RECENT CASES

ADMIRALTY—TORTS—DUTY TO HEED WEATHER BUREAU WARNINGS—A storm with a wind velocity of eighty-three miles per hour caused the scow Moran No. 52 to break its mooring ropes and collide with several other scows which, being thereby torn from their moorings, damaged other ships, one being the plaintiff's. *Held,* that the owner and those in charge were negligent in not heeding Weather Bureau storm warnings, although it is not stated that the owner or those in charge knew of the warning. *Osaka Shosen Kabushiki* v. *U. S. Lighter No. 1,* D. C. E. D. N. Y., decided Jan., 1929.

The standard of care to which a man is held is, of course, that care which a reasonable man with like skill and knowledge would exercise under the circumstances.[1] Since a reasonable man takes extra precautions when he knows that danger is imminent, it has been rightly held that one of the factors to be considered in deciding whether or not the defendant was negligent is the fact that he saw the threatening weather condition,[2] such as storm,[3] ice,[4] or flood.[5] It has also been held that the defendant having been told that storm warnings were up is a fact to be weighed in judging his conduct, where he also saw the storm gathering.[6] This is a logical and reasonable rule. It is difficult to see, however, how it can be said that a man acted negligently in not heeding storm warnings of which he had no knowledge, and to place on a bargeman the absolute duty of keeping posted on the weather reports overlooks the practical difficulty of so doing, and would seem to require a higher standard of care than could reasonably be expected from one in that position. Furthermore, while disregard of a storm warning actually known is one fact to be considered, it seems doubtful whether such warnings are sufficiently infallible to consider the disregard of a report alone, with no other facts tending to show that the defendant acted improperly, such negligence as to impose liability.

BANKS AND BANKING—RIGHT OF BANK TO APPROPRIATE FUNDS OF A DEPOSITOR IN PAYMENT OF A NOTE MADE BY DEPOSITOR—The plaintiff, a depositor in the defendant bank, sued for injury to his credit occasioned by the refusal of defendant to pay a check drawn by plaintiff. The defendant proved that prior to the refusal to cash the check, the amount of money to the credit of

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[1] The Protector, 176 Fed. 171 (E. D. S. C. 1909); SALMOND, THE LAW OF TORT (1907) § 6 (2).

[2] BOHLEN, STUDIES IN THE LAW OF TORTS (1926) 14.

[3] The Newa, 267 Fed. 115 (C. C. A. 4th, 1920).

[4] The Herm, 267 Fed. 373 (C. C. A. 4th, 1920).

[5] Scott v. Hunter, 46 Pa. 192 (1863).

[6] The Sea King, 29 F. (2d) 5 (C. C. A. 2d, 1928).

the plaintiff had been reduced by reason of defendant appropriating funds sufficient to pay a note of plaintiff's, which was held by the defendant and which matured on the same day as the check was presented, and that the balance to plaintiff's credit was insufficient to pay the check. Subsequently on the same day, plaintiff had deposited an amount of money which, added to his credit at the beginning of the day, would have been sufficient to pay both the note and the check. *Held,* that the defendant bank had the right to appropriate funds from the deposits to pay the note at any time during the day of maturity. *Goldstein* v. *Jefferson Trust Co.,* 10 Pa. Super. Adv. 177 (1929).

It is well settled that a bank has the right to appropriate funds deposited with it in payment of debts owed by the depositor.[1] Though some courts have considered that this right is in the nature of a lien held by the bank on the deposits,[2] it is probably more proper to regard the right as partaking of the nature of a set-off by the bank.[3] The title to the deposit is in the bank, and it seems inaccurate to consider that one may have a lien on his own property. Since the note is merely a debt which the maker owes to the bank, the right of the bank to appropriate funds from the deposits to pay the note is uncontroverted.[4] It is further well settled that a note is due at the commencement of business hours of the bank on the day of maturity, even though the maker or indorser has the entire day in which to make payment.[5] It has been held that a demand for payment, followed by refusal of the maker to pay, entitles the holder to treat the note as dishonored before the expiration of the day of maturity.[6] A subsequent payment on the same day will, of course, make the dishonor of no avail.[7] Some jurisdictions, because of the business custom, hold that the note may not be dishonored until the day following the day of maturity, even though it actually matures for the purpose of payment at the beginning of the day.[8] It seems, however, that where the bank is the holder of the note, a demand on the maker is unnecessary, and that the right of the bank to appropriate from the deposits of the maker sufficient funds to pay the note, accrues at the beginning of the day, and this in spite of the fact that such a deduction will not leave a sufficient credit to meet checks drawn by the depos-

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[1] Clark v. Northampton Nat. Bank, 160 Mass. 26, 25 N. E. 108 (1893); Ingber v. Tradesmen's Nat. Bank, 230 Pa. 511, 79 Atl. 751 (1911); MORSE, BANKS AND BANKING (6th ed. 1928) § 559.

[2] Davis v. Bowsher, 5 T. R. 488, 491 (1794); Batson v. Alexander City Bank, 179 Ala. 490, 60 So. 313 (1912).

[3] Irish v. Citizens' Trust Co., 163 Fed. 880 (1908); Furber v. Dane, 203 Mass. 108, 89 N. E. 227 (1909).

[4] Bank v. Brewing Co., 50 Oh. St. 151, 33 N. E. 1054 (1893); Mechanics' and Traders' Bank v. Seitz, 150 Pa. 632, 24 Atl. 356 (1892).

[5] Gordon v. Parmalee, 15 Gray (Mass.) 413 (1860); Coleman v. Carpenter, 9 Pa. 178 (1848); DANIELS, NEGOTIABLE INSTRUMENTS (6th ed. 1913) § 1235.

[6] Thorpe v. Peck, 28 Vt. 127 (1855); *Ex parte* Moline, 19 Ves. Jr. 216 (1812).

[7] German-American Bank v. Milliman, 31 Misc. 87, 65 N. Y. Supp. 242 (1900); Citizens' Bank v. Lay, 80 Va. 436 (1885).

[8] Planters' Bank v. Markham, 6 Miss. 397 (1841); Church v. Clark, 21 Pick. 310 (Mass. 1838).

itor.[9] The equities in the deposits,—of the bank, as holder of the note, and of the payee of the check,—are at least equal, and since the bank has title to the funds, its claim prevails.

CONSTITUTIONAL LAW—COMMERCE CLAUSE—SERVICE UPON AGENTS OF FOREIGN CORPORATIONS DOING BUSINESS IN STATE—Plaintiff, now a resident of Missouri, brings action against the defendant, a Michigan railway corporation, as administratrix of an employee who was killed in Michigan at a time when the plaintiff lived in Michigan. Suit was prosecuted in Missouri under a Missouri statute providing for service upon the agents of foreign corporations in the state. Defendant had no business in Missouri except that of soliciting freight for interstate commerce through the agent who was served. *Held,* that such suit was unconstitutional as a burden upon interstate commerce. *Michigan Central Rwy. Co.* v. *Mix,* U. S. Sup. Ct., decided February 18, 1929.

The narrow problem here presented concerns service statutes only in reference to foreign corporations, partly or wholly engaged in interstate commerce, as distinguished from other corporations or foreign non-residents doing business in the state.[1] As to the former, it is settled that state statutes giving jurisdiction over them must be sufficiently reasonable so as not to unduly burden their interstate commercial activities.[2] Such statutes have been correctly held valid in their entirety by the states as not being in violation of due process;[3] but the Supreme Court has constantly indicated that the jurisdiction gained under them is limited to cases, the causes of which arose within the same state or as a result of business transacted there, else the commerce clause would be violated.[4] And such was its decision as to a similar statute in *Davis v. Farmer's Co-operative Society.*[5] Certain dicta contained therein suggested that if the

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[9] Schuler v. Laclede Bank, 27 Fed. 424 (1886); Merchants' Bank v. Meyer, 56 Ark. 499, 20 S. W. 406 (1892).

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[1] For a discussion of this problem see Scott, *Jurisdiction Over Non-Residents Doing Business Within a State* (1919) 32 HARV. L. REV. 871.

[2] Sioux Remedy Co. v. Cope, 235 U. S. 197, 35 Sup. Ct. 57 (1914). See also Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190 (1910).

[3] Reynolds v. Missouri, Kansas & Texas R. R., 228 Mass. 584, 117 N. E. 913 (1917); Atchison, Topeka & Santa Fe v. Weeks, 248 Fed. 975 (D. C. Tex. 1918). The broad language used may better be explained in some cases on the ground the corporation had consented to be sued in the state, regardless of where the cause of action arose.

[4] Mitchell Furniture Co. v. Buck Construction Co., 257 U. S. 184, 42 Sup. Ct. 72 (1921); Simon v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255 (1915). See also Fry v. Denver & R. G. R. Co., 226 Fed. 893 (N. D. Cal. 1915). And there is no difference whether service be made on the corporation's agent or on a state official named for that purpose. Atchison, Topeka & Santa Fe v. Weeks, *supra* note 3, *contra.*

[5] 262 U. S. 312, 43 Sup. Ct. 556 (1923). Atchison, Topeka & Santa Fe v. Wells, 265 U. S. 101, 44 Sup. Ct. 469 (1924) (garnishment statute applied to non-resident corporation).

plaintiff were a resident of the state in which suit was brought, the court might have jurisdiction even though the cause of action arose outside;[6] and where such were the circumstances, a district court upheld this same Missouri statute in reliance on it.[7] As far as the Supreme Court is concerned, the principal case leaves unsettled the question of whether there is here a valid distinction, for it concerns the situation only where the plaintiff sues in a state where residence was gained subsequent to the time the action arose. The language of the court is not broad enough to include the case of a suit by one in the state where there existed a residence when the right of action developed.

CORPORATIONS—GOODWILL—RIGHT OF A MINORITY SHAREHOLDER TO DEFEAT A SALE BY THE MAJORITY—The majority shareholders of a prosperous concern sold the entire tangible property of the corporation to a new company, organized and controlled by themselves, for a fair market value but making no allowance for the goodwill of the old concern. In an action by a minority shareholder against the new corporation, *held*, that the minority shareholder could recover her pro rata share of the value of the goodwill. *Nave-McCord Mercantile Co.* v. *Ranney*, 29 F. (2d) 383 (C. C. A. 8th, 1928).

The majority shareholders of a corporation are said to be trustees for the minority,[1] and therefore to owe to the minority a duty not only of good faith but of diligence to secure the highest possible return to the corporation.[2] This trust is imposed on the majority because the minority can act only through them. A sale of the assets of a prosperous concern even to strangers can be effected only by a unanimous vote of the stockholders.[3] An attempted sale by the majority amounts to a betrayal of trust in that it is defeating the corporate purposes.[4] Such a sale is at times allowable under special statutory[5]

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[6] 262 U. S. 312, 315 *et seq.*: "Jurisdiction . . . is asserted whatever the nature of the cause of action, wherever it may have arisen and although the plaintiff is not . . . a resident of the state. . . . It may be that a statute like that here assailed would be valid although applied to suits in which the cause of action arose elsewhere . . . if the plaintiff was, when it arose, a resident of the state."

[7] Griffin v. Seaboard Air Line Ry. Co., 28 F. (2d) 998 (W. D. Mo. 1928).

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[1] Backus v. Brooks, 195 Fed. 452 (C. C. A. 2d, 1912); see So. Pac. Co. v. Bogert, 250 U. S. 483, 487, 39 Sup. Ct. 533, 535 (1918); Carrier v. Dixon, 142 Tenn. 122, 126, 218 S. W. 395, 396 (1919). But *cf.* Colgate v. U. S. Leather Co., 73 N. J. Eq. 72, 87, 67 Atl. 657, 663 (1907); with which *cf.* Morse v. Metropolitan Steamship Co., 87 N. J. Eq. 217, 221, 100 Atl. 219, 221 (1917).

[2] Jones v. Missouri-Edison Electric Co., 144 Fed. 765 (1906).

[3] Elyton Land Co. v. Dowdell, 113 Ala. 177, 20 So. 981 (1896); People v. Ballard, 134 N. Y. 269 (1892). But *cf.* Ervin v. Oregon Ry. & Nav. Co., 27 Fed. 625, 632 (C. C. S. D. N. Y. 1886).

[4] See Note (1923) 12 GEORGETOWN L. J. 49.

[5] Metcalf v. American School Furn. Co., 122 Fed. 115 (C. C. W. D. N. Y. 1903) (decided under W. VA. CODE ANN. (1906) c. 53 § 2284); Koehler v. St. Mary's Brewing Co., 228 Pa. 648, 77 Atl. 1016 (1910) (decided under PA. LAWS 1876, 30).

or charter[6] provisions. When the majority attempt to sell to a corporation controlled by themselves the breach of trust is even more obvious, and the sale may be voided by the minority.[7] The purchasing corporation, having obtained the property with notice, can have no rights superior to those of the majority stockholders of the original company. Goodwill, even though intangible, may be a valuable asset. It amounts to property[8] and must be included in determining the value of a corporation. In the principal case, conceding with the court that the majority acted in good faith, the minority shareholder, nevertheless, was deprived unjustly of her property. The purchasing company obtained this unjust enrichment and very properly are held to account to the minority. The principal case indicates a sound growth in corporation law which, it is hoped, will be able to adequately assimilate the modern conception of goodwill.

CORPORATIONS—STATUS OF THE LEGAL ENTITY WHERE ALL THE SHARES ARE OWNED BY ONE MAN OR ANOTHER CORPORATION—A man acquired all the stock in a corporation, having both before and after that time loaned money to the corporation. The corporation having become bankrupt, he presented a claim as a general creditor. There was no fraud in the transactions. *Held,* that the claim should be allowed. *Wheeler* v. *Trustee of Tel. Co.,* C. C. A. 9th, decided Jan. 24th, 1929.

The manager of the Chevrolet Motor Ohio Company and the manager of the General Motors Truck Company, both of which were doing business in the northern district of Ohio, were served in a patent infringement suit in which the General Motors Corporation, incorporated in Delaware, was named as defendant, together with the two companies before mentioned. In a motion by the General Motors Corporation to quash service on the ground that it was not doing business in the district,[1] *held,* that since the General Motors Corporation controlled and directed the Chevrolet Motor Ohio Company as its sole share-holder, and the General Motors Truck Company through a series of other corporations, and was using these companies as mere adjuncts, it was doing business in the district. *Industrial Research Corp.* v. *General Motors Corp.,* 29 F. (2d) 632 (N. D. Ohio 1928).

It is the generally accepted rule that a corporation is a legal person distinct from its share-holders,[2] and this distinction is emphasized by the fact that

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[6] Union Trust Co. v. Carter, 139 Fed. 717 (C. C. W. D. W. Va. 1905).

[7] Glengarry Mining Co. v. Boehmer, 28 Colo. 1, 62 Pac. 839 (1900); McLeod v. Lincoln Medical College, 69 Neb. 555, 96 N. W. 265 (1903); Parsons v. Tacoma Smelting Co., 25 Wash. 492, 65 Pac. 765 (1901).

[8] See Brown v. Weeks, 195 Mich. 27, 38, 161 N. W. 945, 948 (1917); Washburn v. Nat'l Wall Paper Co., 81 Fed. 17, 20 (1897).

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[1] For the jurisdiction of the District Courts of the United States in patent infringement suits, see § 48 of the Judicial Code, 36 STAT. 1100 (1911), 28 U. S. C. § 109.

[2] Richmond, etc. Co. v. Richmond, etc. R. R., 68 Fed. 105 (C. C. A. 6th, 1895); Rhawn v. Edge Hill Furnace Co., 201 Pa. 637, 51 Atl. 360 (1902).

it is sustained even though all the shares are owned by one person, whether that person be another corporation[3] or an individual.[4] The controlling influence resulting from stock ownership is not enough in either of these situations to cause the overthrow of this entity theory.[5] There are, however, many cases saying that the legal entity should be disregarded where the corporation is so organized and controlled and its affairs so conducted as to make it a mere blind, instrumentality, or agent[6] to aid in the consummation of wrong,[7] to justify a fraud or injustice,[8] or to defeat public convenience.[9] In the *Wheeler* case the court accepted this rule as applicable to both classes of complete stock ownership, and, finding no fraud or injustice in the facts, sustained the entity. This is a just and proper result, despite the fact that other creditors were involved.[10] The court in the *General Motors* case, finding an agency relationship existing between the parent and the subsidiary corporations, considered it against sound policy to allow the parent corporation to enjoy the benefits of doing business in such a manner without also being held to the responsibilities attached thereto. It was partially influenced by the legislative purpose to enlarge the jurisdictional opportunities of bringing patent infringers into the federal courts. The result reached appears to be justified by the facts, which indicate that an agency in fact existed; but the court in sustaining its conclusion said that "the fiction of corporate entity may be disregarded" under those circumstances. Such language is not necessary for the result reached. The corporate entity is not a fiction and it is not necessary that it be disregarded. The court could have reached the same result by the application of the law of principal and agent,[11] and without resorting to the metaphysics attending an attempt to snub that which the law has recognized. And is it not an anomaly to first disregard two corporations and then consider them, as such, parties to the suit? An examination of the cases in which the "disregard of

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[3] N. Y. Trust Co. v. Carpenter, 250 Fed. 668 (C. C. A. 6th, 1918); Elenkrieg v. Siebrecht, 238 N. Y. 254, 144 N. E. 519 (1924).

[4] Button v. Hoffman, 61 Wis. 20, 20 N. W. 667 (1884); Sloan Shipyards Corporation v. United States Shipping Board Emergency Fleet Corporation, 258 U. S. 549, 42 Sup. Ct. 386 (1922); Rhawn v. Edge Hill Furnace Co., *supra* note 2; Parker v. Bethel Hotel Co., 96 Tenn. 252, 34 S. W. 209 (1896).

[5] Majestic Co. v. Orpheum Circuit, 21 F. (2d) 720 (C. C. A. 8th, 1927) containing a review of the authorities. Commented on in (1928) 76 U. OF PA. L. REV. 322. For discussion of the one man corporation cases, see Wormser, *Piercing the Veil of Corporate Entity* (1912) 12 COL. L. REV. 496, 515.

[6] Wenban Estate, Inc. v. Hewlett, 193 Cal. 675, 227 Pac. 723 (1924).

[7] Higgins v. Cal. Petroleum & Asphalt Co., 147 Cal. 363, 81 Pac. 1070 (1905); Brundred v. Rice, 49 Oh. St. 640, 32 N. E. 169 (1892).

[8] Booth v. Bunce, 33 N. Y. 139 (1865); First Nat. Bank of Chicago v. Trebein Co., 59 Oh. St. 316, 52 N. E. 834 (1898).

[9] People v. North River Sugar Refining Co., 121 N. Y. 582, 7 N. Y. Supp. 406 (1890). For general discussion see Wormser, *loc. cit. supra* note 5.

[10] There is a general tendency to protect creditors especially in the one man corporation cases. See Hall v. Goodnight, 138 Mo. 576 (1897), where they are protected by recognizing the corporate entity.

[11] Erickson v. Minn., etc., Power Co., 134 Minn. 209, 158 N. W. 979 (1916). See also U. S. v. Lehigh Valley Ry. Co., 220 U. S. 257, 131 Sup. Ct. 387 (1911).

the entity" language is used illustrates that this is not necessary, and that just results could be obtained by the application of some legal or equitable principle,[12] especially where all of the stock is owned by an individual or another corporation.

CRIMINAL LAW—ADMISSIBILITY OF A CONFESSION OF ANOTHER CRIME—The appellants, having been convicted of murder in the first degree, combat the admission of that part of their confessions which deal with a subsequent holdup, committed with a pistol that was taken from the deceased. The objection urged is that the confession included crimes other than that for which the defendants were being tried. *Held,* that the confessions are admissible. *Commonwealth v. Parker et al.,* 294 Pa. 144, 143 Atl. 904 (1928).

Apart from the evidentiary connection between the two crimes,[1] the admission of the confessions was undoubtedly justified under the recent Pennsylvania statute[2] which requires the jury "by its verdict" to fix the punishment at death or life imprisonment. Due to the additional common law requirement in the state that the conclusions of the jury as to both guilt and punishment be included in a single verdict,[3] a particular hardship to the defendant necessarily results.[4] Theoretically, the jury are supposed to determine the degree of the defendant's guilt before assessing the punishment.[5] It is inevitable, however, that the evidence of other offenses will be used by the jury in determining the guilt of the prisoner. At common law, and in many states by statute, this difficulty does not arise.[6] The two matters of guilt and punishment are kept entirely distinct,[7]—the jury determines the degree of the defendant's guilt and then the evidence of the commission of other crimes is submitted and considered in assessing the punishment. While undoubtedly a sportsmanlike practice, the common law procedure can be criticized as being a bit too lenient with habitual criminals. The decision in the principal case very clearly indicates a reversal of the pendulum, at least in Pennsylvania.[8] It is interesting

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[12] See Note (1909) 23 HARV. L. REV. 216; (1916) 15 MICH L. REV. 264.

[1] Evidence of another crime, tending to prove that charged, is admissible. People v. Clark, 70 Cal. App. 531, 233 Pac. 980 (1925); People v. King, 276 Ill. 138, 114 N. E. 601 (1916); Cothron v. State, 138 Md. 101, 113 Atl. 620 (1921); UNDERHILL, CRIMINAL EVIDENCE (3d ed. 1923) § 151.

[2] ACT OF MAY 14, 1925, P. L. 759, PA. STAT. (Supp. 1928) § 7975.

[3] Panek v. Scranton Ry. Co., 258 Pa. 589, 102 Atl. 274 (1917).

[4] See State v. English, 308 Mo. 695, 274 S. W. 470 (1925) (habitual criminal statute); People v. Welch, 49 Cal. 174, 179 (1874).

[5] Schroeder v. State, 17 Ala. App. 246, 84 So. 309 (1919); Commonwealth v. Curry, 287 Pa. 553, 135 Atl. 316 (1926).

[6] State v. May, 142 Mo. 135, 43 S. W. 637 (1897); Ackers v. State, 73 Ark. 262, 83 S. W. 909 (1904).

[7] Glover v. State, 76 S. W. 465 (Tex. Cr. App. 1903).

[8] See the remarks of Mr. Chief Justice von Moschzisker in relation to the PENNSYLVANIA CRIME COMMISSION BILLS, 86 LEGAL INTELLIGENCER 194 (Feb. 22, 1929).

to note to what extent these restrictive relics of the law, that have heretofore been the mainstay of the habitual criminal in court, are being removed in favor of more certain punishment under modern simplified practice. As stated by Mr. Chief Justice von Moschzisker in the principal case,[9] "we can take judicial knowledge of the fact that habitual criminals have become so general that the law, not only *lex scripta* but *non scripta,* must advance to protect society against them."

INFANTS—DISAFFIRMANCE OF CONTRACT—MUST OTHER PARTY BE PUT IN STATU QUO—The plaintiff sold merchandise to the defendant, a minor, who assembled it into radio sets, sold them, and received the benefit of the sales. The plaintiff sued for the unpaid balance, and the defendant pleaded his infancy as a defence. *Held,* that the plaintiff could not recover. *Shutter* v. *Fudge,* 143 Atl. 896 (Conn. 1928).

The problem of whether an infant, in order to disaffirm a contract, must restore the other party to his original position, has resulted in confusion in the decisions, due to the impossibility of formulating a rule which will do exact justice to both parties.[1] The tendency of the earlier cases was to require the infant to return the consideration received under the contract, or its equivalent, if he had lost or squandered it,[2] but these decisions have been largely overruled or limited by later cases.[3] The weight of judicial opinion now is that he must restore only so much of it as remains in his hands.[4] The hardship of such a situation on the adult has caused a few states, notably Minnesota and New Hampshire, to adopt the rule that, when the contract is fair and reasonable, the infant must return what he received, to the extent of the benefit actually received by him.[5] While this is a flexible rule which in some cases will prevent imposition by the infant, it would seem to take away a large measure of the protection generally accorded him, and also to place all his contracts on the same footing as contracts for necessaries.[6] The court in the principal

[9] At 154, 143 Atl. at 907.

[1] If the infant is in every case required to put the other party in *statu quo,* his disability will amount to little, except where he has been so prudent that he really does not need the protection of the law. If he is never required to do it, an instrumnt of fraud and injustice is placed in his hands.

[2] Bartlett v. Cowles, 15 Gray 445 (Mass. 1860); see Kerr v. Bell, 44 Mo. 120, 125 (1869).

[3] Chandler v. Simmons, 97 Mass. 508 (1867); Craig v. Van Bebber, 100 Mo. 584 (1890).

[4] MacGreal v. Taylor, 167 U. S. 688, 17 Sup. Ct. 961 (1897); Barr v. Packard Motor Car Co., 172 Mich. 299, 137 N. W. 697 (1912); Green v. Green, 69 N. Y. 553 (1877).

[5] Berglund v. American Multigraph Sales Co., 135 Minn. 67, 160 N. W. 191 (1916); Wooldridge v. Lavoie, 79 N. H. 21, 104 Atl. 346 (1918). These courts, however, generally construe "fair and reasonable" to mean provident and advantageous to the infant, both in terms and subject matter.

[6] 1 WILLISTON, CONTRACTS (2d ed. 1924) § 238; 3 PAGE, CONTRACTS (2d ed. 1920) § 1623; 1 ELLIOT, CONTRACTS (1913) § 348.

case felt that if the infant lost or squandered the consideration which he received, it was no more than the law anticipated, and he should be protected from the ill effects of his improvidence and immaturity.[7] The decision is in accord with the vast weight of authority, and is entirely in keeping with the general policy of protecting the property of infants.[8] The privilege of disaffirming a contract is accorded an infant because of the indiscretion incident to his immaturity, and, if he were required to restore the equivalent of the property wasted or lost, the privilege would be unavailable when needed most.

LIBEL AND SLANDER—LIBEL OF A CLASS, RIGHT OF ACTION BY INDIVIDUAL—Defendants published a pamphlet naming various liberal organizations as being closely allied with the Soviet revolutionary movement, and calling attention to the interlocking directorates of these organizations, annexing a chart containing, along with many others, the name of plaintiff as director of two of the organizations. *Held* (two judges dissenting), that the libel was against the individual. *Hays* v. *American Defense Society,* 224 App. Div. 588, 213 N. Y. Supp. 500 (1928).

Civil actions of libel are founded upon the subjection of the plaintiff, by defendant's false and malicious publication regarding him, to hatred, contempt or ridicule.[1] It is clear that a person may suffer such injury even though the publication does not specifically refer to him by his name. Thus the action lies where the plaintiff is referred to without being named,[2] or by a wrong name,[3] provided the description or reference sufficiently identifies him.[4] The fact that the plaintiff is one of several libelled by the same publication does not, of course, defeat the action.[5] Where the libel is directed against the whole of a class, without qualification, while it is true that each member is identified, a member cannot maintain the action unless the language is applicable to him with such particularity as to subject him to the injury upon which the action rests.[6] The solution depends mainly upon the size and distribution of the class.[7] Each member of an administrative board,[8] or of a jury,[9] and each occupant of

[7] See White v. Sikes, 129 Ga. 508, 510, 59 S. E. 228, 229 (1907).

[8] See Horton v. McCoy, 47 N. Y. 21, 26 (1871); Harner v. Dipple, 31 Ohio St. 72, 73 (1876).

[1] NEWELL, LIBEL AND SLANDER (4th ed. 1924) § 2.

[2] Palmer v. Bennett, 83 Hun 220, 31 N. Y. Supp. 567 (1894).

[3] Ellis v. Brockton Pub. Co., 198 Mass. 856, 84 N. E. 1018 (1908); Clark v. North American Co., 203 Pa. 346, 53 Atl. 237 (1902).

[4] *Ibid.*

[5] Ellis v. Kimball, 16 Pick. 132 (Mass. 1834); Rychman v. Delavan, 25 Wend. 185 (N. Y. 1840).

[6] Newell, *op. cit. supra.* §§ 337, 338; Ostenberg v. Plamondson, 35 Can. L. T. 262 (1914); Watson v. Detroit Journal Co., 143 Mich. 430, 107 N. W. 81 (1906).

[7] *Ibid.*

[8] Reilly v. Curtis, 83 N. J. L. 77, 84 Atl. 199 (1912); Levert v. Daily States Pub. Co., 123 La. 594, 49 So. 206 (1909).

[9] Smallwood v. York, 163 Ky. 139, 173 S. W. 380 (1914).

a building,[10] has been held to have a right of action.[11] However, even though the nominal object of the libel is a large class, if the libel can be shown to have been intended and generally understood to apply specifically to the plaintiff, he is entitled to redress.[12] Similarly, where a part only of a small group is impersonally referred to, the plaintiff cannot recover unless he establishes the special application of the publication to himself.[13] Since criminal liability for libel rests, unlike civil liability, upon the tendency of the libel to provoke a breach of the peace,[14] it is immaterial, in a criminal prosecution, that the class referred to is large and that the libel has no specific application to any individual.[15] The principal case should admit of no doubt, inasmuch as the plaintiff was specifically referred to by name.[16]

MARRIAGE—INSANE PERSONS—ANNULMENT AFTER THE DEATH OF THE INCOMPETENT—Complainant seeks to annul the marriage entered into by his brother, now deceased, on the ground of the latter's insanity at the time of the marriage. A statute of the state enumerates certain marriages as void, marriage with an insane person not being so classified. *Held,* that the marriage was merely voidable under the statute, valid until avoided in a direct proceeding during the life-time of the parties, and a collateral attack on the ground of insanity, made after the death of the incompetent, by his surviving relative, cannot succeed. *Ellis* v. *Ellis,* 119 So. 304 (Miss. 1928).

Courts, unfettered by a statute, generally follow the common law rule that marriage to an insane person is absolutely void, on the principle of ordinary contracts which requires the intelligent assent of both parties.[1] It will be so declared in any proceeding in which the question may arise, whether during

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[10] Fitzpatrick v. Age-Herald Pub. Co., 184 Ala. 510, 63 So. 980 (1913); Dunlap v. Sundberg, 55 Wash. 609, 104 Pac. 830 (1909).

[11] Cases where a member of the class was held to have no right of action: Comes v. Cruce, 85 Ark. 79, 107 S. W. 185 (1908); Ewell v. Bontwell, 138 Va. 402, 121 S. E. 912 (1924); Lynch v. Kirby, 74 Misc. 266, 131 N. Y. Supp. 680 (1911).

[12] Ostenberg v. Plamondson, *supra* note 6: International Text Book Co. v. Leader Printing Co., 189 Fed. 86 (N. D. Ohio 1910); *contra,* Watson v. Detroit Journal Co., *supra* note 6.

[13] Le Fanu v. Malcolmson, 1 H. L. Cas. 637 (1848).

[14] State v. Avery, 7 Conn. 266 (1828); Newell, *op. cit. supra* note 1.

[15] State v. Brady, 44 Kan. 435, 24 Pac. 948 (1890); Crane v. State, 14 Okla. Cr. 30, 166 Pac. 1110 (1917).

[16] The dissent is presumably based on the ground that, since the plaintiff's name is one of a great number, the libel cannot be said to have any specific application to the plaintiff.

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[1] Wightman v. Wightman, 4 John. Ch. 343 (N. Y. 1820); Ward v. Dulaney, 23 Miss. 410, 433 (1852) (before the statute); 1 BISHOP, MARR. & DIV. (6th ed. 1881) § 136.

the life of the parties or after their death.[2] Though void in itself, it is desirable, in order to remove all doubt as to the status of the parties, to secure a decree of nullity.[3] Where, on the other hand, statutes have been passed regulating marriage, though they expressly prohibit the marriage of an insane person, most courts declare such a marriage voidable, not void, and subject to attack only in a direct proceeding during the life-time of the parties.[4] As a result collateral attacks by third parties are discouraged.[5] More than this, in some cases, the right to avoid is further limited to the insane person, on his recovery, or one acting for him,[6] and it is extended only to the sane party who married in good faith, believing the other was sane.[7] It is a question whether this tendency, illustrated by the principal case, to restrict by statute the right and opportunity to avoid such marriages, is a welcome change from the common law rule,[8] or may cause injustice, as far as civil rights are concerned, in the case, for example, where death occurs before a direct proceeding can be instituted.[9]

POSSESSION—DELIVERY OF KEY TO SAFE DEPOSIT BOX—The testatrix bequeathed to *X* "all the articles of every kind owned by me which may be in her possession at the time of my death." A few months prior to her death the testatrix placed a key to her safe deposit box in a bag under the mattress of the bed in the spare chamber of *X's* house, saying to *X*, ". . . in case anything happens to me, you have the key in your possession." *X* thereafter retained the sole key to this chamber. There was no arrangement for *X* to go to the deposit box in the testatrix's lifetime, and she did not go until after her

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[2] Browning v. Reane, 2 Phill. 69 (Eng. 1812); Bell v. Bennett, 73 Ga. 784 (1884); Sothern v. United States, 12 F. (2d) 936 (E. D. Ark. 1926); (1927) 36 YALE L. J. 577.

[3] *Ex parte* Turing, 1 Ves. & Beames 140 (Eng. 1812); Crump v. Morgan, 3 Ired. Eq. 91 (N. C. 1843); but *cf.* Snedden v. Snedden, 39 Pa. C. C. 222 (1911) (courts lack jurisdiction to issue decree).

[4] *In re* Gregorson, 160 Cal. 21, 116 Pac. 60 (1911); Guthery v. Wetzel, 205 Mo. App. 664, 226 S. W. 626 (1920); Kuehne v. Kuehne, 185 Wis. 195, 201 N. W. 506 (1924).

[5] Inhabitants of Goshen v. Inhabitants of Richmond, 4 Allen 458 (Mass. 1862); Wiser v. Lockwood, 42 Vt. 720 (1870); Henderson v. Henderson, 265 Mo. 718, 178 S. W. 175 (1915).

[6] Mackey v. Peters, 22 App. D. C. 341 (1903).

[7] Daniele v. Margulies, 95 N. J. Eq. 9, 121 Atl. 772 (1923); Lewis v. Lewis, 44 Minn. 124, 125 (1890); Hoadley v. Hoadley, 244 N. Y. 424, 155 N. E. 728 (1927) (sane may not sue under statute, but statute, as amended later, allows it, as noted in (1928) 6 N. Y. LAW REV. 150).

[8] A somewhat similar change is to be found in the law as to marriages by persons under age of consent. People v. Slack, 15 Mich. 193 (1867) (statute makes it voidable); 10 AM. & ENG. ENCY. OF LAW (1889) 622-623 (indicates that some statutes make it voidable only upon the assent of the incapable party).

[9] 2 NELSON, DIV. & SEP. (1895) § 672; 1 BISHOP, MARR. SEP. & DIV. (6th ed. 1891) §§ 636-640.

death. However, the testatrix had frequent access to the box by the use of a duplicate key. *Held,* that the contents of the safe deposit box were not in the possession of *X* at the testatrix's death. *Ferguson* v. *South Dartmouth Cemetery Ass'n, et al.,* 163 N. E. 877 (Mass. 1928).

Although fundamental[1] possession is one of the most unsatisfactory terms in the law, because of the varied constructions of it.[2] Thus, in the instant case, the testatrix may be construed to have meant de facto possession,[3] or legal possession,[4] either actual[5] or constructive.[6] The court in its opinion[7] did not decide in what sense the testatrix used possession. Obviously *X* did not have de facto possession. Accordingly, the strongest case that can be made for *X* must be based on legal possession. It is generally held by courts[8] and writers[9] that two elements must be present for legal possession to exist, i. e., the intent to control as possessor, and some power to physically control the *res* of possession. At very early common law, a manual delivery of the *res* was always required to satisfy the requisite element of physical control,[10] but later decisions have recognized a delivery of a key as sufficient where the *res* could not be physically transferred by reason of its bulk,[11] on the theory that everything possible has been done to effectively transfer actual control out of the deliveror into the

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[1] In all branches of the law, the ascertainment of the nature of legal possession is indispensable. HOLMES, THE COMMON LAW (1881) 206; HOLLAND, JURISPRUDENCE (10th ed. 1905) 185.

[2] Philosophers, lawyers, and jurists have been in hopeless confusion as to the exact meaning of possession and the requisites thereof. HOLMES, *loc. cit. supra* note 1, *et seq.;* BENTHAM, GENERAL VIEW OF A COMPLETED CODE OF LAWS, 188; SALMOND, JURISPRUDENCE (4th ed. 1913) 236.

[3] "De facto possession may be paraphrased as effective occupation or control" of the *res.* POLLOCK AND WRIGHT, POSSESSION IN THE COMMON LAW (1888) 12.

[4] "When the fact of control is coupled with a legal claim and right to exercise it in one's name against the world, we have legal possession." *Ibid.,* 16.

[5] Actual legal possession exists when the possessor has control of the *res* and intends to exercise that control against the world. Terry, *Possession* (1918) 13 ILL. L. REV. 312, 315, reprinted in WIGMORE, CELEBRATED LEGAL ESSAYS (1919) 170, 173.

[6] Constructive possession is that which exists in the contemplating of the law, without actual personal occupation. 3 BOUV. L. DICT. (8th ed. 1914) 2636.

[7] 163 N. E. 877, 878.

[8] State v. Shaw, 67 Oh. St. 157, 65 N. E. 875 (1902); Denny v. Warren, 16 Mass. 420 (1820). However, one of the elements is usually admitted to be present, so the controversy hinges upon the other. Thus there is one class of cases in which the intent is the deciding factor. Queen v. Ashwell, 16 Q. B. D. 190 (1885); Cartwright v. Green, 8 Ves. Jr. 405 (1803). In the "key" cases, the physical control is the important element.

[9] (1899) 48 CENT. L. J. 51; Terry, *loc. cit. supra* note 5; HOLMES, *op. cit. supra* note 1, at 216; Bingham, *Nature and Importance of Legal Possession* (1915) 13 MICH. L. REV. 535, 549.

[10] (1921) 93 CENT. L. J. 392.

[11] Newman v. Bost, 122 N. C. 524, 29 S. E. 848 (1898); Cooper v. Burr, 45 Barb. 9 (N. Y. 1855); Debinson v. Emmons, 158 Mass. 592, 33 N. E. 706 (1893).

deliveree, and therefore such delivery is equivalent to a manual delivery.[12] But where the *res* is physically deliverable, whether present,[13] or neither present or accessible,[14] there is open conflict in the decisions. Following the theory that everything must be done to divest the deliveror of control, it would seem that the deliveree would not obtain possession in either situation. However, some courts have gone so far as to hold that delivery of a key to a remote receptacle transfers possession of its deliverable contents to the deliveree, even though a duplicate key is held by another person.[15] But it is doubtful whether even these courts would decide that the deliveree had possession where the holder of the other key used it repeatedly to afford access to the receptacle, as did the testatrix in the instant case, because all vestige of the deliveree's control is thereby eradicated. Viewing *X's* case in the most favorable light, it must fail, and even eliminating the duplicate key from the facts, the better rule would seem to deny her judgment.

TAXATION—INCOME TAX—MEASURE OF TAXABLE GAIN UPON STOCKS TRANSFERRED BY GIFT AND SOLD BY THE DONEE—By Act of Congress it is provided that, for income tax purposes, "In case of property, acquired by gift . . . , the basis (for ascertaining the gain derived by a subsequent sale by the donee) shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift."[1] The donee of stocks petitioned to recover income taxes exacted because of advancement in the market value of those stocks while in the hands of the donor. *Held,* that he could not recover. Taft v. Bowers, U. S. Sup. Ct., decided Feb. 18, 1929.

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[12] Some courts decide that the deliveree receives constructive possession in this situation. Newman v. Bost, *supra* note 11; Marsh v. Fuller, 18 N. H. 360 (1846). At best this is merely an illusory, meaningless term, which only tends to confuse an already tangled subject. It would be far better, if courts are to give the effect of actual possession to constructive possession, to enlarge the definition of possession to include it.

[13] The cases that hold the view that such is a valid delivery proceed on the ground that the receptacle is delivered, and everything therein is included. Cooper v. Burr, *supra* note 11; Jones v. Selby, Prec. Ch. 300 (1710). On the other hand, is the doctrine that the articles in the receptacle are capable of manual delivery, even though the receptacle is not. Newman v. Bost, *supra* note 11 (insurance policy in drawer of bureau held not to pass into deliveree's possession); Knight v. Tripp, 121 Cal. 674, 54 Pac. 267 (1898).

[14] Some courts hold that delivery of the key divests deliveror of the sole means of control, and therefore gives the deliveree possession or constructive possession. Marsh v. Fuller, *supra* note 12; Snido v. Brotherton, 140 Va. 187, 124 S. E. 182 (1924). The opposing view maintains that no actual possession is thus vested in deliveree. Keepers v. Fidelity Title, etc., Co., 56 N. J. L. 302, 28 Atl. 585 (1893) (trunks were in the next room); Hall v. Hall, 20 Ont. Rep. 684 (1891). For a good summary of this type of case, see note (1912) 40 L. R. A. (N. S.) 901.

[15] Thomas v. Lewis, 89 Va. 1, 15 S. E. 389 (1892); Herrick v. Dennett, 203 Mass. 17, 89 N. E. 141 (1909).

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[1] REVENUE ACT, 1921, c. 136, 42 STAT. 227, § 202, par. 2.

Income has been defined as the gain derived from capital, from labor, or from both combined.[2] It includes profits derived from the sale of capital assets.[3] And it does not alter the situation that the profit has been realized from a single isolated sale of stock held as an investment, rather than from sales in a business of buying and selling such property.[4] The petitioner's contention in the principal case did not contravene these principles, but proceeded upon the theory that the gift of the stock became a capital asset in the donee's hands to the extent of its value at the time of the transfer, and that, therefore, when the stock was sold by the donee, no part of its increase in value while owned by the donor could be treated as taxable income to him within the Sixteenth Amendment.[5] If this contention were sound the increase of the stocks' value prior to the transfer to the donee could not be taxed as income at all, because, inasmuch as no increase in value not actually realized in cash or property can be taxed as income,[6] it is obvious that no such tax could be assessed against the donor. Yet when this increase in value is finally realized as the result of the donee's sale there is at that time a profit derived from capital assets, which, as has been pointed out, is income and should therefore be taxable.[7] The act with which we are concerned affords a means for collecting this revenue made available by the Sixteenth Amendment. If it had seen fit Congress might well have imposed a tax upon the donor for making the gift,[8] and the tax could have been measured by the difference between the price the donor paid for the stock and its value when he transferred it.[9] But it seemed preferable to tax the gain as income when realized by the donee's sale, and this seems the fairer course, because, as is remarked by the circuit court,[10] the donee has paid nothing for the stock and therefore loses nothing.

TAXATION—STATUTORY VALUATION OF NO-PAR VALUE STOCK—PROPORTIONAL TAX ON CAPITAL STOCK OF FOREIGN CORPORATION DOING INTERSTATE BUSINESS—Plaintiff, a foreign corporation engaged in both interstate and intrastate business, sought to enjoin the collection of a Missouri franchise tax, assessed under a statute[1] declaring that for computation of taxes based on the

[2] Eisner v. Macomber, 252 U. S. 189, 40 Sup. Ct. 189 (1920).

[3] Miles v. Safe Deposit & Trust Co., 259 U. S. 247, 42 Sup. Ct. 483 (1922).

[4] Merchants' Loan Co. v. Smietanka, 255 U. S. 509, 41 Sup. Ct. 386 (1921).

[5] The Amendment provides: "Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states. . . ."

[6] Eisner v. Macomber, *supra* note 2.

[7] When the principal case was before the circuit court of appeals, Hand, J., said: ". . . that the whole gain is income cannot . . . be disputed. The language of the Amendment itself gives Congress power to lay 'taxes on incomes,' not on persons." Bowers v. Taft, 20 F. (2d) 561, 564 (C. C. A. 2d, 1927).

[8] Anderson v. McNeir, 16 F. (2d) 970 (1927).

[9] Bowers v. Taft, *supra* note 7, at 563.

[10] *Ibid.*, at 563.

[1] LAWS MO. 1921, § 12, p. 661.

value of shares of stock, no-par value stock should be considered as worth $100 per share. The plaintiff had total assets of $97,000,000, and had outstanding 3,760,000 no-par shares of common stock. It was taxed on such proportion of the value of the capital stock as the assets in Missouri bore to the total. *Held*, that this method of computing the tax is not invalid as placing a burden on interstate commerce. *International Shoe Co. v. Shartel*, 29 F. (2d) 604 (W. D. Mo. 1928).

The tax in question was a franchise tax, applicable to foreign and domestic corporations alike.[2] All of the objections as to due process, unequal protection of the laws, arbitrary classification without uniformity, and no lawful proportion of value were found by the court to have been settled in *Roberts & S. Co. v. Emmerson*.[3] This decision, reversing some previous state court holdings[4] *contra*, seems to have conclusively settled the law that no-par value stock is sufficiently different to justify a separate classification, and that this is based on a reasonable taxing policy.[5] The only remaining question, then, was whether Missouri was burdening interstate commerce by requiring the plaintiff to pay for doing business in the state. It is settled that a state may not impose a privilege tax on a foreign corporation engaged solely in interstate commerce.[6] But a state may tax a corporation's property permanently located within its limits, if the ascertainment of the amount is made dependent in fact on the value of property situated within the state.[7] When the tax is simply a certain percentage of the entire capital stock, it is a burden if there is no maximum amount,[8] and even where there is a maximum according to the latest decision of the Supreme Court.[9] And when the amount is found by a proportion of the *authorized* capital, even though the proportion be based on business done in the state, the commerce clause is violated.[10] But when the tax is on a proportion of the outstanding capital

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[2] So held in State v. Petroleum Corp., 2 S. W. (2d) 790 (Mo. 1928).

[3] 271 U. S. 50, 46 Sup. Ct. 375, 45 A. L. R. 1495 (1926), which affirmed 313 Ill. 137, 144 N. E. 818 (1924).

[4] People *ex rel.* Taxi Corp. v. Walsh, 202 App. Div. 651, 195 N. Y. Supp. 184 (1922); and see annotation in (1923) 36 A. L. R. 791, 796.

[5] Roberts & S. Co. v. Emmerson, *supra* note 3, at 57; State v. Margay Oil Corp., 167 Ark. 614, 621, 269 S. W. 63, 6 (1925), which also holds that the principle is applicable equally when foreign are taxed with domestic corporations. This decision was affirmed in 273 U. S. 666, 47 Sup. Ct. 458 (1927).

[6] Alpha Cement Co. v. Mass., 268 U. S. 203, 45 Sup. Ct. 477 (1924); see Sprout v. South Bend, 277 U. S. 163 (1928).

[7] Postal Telegraph Co. v. Adams, 155 U. S. 688, 15 Sup. Ct. 268 (1895); Western Union v. Kansas, 216 U. S. 1, 30 Sup. Ct. 190 (1910).

[8] Looney v. Crane, 245 U. S. 178, 38 Sup. Ct. 78 (1917).

[9] Cudahy Packing Co. v. Hinkle, U. S. Sup. Ct., decided Feb. 18, 1929, holding (Holmes and Brandeis dissenting) invalid a Washington tax on the authorized capital of all corporations, with a $3000 maximum, and disapproving Baltic Mining Co. v. Mass., 231 U. S. 68, 34 Sup. Ct. 15 (1913), which upheld a statute providing for a $2000 maximum.

[10] Air-Way Corp. v. Day, 266 U. S. 71, 45 Sup. Ct. 12 (1924), in which the tax was held to be an unconstitutional discrimination, since other corporations doing as large a business and owning property of equal or greater value might have a smaller authorized capital.

stock, determined by the value of property in the jurisdiction, the tax is valid, whether on property or imposed as a franchise tax.[11] Under this rule the fact that interstate commerce is affected incidentally does not matter, and the decision in the principal case would therefore seem to be correct, unless it was open to the court to consider the justice, as to the plaintiff, of the method of valuation.[12]

TRIAL—NON-PECUNIARY INTEREST OF TRIAL JUDGE AS GROUNDS FOR HIS DISQUALIFICATION—The petitioner, the Legislature of New Jersey, alleged that the trial judge was biased and prejudiced in the trial of the cause because of political connections and opinions adverse to those of the petitioner. The relief sought was the prevention of the said judge from trying the case. *Held,* that the petition be dismissed. *Ex parte Hague,* 143 Atl. 826 (N. J. 1928).

It has long been a settled principle of the law that no judge is competent to try his own cause.[1] As early as the time of Lord Coke it was said that if an Act of Parliament purported to make such action valid it would be void as against natural justice.[2] Accordingly it has been generally held that, where a judge has a substantial pecuniary interest in the subject matter of the suit, he is disqualified from sitting, because, in effect, he is trying his own cause.[3] So a judge cannot probate a will when he is executor of the estate,[4] nor can he try a case in which a corporation is a party when he is a stockholder thereof,[5] nor can he adjudge bankruptcy proceedings when he is a creditor of the estate.[6] But the rule is different, in the absence of statutes, where bias and prejudice of a judge is not supported by pecuniary interest.[7] Thus mere business relationship,[8]

[11] Hump Hairpin Co. v. Emmerson (*privilege tax*), 258 U. S. 90, 42 Sup. Ct. 305 (1922).

[12] In Union Tank Line Co. v. Wright, 249 U. S. 275, 39 Sup. Ct. 276 (1918), the court rejected a method of valuation which had previously been upheld when imposed by another state in Pullman Co. v. Pa., 141 U. S. 18, 11 Sup. Ct. 876 (1891). The court said: "But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both." There, as in the principal case, it was a statute which determined the method of valuation. There, as here, the Supreme Court had held the same method to be a just measure in a former case. But in the Tank Line case the court did not hesitate to consider the fairness of the method as regarded the plaintiff, whereas in the principal case the court seemed to feel that this was no longer open to its consideration, a conclusion which would seem to be wrong in view of the holding in the Tank Line case.

[1] *In re* Conant, 102 Me. 477, 67 Atl. 564 (1907); Sigourney v. Sibley, 21 Pick. 101 (Mass. 1838); COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 870.

[2] Co. LITT. § 212.

[3] Petition of New Boston, 29 N. H. 328 (1870); Pearce v. Atwood, 13 Mass. 324 (1816); *In re* White, 37 Cal. 190 (1869).

[4] Knight v. Hardeman, 17 Ga. 253 (1855).

[5] *In re* Honolulu Oil Co., 243 Fed. 348 (C. C. A. 9th, 1917).

[6] Thornton v. Moore, 61 Ala. 347 (1878).

[7] State v. Superior Court, 14 Ariz. 126, 125 Pac. 707 (1912); State v. Morgan, 142 La. 755, 77 So. 588 (1917); Bryan v. State, 41 Fla. 643, 26 So. 1022 (1899).

[8] Purvis v. Funk, 55 Fla. 715, 46 So. 171 (1908).

or social[9] or political[10] interest are generally held to be insufficient grounds for removal, for the reason that it cannot be presumed that the judge will violate his sacred oath of office in such cases. The distinction seems to be wholly arbitrary and unfounded. If the judge has a substantial interest or prejudice in the litigation, no matter what the cause may be, it would seem to be more in harmony with principles of justice that he be prevented from trying the case. On the other hand, it can be argued that great difficulty would arise in determining whether or not a substantial prejudice, not based on pecuniary interest, existed; and many unnecessary disputes and controversies would follow. However, the United States Supreme Court has recently held[11] that when a judge sits on a case in which he has a substantial pecuniary interest the due process clause of the federal Constitution is violated. It is possible that in the course of time this provision may be invoked as a means of invalidating future decisions in accord with that in the principal case.

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[9] *In re* Carter, 193 App. Div. 356, 184 N. Y. Supp. 40 (1920).

[10] Fulton v. Longshore, 156 Ala. 611, 46 So. 989 (1908); Elliot v. Hipp, 134 Ga. 844, 68 S. E. 736 (1910).

[11] Tumey v. Ohio, 273 U. S. 510, 47 Sup. Ct. 437 (1927).