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NOTES.

DAMAGES—VOID CONTRACT AS MEASURE OF CONTRACTOR'S RIGHT TO RECOVER—When work is done or expense incurred in accordance with a contract which is void because through ignorance or neglect some legal formality is not complied with, an interesting problem arises concerning the rights of the several parties thereto. Logically a void contract is a nullity; nothing has ever existed. How then can the work be accounted for? Can the one for whom it was done consider it as a gift and accept it with thanks? Or must he pay for it, and how much? Can the one who does the work be sued in trespass for coming upon the other's land and doing it? The last question should probably be answered in the negative. The

contract though void would at least be evidence that the work was done on request, and was not officious intermeddling. In an action for work and labor done by a brother a void contract to devise land for such services was admitted to rebut the presumption that the work was done gratuitously.[1] But further than this most courts will not go.

All courts agree that there can be no recovery upon the void contract. For what then can there be a recovery? Where there has been performance in whole or in part by one party may he recover? If so, must his performance have been in accordance with the void contract? What shall be the basis of his recovery—the compensation stipulated in the contract, or a *quantum meruit*?

Most states allow some recovery. But it must be upon some implied or *quasi* contract. It must be remembered that *indebitatus assumpsit* is subject to any defense which may in good morals be raised. Hence it is necessary that the plaintiff be clearly in a better position than the defendant in order to recover. The cases arising under the Statute of Frauds cover the case in some jurisdictions. But in most an oral contract under the Statute of Frauds is not void but merely unenforceable;—so that a contract exists upon which rights might be predicated except that this would nullify the effect of the statute. Thus in some jurisdictions money paid under an oral contract for the sale of land may not be recovered if the other party is willing to convey the land.[2] This is expressly on the theory that the contract is not void but only unenforceable.[3] Similarly in some jurisdictions one who has rendered services under an agreement within the Statute of Frauds may not recover on a *quantum meruit* if the other party is willing to go on with the contract as if it was enforceable.[4] These decisions seem no more than just. Why should one be allowed to take advantage of a technical defense in a transaction in which he is equally blameworthy while the other is willing to complete the contract? However such decisions to that extent nullify the spirit if not the letter of the statute.

But where one party has performed and the other has refused, so that the first is clearly entitled to some compensation, he is allowed to recover for his services their actual value without regard to the contract price.[5] This is allowed though the statute

[1] Kettry v. Thumma, 9 Ind. App. 498 (1894).

[2] Coughlin v. Knowles, 7 Met. 57 (Mass. 1843); Abbott v. Draper, 4 Denio 51 (N. Y. 1847).

[3] Coughlin v. Knowles, see note 2, *supra*.

[4] Galvin v. Prentice, 45 N. Y. 162 (1871); Abbott v. Inslip, 29 Ohio 59 (1875).

[5] Steel Works v. Atkinson, 68 Ill. 421 (1873); Wallace v. Long, 105 Ind. 522 (1885).

makes the contract absolutely void.[6] This involves the possibility of a person paying more than the price called for in the contract; or in money instead of land.[7] But this is inevitable if the contract is held void. It is no hardship to put the contract in writing, or record it, or whatever the statute provides. If persons "suffer by not complying with the statute it is a penalty due to their own negligence and they have no reason to complain."[8]

The difficulties and apparent hardships of the strict law have been seen by the courts of California and the contracts enforced by a bit of legal camouflage. A statute of that state requires that building contracts for over a certain sum shall be recorded, otherwise they shall be void and neither party shall recover thereunder. This statute was primarily for the benefit of mechanic's lien holders, and naturally the first cases under it involved their rights. The contracts were held void and the statutory consequences enforced in favor of the lien holders.[9] Then in an action between the parties, the contract was declared void and inadmissible as evidence of the value of the services performed in accordance therewith.[10] This case was overruled by the case of *Laidlaw* v. *Maryè*,[11] on the ground that the statute must mean absolutely void only as to the material men and subcontractors who might have liens. The court evaded the express stipulation of the statute by saying that "the contract must remain, not the basis of his recovery, but the measure and test of his right to recover." Otherwise "the contractor may build what he pleases, in any way that suits him, and recover where the contract has not been performed, not only the contract price, but forty times the contract price"; "the owner will be compelled to accept a barn where he expected a house, and to pay for a structure which he never wanted or contracted for, more than he agreed to pay for the desired edifice."

This sounds rather specious but overlooks the fact that the contractor must lay some implied promise to pay in order to recover anything. No jury is liable to find an implied promise to pay for a barn when the parties attempted to make a contract for a house at one-fortieth the price. Moreover the contractor's only excuse for being on the property is to fulfill the contract. It being void he only remains on the land by the grace of the owner, who, however, will probably not exercise his right to put him off if he at least substantially complies with the terms agreed upon. If the owner allows him to stay on and build, he should pay him the

[6] Thomas v. Hatch, 53 Wis. 296 (1881).
[7] Koch v. Williams, 82 Wis. 186 (1892).
[8] See note 7, *supra*.
[9] Williamette, *etc.*, Co. v. College Co., 94 Cal. 229 (1892).
[10] Rebman v. San Gabriel Co., 95 Cal. 390 (1892).
[11] 133 Cal. 170 (1901).

reasonable value of his labor, and a contract to do so will be implied. If he so neglects his rights as to allow a violation of the terms that should be no excuse to one who has expended his money and labor. He may in the first place refuse to allow the contractor to enter until he has recorded the contract.

In *Condon* v. *Donahue*,[12] it is expressly stated that the statute applies to actions between parties to the contract. But the principle that the contract must be "the measure and test of the contractor's right to recover," or at least the upper limit, is affirmed. A recent case [13] holds that the void contract measures the contractor's right to retain money paid to him and allows a recovery of a surplus above the contract price paid by mistake.

There is a possible legal justification for this holding. Though not a contract the writing might be regarded as an admission by the parties of the value of the work to be done. It would as such be admissible against a party who claimed a different value for the work, and in that sense would be the "measure and test of the contractor's right to recover."

However upon whatever theory this decision is supported, it practically negatives, as far as the parties are concerned, the effect of the statute which makes such contracts void. It seems questionable whether such a statute enacted for the protection of many should be negatived to avoid hardship in those few cases where the contractor made a bad bargain and would be able to recover more on a *quantum meruit* than the contract stipulated.

E. N. V.

INDICTMENT AND INFORMATION—ACCESSORIES BEFORE THE FACT—INDICTMENT AS PRINCIPALS—At common law the offense of being an accessory before the fact to a crime existed only when the crime committed was a felony. If the crime committed were treason or were a misdemeanor the procurer was a principal not an accessory. In other words one who instigated another to commit treason or a misdemeanor was a principal in the treason or misdemeanor actually committed, but the instigator of a successful felony was an accessory only. The distinction was, however, procedural only, the punishment meted to the accessory in felony being the same as that suffered by the convicted principal, just as the punishment of the procurer in treason and misdemeanor was the same as that of the principal or misdemeanant. The procedural differences were two: first, the instigator in treason and misdemeanor could be tried at any time, whereas the accessory in felony could not be put on trial until the principal had been convicted;

[12] 160 Cal. 749 (1911); see also Mannix v. Radke Co., 166 Cal. 333 (1913).
[13] R. R. v. West, 167 Pac. 868 (1917).

second, in treason and misdemeanor the instigator could be charged in the indictment as the actual doer of the crime, or the act of the doer could be set out, and it could then be alleged that the instigator procured the doing,[1] whereas in felony the instigator could not be charged as the doer of the principal act, but the indictment had first to aver the guilt of the principal and then to aver that the instigator, before the doing of the principal felony, procured the principal to commit the said felony.[2]

To remedy the failure of justice sometimes resulting from the rule that the accessory in felony could not be tried until after the principal had been convicted statutes have been passed in England and some of our states. Some of these statutes, such as the one in force in Pennsylvania, are very sweeping, providing that the accessory "may be indicted, tried, convicted and punished, in all respects as if he were a principal felon." Others, like the Virginia statute of 1877, provide only that the accessory shall be punished as if he were the principal felon, and that he "may be indicted, tried and punished whether the principal felon be convicted or not, or be amenable to justice or not."

Others, like the statute of Illinois,[3] first define an accessory as being one who advises, *etc.*, another to commit a crime, and then provides that he who thus advises, *etc.*, "Shall be considered as principal and punished accordingly."

Under the Pennsylvania statute providing in terms that the accessory may be indicted, tried and punished as if he were the principal, it is held that the indictment may either charge him specifically as a principal or as an accessory.

Under the Virginia statute, providing only, as it does, that the accessory may be punished as if he were a principal, it has been held that an accessory must be charged as an accessory, with having procured another to commit the felony, and cannot be charged as a principal—with having himself done the felonious act.[4]

The Illinois statute expressly defines an accessory as follows: "Accessories—Before the Fact. Section 2. An accessory is he who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages, shall be considered as principal, and punished accordingly." Section 3 provides that "every *such accessory*—may be indicted and convicted at the same time as the principal, or before or after his conviction and whether the prin-

[1] 3 Bish. New Cr. Proc., Sec. 2.
[2] 3 Bish. New Cr. Proc., Sec. 9.
[3] Secs. 274, 275, Cr. Code, Hurds' Stat., 1911, p. 818.
[4] Hatchett v. Com., 75 Va. 925.

cipal is convicted or amenable to justice or not, and punished as principal."

In a recent Illinois case,[5] one Snyder had procured another to commit a felony. Snyder was indicted. In the body of the indictment Snyder was charged as an accessory, *i. e.*, with procuring R. to commit a certain felony, and in the concluding part of the indictment it was averred that Snyder himself did the act constituting the felony, *i. e.*, he was charged as a principal. The indictment was sustained. The court held that the statute abolished the distinction between accessory before the fact and principals, and said: "The pleader may, if he chooses, state the circumstances of the offense as in an indictment against an accessory before the fact, yet the indictment must contain an allegation charging the defendant as principal."

In an earlier case in the same court, one who had procured another to commit murder had been charged simply as an accessory, *i. e.*, with having procured another to commit the murder, without a further allegation that defendant had himself actually done the killing—which indeed he had not—the court reversed judgment against him, holding that the statute had abolished the offense of accessory by making accessories principals, and that therefore as no such offense existed an indictment charging only such offense charged no crime.[6]

On the other hand in another case in the same jurisdiction[7] the defendant who had procured another to commit murder was indicted simply as a principal, as having himself committed the act of murder. The court held that he was properly convicted on such indictment though the evidence showed him to be guilty only as accessory before the fact. The court saying: "They (accessories) must be indicted as principals or not at all, for they are declared by the act to be principals."

From these three cases it appears that in Illinois, under the statute, the procurer of a felony cannot be indicted as an accessory merely; that he can be indicted as a principal merely; and that he may be charged in the statement as accessory by setting out the true facts, and then averring that he actually did the act constituting the substantive felony.

There are objections to both of the methods, upheld in the cases cited, of indicting an accessory under such a statute. If he is indicted merely as having himself done the act constituting the substantive felony the indictment does not in the first place inform him of the facts to be proved against him. He is charged with having at a certain time and place impersonated B, whereas the

[5] People v. Snyder, 117 N. E. 119.
[6] Fixmer v. People, 153 Ill. 123.
[7] Baxter v. People, 8 Ill. 368.

proof shows that at another time and place he paid X five dollars to impersonate B. If he is charged in one part of the indictment with having done certain accessorial acts and in another part with having done the substantive felony, there is a repugnancy in the indictment.

The best method would seem to be the one held erroneous by the Illinois court, *viz.*, that of simply charging the defendant with the acts in fact done by him. The indictment would then apprise him of the "nature and cause of the accusation against him," would truly inform him of the facts he would be called upon to meet, there would be no variance between the facts charged and the facts proved, and there would of course be no repugnancy in the indictment itself. Having been found guilty "as charged in the indictment" the provision of the statute becomes effective which declares that "He who thus aids, abets, assists, advises or encourages, shall be considered as principal, and punished accordingly." This is a conclusion of law and conclusions of law need not be stated in the indictment. This view has been taken by some courts, notably the California court. The California statute goes further than the Illinois statute in that it provides that the accessory may be indicted, tried and convicted and punished as though he were a principal. In *People* v. *Campbell*,[8] the court held that under this statute the accessory must be indicted as an accessory and not as a principal. The court said it is a fundamental principle in criminal jurisprudence that the accused is entitled to be informed by the indictment of the particular *acts* which he is alleged to have committed, as constituting the offense; and if he in fact, only aided and abetted the crime, the fact must be so stated in the indictment. He then comes to the trial with a knowledge of the acts which are imputed to him.

If the Illinois Legislature really intended to abolish the distinction between principal and accessory, as the court says it in fact did, the method used was ill-chosen, in view of the fact that the statute expressly defines an accessory and prescribes the time when "such accessory" may be indicted. The holding of the court in *Fixmer* v. *People* that such an indictment charged no crime since the statute had abolished the offense of accessory by making accessories principals would seem to be untenable. The statute did not abolish facts—it could not—on the contrary it expressly recited the facts which were alleged against the defendant, and then proceeded to declare—a conclusion of law—that when these facts exist the defendant shall be "regarded as a principal and punished (not indicted) accordingly." The facts that the statute recites as constituting one guilty of the crime of being a principal were alleged in the indictment, therefore under the statute the facts if proved

[8] 40 Cal. 129.

as laid, constituted the crime of being a principal. The facts plus the statute charged the crime of being a principal, not the crime of being an accessory as the court says.

William E. Mikell.

A LATIN PASSAGE IN BLACKSTONE—Aigler's "Cases on Property,"[1] contains a quotation from Blackstone as follows: "All corporeal hereditaments as lands and houses, are said to lie in livery; and the others, as advowsons, commons, rents, reversions, *etc.*, to lie in grant. And the reason is given in Bracton: *'Traditio*, or livery, *nihil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem traductio: sed res incorporales, quae sunt ipsum jus rei vel corpori inhaerens, traditionem non patiuntur'* (livery is merely the transferring from one person to another, from one hand to another, or the induction into possession of a corporeal hereditament; but an incorporeal hereditament, *which is the right itself to a thing or inherent in the person*,[2] does not admit of delivery)."

The italicized passage is clearly wrong. It is incorrect as a translation, showing that the translator did not know how to construe the Latin grammatically; and it makes bad sense logically and legally. Taking the grammar first. *"Jus rei"* is not the way to say in Latin "the right to a thing." *"Jus in rem"* or *"jus in re"* or *"jus ad rem,"* might have such a meaning. As a matter of fact these several phrases have their respective technical meanings which it is not my province now to discuss. *"Corpus"* does not mean person. *"Persona"* has that meaning, whereas *"corpus"* is almost the same as *"res"* except that it is not so extensive in its signification, denoting more definitely than *"res,"* a physical, corporeal substance. Finally the word *"vel"* does not connect *"sunt ipsum jus rei"* with *"corpori inhaerens,"* which would be impossible Latin. It connects *"rei"* with *"corpori,"* both of which are governed by *"inhaerens,"* which in turn agrees with *"jus."*

Logically and legally speaking, what is meant by the statement that an incorporeal hereditament is "the right itself to a thing, or inherent in the person"?

The person in whom a right inheres is apparently the person entitled, whereas when we speak of a "right to a thing," the thing is the subject of the right, to use Austin's terminology. The connection of these two by "or" makes no sense, since they are neither equivalent nor opposed. The only meaning the translator could have attached to the expression would seem to be, "the right to a thing inherent in a piece of land, or the right to a thing inherent

[1] Page 162.
[2] Italics mine.

in a person," *i. e.*, he had in mind the distinction between what is known as a real and a personal servitude, or the distinction between "appurtenant" and "in gross." But his language is anything but illuminating. Or is it possible that he used "inherent in" as equivalent to "a right to," and intended to distinguish between, say, a right of common, which is a right *in rem*, and an annuity, which is a right *in personam?* Then his language is still more remote from the idea he intended to convey.

All these are difficulties of the English translation. The Latin original is quite clear. An incorporeal thing (or hereditament) is according to the Latin, "a right attaching to a thing or body." The thing or body is the subject of the right. The right attaches to it in the same way as, let us say, color attaches to a surface, or any quality attaches to an object. There is nothing at all said about a person.

All this becomes clearer still if we consult the text of Bracton, whom Blackstone quotes. Strangely enough the passage as Blackstone has it[3] is not at all in Bracton, though the sense of it is, and expressed in a way which could not possibly leave any room for the translator's error. *"Res incorporalis,"* it reads,[4] *"non patitur traditionem, sicut ipsum jus quod rei sive corpori inhaeret."* Evidently the standard of precision in quoting an author was in Blackstone's case not quite up to the mark as judged by our own.

All this being clear, the interesting question is, who is responsible for the translation? Blackstone himself never translates the passages and phrases he quotes in foreign languages. One of the earliest editions of Blackstone containing translations of the Latin quotations is the fourth edition of Cooley's Blackstone, edited by James DeWitt Andrews, and published at Chicago in 1899. In his preface to this fourth edition Mr. Andrews says, "The principal objects sought in this edition are to render more easy the task of the student of law and to exhibit clearly the relation of Blackstone's Commentaries to the subject of jurisprudence in general and to American law in particular." And "to this end," the editor goes on to say, "five methods are resorted to . . . *Second.*—Placing with the text and notes the translation of Latin phrases used therein."

This edition contains the identical translation as found in Aigler. Lewis, in his preface to the first volume of his edition of Blackstone, published in 1897, says, "I hope that law students, even those familiar with Latin, will find useful the translation of phrases not in English whether in the text or notes. These translations I have placed in brackets." Here too we find the same identical translation as in Aigler and in Andrews.

[3] Bk. II, p. 317.*

[4] Book 2, Ch. 18, Ed. Twiss, Vol. I, p. 312.

The source of all these translations is to be found in a little book by Jones. It is entitled, "A translation of all the Greek, Latin, Italian, and French quotations which occur in Blackstone's Commentaries on the Laws of England; and also in the notes of the editions by Christian, Archbold, and Williams. By J. W. Jones, Esq., late of Gray's Inn, Philadelphia, 1889." The author's preface, however, bears the date, November 1st, 1823. The Philadelphia edition is therefore a reprint of an earlier English edition of the year 1823 or thereabouts. In this preface the author after an encomium on Blackstone's Commentaries, says, "Many no doubt there are, who in the perusal of his valuable pages find their progress continually impeded by the old law Latin and Norman French left uninterpreted by the author and his editors, and to such, consequently, a large and important portion of the work is mere dead letter. To render it available to this description of its readers, the following version is respectfully offered as a companion to Blackstone by the translator." On page 62 of this little book we read once more the identical translation as above.

Isaac Husik.

LIABILITY OF COMMON CARRIERS FOR LOSS OF, OR DAMAGE TO, INTERSTATE SHIPMENTS TRANSPORTED ON RATES DEPENDENT ON VALUE OR VALUATION—While the courts have agreed that a common carrier may not *exempt* itself from liability for loss of, or damage to, shipments resulting from its own negligence, it is well known that the decisions have been substantially at variance as to the right of the carrier to *limit* its liability to a fixed amount where the basis of liability is its own negligence.[1]

Since the decision of the Supreme Court of the United States in the case of *Hart* v. *Pennsylvania Railroad Company*,[2] there has been a growing tendency on the part of the state courts to accept the view, there adopted by the Supreme Court of the United States, that such limitations are permissible.

There are some difficulties as to the principle governing this doctrine, since it is not easy to understand why a carrier should be permitted in case of its negligence to relieve itself from nine-tenths of its own liability if it is to be prohibited from relieving itself from ten-tenths.[3] And, while the principle of estoppel has been suggested in various cases including the *Hart Case*,[4] this can

[1] Agreed Valuation as Affecting the Liability of Common Carriers for Negligence: 21 Harv. Law Rev. 32.

[2] 112 U. S. 331.

[3] Railway Co. v. Wynn, 88 Tenn. 320.

[4] Sleat v. Flagg, 5 B. & Ald. 432, particularly Bayley, J.'s, comment on Batson v. Donovan, 4 B. & Ald. 21; Earnest v. Express Company, 1 Wood (U. S.) 573; Oppenheimer v. U. S. Express Co., 69 Ills. 62; Hart v. P. R. R.,

hardly be properly relied upon where the carrier, through its agent, knows the true value of the property and the resulting measure of liability.[5]

Pretermitting questions of legal validity it is clear that transportation rates might be based upon actual value or upon what for convenience may be characterized as agreed value; or to state the matter more concisely rates may be based upon *value* or *valuation*. In the former case the carrier offers the reduced rate only to that class of a particular commodity which does not exceed a certain value. In the latter case the carrier offers the reduced rate, no matter what the actual value of the commodity, if the shipper will agree that in the event of loss or damage the value of the shipment will be conclusively deemed to be a specified sum. Manifestly each of these two kinds of rates has its own economic basis, although there is a close relationship between them.

In the case of *Hughes* v. *Pennsylvania Railroad*,[6] the Supreme Court of the United States held that the state courts might continue to apply their own rules in cases coming before them even where the shipments were interstate, on the theory that Congress had not at that time indicated its will to the contrary; but after the passage of the so-called Carmack Amendment in 1906,[7] this view was changed, and, as a result of the decision in *Adams Express Company* v. *Croninger*,[8] the state courts were compelled to adopt the federal rule in connection with interstate shipments, whether or not they had theretofore sustained the opposite rule, either as a matter of common law or as the result of statutory provisions.

This gave rise to widespread dissatisfaction, particularly in states originating shipments of live stock, and in consequence of resulting agitation Congress passed the act of March 4, 1915, customarily called the First Cummins Amendment.[9] This amendment nullified all limitations of liability of the kind under discussion except in the case of goods "hidden from view by wrapping, boxing or other means and [where] the carrier is not notified as to the character of the goods," in which case the carrier was authorized to require the shipper to specifically state in writing the value of the goods and relieved of liability except to the extent of the stated value.

112 U. S. 331 at pages 340-341. In this last-named case, the leading case on the question, the original record shows that the carrier's agent knew that the actual value of the horse exceeded the agreed value. This fact, though mentioned in the argument by counsel for Hart (see page 335), is not adverted to in the opinion of the Supreme Court.

[5] Agreed Valuation, etc.: 21 Harv. Law Rev. 32.

[6] 191 U. S. 477.

[7] 34 Stat. at Large 584, 595.

[8] 226 U. S. 491.

[9] 39 Stat. at Large 1197.

The Interstate Commerce Commission, after a conference with various interested parties, promulgated an opinion [10] which gives point to the underlying principles governing rates and ratings based upon value or valuation, since the Commission holds that, while this co-called Cummins Amendment invalidated contracts limiting liability and condemned rates based upon valuation agreements, it did not interfere with the establishment of rates based on value; and, if a carrier elected to maintain such rates, a shipper who misstated the value of his property in order to obtain a better rate than that applicable upon the basis of the actual value thereof would be subject to the severe penalties provided by Section 10 of the Act to Regulate Commerce.[11]

As a consequence of this official announcement of the Commission—which was regarded as a correct interpretation of the law—the railroad companies established sundry rates, including rates on livestock, on the basis of actual value, instead of on the basis of valuation, with the result that the shipping public found itself no better off than prior to the passage of the First Cummins Amendment, since only by incurring the risk of indictment could the shipper obtain the advantage of lower rates than those applicable in accordance with the actual value of his shipment; and where he did incur this risk the railroads declined to settle except on the basis of the declared value insisting that this must be regarded as the true value.

Further agitation developed and resulted in the passage by Congress of the so-called Second Cummins Amendment on August 9th, 1916,[12] which, as indicated by the report of the Senate Committee, was intended to cure this situation. However, an examination of the text of this amendment, which is found in the margin,[13] shows clearly that Congress did not effectuate the inten-

[10] *In re* Cummins Amendment, 33 I. C. C. 682.

[11] 33 I. C. C. 682, at page 696.

[12] 39 Stat. at Large 441.

[13] BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That so much of an Act to amend an Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty seven, and all Acts amendatory thereof and to enlarge the powers of the Interstate Commerce Commission," approved March fourth, nineteen hundred and fifteen, as reads as follows, to wit:

"PROVIDED, HOWEVER; That if the goods are hidden from view by wrapping boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules," be, and the same is hereby, amended to read as follows, to wit:

tion of the Senate Committee. All that the amendment does is to relieve baggage from the provisions of the First Cummins Amendment and to *authorize* rates and ratings based on *valuation* where expressly permitted by the Interstate Commerce Commission, denying however to the Commission the right to establish or maintain rates based on *valuation* in the case of ordinary live stock. Rates and ratings based on value are left absolutely untouched by this amendment and consequently are in exactly the situation they were prior to its passage, as explained by the Commission in its opinion as to the scope, *etc.*, of the First Cummins Amendment.

Notwithstanding this fact the Interstate Commerce Commission in a recent opinion, *viz., Live Stock Classification*[14] hold that under the amended Cummins Amendment, *i. e.*, the Second Cummins Amendment, they cannot authorize rates on ordinary livestock which are based on value and state further that new rates should be provided at once which are not dependent upon value.[15]

This view is in accordance with a similar view expressed by the Commission in an opinion handed down a few months earlier, *viz., Express Rates, etc.*,[16] but it seems to disclose an effort to effectuate the intention of the Senate Committee rather than a correct legal appraisal of the amended Cummins Amendment. It is interesting to know, however, that the eastern railroad companies under tariffs effective January 1st, 1918, complied with the injunction of the Commission and established a single rating on ordinary live stock.

"PROVIDED, HOWEVER, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances, and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses."

[14] 47 I. C. C. 335.

[15] 47 I. C. C. at page 344.

[16] 43 I. C. C. 510.

From the practical point of view, therefore, the railroads in the east carry no ratings on ordinary live stock based on value. There still remain, however, ratings on certain other commodities which are based on value, and it will no doubt be interesting to observe whether application is made to the Commission to exercise its power under the Cummins Amendments to expressly authorize that these ratings be based on valuation rather than on value. Such applications have been made in connection with certain commodities and in some instances have been approved. And the Commission has itself established ratings based on valuation in connection with certain live stock other than ordinary live stock.[17]

Where such ratings are authorized by the Commission a valid limitation of liability is of course established; but where the carriers without the authority of the Commission continue rates based on value, a correct interpretation of the Second Cummins Amendment would seem to leave the shipper just where he was prior to its passage, in other words in the predicament described by the Commission in its opinion as to the scope, *etc.*, of the First Cummins Amendment.

Henry Wolf Biklé.

[17] National Society of Record Assn's v. Aberdeen & Rockfish R. R. Co. *et al.*, 40 I. C. C. 347.