RECENT CASES

ALIENS—IMMIGRATION—RIGHT TO JUDICIAL REVIEW—An alien with an unexpired passport from a foreign country sought admittance to the United States through Canada as a visitor.[1] The American consular officer upon hearing the evidence decided that he would become a public charge and refused to issue a visitor's visa.[2] A writ of *habeas corpus* was then sued out. *Held:* The *Immigration Act*[3] gives the consul discretionary power and his discretion cannot be controlled or reviewed by the court. *United States v. Phelps,* 14 F.(2d) 679 (D. C. Vt. 1926).

"It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its domain, or to admit them only in such cases and upon such conditions as it may seem fit to prescribe."[4] The rights of an alien seeking entrance to this country are not predicated on those rights afforded citizens, but are based on rights purely permissive in nature and non-obligatory on the part of the government.[5] By virtue of this difference in status, whatever right the alien may have to a judicial review of the decision of an immigration officer, is to be found in the federal law in force.[6] Thus there may be entrusted to an executive officer the final determination of the alien's right to enter.[7] As a result, the power of the judiciary is limited to the single issue of whether the alien received a fair hearing, and does not extend to the question of whether the decision of the immigration officer is correct.[8] In some cases, where an alien domiciled in this country returns after a short visit abroad and is refused re-entry, the immigration act does not

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[1] Aliens are allowed to visit the United States for a limited period under the Immigration Act of 1924, c. 190, § 3(2), 43 STAT. 153 (1924), U. S. COMP. STAT. (Supp. 1925) § 4289¾aa.

[2] The Executive Order of the President, dated Jan. 12, 1925, authorized the Secretary of State and the Secretary of Labor to make additional rules and regulations to carry out the provisions of the Immigration Act of 1924. On Sept. 30, 1925, the Secretary of State, by Rule 42, instructed consular officers to "satisfy" themselves as to the temporary nature of the visit. A similar rule was issued by the Department of Labor on July 1, 1925. Immigration Rules of July 1, 1925, subdivision H.

[3] *Supra* note 1.

[4] Nishimura Ekiu v. U. S., 142 U. S. 651 (1891) at 659. The power to expel aliens, being a power affecting international relations, vests in the political department of the government. Fong Yue Ting v. U. S., 149 U. S. 698 (1892).

[5] 1 R. C. L. 830.

[6] United States v. Sing Tuck, 194 U. S. 161 (1903). *Cf.* Gonzales v. Williams, 192 U. S. 1 (1903).

[7] Nishimura Ekiu v. U. S., *supra* note 4 at 660; Fong Yue Ting v. U. S., *supra* note 4 at 713; U. S. v. Ju Joy, 198 U. S. 253 (1904). See Powell, *Judicial Review of Administrative Action in Immigration Proceedings,* 22 HARV. L. REV. 360 (1909).

[8] *Ibid.* See 22 HARV. L. REV. 221 (1909).

operate differently,[9] even though it might well be contended that his prior residence in this country ought to carry with it certain constitutional rights.[10] But this particular problem does not enter in the principal case, because the status of the petitioner is not that of a returning resident alien, but simply that of an alien without a visitor's visa as required by the *Immigration Act*.[11] His right is to a speedy and fair hearing[12] before the proper administrative officers.[13] If he has obtained that, he cannot complain even though the immigration officer's decision may have been arbitrary. This decision is important, in that it decides that the Act gives administrative officers discretionary power in the issuance of visitor's visas, the exercise of which will then be upheld by the court. There will thus be an effective check on immigrants who succeed in gaining entry to this country as "visitors," and then, having become indistinguishably mingled in the general population, remain indefinitely.[14]

BANKS AND BANKING—JOINT SAVINGS DEPOSIT—TITLE VESTING IN SURVIVOR—*A*, the decedent, deposited moneys in a savings bank. Some time later *B's* name was added to the account with the following notation: "Either or, in case of death of either, the survivor may withdraw part or the whole." On *A's* death his administrator sues to recover the amount withdrawn by *B*, the survivor. *Held:* Title to the account is in *B*. *Osterland v. Schroeder*, 153 N. E. 758 (Ohio, 1926).

Joint bank accounts are very often used as a method of devising money without the formality of making a will. Although the law governing this practice is regulated by statute in many jurisdictions,[1] there is still much confusion regarding the rights of the survivor. Usually he is allowed to recover on either of two theories: (1) That the transaction is a valid gift[2] or (2) that a trust has been created.[3] Many jurisdictions,[4] however, including Pennsylvania, take the view that the survivor has no interest, since the bequest as a testamentary disposition fails to comply with the Statute of Wills, and, as a gift *inter vivos*, lacks the necessary complete relinquishment of the donor's

[9] Takeyo Kayama v. Burnett, 8 F. (2d) 940 (1925), where petitioner was wife of an American citizen and was refused re-entry. Re-entry for one standing in such a position is now allowed under the Act, c. 190, § 13 (c), 43 STAT. 162 (1924), U. S. COMP. STAT. (Supp. 1925) § 4289½ff(c).

[10] See dissenting opinions in Fong Yue Ting v. U. S., *supra* note 4.

[11] *Supra* note 1.

[12] Chin Yow v. U. S., 208 U. S. 8 (1907).

[13] United States v. Ju Toy, *supra* note 7.

[14] See *Ex parte* Goldsmith, 14 F.(2d) 682, 683 (N. D. N. Y. 1926).

[1] See 9 CORN. L. Q. 48 (1923).

[2] Battles v. Millbury Bank, 250 Mass. 180, 245 N. E. 55 (1924); Commonwealth Trust Co. v. Dee Mortimer, 193 Mo. App. 290, 183 S. W. 1137 (1916); Rafferty v. Reilly, 41 R. I. 47, 102 Atl. 711 (1918).

[3] Booth v. Oakland Bank, 122 Cal. 19, 54 Pac. 370 (1898).

[4] Pearre v. Grossnickle, 139 Md. 274, 115 Atl. 49 (1921); Flannigan v. Nash, 185 Pa. 41, 39 Atl. 818 (1898); Wolfe v. Hoefke, 124 Wash. 495, 214 Pac. 1047 (1923).

interest.[5] Nor can it be substantiated on the trust theory because there is no intention to create a trust.[6] The court in the principal case concurs in[7] and adopts the view of the Supreme Court of its own jurisdiction in a similar case. This court[8] considers the theories advanced above, but places its own decision on the ground that *B* receives title to the account by contract.[9] They dispose of the question of consideration by declaring that since the contract was immediately executed none is necessary.[10] But this is true only when an entire immediate interest in the account is transferred,[11] and since *A* retains the right to withdraw the entire deposit at any time it would seem that this doctrine has no application here. The contract theory may however be supported on another ground. When *B's* name is added to the account the bank promises that it will pay *B* on demand or in the event that *A* dies. This promise for the benefit of a third person is supported by *A's* deposit as consideration and is therefore binding on the bank.[12]. Thus a joint interest in the account with the right of survivorship is vested in *B* as donee beneficiary. On this basis it would seem that there is no reason why the courts should interfere with the expressed intent of the parties in such transactions.

BANKS AND BANKING—RIGHT OF TRUST COMPANIES TO ESTABLISH BRANCH OFFICES—The petitioner requested the court to issue a declaratory judgment as to whether, under the laws of Pennsylvania, a trust company is empowered to conduct a branch office for receiving deposits and cashing checks in the same county in which the principal office is located, but in a different township. The plaintiff previously had been notified to discontinue its branch office by the Secretary of Banking. *Held:* A trust company has such authority. *In re Petition of the Media Title and Trust Co. for Declaratory Judgment,* C. P., Dauphin Co. (Pennsylvania), decided Nov. 3, 1926.

The question involved in this case, although of extreme importance, arises for judicial determination in Pennsylvania for the first time. In order to decide this problem, it is necessary to ascertain whether trust companies can be considered as banks. The courts of Pennsylvania have con-

[5] "The delivery must be such as will divest the donor of the present control and dominion over the property absolutely and irrevocably." Wolfe v. Hoefke, *supra* note 4.

[6] "Intention is purely a question of fact, but it seems clear that the average person using this device intends to give *B* a legal power to draw, and the legal right of survivorship. Since it is intended that he should be able to demand payment from the bank, it is inconsistent with this intention to say that *B* has merely an equitable interest." 11 CAL. L. REV. 192 (1922).

[7] 153 N. E. at 759.

[8] Cleveland Trust Co. v. Scobie, 114 Ohio 241, 151 N. E. 373 (1926).

[9] *Ibid.*

[10] *Ibid.*

[11] 5 C. J. 930, note 6 and cases cited.

[12] 1 WILLISTON, CONTRACTS (1920) § 368 and cases cited.

sistently maintained the position that a fundamental and important distinction exists between the two.[1] The chief function of banks is the discounting and negotiating of commercial paper, whereas trust companies are incorporated primarily to loan money for investment purposes, always secured by pledged collateral. Banks therefore take the risk of mercantile enterprises, while trust companies only incur the risk of a slight decline in investment values.[2] This distinction has been recognized and rigidly preserved by the legislature, which has provided one distinct set of laws regulating banks[3] and another regulating trust companies,[4] the latter being expressly prohibited from engaging in "the business of banking."[5] The legislation regarding trust companies makes no specific provision for the establishment of branches, but a logical interpretation of the original statute of incorporation[6] shows an intention to authorize such expansion. It is submitted that the court, in reaching this conclusion, arrived not only at the correct legal solution, but also the one most conducive to economic welfare and the satisfaction of mercantile demands. On the other hand, a bank, in a similar situation, would be prohibited from maintaining a branch office located in a township different from that of the principal office,[7] even though its function was only the receiving of deposits and cashing of checks. The result of this legislation, therefore, is to grant trust companies a much broader field for establishing branch offices than that accorded commercial banks. The principal case also provides an interesting illustration of the effect and possibilities of the new *Uniform Declaratory Judgments Act*.[8]

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[1] Dreisbach v. Price, 133 Pa. 560, 19 Atl. 569 (1890); Anderson's Executrix v. Penna. R. R., 27 Pa. C. C. 76 (1902); De Haven v. Pratt, 223 Pa. 633, 72 Atl. 1068 (1909).

[2] De Haven v. Pratt, *supra* note 1.

[3] Act of 1850, P. L. 77 § 50, PA. STAT. (1920) § 1453; Act of 1874, P. L. 135, PA. STAT. (1920) § 1439; Act of 1876, P. L. 161, PA. STAT. (1920) § 1186; Act of 1917, P. L. 1235, PA. STAT. (1920) § 1190.

[4] Act of 1874, P. L. 73 § 29; Act of 1889, P. L. 159, PA. STAT. (1920) §§ 6311-6326; Act of 1895, P. L. 127; Act of 1923, P. L. 173, PA. STAT. (SUPP. 1924) § 1187a.

[5] Act of 1889, P. L. 159, *supra* note 4.

[6] Act of 1874, P. L. 73 § 3, provides that the charter shall set forth "the place *or places* where its business is to be transacted" and that certificates of incorporation "shall be acknowledged before the Recorder of Deeds of the county in which the *general operations* are to be carried on, or in which the *principal office* is situated."

[7] Act of 1917, *supra* note 3, provides that banks of discount and deposit may maintain branches in the city, borough or township in which the principal office is located, only for the purpose of receiving and paying out moneys; and also that a daily report be made to the principal office, together with a daily transfer of the assets of the branch office to the principal office.

[8] Act of 1923, P. L. 840, PA. STAT. (SUPP. 1924) § 12805a, provides that "courts of record, within their respective jurisdictions, shall have power to declare rights, status and other legal relations, whether or not further relief is or could be claimed."

CONSTITUTIONAL LAW—DUE PROCESS—STATE INHERITANCE TAX UPON THE EXERCISE OF A POWER OF APPOINTMENT OVER TRUST PROPERTY HAVING NO SITUS IN THE JURISDICTION—The testator, a resident of Massachusetts, died there, and by his will, there probated, left certain stocks and bonds to a Massachusetts corporation as trustee. The income from this fund, which was at all times physically located in Massachusetts, was to go to the testator's daughter during her life and upon her death the fund was to go to any person appointed by her in her will, with a gift over in default of her exercise of this general power of appointment. The daughter, who died domiciled in North Carolina, exercised the power by her will, executed and probated in that state. The will was also valid in Massachusetts. Proceeding under a local statute,[1] which imposed a tax upon the exercise by will of any power of appointment derived from a disposition of property, the Commissioner of Revenue of North Carolina demanded a tax computed on the value of the property which passed under the daughter's appointment. *Held:* The tax violates the Fourteenth Amendment by depriving the interested parties of their property without due process of law and is therefore unconstitutional. *Wachovia Bank v. Doughton,* U. S. Sup. Ct., decided Nov. 29, 1926.

According to the view taken by the majority of the court, it was impossible to sustain this tax as a property tax. It is fairly well settled that property passing under a power of appointment, of which power the donor and donee are different persons, is not the property of the donee,[2] so, even if the doctrine of *mobilia sequuntur personam* is adopted, the property in the principal case would have no situs in North Carolina, since the donor of the property and its physical situs were both in Massachusetts, and hence would not be subject to a property tax in the former state.[3]

If this inheritance tax is regarded as an excise upon the right or privilege of succeeding to property under the sanction and protection of the laws of the taxing state,[4] even then it is unconstitutional because the complete succession to the property can be accomplished without invoking the aid of the North

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[1] PUBLIC LAWS N. C. 1921, c. 34 § 6.

[2] United States v. Field, 255 U. S. 257 (1921); Walker v. Mansfield, Treas. and Receiver General, 221 Mass. 600, 109 N. E. 647 (1915); *In re* Brett's Estate, 123 Misc. 507, 205 N. Y. Supp. 155 (1922); Kates' Estate, 282 Pa. 417, 128 Atl. 97 (1925). The three dissenting justices in the principal case upheld the tax on the ground that the daughter's life interest, coupled with her general power of appointment, had the same effect as ownership. Their dissent was based on the authority of Bullen v. Wisconsin, 240 U. S. 625 (1916), but it is submitted that the two cases are different because in the Bullen case the donor and donee of the power were the same individual, and the donor reserved to himself the life income from the fund as well as the power to revoke the trust, which in effect constituted the trust a gift made with the intention that it was to take effect after the grantor's death. See Crocker v. Shaw, 174 Mass. 266, 54 N. E. 549 (1899) and *Re* Ogsbury, 7 App. Div. 71, 39 N. Y. Supp. 978 (1896).

[3] Frick v. Pa., 268 U. S. 473 (1925); Union Refrigerator Co. v. Ky., 199 U. S. 194 (1905).

[4] Magoun v. Bank, 170 U. S. 283 (1898); Walker v. Mansfield, etc., *supra* note 2; *In re* Bowditch, 189 Cal. 377, 208 Pac. 282 (1922).

Carolina laws.[5] That no necessary incident of the transfer of title depends for its efficacy upon the laws of North Carolina, would be more forcefully brought out if the daughter's will, by which the power was exercised, were valid in Massachusetts but not in the state of her domicil, where it was executed. In such instances it has been held that "whether or not the power has been exercised is to be determined by the law of the domicil of the donor of the power and hence it may be exercised by an instrument valid in the jurisdiction where the power is established although not valid in the domicil of the donee."[6] It appears, therefore, that the Supreme Court was correct in denying to the State of North Carolina the right to impose the protested tax on either of these two grounds, the only grounds discussed by the court in its opinion.

However, it is suggested that the tax might conceivably have been upheld on the same ground which was the basis of the decision in the Supreme Court of North Carolina[7]—that the statute[8] levied a tax on an act, viz., the act of exercising the power of appointment by will. Such an interpretation of the statute would undoubtedly give North Carolina the right to impose this tax and might be supported by another recent Supreme Court decision[9] where an *act* was held to be the thing taxed.

CONSTITUTIONAL LAW—EIGHTEENTH AMENDMENT—LIMITATION UPON PHYSICIAN'S RIGHT TO PRESCRIBE LIQUOR—The complainant sought to enjoin the prohibition director in New York and other officials from interfering with him in prescribing vinous and spirituous liquors for medicinal purposes on the ground of a violation of the sections of the *Volstead*[1] and *Willis-Campbell*[2] *Acts*, which declare, in substance, that a physician may not prescribe more than one pint of vinous or spirituous liquor, fit for use as a beverage, for the use of the same person within any period of ten days. It was contended that the statute bore no real or substantial relation to the Eighteenth Amendment,[3] and hence

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[5] Bliss v. Bliss, 221 Mass. 201, 109 N. E. 148 (1915); *In re* Harriman's Estate, 124 Misc. 320, 208 N. Y. Supp. 672 (1924).

[6] Rugg, C. J., in Walker v. Mansfield, etc., *supra* note 2. Accord: Sewall v. Wilmer, 132 Mass. 131 (1882); *In re* Harriman's Estate, *supra* note 5; *In re* Bowditch, *supra* note 4.

[7] Wachovia Bank v. Doughton, 189 N. C. 50, 126 S. E. 176 (1925).

[8] *Supra* note 1.

[9] Palmetto Fire Ins. Co. v. Conn., 47 Sup. Ct. Rep. 88 (1926).

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[1] 41 STAT. 311 (1925), U. S. COMP. STAT. § 10138½cc.

[2] 42 STAT. 222 (1925), U. S. COMP. STAT. § 10138½ccc.

[3] Sec. 1 provides: "After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from, the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited." Sec. 2 provides: "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

was unconstitutional. *Held:* The statute is constitutional. *Lambert v. Yellowley*, U. S. Sup. Ct., decided Nov. 29, 1926.

The Supreme Court was divided five to four in its decision. Justice Brandeis, in delivering the majority opinion, tersely stated that "where the means adopted by Congress in exerting its express power are calculated to effect its purpose, it is not admissible for the judiciary to inquire into the degree of necessity." Justice Sutherland, speaking for the minority, felt that the statute was arbitrary and a misuse of a granted power to accomplish a different purpose, namely, the regulation of medical practice—a power reserved to the states.[4] There can be no question that the principle enunciated above by Justice Brandeis has been consistently followed.[5] Every possible presumption is in favor of the validity of an act of Congress until overcome beyond a rational doubt.[6] A statute, nevertheless, must bear a real and substantial relation to the object sought to be accomplished[7] and it must not be arbitrary.[8] The chief limiting features of the Eighteenth Amendment are the words, "intoxicating liquors" and "for beverage purposes." The Supreme Court has held that the bounds of congressional power were not transcended by the prohibition of traffic in certain non-intoxicating liquors.[9] It has also held that the prevention or regulation of the sale of denatured alohol, which is unfit for beverage use, bore a substantial relation to the Amendment.[10] In *Everhard's Breweries v. Day*,[11] it was decided by a unanimous court that the absolute prohibition of prescriptions of malt liquors for medicinal purposes[12] bore a reasonable connection to the enforcement of the Eighteenth Amendment. The majority in the principal case relied strongly upon the foregoing decision. In the light of these decisions, it is difficult to gainsay that the regulaton in queston bears a rational relation to the recognized congressional power. Likewise, in view of the divergence of medical opinion, the many state statutes forbidding the prescription of all intoxicating liquors for medicinal purposes and the evidence considered by Congress,[13] can we quarrel with the majority in their refusal to declare the statute arbitrary?

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[4] Linder v. U. S., 268 U. S. 5 (1925).

[5] Jacobson v. Massachusetts, 197 U. S. 11 (1905); Purity Extract Co. v. Lynch, 226 U. S. 192 (1912).

[6] Adkins v. Children's Hospital, 261 U. S. 525 (1923); Fairbanks v. U. S., 181 U. S. 282 (1901).

[7] Minnesota v. Barber, 136 U. S. 313 (1890); Mugler v. Kansas, 123 U. S. 623 (1887).

[8] *Ex parte* Curtis, 106 U. S. 371 (1882); Purity Extract Co. v. Lynch, *supra* note 5.

[9] Purity Extract Co. v. Lynch, *supra* note 5; Ruppert v. Caffey, 251 U. S. 264 (1920).

[10] Selzman v. U. S., 268 U. S. 466 (1925).

[11] 265 U. S. 545 (1924).

[12] *Supra* notes 1, 2.

[13] House Report No. 224, 67th Cong. 1st. Sess. Ser. No. 7920; Hearings before the Committee on the Judiciary of the House of Representatives on H. R. 5033, 15, 16, 146; 61 Cong. Rec. 3456, 4035, 4036, 4038, 8749-8757.

CONTEMPT—NATIONAL PROHIBITION ACT—VIOLATION OF INJUNCTION—The defendant was convicted for the maintenance of a common nuisance on his premises under the *National Prohibition Act.* The court, in its injunction, ordered that no liquor should be manufactured, sold, or stored in the premises. It was further ordered that the defendant be restrained from occupying or using the premises for one year for any purpose. Two years after the injunctive order, the defendant made a sale of liquor, for which he is now charged with contempt of violating the court's injunction. *Held:* The defendant is not guilty of contempt. *Webb v. U. S.,* 14 F. (2d) 574 (C. C. A. 8th, 1926).

It is well settled that the federal courts under the *National Prohibition Act* have been granted the power to enjoin a nuisance;[1] the state courts under their respective statutes have similar powers,[2] and have been upheld in punishing for contempt any violations of an injunction. In the federal courts, contempt has been punished in cases of a violation of a temporary injunction;[3] also for a breach within the padlocking term of one year.[4] Similar action has been taken in state courts for violation of a temporary injunction;[5] a one-year term;[6] and permanent injunctions.[7] The last class of cases is based on statutes specifically providing for permanent injunctions, and is thus distinguishable from the principal case. The principal case is unique in that it presents the problem *de novo* of an alleged violation of an injunction two years after the order. The majority of the court held that the clause giving the courts the additional power to close the condemned premises for one year, in aid of the injunction, indicates the intention of Congress to limit the duration of the injunction for one year, whether the premises be closed or not. Thus the sale, being made two years after the injunction order, was not in violation thereof and consequently there was no contempt. The minority of the court maintains that the one-year time limit refers only to the optional padlocking power of the court, reasoning, that on finding the

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[1] 41 STAT. 314 (1919), U. S COMP. STAT. (1925) §§ 10138½ jj, k. The court may order a temporary injunction at the beginning of the proceedings, and on proof of a nuisance, the court shall order that no liquor shall be manufactured, sold or stored, and the court may order the premises to be padlocked for one year. Denapolis v. U. S., 3 F. (2d) 722 (C. C. A. 5th, 1925); Kling v. U. S., 8 F.(2d) 730 (C. C. A. 5th, 1925).

[2] City of Herrin v. Fatima, 230 Ill. App. 221 (1923); Commonwealth v. Dietz, 285 Pa. 511, 132 Atl. 572 (1926); REV. STAT. OF KANSAS (1923) c. 21, Art. 21-213 (the court has power to perpetually enjoin the nuisance); MASS. GEN. LAWS (1922) c. 427, §§ 26, 27 (The court must order a permanent injunction, and may in addition close the premises for a year); Act of March 27, 1923, P. L. 34 § 7, PA. STAT. § 14098a-7 (1924) (similar to federal statute).

[3] United States v. Schoeben, 226 Ill. App. 44 (1922).

[4] United States v. Reisenweber, 288 Fed. 520 (C. C. A. 2d, 1923); Brombach v. U. S., 9 F. (2d) 292 (C. C. A. 6th, 1925).

[5] State v. Emple, 285 S. W. 765 (Mo. App. 1926); *Ex parte* Olson, 111 Tex. 601, 243 S. W. 773 (1922).

[6] *Ex parte* Brown, 66 Cal. App. 534, 226 Pac. 650 (1924).

[7] State v. Aiello, 317 Ill. 159, 147 N. E. 916 (1925); Wright v. Polk County, 171 Iowa 596, 153 N. W. 157 (1915); State v. Durein, 46 Kan. 695, 27 Pac. 148 (1891).

existence of a common nuisance, the court must order an injunction, and, being silent as to the time limit, the presumption is that the injunction is a permanent one—in other words, that the two sentences are not interrelated as to time. The dissenting opinion presents a more reasonable interpretation, considering first the other sections of the statute dealing with punishment for violations of both permanent and temporary injunctions, which would be meaningless if the majority view is the proper one.[3] Moreover, on the assumption of the absence of any optional padlocking power in the courts, there would be no escape from the conclusion that the injunction is a permanent one. The Massachusetts statute, to avoid any misapprehension of the legislature's intention in cases like the principal one, specifically provides for a permanent injunction, with an additional optional power to padlock for one year. It is submitted that the minority view is more in accord with the intention of Congress, the proper interpretation of the statute, and the successful enforcement of law; and it is suggested, to remove every question of doubt, that Congress insert the word "permanent" as so wisely done in the Massachusetts statute.

CRIMINAL PROCEDURE—CONTINUANCE—DISCRETION OF THE COURT—The defendant was indicted for murder and on being arraigned pleaded not guilty. He was remanded for trial to be held five days later, and the succeeding day counsel was appointed for him by the court. As two and one-half of the remaining four days were *dies non*, the defendant moved for a continuance on the ground of insufficient time. *Held:* Motion properly refused. *State v. Lynch*, 134 Atl. 760 (N. J. 1926).

The general rule is that the power of granting a continuance is within the sound discretion of the trial court,[1] but if it is arbitrarily or oppressively exercised, a new trial should be granted.[2] In the principal case the court in affirming the refusal to grant a continuance did not refer to the above view, but put it on the following grounds: first, it did not appear that through this refusal, the defendant was unable to get witnesses; and second, that defendant was notified of the date of the trial in the *habeas corpus* proceedings held in a foreign jurisdiction one month before. The dissenting opinion refused to recognize the first ground, because it felt that insufficient time to prepare for trial was just as prejudicial as inability to summon witnesses; the second ground, because it considered arraignment the first genuine notice. The first point advanced by the dissenting opinion was the basis of the decision in another

[3] 41 STAT. 314 (1919), U. S. COMP. STAT. (1925) § 10138½ I, II.

[1] Pickering v Reynolds, 111 Mass. 83 (1872); Ten Broeck v. Travelers Ins. Co., 116 N. Y. 663 (mem.), 22 N. E. 1134 (1889); Rife v. Middletown, 32 Pa. Super. 68 (1906). See Rex v. Wilkes, 4 Burr. 2527 (1770), at 2539, where Lord Mansfield said: "God forbid that the defendant should not be allowed the benefit of every advantage he is entitled to by law. . . . But discretion, when applied to a court of justice, means sound discretion, guided by law. It must be governed by rule, not humor: it must not be arbitrary, vague, and fanciful; but legal and regular."

[2] 13 C. J. 125.

recent case which, on similar facts, held a refusal of a motion for continuance reversible error.[2] The Constitution of the State of New Jersey guarantees "an impartial trial" and "the assistance of counsel."[3][4] Interpreted liberally, as it should be where human life is at stake, it would seem that the first ground of the majority opinion is untenable. A slightly delayed trial could scarcely have defeated the ends of justice.[5] It might even be argued that the defendant did not have counsel, since counsel who has not had time to prepare his case is virtually no counsel at all.[6] It is also submitted that the second ground is untenable for the reason indicated in the dissenting opinion, viz., that the arraignment is the formal notice to the accused of the indictment and the signal for him to prepare his defense. So well established is this principle that the allowance of a conviction where there was no arraignment, or one that was defective, has been held to be reversible error.[7] It would seem that the ends of justice would have been adequately served had the defendant been allowed a longer period of time to prepare his defense.

GAMING INFORMATION—PROHIBITION OF PUBLICATION—CONSTITUTIONALITY OF STATUTE—A statute prohibits the publication and distribution, either before or after the event, of any betting information about any game or contest. *Held:* The portion that prohibits publication after the event is unconstitutional. *Parkes v. Bartlett,* 210 N. W. 492 (Mich. 1926).

Although gambling at common law was not unlawful,[1] extensive legislation against it both in England and America is familiar to every one. That such legislation is within the police power of the state is universally acknowledged[2] because gambling and gambling earnings are thought to affect the safety, good order and morals of the community.[3] The police power of a state is limited, however, to the reasonable and just restraint upon the life, liberty and property of the individual citizen which is necessary for the protection of the public welfare.[4] Although there are no precise tests by which a particular piece

[2] Anderson v. State, 110 So. 250 (Fla. 1926).

[3] N. J. COMP. STAT., Art. 1 § 8 (1924).

[5] People v. Becker, 210 N. Y. 274, 104 N. E. 396 (1914).

[6] See State v. Collins, 104 La. 629, 632, 29 So. 180, 182 (1900): "It would be a barren right if the counsel were not allowed a reasonable time to prepare for the defense, time to investigate the facts and to examine the law applicable to the case."

[7] Crain v. U. S., 162 U. S. 625, 644 (1896).

[1] 15 HALSBURY, LAWS OF ENGLAND (1911) 284. In a number of courts in the United States the common law of England upon gambling was held to be unsuitable to their conditions and so as a matter of common law gambling was held illegal. See for example Eldred v. Malloy, 2 Colo. 320 (1874); Appelton v. Maxwell, 10 N. M. 748, 65 Pac. 158 (1901).

[2] Ah Sin v. Wittman, 198 U. S. 500, 506 (1904); Marvin v. Trout, 199 U. S. 212 (1906); Crandell v. White, 164 Mass. 54, 41 N. E. 204 (1895).

[3] BURDICK, LAW OF AMERICAN CONSTITUTION (1922) § 270.

[4] Barbier v. Connolly, 113 U. S. 27 (1885); Inland Steel v. Yedinick, 172 Ind. 423, 87 N. E. 229 (1909).

of legislation may be found a proper or improper exercise of the police power, yet in trying a statute's constitutionality, the court must find two essential qualities: first, the purpose must be for the public welfare; second, the means of carrying out that purpose must bear a reasonable relation to the purpose sought to be accomplished.[5] All information concerning betting before an event occurs without a doubt has a tendency to promote gambling, and the efficacy of the legislation to prevent gambling is not a question for judicial interpretation. The court in upholding this part of the statute as constitutional recognizes that the court cannot control the legislative discretion as to the effectiveness of any measure which to a degree tends to counteract the evil dealt with.[6] It is apparent, however, that publication of the information after the event bears a lesser causal relation to induced gambling, than publication before the event. The legislature did not fix any limitation of time after the event for the prohibition. Thus, publications coming long after the event that could have no possible harmful effect would come under the ban, and there would result the wholesale suppression of certain types of news whether harmful or not. It is submitted that the court was justified in judging the means sought to be used an unreasonable method of suppressing gambling, and an unconstitutional restraint upon the personal liberties of the publishers.

INSURANCE—REFORMATION OF POLICY—MUTUAL MISTAKE—Complainant applied for *money and jewelry* insurance to defendant's local agent, and the latter, stating that he had no authority to write that kind of insurance, sent an application to the general agent who, after inspecting complainant's store,[1] issued a policy covering *"money and securities."*[2] The local agent, thinking that jewelry was embraced within these terms, turned the policy over to the complainant, without, however, expressing this opinion. The complainant did not read the policy. Subsequently, a considerable amount of jewelry was stolen and the complainant brought a bill to have the policy reformed on the ground of mutual mistake. The Vice Chancellor accordingly ordered a decree substituting "jewelry" for "securities."[3] From this decree defendant appeals. *Held:* Decree reversed.[4] *Sardo v. Fidelity & Deposit Co.*, 134 Atl. 774 (N. J. Eq. 1926).

In accordance with the general principles applicable to all contracts, it is generally held that a policy of insurance may be reformed so as to express the real agreement of the parties where the policy fails to do so owing to a mutual mistake of both parties.[5] The great majority of cases apply this principle, and

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[5] FREUND, POLICE POWER (1904) § 27.

[6] People v. Fallon, 152 N. Y. 1, 46 N. E. 302 (1897).

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[1] It appeared in evidence that the general agent learned from his inspection that there was jewelry but no securities in the store.

[2] The policy defined "securities" as certain kinds of negotiable paper.

[3] Sardo v. Fidelity & Deposit Co., 98 N. J. Eq. 22, 131 Atl. 73 (1925).

[4] The court was divided ten to five.

[5] See 32 C. J. 1140-1141 and cases cited in the notes.

allow reformation where the mistake was that of an applicant and of a soliciting agent of the insurer, even though the latter's power did not extend to issuing policies, on the ground that the mistake of the agent was the mistake of the insurer.[6] Other courts have taken the view that reformation, because of mutual mistake of applicant and agent, will not be permitted unless the agent had the power to make the contract as alleged.[7] The principal case would seem to be correctly decided on any view since at no time prior to the issuance of the policy was there an agreement between the parties to which the policy failed to conform, and consequently there is no basis for reformation on the ground of mutual mistake.[8]

TAXATION—INCOME TAX ON ACCUMULATED TRUST INCOME—The decedent by his will devised and bequeathed his estate to the plaintiff as trustee to accumulate the income therefrom for certain beneficiaries. This attempted testamentary trust was held void by a decree. The parties then entered into a special agreement, sanctioned by the court. By this agreement a private trust was declared by the beneficiaries, naming the plaintiff as trustee. The effect of this was to change the estate income, which was directed to be accumulated under the testamentary trust, into income held under the private trust. The defendant assessed the estate income *en masse.. Held:* The income is not taxable as an entirety but in the portions as divided among those to whom it belonged. *Girard Trust Co. v. McCaughn,* Dist. Ct. E. D. Pa., decided Nov. 9, 1926.

Under the *Revenue Act of 1924,*[1] the income of an estate is taxable upon the fiduciary in its entirety, except that in the case of unsettled estates the income is made taxable as that of the beneficiaries, if distributed to them at intervals. The defense in this case was that the income had not been distributed at intervals, but had been accumulated according to the trust agreement. The court, however, took the view that by the agreement the estate income became the sum of individual incomes held under the private trust and cited, by way of analogy, the situation where the income of an estate is distributable periodically to certain beneficiaries who direct the fiduciary to pay it to himself to be held by him upon the terms of a trust declared by its owners. The court assumed that such income would be taxable in the portions as divided among those to whom it belonged. This analysis of the case is difficult to support

[6] Peterson v. Casualty Co., 212 Mo. App. 434, 249 S. W. 148 (1923); Merchants' Ins. Alliance v. Hansen, 258 S. W. 257 (Tex. Civ. App. 1924). For other cases allowing reformation of a contract of insurance on the ground that the mistake of the soliciting agent was the mistake of the insurer, see 11 L. R. A. (N. S.) 357, note.

[7] First Nat. Bank v. Guarantee Corp., 294 Fed. 91 (W. D. Pa. 1923); Floars v. Ætna Life Ins. Co., 144 N. C. 232, 56 S. E. 915 (1907).

[8] See cases *supra.* The court in the principal case held that there was no evidence to indicate that the insurance company intended to issue any other policy than the one actually issued.

[1] 43 STAT. 275 (1924), U. S. COMP. STAT. (Supp. 1925) § 6336¼ii.

for several reasons. In order to support the court's view that the income held by the trustee was the sum of the individual incomes of the beneficiaries, it is necessary to treat the trust agreement as though thereby each beneficiary became the grantor of a separate trust to accumulate his divided share of the income. There was no severance and labelling of any kind to show this. What seems a more likely interpretation is that the beneficiaries became the joint grantors of a trust, the purpose of which was to accomplish what could not be accomplished under the void testamentary trust, viz., to accumulate the undivided trust income. The analogy which the court invoked to support its opinion creates a further difficulty in its line of reasoning. The inference to be gleaned from it is that the present case is to be treated as though the income was distributable periodically to the beneficiaries who individually instructed the trustee to pay their share to himself to accumulate for them. This presumably is quite far removed from the actual tenor of the agreement and seems to make unwarranted use of fiction to reach a result. So far as its effect upon the administration of the income tax law[2] is concerned, this case presents a problem of interpretation of a statute for application to a unique situation. The considerations to be taken into account are the usual ones of the intention of the legislative body, the purpose for which the statute was enacted and the construction placed by courts upon similar statutes. The obvious purpose of an income tax law is to derive revenue for the operation of the government with the minimum of administration expense. The corollary to this proposition is that the legislative body will intend to have the manner of assessment as simple as possible, compatible with an equitable distribution of the burden. From this point of view, it seems that to support the present decision would be to pave the way for litigation over numerous niceties of legal manipulation, calculated to avoid high surtaxes. The result would be the further impeding of a machinery not designed for such refined operation.

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[2] *Ibid.* §§ 6336½-6336½zz(10).