NOTES

THE PAYEE OF A NEGOTIABLE INSTRUMENT AS A HOLDER IN DUE COURSE—The question, whether the payee of a negotiable instrument can be a holder in due course under the English *Bills of Exchange Act*,[1] has recently presented itself again. There are situations in which a payee should logically be as fully protected as the innocent indorsee before maturity who gave value. For example, the maker of a note might give it to a third person with instructions to hand it to the payee upon certain conditions, and the third person, disregarding the instructions, might deliver it to the payee in payment of his own debt. In such a case no consideration would have passed between the parties to the note; but the payee would have given value for it to the third person, and he would have had no knowledge or notice of the fraud. He would then be in every respect in the same position as the innocent indorsee except that he is not an indorsee but a payee. There seems to be no reason why that fact of itself should make a difference. The question, logically, should be, was he a *bona fide* holder for value before maturity? Similarly, if the maker signed a note in blank and authorized his agent to fill in a certain amount, and the agent wrote in a greater sum and transferred the note to the payee for value moving to himself, the payee's position would be fundamentally that of an indorsee. In these cases there is necessarily a third person who comes between the maker and the payee—who transmits the instrument to the payee. Whether or not this transmission amounts to a negotiation is the question that must be settled in order to determine the rights of the payee under the statute.

The common law of England and of the great majority of jurisdictions in the United States accorded the payee who gave value for an instrument without notice of its infirmity the same rights given a holder in due course under the *Bills of Exchange Act* and the *Negotiable Instruments Law*.[2] One of the early cases most frequently cited in this connection is that of *Watson v. Russell*,[3] in which A induced B to give him a cheque payable to C. B told A that the cheque was to be delivered only upon certain conditions; but A delivered it to C for value, without informing him of the conditions.

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[1] 45 & 46 Vict. c. 61 (1882).

[2] Russel v. Langstaffe, 2 Doug. 514 (Eng., 1780); France v. Clark, 26 Ch. D. 257 (Eng., 1881); Garrard v. Lewis, 10 Q. B. D. 30 (Eng., 1882); Violet v. Patton, 5 Cranch 142 (U. S., 1809); Armstrong v. American Exchange National Bank, 133 U. S. 433 (1890); Androscoggin Bank v. Kimball, 10 Cush. 373 (Mass., 1852); Fullerton v. Sturges, 4 Ohio 529 (1855). *Contra:* Camp v. Sturdevant, 16 Neb. 693 (1884).

[3] 3 B. & S. 34 (Eng., 1862).

It was held that B could not maintain an action against C for the amount of the cheque, because C was a *bona fide* holder for value.[4]

While the common law was not entirely clear upon this subject, the *Bills of Exchange Act* and *Negotiable Instruments Law* are most obscure, with the result that there is far more disagreement among the authorities than there formerly was. The first intimation that the common law had been changed by the Act was a dictum in *Lewis v. Clay*,[5] in which the Lord Chief Justice said that section 20 of the Act,[6] because of the use of the word "negotiated" in it, limited the meaning of "holder in due course" to a person to whom the instrument had been indorsed by a holder.[7] Soon after came the case of *Herdman v. Wheeler*,[8] deciding squarely, in accordance with that dictum, that "negotiated" in section 20 could mean only a transfer from one holder to another; and that therefore a payee could not be a holder in due course. The court took the view that under section 29 of the Act[9] a payee might be a holder in due course; but that this section was definitely limited by section 20. In the United States, the influence of this decision brought about a similar holding in Iowa, in *Vander Ploeg v. Van Zuuk*;[10] and other jurisdictions have since adopted the same interpretation of section 14 of the *Negotiable Instruments Law* (which is modeled closely after section 20 of the *Bills of Exchange Act*).[11] But the great preponderance of authority in this country is to the effect that the common law has not been changed in this regard by the Negotiable Instruments Law.[12] And

[4] *Supra*, note 3, p. 39. "When the defendant received the cheque, and when he cashed it, he was a holder for value, and had clearly a right to the cheque and the cash. He took the cheque, as the jury found, without notice, and he took it for a good consideration . . ." The court goes on to say that, therefore, the plaintiff was properly non-suited.

[5] 67 L. J. Q. B. (N. S.) 224, 227 (Eng., 1897).

[6] *Cf.* the *N. I. L.* § 14.

[7] Without explanation of his reasoning, he simply referred to the *B. E. A.* §§ 20, 21, 29, 30, 38, 83, 84, 88 and 89 (*cf. N. I. L.* §§ 14; 16; 52, 55, 58; 24, 59; 57, 51; 184, 5; 60) as restricting the definition of "negotiation" so as to give it the meaning of a "transfer from one holder to another."

[8] [1902] 1 K. B. 361. See 15 HARV. L. REV. 579 (1902).

[9] *Cf.* the *N. I. L.* § 52.

[10] 135 Iowa 350, 112 N. W. 807 (1907).

[11] Devoy & Kuhn Coal Co. v. Huttig, 174 Iowa 357, 156 N. W. 413 (1916); Southern Nat. L. Corp. v. People's Bank, 178 Ky. 80, 198 S. W. 543 (1917); Long v. Shafer, 185 Mo. App. 641, 171 S. W. 690 (1914); Bank of Gresham v. Walch, 76 Ore. 272, 147 Pac. 534 (1915). And see cases in BRANNAN, THE NEGOTIABLE INSTRUMENT LAW, 50 (3d ed., 1920).

[12] *Ex parte* Goldberg & Lewis, 191 Ala. 356, 67 So. 839 (1914); Ryle v. Farmers & Merchants Bank, 33 Ga. App. 459, 127 S. E. 233 (1924); Drumm Const. Co. v. Forbes, 305 Ill. 303, 137 N. E. 225 (1922); Liberty Trust Co. v. Tilton, 217 Mass. 462, 105 N. E. 605 (1914); Bergstrom v. Ritz-Carlton Co., 171 App. Div. 776, 157 N. Y. Supp. 959 (1916); Potts v. First State Bank, 51 Okla. 162, 151 Pac. 859 (1915); Johnston v. Knipe, 260 Pa. 504, 105 Atl. 705 (1918). And see cases collected in BRANNAN, *supra*, note 11, pp. 51 *et seq.*, 161 *et seq.*; 36 HARV. L. REV. 751 (1923).

in Canada and New Zealand the same conclusion has been reached.[13]

That the English courts soon became dissatisfied with the view which they had taken is evident in the cases that have been decided since *Herdman v. Wheeler*. The case of *Lloyds Bank v. Cook*[14] differed hardly at all from that case, but a decision was given for the defendant payee, on the ground of estoppel *in pais*. The court, not wishing to overrule its former judgment, and being no more anxious through the application of its own rule to arrive at a conclusion plainly erroneous on the facts of the case, dodged the dilemma altogether. But Fletcher Moulton, L. J., added a well considered dictum in which he renounced the doctrine of *Herdman v. Wheeler*. His reasoning was as follows: section 2 of the Act[15] defines a holder as being "a payee or indorsee . . . ;" according to section 30: 2,[16] "Every holder is prima facie deemed to be a holder in due course" unless fraud or some like circumstance is alleged, which circumstance, however, only shifts the burden of proof; section 29: 1,[17] does not exclude payees from the class of holders in due course unless "negotiated" means "indorsed;" but this it clearly does not, by definition in section 31: 1,[18] in which it is stated that "an instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof." All this, however, was only a dictum, and the older construction of the Act remained unchanged. Two subsequent decisions, *Smith v. Prosser*[19] and *Glenie v. Bruce Smith*,[20] though they are not squarely in point, mark the same desire of the court to free itself of its original interpretation.

The recent case of *Jones, Ltd. v. Waring & Gillow, Ltd.*,[21] is in line with these decisions. There, A fraudulently induced B to give him a cheque for £5000 payable to C. On the face of the cheque was written "not negotiable." A then delivered the cheque to C, who was ignorant of the fraud, for value, on his own account. The cheque was duly honored. Later B discovered the fraud, and sued C to recover the amount of the cheque as money had and received to the use of the plaintiff. The court held that B could not recover, basing its judgment chiefly on the quasi-contractual rights of the parties.

Had the court been willing to decide the case fundamentally,

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[13] See BRANNAN, *supra*, note 11, p. 52.
[14] [1907] 1 K. B. 794.
[15] *Cf.* the *N. I. L.* § 191.
[16] *Cf.* the *N. I. L.* § 59.
[17] *Cf.* the *N. I. L.* § 52.
[18] *Cf.* the *N. I. L.* § 30.
[19] [1907] 2 K. B. 735.
[20] [1908] 1 K. B. 263.
[21] [1925] 2 K. B. 612.

according to the rule concerning payees as holders in due course, its decision would have been the reverse of what it actually was; for the English rule, as has been shown, does not protect the payee. But the court made no reference whatever to the rule or to any of the cases that established it or came under it, though these cases were cited and largely relied upon by the counsel. Pollock, M. R., found that C was a holder for value under section 27: 2 of the Bills of Exchange Act.[22] This, of course, does not answer the real question one way or the other. But he also made the following statement:[23] "It seems to me . . . that the case of *Watson v. Russell* and the observations contained in it, and in the case of *Symonds v. Atkinson*[24] apply, and that these are illustrations which justify one in holding that the plaintiff cannot establish as against the defendants, in cases like the present, that money which has found its way into defendants' pockets was ever had and received by them to the plaintiff's use." (It will be remembered that *Watson v. Russell* was an early English case which held, in effect, that a payee could be a holder in due course.) This was the decision of the Master of the Rolls upon the first count of the complaint—that of money had and received. Sargant, L. J. said:[25] "In my judgment . . . the case comes exactly within the principle of *Watson v. Russell.*" He based his judgment in favor of the defendant chiefly upon this ground. Lord Scrutton, the other Lord Justice who sat upon the case, did not rely upon *Watson v. Russell* in his opinion, but based a dictum upon it. He said he did not propose to decide what would have been the result, had C in this case sued B upon the cheque. He added:[26] "It must not, however, be taken from that that I think that such an action as that would have failed. I think that the passage which has been read from the case of *Watson v. Russell* shows that it probably would have succeeded." He says further that "as between drawer and payee, the marking of the cheque 'not negotiable' does not affect a right of action on the cheque at all." This, it is submitted, follows logically from either interpretation of the *Bills of Exchange Act.*

Thus the English court appears not only to avoid making any further precedents that would bind it to its former construction of the Act, but to take a step, or, at least, to lean perceptibly, toward the rule of the original common law and of the law merchant, that a payee may, at times, be as fully protected as the holder in due course under the Act.

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[22] *Cf.* the *N. I. L.* § 26.

[23] *Supra*, note 21, p. 628.

[24] 1 H. & N. 146 (Eng., 1856).

[25] *Supra*, note 21, p. 644.

[26] *Supra*, note 21, p. 641.

Upon careful reading of the *Negotiable Instruments Law* (which does not differ from the *Bills of Exchange Act* in the parts applicable to this discussion), the following sections stand out as controlling the payee's rights: section 52 defines a holder in due course as "a holder who has taken the instrument under the following conditions: . . . 3. That he took it in good faith and for value. 4. That at the time it was *negotiated* to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." The definition of the word "holder" used at the beginning of this quotation is given in section 191 as a "payee or indorsee of a bill or note. . . . " It follows that a holder in due course (under section 52) may be a "payee who took the instrument. . . . (subsection 3) in good faith and for value." It then must be determined whether subsection 4 has the effect of qualifying what has gone before. Section 30 provides that "an instrument is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder thereof." So far, the definition of "negotiated" may well include the issue of the instrument from the maker to the payee; and the first part of section 52 (as quoted above) does not seem limited by subsection 4. But section 30 goes on to say: "If payable to bearer it (the instrument) is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder completed by delivery." Undoubtedly this last part of the section does restrict the meaning of "negotiated," if it was meant to include all the ways in which an instrument might be negotiated. But it was held in *Liberty Trust Co. v. Tilton* [27] that such was not the intention of the makers of the law; that the last part of section 30 was drawn to describe merely some of the methods of negotiation. In all probability, this is the correct interpretation. It is the preferable one, for it agrees with the common law and with the universal custom of merchants.[28] In any case, it would seem that the common law should still apply, in view of section 196, which provides that the rules of the law merchant shall govern wherever the statute has made no provision;[29] and in view of the usual rule of statutory construction, that where the new law is uncertain or conflicting the common law shall prevail.

O. J. W.

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[27] *Supra,* note 12. See also *Ex Parte* Goldberg & Lewis, *ibid.*

[28] See BRANNAN, *supra,* note 11, p. 54. See also Heening, *The Uniform Negotiable Instrument Law,* 59 U. PA. L. REV. 471, 478 *et seq.* (1911).

[29] *B. E. A.,* § 97; 2 is still more applicable. It provides that "The rules of common law, including the law merchant, save so far as they are inconsistent with the express provisions of this act shall continue to apply to bills of exchange, promissory notes, and cheques."

CONSTITUTIONALITY OF GIFT TAX—The Federal Revenue Act of 1924[1] imposed a graduated tax on the transfer by gift of any property wherever situated, whether made directly or indirectly. The the tax was appended to the inheritance tax and one of its purposes was to prevent the evasion of that tax by means of gifts not made in contemplation of death. The inheritance tax itself covered gifts made within two years of death by creating a presumption that they were made in contemplation thereof.

The constitutionality of the tax has been attacked on the ground that it violates Sections 2 and 9 of Article I of the United States Constitution, which declare that direct taxes must be apportioned.[2] Judges in the Federal District Courts have recently reached opposite conclusions as to whether the tax is direct, and hence void, because not apportioned. In *McNeir v. Anderson*[3] the tax was held unconstitutional by Judge Augustus Hand; while in *Blodgett v. Holden*[4] its constitutionality was sustained by Judge Raymond. Before examining the soundness of these decisions, it is worth while to consider the historical and economic background of the subject and the state of the law before the cases just mentioned were decided.

The provision that direct taxes must be apportioned was adopted as part of the compromise by which slaves were to be counted as three-fifths of a person in the census taken to determine the number of Congressmen each state should send to the House of Representatives. It was adopted to allay the fears of the South that capitation and land taxes would be levied, which would fall most heavily on the planter because of his ownership of large estates and slaves. Just what a direct tax was supposed to be is stated nowhere in the records of the Federal Convention nor in the pages of the Federalist. The first authoritative discussion was in *Hylton v. United States*[5] where direct taxes were suggested to be confined to capitation and land taxes. And this theory was regarded as satisfactory for a hundred years. Then in 1895 it was held in *Pollock v. Farmers Loan & Trust Co.*[6] that an income tax, when derived from real or personal property, was a direct tax, and must be apportioned.

As subsequently explained in *Knowlton v. Moore*,[7] the *Pollock*

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[1] Revenue Act 1924, Part 2, Title 3, Sec. 319, 43 Stat. 313, U. S. Comp. Stat. (Supp. 1925) § 6336 4/5.

[2] Article I., Sec. 2, Clause 3: "Representative and direct taxes shall be apportioned among the several states which may be included in this union, according to their respective numbers."

Article I., Sec. 9, Clause 4: "No capitation, or other direct tax shall be laid unless in proportion to the census or enumeration herein before directed to be taken."

[3] D. C., S. D., N. Y., decided Feb. 15, 1926. Not yet reported.

[4] D. C., W. D., Mich., decided Feb. 17, 1926. Not yet reported.

[5] 3 Dall. 171 (U. S., 1796).

[6] 158 U. S. 601 (1895).

[7] 178 U. S. 41 (1900).

case decided that a tax levied on a person solely because of his general ownership of property is a direct tax. And this definition still stands.

As noted above, the *Pollock* case held that an income tax was a direct tax because to tax what gives value to property is to tax the property itself. Following this line of reasoning, it has been contended that since what gives value to property are the various incidents of ownership, such as the right to give, to use, to sell, a tax on any of these incidents is a direct tax. In connection with this argument it is well to remember two things. In the first place the *Pollock* case was a five to four decision and was made possible only because one judge changed his mind after the reargument; it aroused a storm of protest at the time; and in so far as it rendered a tax on income void, it was rendered ineffective by the Sixteenth Amendment. In the second place, in the thirty-one years since the decision was handed down, there has been only one decision of the Supreme Court holding a tax unconstitutional because direct and unapportioned.[8] And in that case the tax was on the ownership itself of property and not on any of the incidents thereof. In fact, it might be contended that an income tax can be differentiated from a tax on any other incident of property such as the right to sell, because it falls independent of any act of the owner and is on the one incident which gives the property the major part of its value. In view of the hundred and thirty years' history of the interpretation of the meaning of a direct tax, it seems most unlikely that the Supreme Court will see fit to extend the doctrine of the *Pollock* case if it can be avoided.

It is only fair to note, however, before leaving the historical aspect of the question, that in the whole history of American and English taxation there is no record of a gift tax before the Act of 1924. Many of the taxes which have been held indirect by the Supreme Court were placed in that category largely on historical grounds.[9]

It is submitted, however, that while the subject is one in which historical classification is given much weight, the mere novelty of the tax is not sufficient to render it unconstitutional, particularly in view of the history of the interpretation of a direct tax mentioned above.

From the economic point of view the objection to that which all parties admit to be a direct tax is that it is in the nature of a capital

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[8] Eisner v. Macomber, 252 U. S. 189 (1921): held a tax on stock dividends to be a direct tax.

[9] See Holmes, J., in New York Trust Co. v. Eisner, 256 U. S. 345, 349 (1920), where, in discussing the argument that the Federal Inheritance Tax was direct he said: "But that matter is disposed of—not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax has always been regarded as the antithesis of a direct tax; 'has ever been treated as a duty or excise because of the particular occasion which gives use to its levy.' 178 U. S. 81, 83. Upon this point a page of history is worth a volume of logic."

levy. There can be little quarrel by economists with a tax on gifts. The basis is the same as that on which the inheritance tax rests and it is submitted that economically that basis is a sound one. A capital levy on the other hand might well have serious economic results. Any tax levied on capital tends to consume the resources from which the income on which the nation lives arises, and hence to bring about national bankruptcy through killing the goose that lays the golden egg. A tax on current acquisitions might continue indefinitely, whereas a capital levy if pushed to the extreme would leave nothing to tax the following year. While the courts might feel that such a serious change in taxing policy was incompatible with the Constitution, it is submitted that they will be extremely chary of limiting the very broad, and on the whole wisely used, taxing powers of Congress on a technicality unsupported by any sound economic theory.

Turning then to the cases which interpret the test laid down above: a tax on property solely because of its general ownership is a direct tax. Since the test was laid down, the only tax held to fall within its terms was the tax on stock dividends.[10] There is an intimation in another case to the effect that a general sales tax would be a direct tax because on an incident of property.[11] And in a case arising under a State Constitution a tax on removing whiskey from a bonded warehouse was held a property tax, because to tax the right to remove was to tax that which gave value to the property and hence to tax the property itself.[12] This latter case, however, did not even refer to the *Pollock* case, and did not state that the tax was on property because of its ownership. It should also be noted that the right to give, although undoubtedly desirable, is of little economic value and consequently adds little if anything to the intrinsic worth of the property.

On the other hand there are innumerable cases holding taxes to be indirect. The first case in the books touching this problem was one in which a tax on carriages was sustained as indirect.[13] It has been held that a tax on tobacco was not direct because it is not on property as such, but has reference to the origin and intended use of the article taxed.[14] Similarly the corporation tax was held an excise tax and hence indirect, because it was on the privilege of doing business in a corporate capacity and not on property because of its ownership.[15]

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[10] Eisner v. Macomber, *supra*, note 8.

[11] Nicol v. Ames, 173 U. S. 509 (1898).

[12] Dawson v. Kentucky Distilleries Co., 255 U. S. 288 (1921).

[13] Hylton v. U. S., *supra*, Note 5. It is interesting to note that Madison thought the tax direct (letter to Jefferson, May 11, 1794) and that Hamilton, who argued the case for the government, disagreed with him.

[14] Patton v. Brady, 184 U. S. 608 (1902).

[15] Flint v. Stone Tracy Co., 220 U. S. 107 (1911).

A slightly different test was suggested where a stamp tax on memorandums of sale of stock was held indirect because a tax on a particular business transaction, which was contingent on the happening of the sale, and hence did not impose an absolute and unavoidable demand on the owners of the certificate.[16] If this element of absolute and unavoidable demand is necessary to a direct tax, surely the gift tax does not fall within the definition, for the owner is certainly not bound to give his property away, and, by failing to do so, he can avoid the imposition of a tax on his property. In considering this case it is important to distinguish the shiftability of the tax—which as a test of directness was expressly repudiated in *Knowlton v. Moore* [17]—from the absolute and unavoidable demand of the *Thomas* case. Whether the burden of the tax when collected falls on the owner of the property, or can be shifted by him onto someone else, is an entirely different question from whether the tax is going to fall on anyone at all. For instance, a tax on land can be shifted by the landlord through the medium of increased rents collected from the tenant; but, despite its shiftability, the tax is an absolute and unavoidable demand, because as long as the landlord remains owner of the property, regardless of whether he uses it or not, he must pay the tax. Consequently it falls within the test of a direct tax laid down above.

One other case is worthy of mention. In *Billings v. United States* [18] a tax on the use of foreign built yachts was sustained as indirect on the ground that the tax was on the objective active use of the yacht as distinguished from the subjective passive right to use, which was an incident of ownership. Hence it was held that the tax was not on property at all, and consequently was indirect. If this reasoning be sound it would seem to apply with equal force to the gift tax, which is imposed on the active transfer of the property, at which point all the incidents of ownership in the donor have been divested, rather than on the passive right to use, which is an incident of ownership.

There is another theory on which the tax can be justified. In *Knowlton v. Moore* the inheritance tax was upheld as being a tax on the transfer of property. It was said that no one has the natural right to acquire property by will or descent; that the state gives this privilege and therefore can tax its exercise. Those who believe the gift tax to be direct differentiate it from the inheritance tax on the ground that whereas the right to acquire a decedent's property is given by the state by statute, the right to give is independent of state authority and a natural right. However in *Keeney v. New York* [19] the Supreme Court sustained the validity of a state statute imposing

[16] Thomas v. U. S., 192 U. S. 363 (1904).
[17] See note 7, *supra*.
[18] 232 U. S. 261 (1914).
[19] 222 U. S. 525 (1911).

a tax on transfers of property by deed intended to take effect at death. In doing so the court stated that the right to transfer property by such a deed was as much dependent on the law as that of acquiring property by inheritance. If this be true, it would seem that the right to transfer property, independent of the contemplation of death, is also dependent upon the law for its validity. From this it would follow that the gift tax and the inheritance tax were in reality sisters under the skin. And there would seem to be much strength in the argument, for, although the legal formalities in the case of inheritance are greater, yet transfers all depend upon the law for their validity in the last analysis.

Summarizing then the results of this analysis of the problem, we reach the following result. The arguments for holding the tax direct, hence unconstitutional,[20] are twofold:

1. The classification of taxes is a matter largely historical. In the whole field of English and American taxation there is no previous record of the imposition of a gift tax. Since all indirect taxes have some historical analogy to fall back on, the gift tax must be a direct tax.

2. The test laid down by *Pollock v. Farmers Loan & Trust Co.* and the cases explaining it is: "A tax on property solely because of its general ownership is a direct tax." To tax that which gives property value is to tax the property itself. That which gives value to property are the ordinary incidents of ownership.. The right to give is one of these incidents. This tax is in reality on the right to give and hence is a direct tax.

In *McNeir v. Anderson* these arguments are clearly and forcefully outlined by Judge Hand.

The reasons for holding the tax indirect and hence constitutional may be summarized as follows:

Admitting the test of the *Pollock* case, *i. e.*, a direct tax is one levied on property solely because of its general ownership, the gift tax is not direct for:

1. Historically there are no cases which hold a tax direct because imposed on one of the incidents of ownership, except that part of the *Pollock* case which was rendered ineffective by the Sixteenth Amendment. By reason of the circumstances surrounding that decision it should not be extended.

2. Even if a tax on an incident of property is a property tax, this tax is not on such an incident, but on the transfer of the ownership. This actual transfer is independent from that subjective incident of ownership, the right to give, the tax being on the act of transfer and not on the proprietary right to give.

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[20] The constitutionality of the tax is also attacked on the ground that it contains retroactive provisions which render it void. This question is outside the scope of this note.

3. Even if the tax is on property, it is not imposed solely because of general ownership, for active steps by the owner are necessary before the tax will be imposed. There is, in other words, no absolute and unavoidable demand, which is the explanation given in the *Thomas* case of the word "solely" in the definition above.

4. The inheritance tax has been upheld as a tax on the transfer of property. It has been intimated that a tax on gifts *causa mortis* will be valid for similar reasons. There is no valid distinction between gifts *causa mortis* and gifts not made in contemplation of death, hence a tax on the latter form of gift is as valid as on the former.

Judge Raymond in *Blodgett v. Holden* stresses the first two of these arguments only. It would seem, however, that all four are worthy of weight. The cases will undoubtedly reach the Supreme Court in course of time and while it would be rash to hazard a guess as to the conclusion that tribunal will reach, it is submitted that the arguments in favor of the constitutionality of the measure seem the more persuasive.

Jos. S. C., Jr.

THE DUTY OWED BY AN ELEVATOR OWNER TO PASSENGERS—To be carried vertically from one floor of a building to another by an elevator is an experience common to most people, and perhaps to everyone who lives in a city. With the development of the "sky-scraper" type of building, elevators have become even more indispensable in our every-day life than automobiles. Modern science has made great strides in perfecting them mechanically, and in this manner safeguarding the lives of persons carried upon them. Nevertheless, safety devices have not yet been developed to the point where accidents are impossible. Passengers can still be, and are, injured through defects in the machinery, or improper operation of the car.

The recent case of *McKnight v. S. S. Kresge Co.*[1] arose from an unusual and somewhat peculiar accident. The plaintiff's husband, with a helper, was engaged in moving a safe from one floor of the defendant's building to another. A freight elevator in the building, operated by one of the defendant's servants, was used for this purpose, and the safe was placed upon it. Upon reaching the lower floor, the plaintiff's husband stepped off the elevator into a corridor four or five feet in width, and guided the safe as his helper pushed it. While the rear wheels were still on the car, the elevator suddenly moved upward,[2] tilting the heavy safe forward so that it crushed

[1] 285 Pa. 489, 132 Atl. 575 (1926).

[2] The reason for this movement did not appear. The statement of claim made a general charge of negligence in "allowing the elevator to move upward." At the trial there was some evidence that the operator was standing with his hand on the starting rope a moment or so before the accident occurred. This was denied by the operator himself on the witness stand. In any event, the court followed the rule stated in Fox v. Phila., 208 Pa. 127, 57 Atl. 356 (1904),

the plaintiff's husband against the wall of the corridor. In a suit by the widow to recover damages for the death of her husband, there was a verdict for the plaintiff. On appeal, the court held that the relation of carrier and passenger existed between the deceased and the defendant at the time of the accident,[3] and that the case was governed by the rules applicable to those who own[4] and operate passenger elevators.[5] This raises the question of what acts or omissions on the part of the owner will render him liable for the injury of a person on his elevator.

It is well established that the owner of an elevator is not an insurer of the safety of the persons whom he carries,[6] and that he will not be held liable for any injury which the exercise of due care could not have prevented. Consequently, the first problem presented is the determination of what is due care in the circumstances.

In the leading case of *Treadwell v. Whittier*,[7] it was held that the defendants, who operated an elevator in their store, were carriers of passengers, and were bound to exercise the highest degree of care in the construction, maintenance, and operation of their elevator. The court said that there was no real distinction between the carriage of passengers vertically and horizontally, and that the defendants were subject to the same responsibilities as to care and diligence as were carriers of passengers by stage-coach or railroad. In the course of

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to the effect that the happening of the accident in such circumstances raised a *prima facie* presumption of negligence. This rule is applied generally, even in those jurisdictions which profess to require a lower standard of care than the Pennsylvania court exacts. Griffen v. Manice, 166 N. Y. 188, 59 N. E. 925 (1901); Edwards v. Mfgrs. Bldg. Co., 27 R. I. 248, 61 Atl. 646 (1905). See also 9 R. C. L. 1259; 10 C. J. 1039. The presumption does not arise, however, where specific acts of negligence are alleged. Orcutt v. Century Bldg., 201 Mo. 424, 99 S. W. 1062 (1906). Nor where the person injured is an employee of the defendant. Spees v. Boggs, 198 Pa. 112, 47 Atl. 875 (1901).

[3] The relation was not terminated merely because the deceased was not inside the car. It exists while a person is entering or leaving. Fox v. Phila., *supra*, note 2. In the words of Mr. Justice Kephart, in McKnight v. S. S. Kresge Co., *supra*, note 1, where one has alighted from an elevator, but is engaged in direct connection with the car, he has not lost his identity as a passenger.

[4] The duty is personal, and cannot be delegated. Tippecanoe L. & T. Co. v. Jester, 180 Ind. 357, 101 N. E. 915 (1913); Sciolora v. Asch, 198 N. Y. 77, 91 N. E. 263 (1910); Besner v. Central Trust Co., 230 N. Y. 357, 130 N. E. 577 (1921); Connolly v. Des Moines Investment Co., 130 Iowa 653, 105 N. W. 400 (1906).

[5] Where the owner of a freight elevator permits a passenger to ride on it he is held to the same degree of care as to its operation as if it were a passenger elevator. Springer v. Ford, 189 Ill. 430, 59 N. E. 953 (1901). See also Orcutt v. Century Bldg., 201 Mo. 424, 438, 99 S. W. 1062, 1064 (1906), where the court drew an analogy between this situation and the case of a stockman accompanying his stock who rides in the caboose of a freight train.

[6] Treadwell v. Whittier, 80 Cal. 574, 22 Pac. 266 (1889); Springer v. Ford, *supra*, note 5; Tippecanoe L. & T. Co. v. Jester, *supra*, note 4; Orcutt v. Century Bldg., *supra*, note 2; McKnight v. S. S. Kresge Co., *supra*, note 1.

[7] *Supra*, note 6.

the opinion it is said that the utmost care must be used by persons engaging in employments where "human beings submit their bodies to their control, by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb." The court evidently regarded this as the basis of the duty imposed upon railroads, and pointed out that the dangers are greater in the case of elevators. When an accident does occur, the injury is almost always serious, and frequently fatal. If, then, any distinction is to be made between the duties imposed on railroads and elevator owners, a higher degree of care should be required of the latter.

Under the principle just stated, an elevator owner must use all reasonable efforts to furnish good machinery, built with good materials, and of a kind found safest for the purpose. He must exercise the same degree of care to maintain his elevator in a safe condition. In the *Treadwell* case,[8] it was held that the trial judge committed no error when he instructed the jury that the defendants were liable for any defect in the machinery discoverable on a reasonable and careful examination according to the best known tests reasonably practicable. It follows that the utmost care must be employed in the operation of the elevator.

Some courts,[9] in adopting the standard of care described by the California court in the *Treadwell* case,[10] have held that one who maintains and operates a passenger elevator is a common carrier.[11] This would seem to be clearly wrong, inasmuch as there is no obligation to serve all members of the public.[12] It is to be doubted whether any court would take this extreme position where the question is squarely presented in another way.[13] On the contrary, such a holding seems to be more of a means to an end. That is to say, it is invoked

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[8] *Supra,* note 6.

[9] Hartford Deposit Co. v. Sollit, 172 Ill. 222, 50 N. E. 178 (1898); Springer v. Ford, *supra,* note 5; Tippecanoe L. & T. Co. v. Jester, *supra,* note 4; Kentucky Hotel Co. v. Camp, 97 Ky. 424, 30 S. W., 1010 (1895); Orcutt v. Century Bldg., *supra,* note 2; Murphy's Hotel v. Cuddy's Adm'r, 124 Va. 207, 97 S. E. 794 (1919).

[10] *Supra,* note 6.

[11] Where the person injured is a tenant of the building, or the servant of a tenant, some of these courts have found that the owner of the elevator is a carrier for hire, the "hire" being included in the rent. Springer v. Ford, *supra,* note 5. In Kelly v. Lewis Investment Co., 66 Ore. 1, 133 Pac. 826 (1913) it was held that an elevator owner was not a common carrier, but was a carrier for hire.

[12] Seaver v. Bradley, 179 Mass. 329, 60 N. E. 795 (1901), where Holmes, C. J., said that the defendant could have shut the door of the elevator in the plaintiff's face, and could have arbitrarily refused to carry him without incurring any liability.

[13] In Seaver v. Bradley, *supra,* note 12, it was held that a statute defining the duties of "common carriers" did not refer to persons operating elevators. In Robb v. Merchants' Casualty Co., 29 Man. L. R. 113, 44 Dominion L. R. 185 (Can., 1918), it was held that an elevator was not a "public conveyance" within the terms of an accident insurance policy.

to fix the standard of care. From this point of view it is unnecessary, since the same result has been reached in other jurisdictions in another way. These courts have said, in describing the standard which they have adopted, that the owner of an elevator is in the position of a common carrier, or that his liability is like that of a common carrier.[14] While it may be said that the difference is one of expression only, it is submitted that these cases are more accurate. Mr. Justice Kephart adopted this view in the *McKnight* case.[15]

The courts of other jurisdictions have flatly rejected both of the views stated above, and have insisted that the duty imposed upon an elevator owner be described as one of ordinary care only. The leading case in support of this view is *Griffen v. Manice.*[16] Judge Cullen, speaking for the New York Court of Appeals, said that it was probably true that no distinction could be drawn between vertical and horizontal transportation, or between the duties imposed, if the relationship between the parties and the character of the carrier were the same. He found, however, that the defendant was not a common carrier, and that the right of any person to be carried on his elevator was based upon an implied invitation to all those having business on the premises. The duty imposed upon an owner or occupant of real estate in such a situation is to see that the premises are in a reasonably safe condition. An exception would have to be made to this general rule if one who owns an elevator is to be held to a higher standard.

It is interesting to note that many courts have applied the rules of property law in order to determine the rights of persons injured while riding in automobiles.[17] In the case of *Munson v. Rupker,*[18] the court clearly pointed out the differences and difficulties involved. A person going upon a tract of land takes it as he finds it, with the knowledge that the owner cannot and will not start it in motion and hurl it through space in a manner which may mean death to him. One who puts a force in motion must control it with skill and care in proportion to the danger created, whether the law of property requires him to do so or not. This reasoning applies equally, and perhaps more forcefully, to the case of an elevator, where the pas-

[14] Mitchell v. Marker, 62 Fed. 139 (C. C. A., 1894); Sweden v. Atkinson Imp. Co., 93 Ark. 397, 125 S. W. 439 (1910); Champagne v. Hamburger & Sons, Inc., 169 Cal. 683, 147 Pac. 954 (1915) (following Treadwell v. Whittier, *supra*, note 6); Cubbage v. Estate of Conrad Youngman, 155 Iowa 39, 134 N. W. 1074 (1912); Ross v. Sisters of Charity, 141 La. 601, 75 So. 425 (1917); Belvidere Bldg. Co. v. Bryan, 103 Md. 514, 64 Atl. 44 (1906); Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873 (1889); Quimby v. Bee Bldg Co., 87 Neb. 193, 127 N. W. 118 (1910); Fox v. Phila., *supra*, note 2; Riland v. Hirshler, 7 Pa. Super. 384 (1898); So. Bldg. & Loan Ass'n v. Lawson, 97 Tenn. 367, 37 S. W. 86 (1896); Edwards v. Burke, 36 Wash. 107, 78 Pac. 610 (1904).

[15] *Supra*, note 1.

[16] *Supra*, note 2.

[17] See 74 U. OF PA. L. REV. 86 (1925).

[18] 148 N. E. 169 (Ind. 1925).

senger is absolutely powerless to help himself. It shows that the rule of property law, relied upon by the New York court, has no proper application to the carriage of passengers in an elevator.

In the case of *Edwards v. Manufacturers' Building Co.*,[19] the Rhode Island court adopted the rule stated in *Griffen v. Manice*,[20] and criticized the reasoning of the *Treadwell* case.[21] They pointed out that the duty of highest care was imposed upon a common carrier not on account of the danger to passengers, but because of the relation of the carrier to the public. While this may or may not be true,[22] it should have no effect in this situation, since, under the better view above, the duty of an elevator owner is not based upon the fact that he is a common carrier. but arises from the danger of injury in the circumstances, and is merely described as similar to the duty owed by a common carrier.[23]

Both the New York and the Rhode Island courts[24] stress the argument that it would be unreasonable to require every person installing an elevator in his building, regardless of its size, to use the most modern and improved type of elevator, the most successful mechanical device, and the most skillful operators. It is pointed out that there are elevators in small buildings and private homes as well as in office buildings and hotels. Certainly, it would be a hardship to require the owner of a small building to install the same type of elevator that is used in large office buildings. It would not seem that the *Treadwell* case[25] would go to this extreme. The rule there stated requires the exercise of the highest degree of care reasonably practicable.[26]

The difficulty with the rule of *Griffen v. Manice*[27] is that it tends to establish a lower standard of care. Where one undertakes to carry human beings vertically in a cage, where they submit themselves entirely to his control, and where the danger of injury is so great unless proper precautions are taken, it would seem that ordinary

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[19] *Supra*, note 2.

[20] *Supra*, note 2.

[21] *Supra*, note 6.

[22] *Cf.* Seaver v. Bradley, *supra*, note 12; Belvidere Bldg. Co. v. Bryan, *supra*, note 14.

[23] See the text and cases cited, *supra*, note 14.

[24] The rule of these cases is followed in several other jurisdictions. McCracken v. Myers, 75 N. J. L. 935, 68 Atl. 805 (1908); Burgess v. Stowe, 134 Mich. 304, 96 N. W. 29 (1903).

[25] *Supra*, note 6.

[26] Getty v. Hulton, 110 Wash. 124, 188 Pac. 10 (1920). In Ferguson v. Truax, 136 Wis. 637, 118 N. W. 251 (1908) it was said that the defendant was bound to exercise the highest degree of care that men of reasonable vigilance and foresight ordinarily exercise in the conduct of such business under similar circumstances, and an instruction that the standard was such care as a very prudent and skillful man would ordinarily use in the circumstances was held to be erroneous.

[27] *Supra*, note 2.

care in the circumstances must mean the utmost care reasonably practicable. This was recognized in an earlier New York case,[28] and the facts of *Griffen v. Manice* [29] would not bring the case in conflict with such a rule.[30] Unfortunately, however, the language of the court does definitely suggest a lower standard.

On the other hand, the rule of the *Treadwell* case [31] is not entirely satisfactory. The recognition of degrees of care, or of negligence, is always undesirable and misleading.[32] For illustration, if a jury be told that the standard of care is divided into the three degrees of highest, ordinary, and slight care, and that in the case before them, only slight care is required, there will be an inevitable tendency on the part of the jury to think that the defendant was not bound to take any precautions. A further, and better, illustration may be found in the situation which we have been considering. If the jury in such a case be told that the defendant was bound to exercise the highest degree of care, there will be a stronger and almost irresistible tendency to hold him liable merely because the accident occurred. The modern tendency is to avoid such difficulties by abolishing the division into degrees of care or of negligence even in the case of recognized common carriers.[33]

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[28] McGrell v. Buffalo Office Bldg. Co., 153 N. Y. 271, 47 N. E. 305 (1897), where the court said that the highest care might be required as to parts of the machinery which might cause serious injury, and less care as to other parts. This is really the rule of reasonable care in the circumstances.

[29] *Supra*, note 2.

[30] The judgment in Griffen v. Manice, *supra*, note 2, was reversed solely on the ground of the charge to the jury, without any consideration of the evidence, and a new trial ordered. At the second trial it appeared that the elevator in question had been made by a competent manufacturer, and had been inspected a short time before the accident, which occurred when the car bumped at the bottom of the shaft and in some way dislodged some of the counter weights. A verdict for the plaintiff was set aside, and judgment entered for the defendant on the ground that the defendant could not possibly have foreseen that the weights would be dislodged, and that he could not have prevented the accident by the exercise of the utmost care. Griffen v. Manice, 36 N. Y. Misc. 364, 73 N. Y. S. 559 (1901), *aff'd* 74 N. Y. App. Div. 371, 77 N. Y. S. 626 (1902), *aff'd* 174 N. Y. 505, 66 N. E. 1102 (1903). On this view of the facts, the case is not inconsistent with the rule of Treadwell v. Whittier, *supra*, note 6.

[31] *Supra*, note 6.

[32] See the opinion of Page, J., in O'Brien v. N. Y. Rys., 185 N. Y. App. Div. 867, 874, 174 N. Y. S. 116, 121 (1919). See also 32 YALE L. J. 841 (1923); 31 YALE L. J. 555 (1922); 19 COL. L. REV. 166 (1919). Of course, in some jurisdictions the recognition of degrees of negligence and of care is definitely settled. Mr. Justice Kephart, in McKnight v. S. S. Kresge Co., *supra*, note 1, followed the established Pennsylvania law on this point. Fox v. Phila., *supra*, note 2; Cody v. Venzie, 263 Pa. 541, 107 Atl. 383 (1919).

[33] Union Traction Co. v. Berry, 188 Ind. 514, 121 N. E. 655 (1919); Denny v. Chic., etc., Ry., 150 Iowa 460, 130 N. W. 363 (1911). In Young v. St. Louis, etc., Ry., 227 Mo. 307, 127 S. W. 19 (1910) the court said that degrees of negligence had been abolished, although degrees of care were still recognized.

A few cases[34] have decided the question of the duty of an elevator owner to persons whom he carries under the familiar and simple rule of care commensurate with the danger, or, as it is more often expressed, reasonable care in the circumstances, without referring either to degrees of care, or the duties of common carriers, or the duty of an owner of real estate to invitees. The advantages of this rule are apparent. Where, however, the choice lies between *Griffen v. Manice*[35] and *Treadwell v. Whittier*,[36] it is submitted that the stricter rule, adopted in *McKnight v. S. S. Kresge Co.*,[37] is more desirable, since it does not place too heavy a burden upon the elevator owner, and at the same time tends to give greater protection to the persons whom he carries.

L. B. C.

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[34] Jones v. Co-operative Ass'n, 109 Me. 448, 84 Atl. 985 (1912); Lander v. Hornbeck, 74 Okla. 239, 179 Pac. 21 (1918).

[35] *Supra*, note 2.

[36] *Supra*, note 6.

[37] *Supra*, note 1.