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NOTES.

BILLS AND NOTES—VALUE—COLLATERAL SECURITY—The recent case of *Houston* v. *McCaslin* [1] decides that taking a negotiable instrument as collateral security for an antecedent debt constitutes the taker a holder in due course in Pennsylvania. Before the Negotiable Instruments Law, the Pennsylvania law was opposite.[2] This case is the first decision on the subject in the Superior or Supreme Court [3] since the Negotiable Instruments Law.

[1] 65 Super. 28 (Pa. 1916).

[2] Gibson, J., in Petrie v. Clark, 11 S. & R. 377 (1824); Garrard v. R. R., 29 Pa. 154 (1857); Carpenter v. Bank, 106 Pa. 170 (1884).

[3] A decision by Mr. Justice Von Moschzisker, now of the Pennsylvania Supreme Court, in Raken v. Henry, 16 D. R. 207 (Pa. 1907), holds, after a

Section 25 of the Negotiable Instruments Law reads, "Value is any consideration sufficient to support a simple contract. An antecedent debt constitutes value." [4] Section 27 is, "When the holder has a lien on the instrument, he is deemed a holder for value to the extent of the lien." Section 191, "'Holder' means the payee or endorsee of a bill or note, who is in possession of it, or the bearer thereof." These sections were intended to declare that taking paper as collateral security constitutes value. John J. Crawford, Esq., the draftsman of the Act, says,[5] "The holder who has taken the paper as collateral security very plainly has a lien thereon, and is therefore within the terms of section 53 (section 27)." In a lower court case in New York, it was held that these sections did not change the law of New York that collateral security was not value.[6] While another New York case [7] says, "The language (of section 25) ought to leave no doubt on the subject" that the Act changes the law. In Missouri,[8] North Carolina [9] and Michigan,[10] it has been held that sections 25 and 27 changed the common law of those states and that one taking as collateral security for an antecedent debt was a holder for value.

There is no consideration "sufficient to support a simple contract" in the case of collateral security. The holder, however, generally forbears to sue on the original debt until the due date of the collateral paper and this performance might be regarded as a *quid pro quo,* sufficient to bring him within section 25. If this argument will not prevail, section 27 would seem to cover the case clearly. The holder [11] of paper given as collateral has a personally created lien, *e. g.*, a pledge, just as the pawnee of chattels. Section 27 expressly declares then, that he is a holder to the amount of the lien.

The Pennsylvania case not only seems to follow the Act, but also to represent the true policy from the viewpoint of commercial expediency. "The creditor is thereby enabled to secure his debt, and thus may safely give a prolonged credit, or forbear from taking any legal steps to enforce his rights. The debtor has the advantage of making his negotiable instruments equivalent to cash. The (oppo-

scholarly review of the Negotiable Instruments Law and the cases, that collateral security is not value.

[4] Wisconsin, by Statute, Sec. 1675—51, by *addenda* to this section— declares that collateral security is not value.

[5] 3d Ed. Annotation on Negotiable Instruments Law.

[6] Sutherland v. Mead, 80 N. Y. S. 504 (1903).

[7] Brewster v. Schrader, 57 N. Y. S. 606 (1899).

[8] Bank v. Morris, 156 Mo. App. 43 (1911).

[9] Brooks v. Sullivan, 129 N. C. 190 (1901).

[10] Graham v. Smith, 155 Mich. 165 (1908).

[11] Section 27 merely requires that the "holder" have a lien, not a holder in due course; *i. e.*, the holder need not have given value within section 25, but need be only "the payee or endorsee, of a bill or note, or the bearer thereof." Section 191.

site) doctrine would strike a fatal blow to all discounts of negotiable instruments. It is for the benefit of the commercial world to give as wide an extension as possible to commercial paper." [12]

T. K. F.

CONSTITUTIONAL LAW—COMPULSORY WORKMEN'S COMPENSATION—In three decisions recently handed down, the Supreme Court of the United States upheld the constitutionality of Workmen's Compensation as applied in several of the states.[1] In the Hawkins case the act extends to all employments with slight exceptions, and to injuries arising out of and in the course of the employment. The statute is elective in form, but compulsory in effect, as any employer who rejects its provisions is deprived of his common-law defenses, and has the onus of establishing his exercise of due care. In the White case the New York law covers forty-two groups of "hazardous employments," the liability being in general without regard to fault and exclusive of other remedies. The employer may secure compensation by insurance either in a state fund, in a specially authorized insurance company, or by self-insurance in proper cases. The Washington statute covers enumerated industries characterized as "extra-hazardous" (which, however, include practically all the industrial activity of the state), and all injuries "incurred upon the premises or at the plant, or, he being in the course of his employment, away from the plant of his employer." The salient and distinguishing feature of the Washington Act is that the source of compensation is derived solely from a state fund maintained by compulsory contributions from employers, the amount of premiums paid by each employer being determined by the hazard of the particular industry in which he may be engaged.

To the objection that under these acts an employer is subjected to liability without fault on his part, the court, in its opinion, points out numerous instances in which recovery has been allowed without regard to fault or negligence. It is further noted that negligence is merely the disregard of some duty imposed by law, and the nature and extent of the duty may be modified by legislation with corresponding change in the test of negligence, or without negligence other than a failure to comply with a statutory duty.[2] The common-law doctrines of assumption of risk, of contributory negligence . . . are stated to be mere fictions of the common law, and, as such, not beyond alteration by legislation in the public interest. Great emphasis is placed upon the fact that all common-law rules respecting the

[12] Story, J., in Swift v. Tyson, 16 Pet. 1 (U. S. 1842).

[1] New York Central R. R. v. White, 37 Sup. Ct. Rep. 247 (1917); Hawkins v. Bleakly, 37 Sup. Ct. Rep. 255 (1917); Mountain Timber Co. v. Washington, 37 Sup. Ct. Rep. 260 (1917).

[2] New York Central R. R. v. White, *supra*, p. 251.

liability of employer and employee are not violently set aside, but that another, and a reasonably just substitute, is provided. Indeed, a doubt is suggested as to the authority of the state to abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead.

In considering whether the acts are arbitrary or unreasonable the court is led to place the principle of compensation upon some ground of natural justice, and the economic theory advanced is, that losses arising in the course of employment are part of the cost of production, and should be charged up to the employer in the same manner as the cost of repairing broken machinery. The pecuniary loss, it is also declared, should fall upon the employer because it results from something done in the course of an operation from which he expects to derive a profit, with the added thought that the modified assumption of risk by the employee and the fixed responsibility of the employer will be reflected in the wage scale.

It must be confessed, however, that it is difficult at times to grasp the exact legal-economic doctrine upon which the system of Workmen's Compensation is rested. At one point the court seems to consider the relation of employer and employee as a mutual enterprise, but, it would seem, an enterprise out of which the employer alone expects to obtain a profit.[3] In addition to this community of interest between the employer and employee, the paramount concern of the state in the relation is emphasized. The theory that the status of employer is a franchise, and that conditions precedent thereto may be imposed by the state, is not advanced.[4] But it is unequiv-

[3] "The pecuniary loss resulting from the employee's death or disablement must fall somewhere. It results from something done in the course of an operation from which the employer expects to derive a profit. In excluding the question of fault as a cause of the injury, the act in effect disregards the proximate cause and looks to the one more remote, the primary cause as it may be deemed, and that is, the employment itself. For this both parties are responsible, since they voluntarily engage in it as coadventurers, with personal injury to the employee as a probable and foreseen result. In ignoring any possible negligence of the employee producing or contributing to the injury, the lawmaker reasonably may have been influenced by the belief that in modern industry the utmost diligence in the employer's is in some degree inconsistent with adequate care on the part of the employee for his own safety; that the more intently he devotes himself to the work the less he can take precautions for his own security. And it is evident that the consequences of a disabling or fatal injury are precisely the same to the parties immediately affected and to the community, whether the proximate cause be culpable or innocent. Viewing the entire matter, it cannot be pronounced arbitrary and unreasonable for the state to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death, to those entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence." New York Central R. R. v. White, *supra*, p. 253.

[4] *Cf.* Noble State Bank v. Haskell, 219 U. S. 104, 113 (1910).

ocally stated that such statutes have a direct relation to the protection of the lives and health of a large and important element in the community, and are a reasonable exercise of the police power.[5]

In upholding the Washington statute and the method therein adopted of creating the compensation fund solely by premiums based upon the risk of the particular industry, the decision constitutes a definite advance upon the previous cases. This feature of the act is somewhat unusual; moreover, it is difficult to perceive precisely what public purpose is subserved by computing the rate of insurance with reference to the risk of each industry. It has been urged against the compensation scheme that under it the carefully managed plants will be required to make good the losses arising through the negligence of their competitors. Under the Washington Act exactly this result would seem to be produced. The majority of the court meets this contention by pointing out that: "Taking the fact that accidental injuries are inevitable, in connection with the impossibility of foreseeing when, or in what particular plant or industry they will occur, . . . the state may impose the entire burden on the industries that occasion the losses, irrespective of the particular plant in which the accident may happen to occur." [6] This fatalistic conception which views industrial accidents as inevitable, colors the opinion of the court in each of the decided cases. It is submitted, however, that while industrial accidents are inevitable, their relative frequency varies not only with the industry, but also with the precautions and safeguards adopted by a particular plant. With precisely this in view many of the acts permit a form of self-insurance by which the employer is stimulated to the utmost degree of care, and the adoption of the best form of safety devices. It is true that the provisions of the Washington Act will place upon the employer the indirect pressure of his competitors, and probably will be supplemented by other acts requiring the adoption of safety appliances.

This feature of the act is upheld by reference to *Noble State Bank* v. *Haskell*,[7] the court declaring that: "The idea of special excise taxes for regulation and revenue apportioned to the special injury attributable to the activities taxed is not novel." In that case, and in the numerous cases cited in support of this principle, several additional elements were present which would seem to have justified the mode adopted of apportioning the burden. In a typical case where a tax is laid on dogs to compensate sheep owners for injuries to sheep inflicted by dogs, there is an initial difficulty in tracing the source of the damage sustained. In such cases it is the expense and difficulty, or even the impossibility, of affirming the liability that

[5] Barbier v. Connolly, 113 U. S. 27 (1884); Lawton v. Steele, 152 U. S. 133 (1893); Holden v. Hardy, 169 U. S. 366 (1897); Second Employers' Liability Cases, 223 U. S. 1 (1911).

[6] Mountain Timber Co. v. Washington, *supra*, p. 267.

[7] 219 U. S. 104 (1910).

justifies the sweeping provisions of the act. In the Bank case this takes the form of a mutual interdependence by which the most careful bank is, to a not inconsiderable extent, at the mercy of the most reckless. In addition, the broad and rigid control which the state exercised over the banks brought them all within a certain minimum degree of careful and efficient management. The insurance sought to be secured was not against the inevitable and easily computed hazards of careful management, but against the uncertain disasters of speculative and illegal banking. The uniformity of the assessment was justified by the uniformity (due to the uncertainty) of the risk. In the practical administration of Workmen's Compensation, no such mutual interdependence is apparent; the frequency of accidents in any particular establishment, especially in the larger plants, cannot be termed uncertain.

Worthy of note is the very little stress placed by the court upon the degree of hazard required to place an industry within the scope of the compensation acts. By the Washington Act almost every industry is classified as hazardous. To the objection raised against such classification, it is answered: "The question of whether any of the industries enumerated is non-hazardous will be proved by experience,[8] and the provisions of the act form sufficient assurance that if in any industry there be no accident, there will be no assessment unless for expenses of administration." If the foregoing is intended to imply that every industry in which an accident occurs may be classified as hazardous, and such appears to be the import of the words used, the court would seem to have been guilty of a *non-sequitur*. The court, indeed, may have intimated that so far as the burden of its three opinions was concerned, an employee had an equal right to compensation whether his calling be hazardous or non-hazardous. In either case the effect upon the person injured, his family and dependents and upon the community would seem to be identical. The reasoning which would rest the right of the state to prescribe a system of compensation upon the inevitability of numerous accidents and would limit the police power to cover industries only where accidents are frequent, it is submitted, is narrowly legal, and in no sense economic.

Of great significance is the absence of comment upon those features of the acts which restrict the right of recovery to accidents in the course of the employment. If Workmen's Compensation is considered part of the cost of production, the scope of such acts must be limited to injuries arising out of the industry. The somewhat broader provisions of the Washington Act, though scarcely noted by the court, should not be over-emphasized, in view of the frequent recurrence in the opinions of the phrase "loss arising out of the business," and equivalent expressions. However, it may be noted that the

[8] *Past* experience does not seem to be considered.

court does not seem to consider the more extended provisions of the Washington Act a sufficient departure from the New York Act to animadvert thereon.[9] The status of an act which would award compensation irrespective of the source of the injury must therefore be deemed uncertain. Certainly a statute which covers every injury sustained on the plant of the employer is beyond the scope of Workmen's Compensation in its narrow sense. With the constitutionality of these statutes now definitely established, a broader application of the underlying principles would seem to be indicated in the direction of accident insurance. Certainly their practical administration will necessitate also a more stringent control by the state, over each industrial plant.

B. W.

CONSTITUTIONAL LAW — MUNICIPAL CORPORATIONS — POLICE POWERS—PROHIBITION OF BILLBOARDS IN RESIDENTIAL DISTRICTS— A recent decision of the Supreme Court of the United States has determined that it is within the police power of a municipality to regulate the size, material, manner of construction and the place of erection of billboards as a special class of structure; and that such regulation does not deprive any person of his liberty or property without due process of law, or of the equal protection of the law,— at least so far as the Constitution is concerned.[1] In that case an ordinance of the city of Chicago made it unlawful to erect any billboard or signboard in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, without first obtaining the written consent of the owners of a majority of the frontage of the property on both sides of the street; and the Supreme Court held that such an ordinance was justifiable as a reasonable exercise of the police power of the municipality, and, as such, did not conflict with the Fourteenth Amendment. In the course of its opinion, the court points out that refuse of all descriptions frequently collects around and behind such structures, so that they become a menace to health; while they also jeopardize the safety and morality of the community by facilitating the start and spread of fires, and by affording a convenient concealment and shield for immoral practices, and for loiterers and criminals. For these reasons, say the court, billboards are to be considered as a class by themselves, as distinguished from buildings and fences. Thus the court justifies at least a partial prohibition of the erection, upon private property, of billboards, as such, without regard to their manner of construction.

[9] This particular feature of the act was not emphasized by counsel for the Mountain Timber Company.

[1] Cusack v. Chicago, 37 Sup. Ct. 190 (1917).

An examination of the decisions of the various state courts upon this question, indicates that this is a rather extreme position. Most of the state constitutions contain provisions similar to those of the Fourteenth Amendment, but the state courts generally have not been so liberal as the Supreme Court in the application of those provisions in cases relating to the regulation of billboards. One of the first decisions by a state court upon this question, and one which has been cited frequently since, is the case of *Crawford* v. *Topeka*.[2] In that case the court held that a municipality might regulate the erection of billboards upon private property so as to fully protect persons passing along the street; but that an ordinance providing that no person shall erect any billboard unless it is placed at such a distance from the sidewalk as shall exceed, by at least five feet, the height of such billboard, is an unreasonable regulation, not necessary for the safety of the public, and is therefore invalid as an exercise of the police power. This case refuses to recognize that there is any sound reason for discriminating between billboards, if properly and securely erected, and other structures, such as buildings and fences. Following the reasoning of this case, there have been a number of subsequent decisions by state courts which have held that the regulation of the size, location or material of billboards, as such, without including similar structures used for different purposes, is an unjust discrimination and is therefore illegal.[3] The same decisions also hold such regulation of billboards, without regard to whether they may be a menace to the public health, safety, or morals, is illegal, because it is not a valid exercise of the police power. Thus, in the case of *Bill Posting Co.* v. *Newburgh*,[4] an ordinance requiring all billboards in the city to be constructed of metal is declared invalid as an unreasonable exercise of the police power, in that many wooden billboards might be erected at such places that they could not possibly spread fire. But later, in the same jurisdiction, a municipality was permitted to prescribe definite fire limits within which the erection of wooden structures, particularly billboards, was prohibited;[5] and restrictions as to the height and solid space of skysigns were also allowed as a reasonable exercise of the police power.[6]

All of the decisions recognize the right of a municipality, as part of its police power, to regulate the erection of billboards in so far as reasonably necessary for the protection of the health, safety or morals of the public; but the courts have differed in their concep-

[2] 51 Kan. 756 (1893).

[3] Curran Co. v. Denver, 47 Col. 221 (1910); Chicago v. Gunning System, 214 Ill. 628 (1905); Bill Posting Co. v. Atlantic City, 71 N. J. L. 72 (1904); Passaic v. Bill Posting Co., 72 N. J. L. 285 (1905); State v. Whitlock, 149 N. C. 542 (1908).

[4] 137 N. Y. Sup. 186 (1912); affirmed 138 N. Y. Sup. 1144 (1913).

[5] People v. Miller, 161 N. Y. App. 138 (1914).

[6] People v. Ludwig, 158 N. Y. Supp. 208 (1916).

tion as to what is a reasonably necessary regulation. In the case of *In re Wiltshire*,[7] the court decided that an ordinance, limiting the height of billboards on the ground to six feet was a reasonable regulation, though admittedly a close case. The court declared that it would take judicial notice of the fact that billboards are usually, if not invariably, cheap and flimsy affairs constructed of wood, and justified its decision on this ground. But this position was severely criticised in *Curran Co.* v. *Denver*[8] as "opposed to all the authorities, and erroneous in its logic and conclusions." All of the cases agree, however, that an ordinance providing that no billboard over a certain height should be erected without the consent of the common council, or of some administrative officer, is a valid exercise of the police power, because it is not an absolute prohibition of all billboards, but permits a discrimination based upon considerations of public safety.[9] But mere æsthetic or artistic considerations will never justify an exercise of the police power; and therefore it is universally held that an ordinance prohibiting the erection, on private property, of *all* billboards merely because they are unsightly or incongruous, or for any other reason, is invalid as an unreasonable exercise of the police power.[10] Similarly, the prohibition of the erection, on private property, of any sign or billboard which may be seen from a public park, is invalid as a restriction not prompted by any consideration of public health, safety or morals.[11] It has also been decided that an ordinance of a municipality in "dry" territory, prohibiting the display of liquor advertisements, was unreasonable, and therefore invalid,[12] although it would seem that if a community may prohibit the sale of liquor as a reasonable police regulation, it should also be able, under its police power, to prohibit advertisements designed to promote the sale of liquor.

Although a majority of the state courts have condemned ordinances whose regulatory provisions apply only to billboards or similar structures used for advertising purposes, a few jurisdictions have permitted such a classification; and in view of the recent Supreme Court decision, the latter would seem to be the better view. The theory upon which these cases proceed is that billboards and similar structures erected for the purpose of displaying advertisements are inherently different from a fence or a building. Generally, they are insecurely constructed and present a large surface to

[7] 103 Fed. 620 (1900).

[8] 47 Col. 221 (1910).

[9] Whitmier v. Buffalo, 118 Fed. 773 (1902); Rochester v. West, 164 N. Y. 510 (1900); Gunning System v. Buffalo, 75 N. Y. App. 31 (1902).

[10] Varney v. Williams, 155 Cal. 318 (1909); Bryan v. Chester, 212 Pa. St. 259 (1905).

[11] Haller Sign Works v. Training School, 249 Ill. 436 (1911); Commonwealth v. Boston Adv. Co., 188 Mass. 348 (1905).

[12] Haskell v. Howard, 269 Ill. 550 (1915).

the wind; and, unlike a building, they possess no supporting walls, so that they are extremely susceptible to collapse. If located on the ground, access behind them is open, and they afford an excellent concealment for the commission of all forms of nuisances and immoral practices; and great quantities of rubbish and trash usually collect behind them, whereas a fence is designed to keep out intruders, and to prevent the other conditions to which billboards are so conducive. The leading case in support of this view in the state courts is *St. Louis Gunning Co.* v. *St. Louis,*[13] in which the regulation of the erection of billboards, as a distinct type of structure, is justified upon considerations of the health, safety and morals of the community; and this decision has been followed in at least four other jurisdictions.[14] The more recent decisions in all the jurisdictions seem to indicate that the growing complexity of our urban life is inclining the courts to allow greater liberality to municipalities in the application of their police power, so that in the future we may expect the courts to approve, not only more minute police regulations of billboards, but also the regulation of other subjects which have previously escaped the attention of legislators and laws.

E. L. H.

CONSULS—LIMITATIONS ON POWER TO DEAL WITH PROPERTY RIGHTS OF THEIR NATIONALS—A consul is the commercial agent of a country residing in a foreign community, usually a seaport, whose duty it is to support the commercial intercourse of the state and especially of the individual citizens.[1] He is not entitled to represent his sovereign in a country where the sovereign has an ambassador, but "he has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country."[2] The various officials of this service, consuls general, consular agents, *etc.,* are invested with the same powers and duties, and, though nominally different, the office of each is substantially the same as that of the other and the name is determined by the relative importance of the city or community to which the officer is assigned.[3] Limitations on the powers exercised by a consul are imposed by the regulations of his own government and of that to which he is sent,

[13] 235 Mo. 99 (1911).

[14] Kansas City Gunning Co. v. Kansas City, 144 S. W. 1099 (Mo. 1912); State v. Staples, 73 S. E. 112 (N. C. 1911); Horton v. Old Colony Co., 36 R. I. 507 (1914); *Ex parte* Savage, 141 S. W. 244 (Tex. 1911).

[1] 3 Am. & Eng. Encyc. of Law, 764.

[2] Story, J., in *The Anne,* 3 Wheaton 435 (1818); see also Robson v. The Huntress, 2 Wall. Jr. 59 (1851), and Gernon v. Cochran, Fed. Cas. No. 5368 (1804).

[3] Schunior v. Russell, 83 Texas 83 (1892).

by treaty or by the operation of the municipal law of that country. Such sovereign state has the imprescriptible right in the absence of treaty stipulation to forbid intervention in certain matters, even though normally allowed to a consul.

The duties of a consul touching upon the property interests of his nationals usually involve maritime matters or the administration of estates. While the right of a consul to intervene on behalf of citizens of his country who are absent but interested seems too well established in practice to be doubted, still there are frequent occasions when his duties are closely circumscribed. He may assert a claim for his fellow-citizens even where the claimants are unknown without any special authority, but he must have that before he can obtain actual restitution or proceeds.[4] This was several times decided during our early history, when prizes were brought to our ports by privateers. So a Spanish consul was allowed only to file a libel in our courts for a vessel of his country seized by citizens of a Spanish colony at war with Spain,[5] and another consul could assert a claim for slaves wrongfully captured by a privateer, but could not have them surrendered without satisfactory proof as to the real owner.[6]

By the law of nations a consular officer is the provisional conservator of the property within his consular district belonging to his countrymen who die therein. But the power and duty of a consul so to guard, collect and transmit the decedent's estate is not exclusive. Unless he is so authorized by treaty, local law or usage, he can only assist others upon whom those functions devolve under local law.[7] A treaty with Germany authorizing German consuls to act as the legal representatives of the Kaiser's subjects has been held not to constitute such consuls administrators of deceased persons, nor to authorize a consul to recover wages due a deceased seaman who was in life a German subject, unless he represents heirs who are entitled to the money and who are German subjects.[8] On the other hand, a very similar treaty with the Argentine Republic applying to Italy under the "most favored nation" clause was interpreted to entitle Italian consuls to administer the property of all nationals dying intestate within their consular jurisdiction and after administration to send the surplus to the next of kin in Italy.[9] After administration a foreign consul in the United States can receive the distributive shares to which persons residing in his country are entitled from the estate of one dying here.[10] But "neither under the law of nations

[4] *The Bello Corruves,* 6 Wheaton 152 (1821).
[5] *The Divina Pastora,* 4 Wheaton 52 (1819).
[6] *The Antelope,* 10 Wheaton 66 (1825).
[7] 7 Op. Atty. Genl. 274. Opinion of Attorney-General Cushing.
[8] *The General McPherson,* 100 Fed. 860 (Wash. 1900).
[9] *In re* Lobrasciano's Estate, 77 N. Y. Supp. 1040 (1902).
[10] *In re* Tartaglio's Estate, 33 N. Y. Supp. 1121 (1895).

nor the law of the United States nor any treaty with the King of Sweden and Norway" could a consul of the latter take from an administrator the succession of a Swede opened up in one of our states, such a right being incompatible with the sovereignty of the state.[11] The various treaties made by our government really go no farther than to make foreign consuls eligible to administer the estates of their fellow-citizens when no one having a prior right under the local laws is competent or willing to act, and are not intended to supersede local laws and confer a right of administration upon foreign consuls that is exclusive and paramount to all others.[12]

Recently a New York court held that the general law of nations did not sustain as valid the settlement by a Russian consul general with a railroad for its negligent killing within his jurisdiction of a countryman of the consul. Such a power was held not to be included in the right to represent the "next of kin" in legal and other proceedings for the proper administration, conserving, and guarding of the estates of his countrymen.[13] The court relied on the proposition that the rights of consuls rest on international law as well as treaty stipulation and it decided that the consul's act in accepting a small sum for the wife and children of the deceased was not a release of the railroad from further liability. Thus is illustrated the position once taken by our State Department in refusing to extend to Italian consuls certain rights as administrators; it was declared that in view of the fact that the administration of estates in our country was under the control of the respective states, it was thought that such an international agreement should not be made.[14] It would seem, however, that this reason has ceased to be controlling; it is certain that it should not be if we are to reciprocate with foreign countries in extending powers to consuls. Half a century ago it was declared that our consuls were authorized and required to act as administrators on the estates of all United States citizens dying intestate in foreign countries and leaving no legal representatives or partner in trade.[15] Included in this, "one of the most sacred and responsible trusts imposed by their office," is the duty to send the proceeds of the administrated estates to the United States Treasury to be held in trust for the legal representatives.[16]

[11] Succession of Thompson, 9 La. Ann. 96 (1854).

[12] Matter of D'Adamo, 212 N. Y. 214 (1914).

[13] Hamilton v. Erie R. R. Co., 114 N. E. 399 (N. Y.).

[14] For. Rel. (1894), 366; 196 MS. Dom. Let. 658.

[15] Mr. Marcy, Secretary of State, to Mr. Aspinwall, Aug. 21, 1855, 44 MS. Dom. Let. 270.

[16] Mr. Cadwalader, Assistant Secretary of State, to Mrs. Hopkins, March 27, 1876, 112 MS. Dom. Let. 456.

The limitations on the power of consuls to deal with the property rights of their nationals vary with the treaties binding the various countries they represent and with the local laws of those to which they are accredited. International law and usage have of course their influence in determining such limitations as are imposed by diplomatic agreements and judicial decisions.

H. D. S.

CORPORATIONS—POWER OF DIRECTORS—REFUSAL TO REGISTER TRANSFER OF SHARES OF STOCK—The desirability that those in control of a corporation should retain that power has led to many attempted restrictions on the free transfer of stock. This continued shaping of policies by one group, while it may lead to efficient management, may be detrimental to the interests of minority stockholders. There is a further objection to conditions limiting the absolute right to transfer stock, *viz.*, that it is a restriction on a man's otherwise absolute right to dispose of his personal property as he pleases.

In the absence of restrictions in the articles of association, directors cannot prevent the transfer of shares under the English Companies Act of 1862, which provides that the company may determine the manner of transferring shares.[1] Such restrictions are quite common in the articles of English companies, however, and in a recent English case [2] some interesting questions as to the discretion of directors in refusing to register shares to transferees were presented. There a company was formed as an outgrowth of a firm of steamship managers. The following provision was to be found in the articles of association: "The directors and managers may decline to register the transfer of any fully paid-up share or shares on certifying that, in their opinion, it is contrary to the interests of the company that the proposed transferee should be a member thereof." Dissension grew up between one of the directors and two others and he threatened to wind up the company; he then made two transfers of single shares, stating that his purpose was to fill a vacancy caused by one woman, and to stop "hole-in-corner" meetings. The opposing directors refused to register stock to the transferees, mentioning that it was contrary to the company's interest that the transferee should be a member thereof, but that the certificate did not reflect on the personal character or financial standing of the transferee. The directors deemed the transfer of *single* shares a departure from the essential family nature of the company, as well as tending to increase secretarial expenses. The court held that the directors had exceeded

[1] Weston's Case, L. R. 4 Ch. 20 (Eng. 1868).

[2] *Re* Bede Steam Shipping Co., 115 T. L. R. 580 (Eng. 1916).

their discretion in declining to approve the transfer, because they did favor splitting up the holding, they having no personal objection to the proposed transferee. A dissenting judge held their act justified, intimating that the transferees were mere tools of the transferor, and that the directors had to consider whether the transferees were acting for some other person and whether the object of that other person was contrary to the interests of the company.

We are, therefore, not surprised to find a leading New York case holding that where no discretionary power was expressly reserved, the directors of the Standard Oil Trust were obliged to receive as a shareholder a competitor who had been a bitter enemy of their concern, he having bought the shares in the open market.[3] A by-law, unwarranted by a charter prohibition of the transfer of stock to competitors, was in accordance with this view held void.[4] Many courts have held that a by-law, unauthorized by the charter, restricting the transfer of shares of stock without first giving other stockholders and the corporation an option to purchase it at a price named, is void as being a restraint upon the alienation of property;[5] so, of a by-law requiring the consent of the president and majority of directors as a condition precedent to the transfer of shares.[6] By-laws preventing transfer of stock to non-stockholders without the consent of directors were held void as unreasonably restraining transfer of property, and so the cases might be multiplied indefinitely.[7] But temporarily excluding stock from market during the existence of a contract for the sale of treasury stock did not come within the rule.[8] It is to be noted that these cases are those in which the charter makes no provision for restrictions on the sale of stock, and, as in England, where charter contains such a clause, it is of course valid.[9] In a comparatively recent New Jersey decision there was a section of the general corporation statutes that shares were transferable on the books in such manner and under such regulations as the by-laws prescribed. A by-law provided for issuance of a new certificate to the transferee if approved by the board of directors. The act and by-law were construed as only authorizing the directors to pass upon the formalities of transfer and not to give them the right to refuse, in their discretion, a transfer by one stockholder to another. The court, however, set its face against all

[3] Rice v. Rockefeller, 134 N. Y. Appeals 174 (1892).

[4] Kretzer v. Lightning Rod Co., 181 S. W. 1066 (Mo. 1916).

[5] Bloede v. Bloede, 84 Md. 129 (1896); Ireland v. Globe Milling Co., 21 R. I. 9 (1898).

[6] Finch v. Macoupin Co., 146 Ill. App. 158 (1908).

[7] Miller v. Farmers' Milling Co., 78 Neb. 441 (1907); Douglas v. Aurora Daily News Co., 160 Ill. App. 506 (1911).

[8] Cook v. Buck, 149 Pac. 95 (Col. 1915).

[9] Casper v. Kalt Zimmers Co., 159 Wis. 517 (1914).

such fetters on the free transfer of stock.[10] In Wisconsin an early decision [11] held a by-law prohibiting transfer of stock by a stockholder without consent of all the stockholders void as against public policy. In a later case,[12] however, in the same jurisdiction, articles of incorporation, by-laws and stock certificates on their face, provided that shares were not transferable except in pursuance of a vote of two-thirds of outstanding shares and this majority might either consent to the transfer or themselves take up the shares sought to be transferred by paying for them at par. If they did neither the holder was at liberty to sell and transfer his shares as usual. The court said, "It is sometimes necessary and often desirable that a corporation protect itself against the acquisition of shares of its stock by rivals in business or other disturbers who might purchase shares merely for the purpose of acquiring information which might thereafter be used against the interests of the company." Similar restrictions upon the transfer of shares are generally recognized and held valid where they form part of the charter or articles of organization of the corporation and are matters of contract. So we find the Massachusetts courts starting a chain of authorities holding that even though a by-law to the effect that a board of directors should appraise the value of shares and have the option to take them at that value in case of any transfer should be void, it would be upheld as an agreement between corporation and stockholder, the by-law in question being printed on back of the certificates.[13] As a further step in the development of the doctrine in that jurisdiction comes the decision holding that in the absence of proof of West Virginia law a by-law of a corporation of that state prohibiting a stockholder from selling stock without first offering for sale to directors, the court saying, "There seems to be no greater objection to retaining the right of choosing one's associates in a corporation than in a firm." [14] An Ohio court construed a general provision in the corporation statutes of Delaware authorizing a corporation to make by-laws for the certification of a transfer of stock as rendering valid a by-law giving directors thirty days within which to dispose of stock to persons deemed desirable as holders.[15]

In accordance with the view of the Abbott case, Pennsylvania holds when the organizers of a corporation agreed that a by-law of the proposed corporation should provide that the subscriber should not sell his stock until he should have offered it to other stock-

[10] Morris v. Dyeing Machine Co., 81 N. J. E. 256 (1913).

[11] *In Re* Klaus, 67 Wis. 401 (1886).

[12] Farmers' Co. v. Laun, 146 Wis. 252 (1911).

[13] New England Trust Co. v. Abbott, 162 Mass. 148 (1894); Weiland v. Hogan, 172 Mich. 626 (1913).

[14] Barrett v. King, 181 Mass. 476 (1902).

[15] Nicholson v. Franklin Brewing Co., 82 Ohio St. 94 (1912).

holders, such a by-law is upheld as an agreement among subscribing stockholders.[16] A similar restriction in the by-laws was sustained in Feldstein's estate,[17] the restriction being noted on the certificate.

Thus we see from a survey of the cases that the courts are tending away from the view that there is something pernicious in provisions adopted at organization of the corporation, giving those vitally interested in the corporation a chance to buy up shares before they are placed upon the market, or even in reposing, as in the English case, discretion in the directors as to registering the transferee. It is submitted that the discretion of the directors exercising this power is as much a subject of review as a case where they had set aside a sum for depreciation to the apparent detriment of rights of preferred stockholders to a dividend, and that such a control is essential to the maintenance of a family concern, which, as in our principal case, is really a partnership under corporate guise.

C. B. W.

[16] Garrett v. Lawn Mower Co., 39 Pa. Superior Ct. 78 (1909).
[17] 25 D. R. 602 (Pa. 1916).