer from amenability to the state medical act, the argument naturally arises that the words of the exception could mean nothing else. The tenets of a church are the beliefs, doctrines, and creeds of that church, of an organized body as distinguished from an individual. It is a tenet of the Christian Science church that prayer to God will result in complete cure of disease, and the practice of such a tenet would be directly saved by the exception. And the fact that the Christian Science church is in terms expressly excepted from the prohibitions contained in the medical practice acts of many of the states might also be used to throw light on the probable like intention of legislatures in framing the exception which we are considering.[13] But on the other hand, the argument which led the New York court to reach an opposite conclusion in the first opinion is very convincing. The court admitted that any person or any church may resort to prayer whenever they wish for the healing of the sick, but contended that a business venture was not a religious exercise. None of the indicia of worship were present in the treatments,

[12] Sec. 173.

[13] These states are Maine, New Hampshire, Massachusetts, Connecticut, North Carolina, North and South Dakota, Kentucky, Tennessee and Wisconsin.

which were not had in a place of religious worship, nor in any building connected therewith, in which case only such acts would have come within the saving clause of the statute.[14] The whole difficulty arises from the fact that healing would seem to be the one prominent and distinctive tenet of the Christian Science Church.[15]

As to the second difficulty, it has been repeatedly held that a person who relies on the efforts of a Christian Science healer to save the life of his sick child can be convicted of involuntary manslaughter for his neglect to provide medical attendance as required by statute.[16] It seems never to have occurred to counsel or judge in any of these cases that by calling in the Christian Science healer the father *had* called a physician and was therefore not guilty of a violation of the statute. It is submitted that such a defense would have been summarily disposed of, had it been attempted, yet the apparently illogical situation exists.

And finally, upon the last question advanced, there may, and does, exist a vigorous difference of opinion. It may well be argued that Christian Science healing is not the practice of medicine. As ordinarily and popularly understood, the practice of medicine has relation to the art of preventing, curing, or alleviating disease or pain, and consists in the discovery of the cause and nature of disease, and the administration of remedies or the prescribing of treatment. Obviously the popular conception of the practice of medicine would require stretching in order to include Christian Science.[17] Moreover, it will be found that the doctrines and beliefs of that church negative the very existence of disease as a physical fact and affirm that what is ordinarily recognized as the presence of disease is simply evidence of a lack of harmonious relation with the

[14] People v. Cole, *supra*, n. 4, at p. 317, the court says: "But where a person opens a business office disconnected from any place of worship, and in surroundings incongrous with any idea of sacrifice and prayer, and for pecuniary consideration furnishes such services as he undertakes to give, then it is no longer a question of one's following the tenets of his religion, but of one's engaging in a purely commercial pursuit, which has brought in to this defendant an income of from $5000 to $6000 a year."

[15] For this reason the Pennsylvania courts have refused to allow Christian Science churches to incorporate. It is held that their purpose is not merely to inculcate a creed or establish a form of worship, but also to treat and cure diseases through healers whom they train and constitute, and it is for that reason contrary to the public policy of the state as expressed in the laws relating to the practice of medicine and surgery, and the safety and protection of the public health. First Church of Christ Scientist Application, 6 Pa. Dist. 745 (1897); First Church of Christ Scientist, 205 Pa. 543 (1903).

[16] Commonwealth v. Brett, 44 Pa. C. C. 56 (1916): Commonwealth v. Hoffman, 29 Pa. C. C. 65 (1903): People v. Pierson, 176 N. Y. 201 (1903); State v. Chenoweth, 163 Ind. 94 (1904); Rex v. Brooks, 9 Brit. Col. 13 (1902); Reg. v. Senior (1899), I Q. B. 283.

[17] State v. Mylod, 20 R. I. 632 (1898).

Almighty. The healer makes no diagnosis and disavows all personal ability or power to influence or affect the condition of the person seeking relief. He emphasizes the fact that God is the only healer and that prayer to God is the only efficacious means of relief. Without going further into the church's doctrines, the difficulty of sustaining the contention that a Christian Science healer is practicing medicine will readily be seen.[18] Yet it will be just as readily seen that to hold otherwise would be directly antagonistic to the spirit and purpose of these state medical acts, the objects of which are to secure the safety and protect the health of the public. The law regards disease as a fact, and these statutes are based upon the assumption that to allow incompetent persons to determine the nature of disease and prescribe remedies would result in injury and loss of life. The subject of such legislation is not really medicine and surgery, but rather the public health, in aid of which the laws make the right to undertake the treatment of disease dependent upon the possession of reasonable qualifications.

The whole question is fraught with the great difficulty that, while Christian Science is a religious belief and is accordingly entitled to the protection given by federal and state constitutions regarding freedom of religious belief, its principal tenet seems to be that of the art of healing, a subject which is embraced within the police power of the states as being closely concerned with the public health. Just how the courts will deal with Christian Science in the future is more or less a matter for speculation, and time alone will clear up the difficulties here adverted to.

P. H. R.

[18] In the first opinion of People v. Cole, *supra*, n. 4, Judge Dowling wrote a strong dissenting opinion based upon the view that the Christian Science healer negatives the very existence of disease as a physical fact.