NOTES

THE LAW SCHOOL—Enrollment for the year 1930-1931 is 493, just a few less than last year when the total reached 515, the largest in the history of the school.[1]

The present enrollment is entirely satisfactory. All members of each class now in the school have not only met the requirement of a college degree, but have, through interviews with the Admissions Committee, given evidence of their fitness for the study and practice of law. The scheme of selective admissions, while a considerable burden to operate, gives continued evidence of its value with each year of its application.

The school is continuing to attract a larger proportion of graduates from other institutions. The University of Pennsylvania still continues to furnish the largest proportion of the entering class and should normally continue to do so. But the percentage of entering students from other colleges has risen in four years from 43 per cent.

		University of Pennsylvania:	
		College	39
		Wharton School	36
		Miscellaneous	0
			75
Other Institutions:			
Albright	1	Princeton	9
Allegheny	1	Radcliffe	1
Antioch	1	St. Bonaventure	2
Brown	1	St. John's	2
Bucknell	6	St. Joseph's	7
Colgate	2	St. Thomas	1
Cornell	6	St. Vincent	1
DePauw	1	Susquehanna	1
Dickinson	6	Swarthmore	2
Duquesne	1	Syracuse	1
Fordham	1	Temple	10
Franklin and Marshall	2	University of Delaware	5
Geneva	1	University of Georgia	1
Georgetown	1	University of Michigan	1
Gettysburg	1	University of Pittsburgh	1
Grove City	1	University of Southern California	1
Harvard	5	Ursinus	4
Haverford	4	Villanova	5
Holy Cross	3	Virginia Military	2
Lafayette	9	Washington	1
Lehigh	3	West Virginia University	1
Mt. Holyoke	1	Williams	1
Muhlenberg	2	Yale	2
New Jersey College for Women	1		
Pa. Military College	2		
Pennsylvania State	6	Total	206

36% + from University of Pennsylvania.
63% + from other colleges.
21 new colleges represented.

[1] The division by classes is: First Year 206; Second Year 142; Third Year 139; Unclassified 3; Graduates 4.

to 64 per cent.[2] During the same period, the proportion of students coming from outside the State of Pennsylvania increased 7 per cent.

Professor Austin T. Wright is on leave of absence for the current year. In his absence his courses in Corporations and Partnership are being given by Alexander Hamilton Frey, M. A., LL. B., J. S. D., who comes as Visiting Professor. Mr. Frey, after a time in practice with Simpson, Thacher and Bartlett in New York, has been a member of the faculty at the Yale Law School. He is special adviser on the Restatement of the Law of Business Associations for the American Law Institute, assisting Dr. William Draper Lewis who is in charge of the work in this subject in addition to his duties as Director.

Mr. William E. Mikell, Jr., Assistant Professor of Law, has resigned to resume practice with Saul, Ewing, Remick & Saul, of Philadelphia, with whom he was associated before becoming a member of the faculty. The course in Sales, formerly taught by Mr. Mikell is being given by Mr. Carroll Wetzel, LL. B., 1930, of Trenton, New Jersey, who is one of the Gowen Fellows for the current year.

Mr. W. James MacIntosh who taught the course in Pennsylvania Practice last year has resigned. The course in Practice and the work in Practice Court are being given by Mr. Philip Amram of the firm of Wolf, Block, Schorr and Solis-Cohen.

During the past year the rules regarding requirements for graduation have received a great deal of attention from the faculty. A revision was adopted, designed to require a somewhat higher standard of performance. The rules will continue to receive attention this year. There is no desire to set a mark for scholastic achievement that cannot be reached by the student. But there is a strong desire, in which all interested in the school will share, to make graduation from the school signify a high standard of accomplishment.

Herbert F. Goodrich.

COMPULSORY MOTOR ACCIDENT INSURANCE EXCLUSIVELY WITH THE STATE—In current years the states have sought to engage in fields of competitive business and the problem has arisen whether or not the state's embarking upon these enterprises is consistent with its constitutional limitations. But a question far more important was recently presented in Massachusetts; to determine the extent to which a state may, in protecting the welfare of its citizens, invade the realm of private business which it is empowered to regulate.[1] The court was requested to render an opinion upon the valid-

[2] The institutions represented are as follows:

[1] ". . . a state may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles." 2 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 1284. "The power of a State to regulate the use of motor vehicles on the highways has

ity of a proposed act of legislature establishing a "State Motor Vehicle Insurance Fund,"[2] providing for compulsory motor accident insurance,[3] and requiring contributions to a state-managed fund as a prerequisite to the registration of motor vehicles within its jurisdiction. The fund was to be administered by commissioners, appointed by the governor, for the purpose of providing compensation for those injured or killed on the highway. The specific inquiry was whether the state could constitutionally perform acts which in effect would prohibit insurance companies from continuing their widespread activities in respect to personal injuries in motor accidents. The Supreme Judicial Court of Massachusetts decided, in *Opinion Of The Justices*,[4] that the bill would create a substantial monopoly in a field of competitive enterprise, and, not being a justifiable exercise of the police power, was invalid. This opinion is of outstanding importance in that it represents the first denial of the right of a state to undertake the practice of insurance to the virtual exclusion of existing private companies; because it is the first judicial opinion upon a proposed enactment that is representative of bills pending in other legislatures; and because it is indicative of a growing tendency among the various states to depart from a civil form of government to one more socialistic.

The first notable instance in which a state sought to create a monopoly in a private employment was the *Slaughter House Cases*,[5] decided in 1872, where the State of Louisiana, by legislative enactment, created a corporation to conduct the slaughtering business within certain limits and restrained all other persons from continuing similar occupations within that area. The statute was declared to be constitutional in that it forbade none from pursuing the vocation of butcher, or from performing his own slaughtering, but required as a

been recently considered by this court and broadly sustained," Mr. Justice Brandeis in Kane v. N. J., 242 U. S. 160, 167, 37 Sup. Ct. 30, 31 (1916). To the same effect Hendrick v. Maryland, 235 U. S. 610, 35 Sup. Ct. 140 (1914); Pawloski v. Hess, 250 Mass. 22, 144 N. E. 760 (1924). The business of insurance is affected with a public interest, and it is a fundamental principal that such enterprises may be regulated by statute, German Alliance Ins. Co. v. Lewis, 233 U. S. 389, 34 Sup. Ct. 612 (1913).

[2] Initiative Petition of Frank A. Goodwin and others for the establishment of a State Motor Vehicle Insurance Fund to provide compensation for injuries and deaths due to motor vehicle accidents, House No. 202. "No motor vehicle or trailer except . . . shall be registered . . . unless the application therefor is accompanied by a contribution to the fund as required . . . and the payment of said contribution shall constitute an acceptance of the provisions of law relative to the fund."

[3] In connection with this case it was not necessary to consider the constitutionality of the compulsory feature of the plan as the Act of April 29, 1925, MASS. CUM. STAT. (1927)—"An act requiring owners of certain motor vehicles and trailers to furnish security for their civil liability on account of personal injuries caused by their motor vehicles and trailers" was upheld in a declaratory judgment in Opinion of the Justices, 251 Mass. 569, 147 N. E. 681 (1925).

[4] 171 N. E. 294 (Mass. 1930).

[5] 16 Wall. 36 (1872); four members of the court dissented.

police measure, that it be done at prescribed places. Twenty years later the State of South Carolina prohibited the manufacture or sale of liquors except by the state. The act was held to be invalid [6] because traffic in intoxicating liquors was neither unlawful nor *malum in se*, and since there was no necessity for the act, it violated constitutional guaranties. The same court reached an opposite conclusion when the identical problem was presented a year later, in deciding that the act was a proper exercise of the police power; in that there was no inherent right to deal in liquor, since traffic in intoxicants is attended with danger to the general welfare of the community.[7] Then followed a series of attempts by the states to engage in commercial enterprises, which were, for the most part, held to interfere with the rights of the citizens and were declared invalid,[8] save only those enacted as police or emergency measures.[9]

In more recent years, the decided trend of authority manifests a complete reversal of attitude and courts have permitted, in the main, state participation in private enterprises.[10] Since the pertinent provisions of the Constitution have remained unaltered, this change can be attributed only to a modification of judicial sentiment, reflecting an agitation for socialistic measures at the expense of civil form of government. Considering this change of attitude, the proposed Massachusetts law is neither startling nor revolutionary, but is merely a further advance in the states' endeavor to undertake private business, and follows in natural sequence after the compulsory workmen's com-

[6] McCullough v. Brown, 41 S. C. 220, 19 S. E. 458 (1893); one dissent.

[7] State v. Aiken, 42 S. C. 222, 18 S. E. 690 (1894). But note the following excerpt from Mr. Justice Gary's opinion at 247: "As we have said, if the act is not a police measure, it is unconstitutional." Mr. Chief Justice McIver dissented; it is interesting to note that since the decision in McCullough v. Brown, *supra* note 6, the court had undergone a change in personnel.

[8] Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442 (1882) (to loan money); Dodge v. Mission Township, 107 Fed. 827 (C. C. A. 8th Dist. 1901) (sugar factories); Keen v. Mayor and Council of Waycross, 101 Ga. 588, 29 S. E. 42 (1897) (plumbing business); Lowell v. City of Boston, 111 Mass. 454 (1873) (loans to land-owners); Opinion of the Justices, 155 Mass. 598, 30 N. E. 1142 (1892) (wood and coal); Opinion of the Justices, 182 Mass. 605, 66 N. E. 25 (1903) (wood and coal); Rippe v. Becker, 56 Minn. 100, 57 N. W. 331 (1894) (grain elevator); New York Sanitary Utilization Co. v. Department of Public Health of New York, 32 Misc. (N. Y.) 577, 67 N. Y. Suppl. 324 (1900) (garbage business).

[9] State v. Weinrich, 54 Mont. 390, 170 Pac. 942 (1918) (borrow for crop failure); State v. Nelson County, 1 N. D. 88, 45 N. W. 33 (1890) (purchase seed for needy farmers).

[10] Jones v. City of Portland, 245 U. S. 217, 38 Sup. Ct. 112 (1917) (coal and wood); Holton v. City of Camilla, 134 Ga. 560, 68 S. E. 472 (1910) (ice business); Union Ice & Coal Co. v. Town of Rushton, 135 La. 898, 66 So. 262 (1914) (ice business); Green v. Frazier, 44 N. D. 395, 176 N. W. 11 (1920) (banking, farm products, etc.); Minot School District v. Olseness, 53 N. D. 683, 208 N. W. 968 (1926) (state fire and tornado insurance); Laughlin v. Portland, 111 Me. 486, 90 Atl. 318 (1914) (coal and wood); State v. Stewart, 58 Mont. 1, 190 Pac. 129 (1920) (grain elevator).

pensation funds. This type of insurance fund is but one of ten varieties [11] established by the various states and dates back to 1829, though of relatively slight importance until the twentieth century. State funds are either optional or compulsory: "compulsory" if the individual must resort to the state alone as insurer; "optional" if private undertakings are not prohibited and the individual is permitted to choose between the state and a private company as insurer, or to deposit security in lieu thereof.[12] When the fund is of the latter type, the sole inquiry is whether the state is privileged to enter that business and no question of any violation of the rights of individuals is presented. A serious constitutional problem is raised, however, when a state, as in the principal case, seeks to establish a monopoly in a field of lawful enterprise wherein private companies have been competing.

Resort to the court's opinion discloses that by reason of a statute,[13] there is existing a large business of insuring motor-owners against civil liability for personal injuries, conducted by private companies. And since "the right to conduct a lawful business is a property right, protected by the common law and guaranteed by the organic law of the state," [14] it is apparent that the bill would deprive the insurance companies of their property without due process of law,[15] unless it may be authorized under the police power. The bill

[11] In addition to the workmen's compensation funds, there are teacher's pension funds, state employees' pension funds, hail insurance funds, bank guaranty funds, public deposits guaranty funds, public property insurance funds, life insurance funds, Torrens title insurance funds, and public official bonding funds; McCAHAN, STATE INSURANCE (1929). The writer has been able to find but one case testing the constitutionality of any of the nine funds mentioned above, namely Noble Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186 (1911) upholding a public deposits guaranty fund.

[12] 8 N. Y. ANN. CONS. LAWS (2d ed. 1917) 9307; New York Central Railroad v. White, 243 U. S. 188, 37 Sup. Ct. 247 (1916), Mr. Justice Pitney at 209: "This being so, it is obvious that this case presents no question as to whether the State might, consistently with the Fourteenth Amendment, compel employers to effect insurance according to either of the plans mentioned in the first or second clauses. There is no such compulsion, since self-insurance under the third clause presumably is open to all employers on reasonable terms that is within the power of the State to impose. Regarded as optional agreements, for acceptance or rejection by employers unwilling to comply with that clause, the plans of insurance are unexceptionable from the constitutional standpoint."

[13] *Supra* note 3.

[14] Godin v. Niebuhr, 236 Mass. 350, 351, 128 N. E. 406, 407 (1920); State v. Scougal, 3 S. D. 55, 51 N. W. 858, 865 (1892). "An established business is in essential respects like a right of property. The experience gained in pursuing it, the connections formed through it, the confidence of patrons and clients, are valuable and profitable assets, which the law, under the name of good will, recognizes as a species of property, and as, to a certain extent, transferable." FREUND, POLICE POWER (1904) 543.

[15] In the case of corporations, such legislation would virtually take away or alter the charter, depending on its powers, and the further constitutional objection of impairment of the obligation of contracts would be incurred, under the decision in Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

can be supported if its *raison d'être* is similar to that underlying the compulsory workmen's compensation, which has been adjudged as constitutional.[16] In the case upholding the Washington act,[17] it appears that it was declared constitutional as a police measure, *viz.*, "To support the State of Washington in concluding that the matter of compensation for accidental injuries . . . employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies." [18] Accordingly if the proposed legislation is to be upheld, it must come within the category of reasonable regulation.[19] In support thereof it must be admitted that motor traffic is a constant source of danger to the welfare of the state and, if unregulated, the financial irresponsibility of motor owners would be harmful to the well-being of the public. In addition, any possible fraudulent practices by the insurance companies, such as inequitable settlements, would deprive those injured of the benefit of those measures. Some authority might be obtained from Mr. Justice Holmes' argument:

> "There is nothing I deprecate more than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in its insulated chambers afforded by the several states . . . ." [20]

And finally it may be urged that the power to compel the individual to purchase insurance [21] might be said to include the right to dictate from whom that insurance must be taken.

The writer feels that these arguments are untenable. The proposition that the right to compel the purchase of insurance includes the power to dictate from whom it must be obtained regards only the relationship between the state and the motor-owner, and entirely overlooks the interests of a third party, the insurance company, whose fundamental rights are the sole controversy under the bill in question.

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[16] Mountain Timber Co. v. Washington, 243 U. S. 219, 37 Sup. Ct. 260 (1916).

[17] 3 WASH. COMP. STAT. (Remington, 1922) 7673. It provides that the remedy afforded by the state system shall be exclusive of all other remedies or proceedings. Accordingly, this statute is the nearest approach to the one under discussion.

[18] Mountain Timber Co. v. Washington, *supra* note 16, at 239, 37 Sup. Ct. at 265.

[19] The police power of the state extends only to such measures as are reasonable, and the general rule is that all such measures must be reasonable under all circumstances, State v. Phelps, 144 Wis. 1, 128 N. W. 1041 (1910); *Ex parte* Quarg, 149 Cal. 79, 84 Pac. 766 (1906).

[20] Dissenting opinion in Truax v. Corrigan, 257 U. S. 312, 42 Sup. Ct. 124 (1921).

[21] *Supra* note 3.

In respect to Mr. Justice Holmes' doctrine, it is submitted that his policy appears to have found little support elsewhere, and further, that the instant case could be included in the actual wording of the Constitution and thus within the exception set forth in his argument. The fact that people may, in spite of statutory regulation of insurance companies, be subjected to unethical practices, is not a reason for state usurpation under the guise of the police power. Every business offers some opportunities for censurable dealings, but it cannot be seriously contended that the state governments should take over all enterprises and occupations;[22] these undesirable usages could be reduced to a minimum through the control of a commission.

The real reason for the failure of the bill is this: that though the legislature may very properly regulate the subject, it has exceeded the measures to which it may justifiably resort. The police power of a state to regulate a business does not include the power to engage in carrying it on,[23] and the power to regulate does not include the power to confiscate.[24] Hence, if the legislature can achieve the same result by setting a maximum rate for private insurance companies, and maintaining in general, a supervisory control over the service, the state would not be justified in destroying an established business. Only as a last resort to protect the public, should the legislature remedy an undesirable situation by prohibiting, in effect, the continuance of a lawful calling;[25] anything short of this extreme necessity would be subversive of established rules of policy, contrary to the spirit of freedom of enterprise, and destructive of vested interests in private property.

M. C. S.

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[22] Adams v. Tanner, 244 U. S. 590, 37 Sup. Ct. 662 (1917). Mr. Justice Reynolds, at 594: "Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about with proper regulations. But this is not enough to justify the destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, probably no business, which does not offer peculiar opportunities for reprehensible practises; and as to every one of them, some can be found quite ready earnestly to maintain that its suppression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked."

[23] Rippe v. Becker, *supra* note 8, at 112, 57 N. W. at 333.

[24] Adams v. Tanner, *supra* note 22.

[25] Booth v. Illinois, 184 U. S. 425, 22 Sup. Ct. 425 (1901), Mr. Justice Harlan: "If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached *unless* that calling can be actually prohibited, the courts cannot interfere, unless looking through mere forms and at the substance of the matter, they can say that the statute enacted . . . is a clear, unmistakable infringement of rights secured by the fundamental law." (Italics the writer's.)

RIGHT OF TRUSTEES TO RETAIN UNAPPROVED SECURITIES HELD BY THE CREATOR OF THE TRUST—The majority of states have, by constitutional provisions, statutes, rules of court, or otherwise, established definite classes of securities in which a trustee may legally invest the trust estate.[1] A trustee who, in good faith, makes a proper trust investment is, in all jurisdictions, relieved from liability for loss. Frequently, however, the estate which reaches the trustee consists, in whole or in part, of securities which are not legal investments for trust funds. In this situation, the question arises whether the trustee is required to reinvest the estate, or whether he may retain the existing securities without being subject to surcharge in case of loss.

While the decisions in this country are not uniform, the weight of authority seems to be that in the absence of statute or a contrary provision in the instrument creating the trust, the right of a trustee to retain investments made by the creator of the trust is no greater than his right to make the investment originally.[2] In *Ashurst v. Potter*,[3] Gummere, Master, states:

> "Retaining improper investments was, in effect, making them; retention in such cases is a positive act; and the fact that the testator had considered these stocks good investments, and had invested in them, cannot excuse them (the trustees) for investing in them."

The fact that the trustee, in retaining unapproved securities, has used the prudence and business foresight of a careful man does not, under the rule here expressed, protect him in any way.[4] His duty with regard to the trust estate is to exercise discretion only in those matters which a trustee is allowed by law to do.[5]

In some states considerable latitude was at one time given to trustees in disposing of non-legal investments made by the creator of the trust. As late at 1850 both New York[6] and Pennsylvania[7]

[1] See MCKINNEY, TRUST INVESTMENTS (2d ed. 1927) for statutes regulating the investment of trust funds in the various states.

[2] Ashurst v. Potter, 29 N. J. Eq. 625 (1878); Ward v. Kitchen, 30 N. J. Eq. 31 (1878); *Re* Keane, 95 Misc. 25, 160 N. Y. Supp. 200 (1916); *Re* Leitch's Will, 185 Wis. 257, 201 N. W. 284 (1924) (an action to interpret the will of the testator).

In no jurisdiction may a trustee continue a speculative account begun by the creator of the trust: *Re* Hirsch's Estate, 101 N. Y. Supp. 893 (1906), *aff'd*, 188 N. Y. 584, 81 N. E. 1165 (1907); *cf.* Mathews v. Sheehan, 76 Conn. 654, 57 Atl. 694 (1904).

[3] *Supra* note 2, at 632.

[4] Wotton v. DeReau, 167 N. Y. 629, 60 N. E. 1123 (1901).

[5] The trustee should dispose of non-legal investments within a reasonable time: Babbitt v. Fidelity Trust Co., 72 N. J. Eq. 745, 66 Atl. 1076 (1907). As to what constitutes a reasonable time see: *Re* Keane, *supra* note 2; Matter of Weston, 91 N. Y. 502 (1883).

The same rule doubtless applies to investments which, though legal when made, are subsequently declared illegal.

[6] Jones v. Jones, 50 Hun 603, 2 N. Y. Supp. 844 (1888).

[7] Coggin's Appeal, 124 Pa. 10, 3 Walk. 426 (1880).

held that a trustee was not liable for a loss occasioned through a failure to dispose of such investments, provided that the retention constituted an honest exercise of judgment based on actual consideration of existing conditions.[8] The courts acted, with some justification, upon the theory that the existence of such investments in the estate committed to the trustee was equivalent to a direct authorization to retain them if the trustee should see fit. It is unnecessary to discuss this rule at length. It has been repudiated in New York today;[9] and in Pennsylvania it has been so modified that only extraordinary conditions will justify the trustee in retaining unapproved investments.[10]

Although, as it has been shown, the trustee should, in general, dispose of non-legal securities held by the creator of the trust, his duty to do so may be modified by the terms of the instrument creating the trust. If the trustee is directed to retain the securities committed to him, whether they be legal investments or not, he cannot be held liable for loss resulting from his failure to dispose of them;[11] in fact, he may not sell them except by authority of the court. Frequently, however, the trustee is merely authorized, in general terms, to deal with the investment of the trust estate as he may, in his discretion, see fit. Here, unless the terms of the trust instrument are most explicit, the tendency of the courts is to compel the sale of the non-legal securities and the reinvestment of the fund in securities which are approved by law.[12] In *Babbitt v. Fidelity Trust Co.*,[13] Garrison, V. C., expresses the rule as follows:

> "Differently stated, I think that this clause confides the property to the trustee to be dealt with as its judgment deems advisable, subject to those rules which govern trustees; that its discretion, in other words, was not to do unauthorized things, but to exercise its judgment concerning what authorized things it would do."

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[8] Taylor's Estate, 277 Pa. 518, 121 Atl. 310, 37 A. L. R. 553 (1923).

[9] *Re* Douglas, 60 App. Div. 64, 69 N. Y. Supp. 687 (1901); *Re* Keane, *supra* note 2.

It will be observed, however, that in many recent New York decisions the wording of the trust instrument has been liberally construed to allow the continuance of non-legal investments: *infra* note 14.

[10] Brown's Estate, 287 Pa. 499, 135 Atl. 112 (1926). Apparently, the trustee, to be relieved from liability, must show that there was no market for the securities retained, or that their market price was obviously below their true value.

[11] Northrup v. Browne, 204 Fed. 224, 122 C. C. A. 496 (1913). See also cases cited *infra* note 15.

[12] Tuttle v. Gilmore, 36 N. J. Eq. 617 (1883); *cf.* Trust Co. v. Trust Co., 250 Ill. 86, 95 N. E. 59 (1911).

[13] *Supra* note 5, at 758, 66 Atl. at 1081. The trust agreement authorizes the trustee: "to hold and possess or dispose of and convey the same, by proper instruments of conveyance, as in its judgment may be deemed advisable, and to collect the principal of securities and reinvest the same from time to time." *Cf.* Brown v. Brown, *infra* note 22.

In New York alone the rule is less strict, the tendency of the courts being to construe the wording of the instrument creating the trust so as to permit, when reasonable, the continuance of investments made by the creator of the trust.[14]

A somewhat different situation arises when a trust is created in specific securities. It is obvious that the trustee may not disregard the directions of the creator of the trust without being subject to surcharge for resulting loss. It follows that he may not dispose of specific investments which have been placed in trust, whether they are of a class recognized by law as being proper for the investment of trust funds, or not.[15]

Although, in general, a trustee should not retain unapproved investments received from the creator of the trust, he may, nevertheless, be relieved from liability by the consent or acquiescence of the *cestui que trust* to that course of action. Such consent may be either express or implied; or the beneficiary may be estopped to deny the authority of the trustee to retain the investment.[16] Necessarily the *cestui que trust* must be of full legal capacity if his consent to the retention of the non-legal investment is to relieve the trustee in case of loss.[17]

In several states, the problem under discussion has been dealt with specifically by the legislature. A statute in Illinois [18] permits a trustee to retain non-legal securities received by him from the creator

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[14] *Re* Wolf, 1 Connoly 102, 2 N. Y. Supp. 494 (1888); Bartol's Estate, 182 Pa. 407, 38 Atl. 527 (1897); Dunklee v. Butler, 30 Misc. 58, 62 N. Y. Supp. 921 (1899). But the court has power to review the use of the trustee's discretion: *Re* Keane, *supra* note 2.

Where the trust instrument authorizes or directs the sale of the existing investments, it is the duty of the trustee to reinvest the estate in legal securities: Clark v. Beers, 61 Conn. 87, 23 Atl. 717 (1891) (a suit by a trustee for the construction of the testator's will). Note that unless prohibited from selling non-legal securities, the trustee is at liberty to do so and to reinvest the money in approved investments: Guaranty Trust Co. v. U. S. Steel Corp., 107 Misc. 720, 176 N. Y. Supp. 402 (1918).

[15] Murray v. Feinour, 2 Md. Ch. 418 (1851); Ward v. Kitchen, *supra* note 2; Golder v. Littlejohn, 30 Wis. 344 (1872); see Penn v. Fogler, 182 Ill. 76, 55 N. E. 192 (1899).

The court, however, has power to authorize a sale if it sees fit: Murray v. Feinour, *supra;* Richardson v. Knight, 69 Me. 285 (1879).

The principles set forth in this note apply equally to investments received from a predecessor in trust: Missionary Society v. Corning, 164 Mich. 395, 129 N. W. 686 (1911); Villard v. Villard, 319 N. Y. 482, 114 N. E. 789 (1916). *Contra:* Jack's Appeal, 94 Pa. 367 (1880); Fahnestock's Appeal, 104 Pa. 46 (1883) (both decided at a time when Pennsylvania allowed the continuance of non-legal investments).

[16] Pope v. Farnsworth, 146 Mass. 339, 16 N. E. 262 (1888); Matter of Douglas, 60 N. Y. App. Div. 64, 69 N. Y. Supp. 687 (1901); Matter of Hall, 164 N. Y. 196 (1900).

[17] Murray v. Feinour, *supra* note 15. And he must be fully apprised of the effect of his legal rights: Adair v. Brimmer, 74 N. Y. 539 (1878).

[18] Ill. Rev. Stat. (Cahill, 1925), c. 3, § 144; Merchants' Loan Co. v. Northern Trust Co., *supra* note 12.

of the trust. Connecticut,[19] likewise, permits the retention of unapproved securities, by the trustee, "unless otherwise directed by the court of probate or by the instrument creating the trust." [20] A similar statute is in force in New Jersey.[21] It applies, however, only to trusts created by will, and not to trusts *inter vivos*.[22] It makes, in addition, a requirement not found in the two statutes just cited, namely, that of "reasonable discretion" on the part of the trustee.[23]

The problem presented in this note is one of public policy. On the one hand, it is desirable to throw complete protection around trust estates by regulating the class of securities in which a trustee may invest. On the other hand, it is obvious today that many so-called non-legal investments are equal in safety to those approved by law for the investment of trust funds. It is submitted that the solution of the problem rests in the adoption of statutes similar to those existing in Illinois, Connecticut and New Jersey. At the present time, it would seem that unless a trustee acts under the direction of the creator of the trust, the *cestui que trust,* or the court, he should, for his own safety, dispose of non-legal investments which are present in the estate, and reinvest the fund only in those securities which are approved by law for the investment of trust estates.

N. M. E., Jr.

THE RIGHT OF A MINOR CHILD TO MAINTAIN AN ACTION IN TORT AGAINST HIS PARENT—Although the right of a minor child to maintain contract actions [1] and actions concerning real property [2] against his parent was settled early in our law, no cases testing the existence of a right in a child to recover in a tort action arose until the nineteenth century.[3] No English court has yet been called upon to decide the question. In America, there are but thirteen cases deal-

[19] CONN. GEN. STAT. (1918), § 4904.

[20] Beardsley v. Bridgport Asylum, 76 Conn. 560, 57 Atl. 165 (1904) (an action to construe the will of the testator); see State v. Washburn, 67 Conn. 187, 34 Atl. 1034 (1896); Curtis v. Osborn, 79 Conn. 555 (1907).

[21] N. J. COMP. STAT. (1910), p. 2271, § 34.

[22] Brown v. Brown, 72 N. J. Eq. 667, 65 Atl. 739 (1907); Babbitt v. Fidelity Trust Co., *supra* note 5.

[23] Coddington v. Stone, 36 N. J. Eq. 361 (1883); Parker v. Glover, 42 N. J. Eq. 559, 9 Atl. 217 (1887). For a decision involving the question of what constitutes good faith and reasonable discretion, see: Beam v. Patterson Trust Co., 81 N. J. Eq. 195, 86 Atl. 369 (1913), *aff'd,* 83 N. J. Eq. 628, 92 Atl. 351 (1914).

[1] Fetrow v. Krause, 61 Ill. App. 238 (1895).

[2] Alston v. Alston, 34 Ala. 15 (1859); Preston v. Preston, 102 Conn. 96, 128 Atl. 292 (1925); Roberts v. Roberts, Hard. 96 (1657); Duke of Beaufort v. Berty, 1 P. Wms. 705 (1721).

[3] Where the defendant is not a natural parent but one *in loco parentis,* the right of action is conceded. Treschman v. Treschman, 28 Ind. App. 206, 61 N. E. 961 (1901); Dix v. Martin, 171 Mo. App. 266, 157 S. W. 133 (1913); Clasen v. Pruhs, 69 Neb. 278, 95 N. W. 640 (1903); Lander v. Seaver, 32 Vt. 114 (1859).

ing with this situation, twelve in the United States, and one in Canada. As court after court in this country denied the right of action,[4] the law was apparently becoming crystallized to the effect that the parent was immune from such a suit. However, a recent contrary decision in New Hampshire,[5] has not only re-opened the entire question but has also demonstrated the fact that the law here is still in a state of development. A brief consideration of several cases will be valuable in disclosing the types of issues involved in such litigation.

Hewlett v. George,[6] decided in 1891, is the first and the leading case on the subject. The situation there was an action in tort for false imprisonment brought by a minor child against her parent. The court in holding that the action would not lie based its decision on a consideration of reciprocal rights and duties and a policy of *laissez faire*.[7] In *Roller v. Roller*,[8] a minor daughter, after prosecuting her father criminally for rape, brought a civil action for damages. The court was faced with probably the most extreme case possible. Nevertheless, it was felt that the interests of society would be better served by blindly and unquestioningly following the dictates of public policy enunciated in the *Hewlett* case than by drawing the distinctions this case called for. The next case[9] presented a situation where the cause of action was the failure of the parent to exercise reasonable care under circumstances which would have entitled a stranger to a right of action. Again the child's right was denied, the court following the dogma of *Hewlett v. George*.

These three cases present examples of excessive punishment by a parent, of the commission of an abhorrent and infamous felony, and of negligence. It is important to note that the principles which

[4] Mesite v. Kirchstein, 109 Conn. 77, 145 Atl. 753 (1929); Smith v. Smith, 81 Ind. App. 566, 142 N. E. 128 (1924); Miller v. Pelzer, 159 Minn. 375, 199 N. W. 97 (1924), (1924) 9 MINN. L. REV. 76; Hewlett v. George, 68 Miss. 703, 9 So. 885 (1891); Goldstein v. Goldstein, 4 N. J. Misc. 711, 134 Atl. 184 (1926); Sorrentino v. Sorrentino, 248 N. Y. 626, 162 N. E. 551 (1928); Small v. Morrison, 185 N. C. 577, 118 S. E. 12, note 31 A. L. R. 1135 (1923), (1924) 33 YALE L. J. 315; Matarese v. Matarese, 47 R. I. 131, 131 Atl. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 388, 77 S. W. 664 (1903), (1904) 17 HARV. L. REV. 361; Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905), (1905) 53 U. OF PA. L. REV. 387; Wick v. Wick, 192 Wis. 260, 212 N. W. 787 (1927); Zutter v. O'Connell, 229 N. W. 74 (Wis. 1930).

[5] Dunlap v. Dunlap, 150 Atl. 905 (N. H. 1930).

[6] *Supra* note 4.

[7] "But so long as the parent is under obligation to care for, guide and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrongdoing, and this is all the child can be heard to demand." *Ibid.* at 711, 9 So. at 887.

[8] *Supra* note 4.

[9] Small v. Morrison, *supra* note 4.

have governed in all these situations were first pronounced in a case involving merely an abuse of the parent's privilege of disciplining the child.[10] Had the *Roller* case been the first to arise, it is difficult to believe that the result would not have been different. The court in the *Hewlett* case felt that the existing remedies of forfeiture of custody and of criminal prosecution were a sufficient check to curb an unkind or cruel parent. To allow a minor child to recover damages seemed utterly foreign to the court's conception of the state of peace which should prevail in the family; and to constitute an unwarranted interference attacking the very structure of the home. This opinion was shared by Schouler [11] and is, undoubtedly, good policy in most situations. If the authority of the parent is to be questioned in domestic matters, no parent would feel safe in administering any sort of discipline for fear that some court would deem it to be excessive. When the *Roller* case arose, counsel urged the court to consider the brutal act of the parent as an emancipation, and to distinguish the case at bar from those of domestic discipline. The Washington court was moved to a degree by the unusual facts, and the further argument of counsel that a rule promulgated to preserve family peace should not be applied where the tranquility of the home had already been destroyed by the act of the parent. It felt, however, that if a distinction were drawn, the law would be thrown into utter confusion because of the difficulty of determining what degree of brutality would be necessary to take a case out of the *Hewlett* rule. The court justified its inhuman view in these words:

> "There seems to be some reason in this argument, but it overlooks the fact that courts, in determining their jurisdiction or want of jurisdiction, rely upon certain uniform principles of law, and, if it be once established that a minor child has a right to sue a parent for a tort, there is no practical line of demarcation that can be drawn; for the same principle that would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort." [12]

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[10] Hewlett v. George, *supra* note 4.

[11] "The question, moreover, is sometimes raised in these days, whether a young son or daughter occupying the filial relation may not, on becoming of age, sue the parent or *quasi*-parent for alleged maltreatment or other injury. With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy or mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offence, if any offender at all, forfeiting custody and suffering criminal penalties if need be; but for the minor child who continues, it may be for years, at home and unemancipated, to bring a suit when arrived at majority, free from parental control and other counter-influences, against his own parent appears quite contrary to good policy." SCHOULER, DOMESTIC RELATIONS (6th ed. 1921) § 275.

[12] *Supra* note 4 at 244, 79 Pac. at 789.

Since the family has always been considered as a unit of government, and since the development of both the health and the morals of the children has always been the responsibility of the parent, it seems but reasonable that the parent be given wide latitude in the rearing of the child. No child should be permitted to question the authority of the parent in domestic matters. The remedies mentioned in the *Hewlett* case are sufficient to insure the safety of the child. Where no question of domestic control is involved, however, the situation is quite different. Professor McCurdy[13] has suggested that in these cases the parent be given an unqualified privilege. It does not shock one's sense of justice to say that a parent correcting a child for some prank or disobedience should not be called upon to respond in money damages even though the punishment be excessive. But the failure to recognize a difference where a child playing about the family garage is run down by the carelessness of the father in the operation of his automobile or where a child is employed in the father's business and with other workmen is injured because some defective scaffolding or materials are supplied seems indicative of a lack of discernment. In such a case the child should have the same right of action as any stranger. No question of parental authority is involved. Should considerations of family tranquility, often inapplicable, operate to defeat the right of the child when strangers injured in the same disaster may recover?[14]

The question of insurance renders the problem more difficult. The basis for the denial of the right of action is the argument of public policy that a contrary rule would disturb the tranquility of the home and the family. Where the parent is indemnified by insurance, in reality, an adverse judgment would be a financial benefit rather than a detriment. The reason for the rule of the *Hewlett* case does not apply. If it is discarded in insurance cases, however, then the result would be in conflict with the settled principle that the liability of an insurer is purely derivative. It would be illogical to impose liability on one insured and to exempt the uninsured from suit altogether. This is, however, exactly what the court did in the recent case of *Dunlap v. Dunlap*.[15] The court, realizing the radical step it was taking, attempted to rationalize its decision by considering the question of insurance as one of the facts of the case. When it is remembered that the fact of insurance is never even a part of the record of a cause, this confuses rather than clarifies the argument. The reasoning of the court appears in the following quotation from the opinion:

> "It is said that, since the insurer is liable only when the father is, it cannot be concluded that the father is liable because

[13] McCurdy, *Torts Between Persons in Domestic Relations* (1930) 43 HARV. L. REV. 1030.

[14] See Straub, *May a Child Sue a Parent for a Personal Tort* (1924) 28 LAW NOTES 108.

[15] *Supra* note 5.

> the insurer is. In a narrow sense this is true. But the essential fact which establishes the suability of the father is that he has provided for satisfying the judgment in some way which removes the suit from the class promotive of family discord." [16]

It is probable that the reasoning of the New Hampshire court will not long endure in our law. Nevertheless, the ultimate result is to be commended, and the courage of the court in departing from a long line of contrary decisions is to be admired. Though the rule of the majority is just when applied in situations such as *Hewlett v. George* where it originated, it is surely productive of great injustice when applied in cases such as *Roller v. Roller* and *Small v. Morrison.* This was the attitude of a foreign court when the problem arose for the first time in Canada.[17] That court dismissed the array of American authority with the comment that a right of action existed for every wrong, and that the relation of the parties was immaterial. The opinion of the Canadian court has always been the thought of the text authorities [18] in England where there are no judicial rulings on the subject.

Involved as the problem is, considerable study and analysis will be necessary before a satisfactory solution can be achieved. In a recent article,[19] Professor McCurdy has done much to clarify the question. The decision of the New Hampshire court well illustrates the extent to which courts are influenced by the opinions of academic authorities, for the *Dunlap* case was decided shortly after the appearance of Professor McCurdy's article in the *Harvard Law Review* and the treatise was relied upon by the court in disposing of many of the arguments formerly advanced by courts in refusing the right of action. It is to be hoped that in the further development of the law on this subject, the combined efforts of the courts and the text authorities will result in a continuation of the courageous progress begun by the New Hampshire court.

N. L.

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[16] *Ibid.* at 913.

[17] Fidelity and Casualty Co. v. Marchand, [1924] 4 D. L. R. 157.

[18] ADDISON, TORTS (1860) 423; POLLOCK, TORTS (1887) 107; CLERK AND LINDSELL, TORTS (1889) 152; EVERSLEY, DOMESTIC RELATIONS (1885) 601.

[19] *Supra* note 13.