ANNOUNCEMENT

THE REVIEW announces with regret the resignation of Louis Gorrin from the office of Note Editor. At the same time it takes pleasure in announcing the election of Meyer L. Girsh to that office, and the election of Andrew J. Schroder, II, to the office of Book Review Editor, recently vacated by Mr. Girsh.

THE REVIEW also takes pleasure in announcing the election to the Editorial Board of the following members of the Third Year Class: George M. Brodhead, Jr., Milton Gould, Benjamin R. Jones, Jr., Walter N. Moldawer and Hyman Zuckerman.

NOTES.

LIMITATION OF SHIPOWNERS' LIABILITY IN AMERICAN COURTS

The problem of the limitation of a shipowner's liability for damage to property or loss of life in marine disaster arising from collision or other negligent act or omission wherein subjects of foreign nations are involved, may be approached from the viewpoint of either statutory construction or conflict of laws. The ratio decidendi of the adjudicated cases—those that do lay down a definite rule of law—does not always rest on a genuinely legal or logical basis. The decisions in English and American courts until recently have been in conflict, even in the courts of the same jurisdiction.

The avowed purpose of the United States statutes limiting the liability of shipowners for losses sustained without such shipowner's privity or knowledge, to the extent of his interest in the vessel and freight then pending, is the protection of United States shipowners in competition with foreign shippers. By the law administered in admiralty prior to these enactments, i.e., the "general maritime law," there was no such doctrine of limitation of liability in this country. The effect of these statutes is to limit, in certain cases, an owner's liability for tortious acts to the value of his interest in the ship, providing he surrenders his ship, or transfers it to trustees for the benefit of claimants. The purpose and the effect of the acts combine either to limit the doctrine of respondeat superior, a fundamental concept both of the common law and the general maritime law, or totally to displace it with another liability. What principle of conflict of law is to be applied in a given case depends upon which

2 23 CONG. GLOBE 713 (1851); Norwich v. Wright, 81 U. S. 104, 121 (1871).
3 The Rebecca, 1 Ware 187 (D. C. D. Me. 1831).
theory, limitation or displacement, is considered the result of these acts.

In England today the dispute as to which theory is to be applied is of mere academic importance inasmuch as the English limited liability statutes since 1894 have expressly provided that their terms shall extend to all cases of collision or other disaster, irrespective of whether the shipowner seeking limited liability is British or foreign. But in the American courts, it is of more than mere theoretical interest, and in order to lay a foundation in reason for correct theoretical application, it is well to consider the prevailing conflict of laws doctrines and their application to these cases.

It is generally admitted that actions for personal torts are transitory and may be brought wherever service can be made upon the tortfeasor. However, the existence of liability is dependent on the substantive law where the act takes place. Under that law it is to be determined whether a right with its correlative obligation has been created by the act. Procedural matters, or matters of remedy, not pertaining to the substance of the right, are to be determined by the law of the forum. If, then, limitation of liability is a matter purely of remedy, the statutes limiting liability, not making any distinction in terms between American and foreign-owned bottoms, must be applied in all cases tried in our courts regardless of the place of injury or the registry of the ship. If it is a matter of substance, then the lex loci delicti becomes the deciding factor.

In one of the earliest cases wherein the conflict of laws problem was discussed, a collision occurred on the high seas between a British and a Norwegian vessel, due to the negligent navigation of the former. The owner of the British vessel, being libelled in the United States District Court, petitioned for limited liability under the United States statute. The district court held that a British shipowner could not obtain the benefit of the statute because "that statute contains no language that will admit of the supposition that it was in-

5 Merchant Shipping Act 57 & 58 Vict. c. 60 s. 503 (1851); 1894 s. 503; 1906 s. 69; 1907 s. 1.
7 Beale, Conflict of Laws (1916) 157: "What acts are forbidden, so that their commission constitutes a tort, what use of property is permitted, are questions which concern only the sovereign within whose dominion the acts are proposed. What is a tort, . . . what civil rights a person may exercise, are all determined by the law of the place where the alleged rights are to be exercised."
9 Goodrich, op. cit. supra note 6, 158 et seq.
tended to apply to foreigners out of the jurisdiction." However, the court would not apply either the law of Norway or England, for "no good reason can be given for resorting to the law of one of these nations rather than the other," but applied the "law of the place where he incurred the obligation... the high seas." The reasoning of the court presupposes that limitation of liability is not merely a procedural limitation on the doctrine of *respondeat superior*, but an absolute right in the nature of a defense to the application of the doctrine. If this is true, the court's application of the *lex loci delicti* is correct, assuming the high seas to be a jurisdiction governed by the *lex maris*. Most courts speak of the sea as *regio nullius* or *regio communis* with a "universal law of the sea." But, in *The Lottowanna* the Supreme Court recognizes that the general maritime law is the law of the sea as administered in each country by its courts. The court then applied the "general maritime law" and not the statute invoked by the respondent. And yet, in *The Lottowanna*, in laying down the rule for ascertaining the maritime law of this country, the court said "we must have regard to our own legal history, constitution, legislation, usages and adjudications as well." This, and *Thomassen v. Whitwell*, recognize that a general body of law did grow up, similar, to a great degree, in most countries, but differing in many aspects. Therefore, "general maritime law" means nothing, and the *lex fori* becomes substituted for the *lex loci*, subject to whatever limitations the forum chooses to put upon it.

In *The Scotland*, a case of collision between an American and a British ship, on the high seas, the Supreme Court held that the British owners might take advantage of our limited liability statute. The rule of the decision was that where "the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly." The Court assumes that limitation of liability is a right, not merely a remedy,

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22 Ibid. 406.
23 89 U. S. 558, 573 (1874). "But it is hardly necessary to argue that the maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country... it can only so far have the effect of law in any country as it is permitted to have. No one doubts that every nation may adopt its own maritime code. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it. And without such voluntary adoption it would not be law." *Benedict, Admiralty* (4th ed. 1910) 3, defines "maritime law": ". . . general rules, as the Law of the Sea, to which all submitted as to a sort of maritime law of nations. This is now called the general maritime law, and sometimes the admiralty law... But it should be borne in mind that this general maritime law may be subject to change in different countries," citing *The Lottowanna*, supra.
when it admits that if the colliding ships are of one nationality, that nation's law would govern. The only theory that can justify this conclusion is that the whole occurrence was consummated on the "floating territory" of that State—"the law of the flag" being the *lex loci delicti commissi*. and that the substantive law of that nation, governing the territory of both ships, would apply. This would be good conflict of laws doctrine. However, in this case, the injury was done on board an American ship which is part of the floating territory of the United States and subject to the laws of the United States. Therefore, the limited liability statute should apply of right, without regard to the fact that the wrongdoing vessel was not an American ship.

The rule of *The Scotland* was directly applied in *re Leonard, et al.*, in a situation where its application would injure the foreign owners, by limiting the liability of an American vessel which had collided with a British vessel on the high seas.

The principle was reaffirmed in *The Belgenland*, which was the case of a collision on the high seas between the Belgian steamer, *Belgenland*, and the Norwegian barque, *Lina*, which was sunk. Mr. Justice Bradley, who delivered the opinion in *The Scotland*, said,

"if the maritime law as administered by both nations to which the respective ships belong, be the same in both in respect to any matter of liability or obligation, such law, if shown to the court, should be followed in that matter in respect to which they so agree, though it

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28 McDonald v. Mallory, 77 N. Y. 546, 553 (1879): "... for matters occurring at sea the vessel must be regarded as part of the territory of the State." In Crapo v. Kelly, 84 U. S. 610, 624 (1872), which involved an assignment made on board a ship of Massachusetts registry, the court said, "We are of the opinion, for the purpose we are considering, that the ship Arctic was a portion of the territory of Massachusetts." *International Nav. Co. v. Lindstrom*, 123 Fed. 475 (C. C. A. 2d, 1903); *Vicomte etc., v. So. Pac. Co.*, 176 Fed. 843 (C. C. A. 1st, 1910); *Regina v. Keyn*, 2 Ex. D. 63 (1876); *Wharton, Conflict of Laws* (3d ed. 1905) § 4806; *Minor, Conflict of Laws* (1901) § 195; *Calvo, Le Droit International*, (5th ed. 1895) § 72.

27 See cases cited supra note 16.

28 Slater v. Mex. Nat. R. R. Co., supra note 6, at 126, 24 Sup. Ct. at 582: "The theory ... is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation ... which, like other obligations, follows the person and may be enforced wherever the person may be found. But as the only source of this obligation is the law of the place of the act, it follows that the law determines not merely the existence of the obligation, but equally determines its extent." Loucks v. Standard Oil Co., supra note 6, at 106, 120 N. E. at 200, per Cardozo, J., "A tort committed in one state creates a right of action that may be sued upon in another unless public policy forbids." *Spokane Inland R. R. v. Whitney*, 237 U. S. 487, 494, 35 Sup. Ct. 655, (1914): "... the right to recover damages for the killing of the decedent was created by the Idaho statute. That right could be enforced in another state, ... but, wherever enforced, the liability sprung from the Idaho law and was governed by it."


15 Supra note 14.

16 Ibid. at 307.
differ from the maritime law as understood in the country of the forum; for as respects the parties concerned, it is the maritime law which they mutually acknowledge." Thus, the rule concerning the application of the United States limited liability statutes laid down in *The Scotland* has become the well settled rule in cases of collision on the high seas, between vessels of different nations, and is applicable whether the one seeking the aid of the statutes is American or foreign.\(^2\)

The doctrine is carried to its extreme, however, in the case of *The Titanic*.\(^2\) In that case, the Steamship Titanic, of British registry and ownership, due to negligent navigation, but without fault on the part of the owners, collided with an iceberg on the high seas and sank. Actions for loss of life and property were instituted in the federal courts, totalling millions of dollars. If the American rule of limitation of liability were to be applied, the recovery would be limited to the value of the ship saved, which consisted of several life-boats.\(^2\) If the British statute for limitation of liability were to be applied, there would be a fund applicable for recovery, equal in value to the estimated value of the ship immediately prior to the disaster.\(^2\) The Supreme Court held that the law of the United States applied. Mr. Justice Holmes in delivering the opinion of the Court, admits "that the Act of Congress does not control or profess to control the conduct of a British ship on the high seas" and that "it is true that the foundation for recovery upon a British tort is an obligation created by British law," but adds, "it is also true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose." And, further, the Court says, "A law that limits a right in one case may limit a remedy in another." If full effect be given the decision and language, its result is to say British law gives the right and our statute limits the remedy. However, what becomes of Mr. Justice Bradley's theory in the cases of *The Belgenland* and *The Scotland*?\(^2\) Mr. Justice McKenna in *The Titanic* also considered it a proper deduction from *The Scotland* that the law of the foreign country should be enforced in respect to the amount of the owner's liability. This sit-

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\(^2\) City of Norwich, 118 U. S. 468, 6 Sup. Ct. 1150 (1886); 46 U. S. C. § 182 *supra* note 1.

\(^2\) *Merchant Shipping Acts* (1894) s. 503; (1906) s. 69; (1907) s. 1; The John McIntyre, 6 P. D. 200 (1881).

\(^2\) *The Scotland*, *supra* note 14, at 29: "... but if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag, and would determine the controversy accordingly."
uation is the clearest type of case referred to by the dictum in *The Scotland*, the case where there is only one nation involved, and a nation which has a limited liability statute of its own which pur-
ports to cover this very situation.

This decision is in the same court which, just seven years be-
fore decided *The Hamilton* in which a collision on the high seas, 

between two American vessels owned by Delaware corporations, re-
sulted in the death of sailors aboard the one vessel that sank. Mr. 
Justice Holmes, who also delivered the opinion in this case, held that 
the Delaware statute governs the right to sue for wrongful death 

occurring aboard the sunken vessel, it being also at fault, but that 
the *Hartie Act* limiting liability did not apply "even if its terms 
could be extended to personal injuries or loss of life." Why does not 
the Act limiting liability apply to an American ship on the high seas, 
assuming that it would apply to loss of life? If the statute is a 
procedural one, then the statute of Delaware giving the right of 
action is to be modified by the statute binding on the forum in this 
matter of procedure. This view is necessary if Mr. Justice 
Holmes' analysis of the situation in *The Titanic* is accepted and it 
is considered that *The Hamilton* is wrongly decided or that the Su-
preme Court departed from its original view.

So, in *La Bourgogne*, Mr. Justice White assumes, without 
discussing the reasons therefor, that the French owners are entitled 
to the protection of the United States limited liability statutes, and 
proceeds to apply them. Yet this case, too, was one in which actions 
were brought for loss of life, under the provisions of *Le Code 
Napoleon*. The cause of action was held to be determined by the 
*lex loci delicti*; the limitation of liability was held to be governed 
by our statutes. There is no difference between the two cases, except 
that the argument is stronger in *The Hamilton* for limited liability, 
in that both vessels are of American registry, and it cannot be as-
sumed under proper constitutional construction that the act of Dela-
ware is to limit any procedure of the federal court (Mr. Justice 
Holmes' view in *The Titanic* being that limitation is procedural). 

In *La Bourgogne*, the vessel was French, and death occurred thereon, 
but the Napoleonic Code provides for full damages.

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27. 207 U. S. 398, 28 Sup. Ct. 133 (1907).
... is a matter solely to be determined by the sovereign from whom the 
remedy is demanded"; *Goodrich*, op. cit. supra note 6, at 93.
32. See *supra* note 15.
cause a autrui un dommage, oblige celui par le faute duquel il est arrive a le 
reparer."
The theory is put to its most severe test in *Royal Mail Steam Packet Co. v. Companhia,* etc. In this case the Brazilian ship *A. J.* collided with the British *Silarus* in Belgian territorial waters. The Brazilian ship, which had been negligently navigated, pleaded the Belgian limited liability statute. The law of Belgium also fixes the liability in proportion to fault. The District Court held that the apportionment of damages, i.e., "the measure, elements, and extent of the damages given by the *lex loci,*** (in this case Belgium since the collision occurred in Belgian territorial waters) "pertain to the substance of the right, not to the remedy," and "while the rights and liabilities of the parties will be determined in accordance with the law of the foreign country, the right to limit liability will be controlled by the limited liability statute of our country. The Limited Liability Act of the United States does not impose, but only limits, an existing liability, and is not a part of the general maritime law, but is a declaraton of general policy of the United States for the administration of justice in maritime cases. It relates not to the right or liability, but to the remedy, and that is governed by the law of the forum."

The court clearly defines the view of the Statutes, calling them remedial, and therefore of the forum. But the distinction between the mode of proportioning damages and the limitation of liability seems very artificial. If the one is procedural or remedial, certainly the other is. *Respondeat superior* is a rule of substantive law, and the awarding of punitive damages is just as much a rule of substantive law. The limitation of liability under our statutes impairs the doctrine of *respondeat superior* and gives a substituted liability, the liability of the ship. Wherein is the difference between the proportionment of amount of damage which the owner must pay and a rule which limits the amount the owner must pay? The first is a qualification reducing the common law liability of joint tortfeasors in much the same way that the limited liability statutes reduce the common law liability of the master for the torts of his servant committed within the scope of his authority. It would therefore seem that the limitation of liability is a substantive right—a matter of defense.

Under the common law rule of conflict of laws of the federal courts whereby the *lex loci delicti* governs to determine the existence of the wrong, it is also the rule that "when a person recovers in one

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34 31 Fed. (2d) 757 (D. C. E. D. N. Y. 1928).
37 The M. Moxham, 1 P. D. 107 (1876).
38 Herrick v. R. R., *supra* note 6, at 13, 16 N. W. at 413: "The statute of another state has, of course, no extraterritorial force, but rights acquired under
jurisdiction for a tort committed in another, he does so on the ground of an obligation incurred at the place of the tort . . . and that is not only the ground but the measure of the maximum recovery." 39 The court in Western Union Telegraph Co. v. Brown says "the injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious." 40 Under this rule, limitation of liability is more than a mere matter of procedure, and becomes part of the substantive right which is to be governed by the lex loci delicti, and it is not enough to contravene the public policy of the forum that there is a different statute in the forum.41 The right to damages is not a remedial right, since it is based on the destruction of a right, and "concerns the sovereign within whose dominion the act was done; that is, the place of the wrong . . . creates the right to redress." 42 From the foregoing principles, it would seem, therefore, that limitation of liability should be applied as the substantive law of the locus delicti in all cases, and in order to determine whether limitation of liability is to be granted, the petitioner must show that by the lex loci delicti he is entitled to limitation. Then, if he is so entitled, the statute of that jurisdiction, if proved, and not the United States Statute, should be applied.43

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it will always, in comity, be enforced, if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought . . . whether the right of action be ex contractu or ex delicto . . . . But it by no means follows that because the Statute of one state differs from the law of another state, that therefore it would be held contrary to the policy of the laws of the latter state," affirming the judgment of court below which held the right to recover and the limit of amount recoverable are governed by lex loci, not lex fori." Western Union Tel. Co. v. Hill, 163 Ala. 18, 33, 50 So. 248, 256 (1909): "We also think that the great weight of authority supports the proposition that where a tort is committed in one state and sued on in another, the lex loci delicti governs," holding that where state in which breach occurred gives damages for mental anguish, such damages will be given even though state in which contract was made does not allow such damages.

Western Union Tel. Co. v. Brown, 234 U. S. 542, 34 Sup. Ct. 955 (1913), distinguishing The Titanic parenthetically, "A limitation of liability may stand on different grounds."

Supra note 39 Accord: Northern Pac. R. R. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978 (1893); St. Louis, I. M. & S. R. Co. v. Brown, 67 Ark. 295, 54 S. W. 865 (1899); Sedgwick, DAMAGES (9th ed. 1912) § 1373; MINOR, op. cit. supra note 16: "The plaintiff should have the same substantial relief in the form that he would be entitled to if he had sued in the locus delicti."

Herrick v. R. R., supra note 38.

Beale, op. cit. supra note 7, § 162.

See supra note 18.
RIGHT TO RECOVER COMPENSATION FOR SERVICES RENDERED UNDER A LOBBYING CONTRACT—Fundamental in any discussion of lobbying contracts is the fact that our legislative bodies function in a highly ramified civilization and consequently cannot be expected to move sua sponte on all matters affecting their constituents. Some method of lawfully promoting desired legislation must be permissible; accordingly, no court has refused to enforce agreements stipulating for purely professional services in procuring the passage or defeat of legislative measures, it being immaterial whether the body sought to be influenced be Congress, state legislature or municipal council. The language used in Trist v. Child has become the classic description of judicially acceptable services:

“We entertain no doubt that in such cases, as under all other circumstances, an agreement express or implied for purely professional services is valid. Within this category are included drafting the petition to set forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing, to a committee or other proper authority, and other services of like character. All these things are intended to reach only the reason of those sought to be influenced. They rest on the same principles of ethics as professional services rendered in a court of justice, and are no more exceptionable.”

Naturally enough, the definition has scarcely precluded strenuous court-room controversies over its applicability to the facts of the particular case before the court, the methods employed and upheld:

Aside from the question so often voiced: Is lobbying inherent in democracy? another and entirely dissociated query might well be put: Is lobbying the natural outgrowth of our present economic structure? The response of the courts when confronted with contracts for such services, however, reveals them to be actuated less by the economic than by the political aspects of the situation. See Senator T. H. Caraway’s radio address reported in New York Times, Nov. 15, 1929, at 14.

Stanton v. Embrey, 93 U. S. 548 (1876); State v. Okanogan County, 280 Pac. 31 (Wash. 1929); Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 253 Pac. 726 (1927).


Dunlap v. Lebus, 112 Ky. 237, 65 S. W. 441 (1901).


Wood v. McCann, 6 Dana 366 (Ky. 1838) held an averment that legislative acts were passed “at his instance and request” to import professional services only; in Hunt v. Test, 8 Ala. 713 (1845), “to do all in his power” was held to be a stipulation for legitimate services. In Barry v. Capen, supra note 6, plaintiff, who was an attorney and also chairman of the Democratic City Committee, agreed to and did advocate to the street commissioners the laying out of a street through defendant’s land, defendant telling him to “go and get
ranging from drawing up technical plans and projects to "bombard ing" senators and congressmen with letters and "keeping in touch with every person whose influence [plaintiff] deemed might be useful in securing favorable action." But more than one court has balked at the rendering of even these services when they are performed not before the legislature itself or some committee thereof but before its individual members. These decisions adopt the words of Powers v. Skinner:

"A person . . . cannot with propriety be employed . . . to labor privately in any form with them, out of the legislative halls, in favor of or against any act or subject of legislation. The personal and private nature of the services to be rendered is the point of illegality in this class of cases."

It is felt that the agent thus employed deprives the opponents of the measure of a fair opportunity to meet his contentions. The view thus taken seemingly ignores the fact that in the vast majority of instances little or no opportunity is afforded interested persons to appear before the legislative body or its committees; such courts seem also to be unmindful of the necessary and reputable practices of individual legislators listening, in their offices, to arguments of those who might otherwise be unable even to have the measure intro-

as much as you can, and I will pay you $1000 for it"; in an opinion by Holmes, J., the agreement was upheld. In State v. Okanogan County, supra note 3, plaintiff, a civil engineer, recovered the agreed fee for submitting briefs, arguments and data in support of a money claim by a county against the United States, the court quoting the language of Trist v. Child, loc. cit. supra note 7, with approval. See Meehan v. Parsons, 271 Ill. 546, 111 N. E. 520 (1916), where it was held not against public policy for a city to pay its mayor's expenses in securing Congressional appropriations for building costly levees; cf. Kansas City Paper House v. Foley Ry. Printing Co., 85 Kan. 678, 118 Pac. 1056 (1911) where the agent was employed "simply as an ordinary salesman whose efforts were confined to talking up the goods." The use of money to influence legislation is not necessarily improper; it depends on the manner in which it is used. Thus, if it is used to pay for the publication of circulars or pamphlets, or other modes of collecting and distributing information openly and publicly among the members of the legislature, the use is not objectionable. See Kansas Pacific Ry. Co. v. McCoy, 8 Kan. 538, 543 (1871). Also, see County v. Howard, 133 Va. 19, 62, 112 S. E. 876, 889 (1922), holding statute, making a criminal offense "of paying money or other compensation to secure the passage or defeat of any measure", to aim only at buying votes, bribery and the like, and not at purely professional services.


Herrick v. Barzee, 96 Ore. 357, 190 Pac. 141 (1920), Bennett, J., in a dissenting opinion, confuting the distinction between persuasion and influence attempted in Stanton v. Embrey, supra note 3.

Although this is stated to be the majority rule in 3 WILLISTON, CONTRACTS (1920) § 1728, and elsewhere, it is a view to be found only in dicta, especially in such cases as Powers v. Skinner, 34 Vt. 274, 274 (1861), where the individual advances are tainted.

Supra note 11, at 281.
duced before the committee at all. The more practical view, allowing individual solicitation, has received judicial sanction in other courts,\textsuperscript{13} one\textsuperscript{14} striking a compromise in declaring that such individual approach might afford a reason for believing that illegal methods were pursued, but agrees that it does not of itself compel that conclusion.

However, many a plaintiff, who has in all honesty contracted for and performed admittedly proper services, has come into court to recover his compensation only to find his contract eschewed as contravening public policy because such compensation was to be contingent upon the success of his efforts.\textsuperscript{15} The contingency of the reward, maintaining the courts adopting the so-called federal view,\textsuperscript{16} is a strong incentive to the exercise of sinister methods, some even going so far as to call such demoralization the necessary consequence of this type of agreement. The contrary view is taken elsewhere,\textsuperscript{17} and although we are not compelled to summon mathematics, as has one court,\textsuperscript{18} to support the latter result, perhaps it is best to recognize human frailty in the face of temptation and give due regard to the stipulation, not, however, as conclusive of illegality but as a signal for stricter scrutiny of the entire transaction. Generally, such a provision has not been held to vitiate the analogous type of agreements to procure public contracts,\textsuperscript{19} the sweeping statement of an early federal court, refusing to distinguish such contracts from those

\textsuperscript{13} Foltz v. Cogswell, 86 Cal. 542, 25 Pac. 60 (1890); Herrick v. Barzee, \textit{supra} note 10; County v. Howard, \textit{supra} note 8. See 3 \textsc{Williston}, \textsc{Contracts} \S 1728.


\textsuperscript{16} The federal cases most frequently cited are Marshall v. B. & O. R. R., 57 U. S. 314 (1853); Providence Tool Co. v. Norris, 69 U. S. 45 (1864); and Trist v. Child, \textit{supra} note 2, in all of which lobbying methods were employed in fact. See \textit{infra} note 29. The federal view is that represented by the often overlooked decisions in Wright v. Tebbitts, 91 U. S. 252 (1875); Stanton v. Embrey, \textit{supra} note 3; Taylor v. Bemiss, 110 U. S. 42, 3 Sup. Ct. 441 (1883); Valdes v. Larrinaga, \textit{supra} note 9.

\textsuperscript{17} Stroemer v. Van Orsdel, 74 Neb. 132, 103 N. W. 1053 (1905); Anderson v. Blair, 202 Ala. 209, 80 So. 31 (1918); Stansell v. Roach, 147 Tenn. 183, 246 S. W. 520 (1923), annotated in 29 A. L. R. 143 (1923); State v. Okanogan County, \textit{supra} note 3. As to the effect of the amount, see \textit{infra} note 38.

\textsuperscript{18} Stroemer v. Van Orsdel, \textit{supra} note 17.

to influence legislation,\textsuperscript{20} having been later modified \textsuperscript{21} to accord with the prevalent view.

Human ingenuity renders far too remote the possibility of a classic description of illegitimate means \textsuperscript{22} for any attempt here to be made in that direction, but the thoughts of some courts and the testimony of some lobbyists are at least not unhelpful by way of illustrating how their practices spread themselves all the way from the page scurrying through the legislative halls to conciliating suppers and direct bribes. Where improper influences have been employed in the performance of an agreement legal on its face, the courts without exception properly refuse judicial aid to the recovery of compensation thereunder;\textsuperscript{23} but rarely does their indignation fail to let loose a flood of unearned dicta as to contingent compensation, the "tendency" of such agreements, and the immateriality of whether improper means were employed or contemplated, the court habitually declaring the contract "void" as against public policy. Manifestly, their language is immeasurably colored by their knowledge that lobbying tactics were employed in fact. Perhaps the better conception of the refusal to grant compensation in such cases is not that of illegality of contract, the terms of which expressly call for professional services, but that of a legal contract the illegal performance of which fatally affects plaintiff's right to recover; for clearly, if the agent had not performed, and then failed to interpose any defense in an action by his employer on the contract, the latter would be entitled to damages for breach of contract.\textsuperscript{24} If the words used in the agreement served as a mere cover for the illegal consideration, \textsuperscript{20}Providence Tool Co. v. Norris, \textit{supra} note 16, at 55. \textsuperscript{21}Valdes v. Larrinaga, \textit{supra} note 9. \textsuperscript{22}"Lobbying" seems to comprise within its meaning all methods of influencing public bodies to act or not to act upon a subject without reference to its merits. See Trist v. Child, \textit{supra} note 2, at 451; the opinion of that case has been substantially embodied in \textit{Tex. Rev. Crim. Stat.} (1925) art. 179, 180, 181. Also, see Spalding v. Ewing, 149 Pa. 375, 24 Atl. 219 (1892). Senator Caraway, \textit{supra} note 1, offers an interesting classification. \textsuperscript{23}Spalding v. Ewing, \textit{supra} note 22, where the court clearly believed, even without actual proof, that improper tactics had been employed in "overcoming the resistance of the post-office authorities"; Hyland v. Oregon Paving Co., 74 Ore. 1, 144 Pac. 1160 (1914), where the agent circulated petitions among the city's property owners, persuaded them to appear before street committees and council, and fought remonstrances to procure an ordinance authorizing paving; Adams v. East Boston Co., 236 Mass. 121, 127 N. E. 628 (1920), where the agents, to effect a sale of marsh lands to the state, systematically secured the pre-election pledges of members-elect of the legislature to support a bill authorizing such taking and to vote for a speaker favorable to the purchase, the opinion rendered violently condemning the subserving of private interests under any guise; \textit{cf.} Flynn v. Bank, 53 Tex. Civ. App 481, 118 S. W. 848 (1909), where no recovery was allowed even though the agreement was "to use his best efforts by all rightful and legal means"; Crocker v. United States, 240 U. S. 74, 36 Sup. Ct. 245 (1915); Providence Tool Co. v. Norris, \textit{supra} note 16; Hayward v. Nordberg Mfg. Co., 85 Fed. 4 (C. C. A. 6th, 1898). \textsuperscript{24}Cole v. Brown-Hurley Co., 139 Iowa 487, 117 N. W. 746 (1908).
the contract is treated as illegal, the manner of performance being evidence of what was actually contemplated, but not being conclusive, inasmuch as an illegal performance of almost any contract is possible. Where the contract is ambiguous, the performance should, a fortiori, be evidence of what was intended. Where the terms clearly require ante-room strategy, the contract is properly held to contravene public welfare, although here again there is to be found lax talk of contingency of reward and corrupting tendency. The presumption is that professional services are intended and performed, with the burden on the employer to prove otherwise; on the other hand, it has been arbitrarily said that where the language of the contract is broad enough to cover professional and lobbying methods, the law will pronounce a ban on the paper itself. When the court condemns the entire transaction, it leaves the parties where it finds them, whether the defense of lobbying is pleaded or not.

25 Goodrich v. Northwestern Tel. Exch. Co., 161 Minn. 106, 201 N. W. 290 (1924), agreement by mayor, majority of city council and some private persons to “use all reasonable means to prevent telephone agitation in the city,” it being understood that personal influence would be used, where necessary, to prevent a concession to a competing telephone company.

26 See Barry v. Capen, supra note 6, at 100, 23 N. E., at 736; Dunham v. Hastings Paving Co., supra note 19, at 248, 67 N. Y. Supp., at 634.

27 See Stroemer v. Van Orsdel, supra note 17. It is perhaps the extreme obviousness of this which has led to its apparent judicial oversight in this general class of cases.

28 Knut v. Nutt, 83 Miss. 365, 371, 35 So. 686, 687 (1903), upholding an agreement to prosecute a private money claim against the United States “through such diplomatic negotiations as may be deemed best by him for interests” of his client.


30 Salinas v. Stillman, 66 Fed. 677 (C. C. A. 5th, 1894). Balanced against this legal presumption, however, is the court’s awareness of the often extreme difficulty of proof.

31 See Hyland v. Oregon Paving Co., supra note 23, at 18, but it should be noted that improper means were in fact employed; cf. Hunt v. Test, supra note 8, in which the same stipulation “to do all in his power” received an entirely opposite construction.

Despite the oft-reiterated dictum of *Trist v. Child* to the supposedly broad effect that the character of the agent employed is immaterial, the fact that he is "on the list" in lobby circles should clearly be an element in considering what type of services were intended, but the mere fact of political or personal association should not be conclusive against him, though a doubt is natural. It seems that the character of the one who hires does affect the court's decision where the employer is itself a legislative body, for it is deemed capable of determining for itself what the public policy is to be. Although counsel for the ill-faring lobbyist sometimes seeks to create a distinction between the seeking of public and that of private acts of legislation, the courts have very properly brushed it aside, a result justified by the realization that in either situation the essential goal sought is the securing of public sanction. The fraudulent character of the claim which the agent aims to impress upon the legislators does, however, greatly affect his right of recovery, despite the statements of some courts. The propriety of such

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33 Drake v. Lauer, *supra* note 29. *Cf.* Chippewa &c. R. R. v. Chicago &c. R. R., 75 Wis. 224, 44 N. W. 17 (1889), agreement by railroad to render "reasonable and proper services" in procuring a land grant held necessarily a lobbying contract (even though there was no evidence of undue influences having been exerted), the court stressing the non-professional character of the person rendering the services; McCallum v. Corn Products Co., 131 App. Div. 617, 116 N. Y. Supp. 118 (1909) (plaintiff hired "only because he was a Jersey man and knew some officials at Trenton").

34 Barry v. Capen, *supra* note 8, (agreement by chairman of Democratic City Committee upheld). In Oscanyan v. Arms Co., 103 U. S. 261 (1889) the right to recover compensation for personal influences exerted by a foreign consul to secure a firearms contract with a foreign government denied.

35 Southard v. Boyd, 51 N. Y. 177 (1872), recovery of 5% agreed fee for securing of ship charter from government by ship-brokers, one of whom was a son and another the son-in-law of the government agent who selected the vessel, granted; *cf.* Elkhart County Lodge v. Crary, 98 Ind. 238 (1884) (improper influences employed in fact).

36 David v. Commonwealth, 164 Mass. 241, 41 N. E. 292 (1895). To be distinguished from the true lobbying contract cases are those in which the agreement is set aside on the ground of the hiring body's lack of statutory power. Miller County &c. v. Cook, 134 Ark. 328, 204 S. W. 420 (1918); State v. Bell, 124 Wash. 647, 215 Pac. 326 (1923). It is on such a ground that the general problem of contracts to influence legislation has been decided in England. MacGregor v. Dover &c. R. R., 18 Q. B. 618 (1852); Taylor v. Chichester & M. R. R., L. 4 R. 4 H. 649 (1870).


38 Usher v. McBratney, Fed. Cas. No. 16,805, at p. 853 (C. C. D. Kan. 1874) (preventing a legislative investigation into the affairs of a railway corporation); Houlton v. Dunn, 60 Minn. 26, 61 N. W. 698 (1895) (obtaining for $2500 government land worth $12,000); Hazleton v. Sheckells, 202 U. S. 71, 26 Sup. Ct. 567 (1905), distinguished in Valdes v. Larinaga, *supra* note 9. The "equitable" character of the claim is especially stressed in *State v. Okanogan County, supra* note 3, but it is only with some difficulty that a fee of 50% can be reconciled with the court's opinion. Taylor v. Bemiss, *supra* note 16, seems to be the only decision recognizing the amount of the fee as indicating fraud.
a test may well be doubted, the justness of the claim being primarily an issue to be determined not by the court but by the legislature. But a sober refutation to this contention is perhaps found in the fact that the court seeks not to set itself up as a final board of assessors or tariff-makers but to fulfill its function of protecting the body politic by placing about its representatives the best shield it has at its disposal. It has been said that it is of no matter that actual benefit and not harm results to the public, but these cases overlook the true nature of the evil guarded against, namely, the tainted imposition of private views upon the legislature.

The language of Marshall v. Baltimore & Ohio Railroad Co., to the effect that, unless the hired advocate discloses the existence of his employment to the body before which he pleads, he practices a fraud upon them, has been universally approved, even being substantially embodied in many statutes. Well may it be asked, however, as to how the advocatory character of the agent affects the validity of his argument. Where the agent has a direct pecuniary interest in the measure beyond that of mere employment, it is usually stated that such interest must be disclosed. Although compensation may be recovered for professional services, yet where they are blended with lobbying practices the court will refuse to sift them.

The overwhelming mass of dicta has clearly effected much confusion as to the precise status of contracts to influence legislation, but the courts have revealed unmistakably their attitude towards such agreements. While contracts to influence purely extra-legislative, although public, bodies and conference groups have not come within the scope of past decisions, there seems to be no reason why the salutary rule, so often applied to picayune claims, should not be extended to embrace situations involving not merely national but also international well-being.

M. G.

The Power of an Executive to Construe Statutes Pertaining to His Department as a Reason for Denying Mandamus—The law of mandamus has been well settled by a long series of cases in the Supreme Court of the United States. The

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40 supra note 16, at 335.

41 Stroemer v. Van Orsdel, supra note 17; Foltz v. Cogswell, supra note 13.


43 Miles v. Thorne, 38 Cal. 335 (1869) (plaintiff to receive share of tolls after franchise obtained).

44 Trist v. Child, supra note 2; Rose v. Truax, supra note 29.

1 Beginning with Marbury v. Madison, 1 Cranch 137 (U. S. 1803) and Kendall v. United States, 12 Pet. 524 (U. S. 1838).
decisions have firmly established the doctrine that the writ of mandamus will be issued to compel the performance of a ministerial duty by the official but that it will be refused when the duty required of him involves the exercise of judicial or quasi-judicial discretion. The only difficulty in any given case is the application of the doctrine and the determination of the question whether the act of which the performance is sought is of a ministerial or of a judicial character. Where a statute expressly vests the executive with discretion, or clearly implies that he is to act according to his judgment, the solution is simple enough. In one situation, however, the courts say that the executive has discretion though there is nothing expressed in the statute concerning such discretion, nor is there anything in the statute from which it may be implied. This situation is where the executive acts according to his own construction of an ambiguous statute, and a mandamus is sought to compel him to act according to a possible alternative construction. The courts, in such a case, often declare that the executive is vested with discretion in interpreting ambiguous statutes relating to his department.

2 United States v. Schurz, 102 U. S. 378 (1880); United States v. MacVeagh, 214 U. S. 124, 29 Sup. Ct. 556 (1909); Ballinger v. United States, 216 U. S. 240, 30 Sup. Ct. 338 (1910); In re Stewart, 155 N. Y. 545, 50 N. E. 51 (1898); also both cases supra note 1.


4 As stated by Peckham, J., in Roberts v. United States, 176 U. S. 221, 229, 20 Sup. Ct. 376, 379 (1900) : “The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty.”


6 In People ex rel. Sheppard v. Illinois State Board of Dental Examiners, 110 Ill. 180 (1884), where the defendant board was required by statute to issue licenses to practice dentistry to graduates of “reputable” dental schools, it was held that it was within the discretion of the board to determine which dental schools were “reputable” and mandamus was refused. Thus a mandamus was also refused on the same ground where a statute authorized a medical examining board to refuse a certificate to an applicant who had been guilty of “unprofessional and dishonorable conduct” and the relator was refused a certificate because of such misconduct, State ex rel. Powell v. State Medical Examining Board, 32 Minn. 324 (1884); and where a charter board was given charge of awarding contracts to the lowest “reliable and responsible” bidder, Kelly v. Chicago, 62 Ill. 279 (1871).

7 Or in the closely analogous situations where there are two statutes each apparently clear, but together they create an ambiguity, as in Decatur v. Paulding, infra note 8; or where the statute is apparently very clear, but a peculiar situation arises which may or may not come within the statute depending on what interpretation is given it, as in cases cited infra note 19.
Decatur v. Paulding,\(^8\) decided in 1840, was the first case in which the situation was squarely met by the Court. The Court there held that the head of an executive department may exercise his discretion in construing the statutes under which he is to act. The broad proposition thus laid down in this and many other cases which followed it\(^9\) was somewhat qualified by the case of Roberts v. United States,\(^10\) decided sixty years later, which restricted the doctrine to situations where the Court itself found the statute to be ambiguous. In the course of the opinion the Court, speaking through Peckham, J., said:

"Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by statute to perform. But that does not necessarily and in all cases make the duty anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute, which requires, in some degree, a construction of its language by the officer."\(^11\)

Apparently the Court felt the executive was abusing his discretion

\(^8\) 39 U. S. 497. In this case, Congress had passed a general pension act and had adopted a resolution the same day granting a specific pension to Mrs. Decatur. Mrs. Decatur claimed under both the general act and the resolution, but the Secretary of the Navy, who was trustee of the naval pension fund, held that she had to elect to take either under the general act or under the resolution but she could not claim under both. Having taken under the general act, Mrs. Decatur sought a mandamus to compel the Secretary to pay her the pension provided by the resolution. Mandamus was refused. M'Lean, Story and Baldwin, JJ., dissented, taking the view that the executive had no discretion to interpret the statutes pertaining to his department.


\(^10\) 176 U. S. 221, 20 Sup. Ct. 376 (1900). Here, certain certificates had been issued to the assignor of the relator on which the relator was forced to sue in order to secure their payment. Later a statute was enacted providing for the payment of a certain rate of interest to those who had owned and redeemed such certificates. The Treasurer of the United States ruled that the relator did not come within the statute on the ground that he had not redeemed the certificates but had merely secured payment of a judgment in a cause of action based on the certificates. The court held that the certificates had been "redeemed" within the meaning of the act, and that mandamus would lie since the construction of the statute was "plain and unmistakable".

\(^11\) Supra note 10, at 231, 20 Sup. Ct. at 379.
by refusing to perform a duty plainly devolved upon him by statute on the ground that he construed the statute otherwise. It is a general rule that mandamus lies where an executive, having discretion, abuses that discretion.12

The construction of a statute pertaining to executive departments is often involved in other than mandamus cases, and in these cases the courts are inclined to give an ambiguous statute the same construction as the executive department, providing the departmental interpretation has been uniform and consistent over a long period of time.13 Here, however, the discretion of the official in construing the statute is not involved, because (1) the court is not bound by the particular construction given by the executive, and (2) the interpretation must have been continued for a long time or the court will not give it weight.14 If it were a matter of discretion, each new incoming official could interpret all the acts pertaining to his department for himself. The rule seems a practical one based on public policy.15

Thus there is a plain distinction between the cases where an executive interpretation arises in a suit against the government, or between private parties, and where it arises in a mandamus action against the executive himself. Chief Justice Taney in Decatur v. Paulding said:

"If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would

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14 It is but a step away from this situation to that where the public generally has accepted a certain construction of an ambiguous statute. Under such circumstances, it is held that common usage and practice under the statute for a long period of time will greatly influence the courts in construing the statute likewise. McKeen v. Delancey, 5 Cranch 22 (U. S. 1809); Rogers v. Goodwin, 2 Mass. 475 (1807); Packard v. Richardson, 17 Mass. 121 (1821).

15 In Rogers v. Goodwin, supra note 14, at 477, the court said: "Were the Court now to decide that this construction is not to be supported, very great mischief would follow. And although, if it were now res integra, it might be very difficult to maintain such a construction, yet at this day the argumentum ab inconvenienti applies with great weight. We cannot shake a principle which in practice has so long and so extensively prevailed. If the practice originated in error, yet the error is now so common that it must have the force of law. The legal ground on which this provision is now supported is, that long and continued usage furnishes contemporaneous construction, which must prevail over the mere technical import of the words."
not be bound to adopt the construction given by the head of a
department."\textsuperscript{16}

But if the party bringing the suit is so unfortunate that his only
remedy, if any exists at all, is mandamus, the rule seems harsh. It
leaves the interpretation of a statute, which is a judicial function, to
an individual usually untrained in the law. True, the executive may
resort to the Attorney-General for advice, but he need not do so, and
if he does, he is not bound to follow the advice given him. More-
over, the rule enables each new incoming executive to construe a
statute in a different manner from that of his predecessor in the
same office.\textsuperscript{17} In \textit{Houghton v. Payne}\textsuperscript{18} the Postmaster-General
changed the departmental construction of a statute which had been
followed for sixteen years.

To say that the legislative body intended an official to act
according to his own construction of a statute which is ambiguous
on its face is almost to impute an intent to that body to enact an
ambiguous statute. Of course, there are many cases where it must
be determined whether the statute was intended to apply to a par-
ticular set of facts, and in reaching a conclusion, an interpretation
of the statute may necessarily be involved.\textsuperscript{19} In such a case, the
argument against holding that the legislative body intended that the
executive should interpret the statute to determine whether it applied
to the particular set of facts is not so strong since every particular
case which might arise could not be provided for in the act. But if
there is discretion in interpretation under these circumstances, why
does the interpretation given by the executive not bind the courts
in an action other than mandamus? The answer apparently is that
the executive may act according to his own interpretation, but
whether rights exist depends upon a legal interpretation of the stat-
ute. However, where mandamus is the only remedy a party may

\textsuperscript{16} \textit{Supra} note 8, at 515.

\textsuperscript{17} "In our system of government where changes of State officers are so
frequent, and where one political party may succeed another in a few years,
it is of great importance that there shall be no right in a new officer to reverse
the decisions of his predecessor. The contrary rule would, in our government,
be especially dangerous. And officers themselves should be protected from
the importunity of claimants in such cases; even where the claim is one against
the State itself." \textit{People ex rel. Best v. Preston, supra} note 9, at 189.

\textsuperscript{18} 194 U. S. 88, 24 Sup. Ct. 590 (1904). This was a bill in equity for an
injunction.

\textsuperscript{19} As in \textit{Houghton v. Payne, supra} note 18, where the question arose
whether paper bound editions of standard works of great authors issued quar-
terly were periodicals within the meaning of the statute; or as in \textit{United States
ex rel. Dunlap v. Black, supra} note 9, where a statute was enacted increasing
the pensions of those individuals who had received $50 a month under a previous
statute and the question was whether the relator could apply for such increase
because he could have claimed under the statute allowing $50 a month, although
he had in fact claimed and had been receiving, under a different act, less than
he was entitled to.
have, there is no way of enforcing those rights. It can hardly be conceived that the legislature intended to create rights capable of being enjoyed only if the executive happened to reach a correct interpretation, realizing that those who are to interpret are generally lacking in the necessary legal training.

There is a tendency in the more recent cases to avoid the harsh doctrine of Decatur v. Paulding through the medium of the rule in Roberts v. United States—that is, by finding the statute which the executive thought ambiguous, to be clear and explicit. Thus the Court granted a mandamus in Work v. United States ex rel. McAlesster-Edwards Co., decided in 1923, where the Court held that the Secretary had no discretion to construe "appraised value" in a statute as referring to a new appraisement rather than to an appraisement according to a statute enacted six years earlier. A mandamus was also granted in Lane v. Hoglund, decided in 1917, where the Court held that a report from a deputy forest supervisor recommending cancellation of a land entry on account of non-residence and lack of cultivation was not a "pending contest or protest" against the validity of such entry within the meaning of the statute and that the executive could not construe it as such. In Work v. United States ex rel. Mosier, decided in 1923, the Court held that certain bonuses were "royalties" within the meaning of the statute in spite of a departmental construction otherwise, but mandamus was refused on other grounds. However, in Work v. United States ex rel. Rives, decided in 1925, the Secretary having held that the purchase of land containing manganese by a manganese concern during the war was "speculative" within the meaning of a statute which provided for allowances of certain claims of private persons who had lost money in the production of war materials owing to the Armistice, and excepting all investments for speculative purposes, mandamus was refused on the ground that the Secretary could exercise his discretion in construing the statute. The Court could easily have come to the same decision on the ground of express discretion vested in the Secretary since the statute provided that he was to make such adjust-

20 "Whenever, in pursuance of the legislation of Congress, rights have become vested it becomes the duty of the courts to see that those rights are not disturbed by any action of an executive officer, even the Secretary of the Interior, the head of a department. However laudable may be the motives of the Secretary, he, as all others, is bound by the provisions of Congressional legislation." Ballinger v. United States, 216 U. S. 240, 249, 30 Sup. Ct. 338, 340 (1909). See Noble v. Union River Logging R. R., 147 U. S. 165, 13 Sup. Ct. 271 (1893), where the Secretary of the Interior was enjoined from revoking a decision of his predecessor which would have the effect of depriving the plaintiff of vested rights.


22 244 U. S. 174, 37 Sup. Ct. 558.


24 267 U. S. 175, 45 Sup. Ct. 252.
ments and payments in each case as he should determine to be just and equitable, and the decision of the Secretary was to be conclusive and final.

The explanation of the rule in *Decatur v. Paulding* is a historical one—the reluctance of the judiciary to interfere with the executive department in the exercise of the duties intrusted to it.\(^2\) It is worthy of note that, while the principle of *Kendall v. United States*,\(^2\) which allows a mandamus to issue against an executive where purely ministerial duties are involved is well established today, when that case was decided (1838) there were three dissenting justices, one of which was Taney, C. J., who wrote the opinion in the *Decatur* case. The rule thus stands as an example of a retarded development in the law of mandamus.\(^2\)

\[W. \text{ N. M.}\]

**LIABILITY OF BAILORS AND OTHER SUPPLIERS OF PERSONAL PROPERTY FOR INJURIES DUE TO DEFECTS**—The recent decision of *Oliver v. Saddler & Co.*\(^1\) presents a cross-section of the liability to which certain possessors of personal property may be subjected upon transfer thereof. This case is significant because of the fact that it intimates a departure from *Caledonian Ry. Co. v. Mulholland*,\(^2\) hith-

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\(^{2}\) "The position taken by the Court [in Decatur v. Paulding] . . . appears to reflect the view given weight and currency at the time by President Jackson, that the executive and judicial departments have concurrent and independent power to interpret the law in the regular course of their separate duties." DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF THE LAW (1927) 288.

\(^{2}\) *Supra* note 1.

\(^{2}\) "The effect of the decisions is thus, . . . they [the courts] will reverse for error of law only where they feel that the error is so gross as to be beyond the bounds of reason. In other words, they will not substitute their own opinion of the law for the legal opinion of the Land Department except where they regard the latter's opinion as a rational impossibility. This result, when so expressed, appears as a paradox . . . . The paradox vanishes if we say that what the courts really do is to refuse to treat as matters for the application of legal rules, or to lay down such rules to govern, many of the details of procedure and even of classification and interpretation which they properly prefer to regard as the subject-matter for a body of technical administrative practice." DICKINSON, op. cit. *supra* note 25, at 286.

\(^{1}\) Chapman (the party's maiden name) or Oliver in the full title of the case, according to Scottish practice. [1929] A. C. 584. In this case a firm of stevedores and a porterage company were engaged in unloading bags of maize. The stevedores' work consisted of depositing the bags on deck; from this point they gratuitously permitted the porterage company to use their slings which were already around the bags, the unloading being expedited thereby. The stevedores employed an inspector on whom the porters were known to rely. The court held that a duty was owed the porters to have the slings in fit condition, certain distinctions existing between the case at bar and Caledonian Ry. Co. v. Mulholland or Warwick, *infra* note 2.

\(^{2}\) [1898] A. C. 216. In this case the defendant railroad contracted with a consignee to ship coal to a certain station, beyond which it gratuitously per-
erto unquestioned as establishing the limit and extent of the liability of one supplying articles for the use of others.

The mode of transfer involved in these cases is a bailment. A fundamental proposition in the common law regards the rights and duties arising out of bailments as founded upon the contemplation of benefit accruing to the one party or to the other. It was early decided that this factor determined the nature of the bailee's duty with reference to his care for the chattel; however, the conception that a bailment created duties peculiar to itself gave rise to certain inconsistencies later to be noticed.

It was established in Blakemore v. Bristol & Exeter Ry. Co. that a bailor, though he derive no benefit from the bailment, "must be responsible for defects in the chattel with reference to the use for which he knows the loan is accepted, of which he is aware, and owing to which directly the borrower is injured." In examining the basis and extent of this liability, it is clear that according to the Blakemore decision the duty is contractual. Though it is generally held that a contract does exist in such cases of gratuitous bailments, the better view is otherwise. Even under the view that a contract is present, the duty does not necessarily depend upon the contract, but rather upon the relation of the parties. The function of the contract being merely to establish such relation, where the claim goes further to aver a breach of duty arising out of that relationship the action is one

mitted a second railroad to haul the freight cars to the consignee's premises under an arrangement to which the defendant was not party. It was held that no duty was owed servants of the second railroad to have the cars in fit condition. Followed in Kemp & Dougall v. Darmangil Coal Co., 1909 Sess. Cas. 1314. Bohlen, Basis of Affirmative Obligations in the Law of Tort (1905) 53 U. of Pa. L. Rev. 209, 232, Bohlen, Studies in the Law of Torts (1926) 33, 59.

A bailment is the rightful possession of personal property by one who is not the owner. 2 Williston, Contracts (1924) § 1032. The common law concepts of bailment were derived from the civil law, which classified the types of bailment mainly according to the nature of the transaction, such as keeping, using, or carrying the chattels. Coggs v. Bernard, 2 Ld. Raym. 909 (1702). The general classification, however, turns upon the factor of benefit: bailments for the sole benefit of the bailee, bailments for the sole benefit of the bailor, and bailments for the benefit of both parties. Schoeler, Bailments and Carriers (3rd ed. 1897) § 14.


Blakemore v. Bristol & Exeter Ry. Co., supra note 5 (regarding as consideration the bailee's duty to care for the chattel); Story, Bailments (9th ed. 1878) § 2, n. (regarding as consideration the bailee's duty to redeliver); Dobie, Bailments and Carriers (1914) § 33.

2 Williston, Contracts § 1039 (the duties mentioned supra note 6 considered mere conditions qualifying the bailee's right of user).
of tort. However, it is not necessary for a contract to establish the relation from which the duty to disclose known defects arises. Where a person consents to another’s coming into contact with his property, knowing that the other is unaware of its dangers, his conduct is essentially misfeasance rather than nonfeasance. That a contract was regarded necessary arose out of the tendency of the times to refer obligation to consent—that is clear that the same duty would exist in cases of gifts where no contract could be alleged. The position of a donee is closely analogous to that of a bailee in a bailment which is gratuitous or for his sole benefit; the declaration of Coleridge, J., in the Blakemore case, that the duty “is so consonant to reason and justice that it cannot but be part of our law,” is equally applicable. The conclusion is further sustained by analogy to the rights of a mere licensee on the land of another. Thus, the relation to which the law attaches the obligation to refrain from leading another into known danger is not that of bailor and bailee, but rather that of supplier and user, whether the transfer be by gift, license or sale.

It is not unreasonable to require the gratuitous supplier of property to use ordinary efforts to inform the other party of facts concealment of which is likely to render use of the property dangerous. Such supplier is not under duty to ascertain facts, but he must not close his eyes to truth; he need not discover dangers, but it is sufficient that from facts already within his knowledge he should know danger to be probable. Thus, more facts come to the knowledge of a manufacturer, and though he make a gift of his product the recipient is at least entitled to those facts. However, where the facts are so available that a donee, without even looking the gift-horse in the mouth, can acquire all the knowledge which would protect him, the reason falls and with it the rule. On the other hand, where the supplier believes that the recipient is incapable of understanding the gravity of the danger, neither the availability nor the disclosure of the facts should be sufficient to relieve him of liability. On the same principle, even where the property is not defective, and the source of danger is the incompetency of the user, the supplier who is aware

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9 See Gautret v. Egerton, L. R. 2 C. P. 370, 375 (1867) (“something like fraud”).
11 Bohlen, *op. cit. supra* note 2, 441, 464.
12 “The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee.” Gautret v. Egerton, supra note 9; De Haven v. Hennessy Bros. & Evans Co., 137 Fed. 472 (C. C. A. 6th, 1905). *Contra:* Fitzpatrick v. Cumberland Glass Mfg. Co., 61 N. J. L. 378, 39 Atl. 675 (1898). It appears inconsistent to place the duty to disclose known defects upon a licensor of personalty, but not upon a licensor of realty.
of such incompetency cannot escape liability. In any event, the
duty being imposed by law apart from contract, the scope of the sup-
plier's liability depends on the extent of his negligence: he remains
liable for injuries of which the danger is in law the cause, to the re-
cipient, to users in his right, or to strangers whom he should foresee
as within the zone of the hazard he has created. Where he uses rea-
sonable efforts to disclose his knowledge of danger to the recipient,
he is ordinarily relieved of liability not only to the recipient, but also
to third persons subsequently injured; similarly, where the property
is accepted only for the use of a third party, unless the supplier has
reason to believe that the information will not be transferred, or the
property is incapable of safe use for any purpose, in which instances
his manifest duty is not to supply.

The particular question presented in Oliver v. Saddler & Co.
involved the further duty to inspect, as between bailor and bailee.
Where a bailor is benefited by the bailment, it is acknowledged that
his duties should be of a nature higher than in the case of a bail-
ment which solely benefits the bailee; such bailor is under obligation
to use reasonable efforts to anticipate dangers by discovering defects
which may exist in the chattel bailed. The existence of a contract
in such case is unquestioned. Therefore it was natural for courts
to include this obligation in an implied warranty to the effect that
the property be suitable for the purpose known to be intended.
The nature of this duty, however, appears to be rendered uncertain by
the manner in which courts use the term "warranty": it has been
regarded as synonymous with "obligation," and has also been consid-
ered in terms of negligence. The Lord President, in Wood & Co. v.
Mackay, declared, "I will not use the word 'warranty,' in case it
may not be strictly accurate." The cases, in effect if not in language,
hold that a bailor benefited by the transaction is under duty to use
ordinary care to furnish a chattel reasonably safe.

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23 Gardiner v. Solomon, 290 Ala. 115, 75 So. 621 (1917); Crowell v. Dun-
can, 145 Va. 489, 134 S. E. 576 (1926).
24 Gagnon v. Dane, supra note 5. That the liability discussed in this note
applies to property damage as well as to personal injuries, see Akers v. Over-
25 2 Williston, Contracts § 1040.
26 17 Vogan & Co. v. Quilton, 81 L. T. R. 435 (1899); see In re Bliss Co., 250
N. Y. 410, 417, 165 N. E. 829, 832 (1929) and cases therein cited.
Page, L. R. 9 Q. B. 122 (1867), Kelly, C. B., held that it was needless to con-
sider the abundant evidence of negligence, allowing recovery upon an implied
warranty. However, Piggott, B., held "I am of the same opinion ... that,
as a letter out of a vehicle for hire he was bound to use proper and ordinary
care that it was reasonably fit and proper for the purpose."
29 Moriatirv v. Porter, 22 Misc. 536, 49 N. Y. Supp. 1107 (1898); Conn
v. Hunsberger, supra note 12. Circumstances may require the utmost care. See
2 Beven, Negligence (4th ed. 1928) 969 as to Hyman v. Nye, 6 Q. B. D. 688
(1881).
Upon this phase of the problem it is most important to determine the true basis of liability, since violation of a duty to inspect would constitute nonfeasance rather than misfeasance, and there is no general duty to act for the protection of others. Even under the theory of implied warranty, absence of a contract between the supplier of the defective property and the person injured should not necessarily defeat recovery. However, especially where the rights of injured third parties are involved, the courts have not relied upon the implication of a warranty. The fact that the law was able to shake off the influence of Winterbottom v. Wright, cited as controlling in the Blakemore case, is further indicative of the concept that a bailment created duties peculiar to itself. The issue of privity was squarely faced in Elliott v. Hall: "It is contended that there is no duty because there was no contract with the plaintiff, but the plaintiff was acting as the servant of the company with whom the contract was made, and the defendant must have known that the buyers would not unload the coal themselves and that their servants would do so." But this was not to be the limit of liability, for in White v. Steadman, Lush, J., discussing Elliott v. Hall, states "I do not think it matters that the plaintiff in that case was a person who would necessarily to the defendant's knowledge use the truck. The duty lies toward the persons or class of persons whom the owner must be taken to contemplate may use the dangerous chattel . . . ."

This evolution of liability has erroneously remained peculiar to the bailment relation in the majority of jurisdictions. There is a distinction in law between a bailor and a manufacturer-vendor in that the bailor still owns the property though he transfer possession, such ownership entitling him to a degree of control over the chattel and interesting him in its future use. However, the law of tort is more concerned with physical probabilities than the law of property—and once possession of property is transferred, actual ability to control is lost whether the transfer be by bailment or sale. In any event, as prerequisites to recovery, the use of the chattel must be the use for which it was known to be intended, and the person using it must be doing so rightfully. It is submitted, therefore, that the jurisdictions which allow a person other than the bailee to recover for injuries

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21 See Note (1929) 77 U. of Pa. L. Rev. 388, 391.

22 10 M. & W. 109 (1842).

23 15 Q. B. D. 315 (1885). The question of liability to a third party had been raised in Young v. McCarthy, 6 H. & N. 329 (1861) but not decided. In Heaven v. Pender, 11 Q. B. D. 503 (1883), a servant of the bailee was allowed recovery, the Blakemore case being distinguished.


caused by defects which the bailor should have discovered, are inconsistent when they deny recovery to a person other than the purchaser against a manufacturer-vendor.

The duty of a bailor, with reference to defects in the property which he should recognize as likely to injure others, has the same basis as other affirmative obligations—his derivation of benefit. Where the bailor has no more interest in the purposes of the bailment than a donor, it is unreasonable to impose upon him a duty to put the subject-matter in safe condition; this would unduly restrict the transfer of property, causing persons to refrain from lending chattels for another's purposes and from making gifts. On the other hand, one receiving property or its use as a gift should not expect the donor even to prepare it for him. However, where the bailor is benefited by the transaction the situation is otherwise: he has a reason to prepare the chattel for the expected purpose, and the bailee is entitled to believe that it will be reasonably safe for such purpose. A bailment may be of material benefit to the bailor, even though gratuitous in that he derives no compensation in money. With regard to the duty to inspect, the essential factor is that the benefit have sufficient reference to the business purposes of the bailor to place the bailee in the class of business guest. A most common form of bailment which benefits both parties is that of hire; here it is important to ascertain when the contract is at an end. The unloading of a freight car and the movements necessary thereto at the point of delivery may be within the terms of the bailment; but its use beyond the point of delivery, though necessary to bring the freight to the consignee's premises, may be a "new journey" in which the bailor is unconcerned. Even though work is being performed for the bailor by the bailee, property transferred from the one to the other may be entirely for the business purposes of the bailee.

The category in which each Law Lord placed the bailment involved in Oliver v. Saddler & Co. may be determined by considering certain language in and the substance of each opinion. Lord Buckmaster observed "It is in the interests of everyone concerned in the expeditious discharge of the cargo that these operations should be continuous." However, he proceeded to distinguish the case at bar from the Mulholland case upon the ground that "In that case exami-

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26 Bohlen, op. cit. supra note 2, 209 et seq., BOHLEN, 33 et seq.
27 The Steamboat New World v. King, supra note 4; SCHOULER, op. cit. supra note 3, § 91.
28 This is well discussed in the opinion of the Court of Sessions, Chapman or Oliver v. Sadler & Co., [1928] Sess. Cas. 608, 616, but applied with questionable accuracy in referring to the Mulholland case and in considering the instant situation "foreclosed" thereby.
29 Elliott v. Hall, supra note 23.
31 Young v. McCarthy, supra note 23. The twilight zone of this problem appears to be reached where the benefit which accrues to the bailor is goodwill, e. g., a gift may often be an advertisement.
nation of the wagons was equally open to both persons by whom they were used," rather than upon the presence of benefit to the bailor in the instant situation. Lord Atkin declared "In these conditions the rule as to gratuitous bailors appears to me to have no application." Nevertheless, he did not regard this factor in distinguishing the Mulholland case, "where it was unreasonable to maintain that there was a duty to examine," from the principal case, "where the duty to examine is recognized and relied on by both parties." This assumption of the existence of a duty is clearly begging the question. Viscount Dunedin, adding his observations only "in case I should be thought to be pushing the idea of the liability of the owner of the defective chattel far further than I think it ought to be pushed," distinguished the cases on the ground that "in the present case the use to which the chattel was being put was obviously dangerous," making no reference to the purposes of the bailment in either instance. Thus, the issue is raised whether these distinctions would justify any departure from the orthodox basis of liability—that a person is under duty to use ordinary care to make property reasonably safe for a use by another which benefits his own business purposes.

The first distinction, that the recipient of the property had no opportunity to inspect it, cannot impose an affirmative obligation upon a supplier. The bailee in a transaction for his sole benefit is under no duty to accept the property at all; if a donee-bailee is willing to take it regardless of his inability to inspect, merely because the benefits which accrue to him outweigh such disadvantage, this serving of his own interests should hardly increase a donor-bailor's obligations. However, under the classical view, where the duty of the bailor is determined by his derivation of benefit, the bailee's opportunity to inspect is a factor accorded the proper consideration: it is a circumstance in determining whether the supplier has exercised due care and whether the bailee is guilty of contributory fault. Even a duty upon a third party to inspect should not relieve the supplier of his obligation.  

Reliance upon the defendant's inspection, the distinction emphasized by Lord Atkin, is an element independent of any duty of a supplier of property to inspect. Where the plaintiff, to the knowledge of the defendant, relies upon the latter's gratuitous services under circumstances which constitute an inducement that he do so —although this may impose upon the defendant the duty to act with care or to continue such services—to regard such reliance as a dis-

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33 Montgomery v. Missouri Pac. Ry. Co., 181 Mo. 477, 79 S. W. 930 (1904); see Loader v. London & India Joint Docks Committee, 8 T. L. R. 5 (1801). It is not to be inferred that the writer regards as gratuitous the services rendered in the instant case.
tinguishing issue between cases of bailment merely confuses the basis of liability. Entirely unconnected with the duties attendant to the present ownership and prior possession of property, it is less properly a distinction than a wholly separate theory of liability.

That the use of the chattel is "obviously" dangerous also presents no reason for disregarding the factor of benefit to the bailor as the basis of his obligation to put the property in safe condition. A perfect sling is no more dangerous than a perfect freight car; and if either is defective persons within the area of use are subjected to the risk of serious bodily harm. It would be unfortunate to bring into the law another arbitrary distinction.\textsuperscript{3} Obvious danger is merely a circumstance to consider in connection with the question whether reasonable care has been exercised—once it is established that the duty to exercise such care existed.

It is submitted, not out of reverence for settled principles, but out of lack of conviction in the reasoning of \textit{Oliver v. Saddler & Co.}, that in determining the liability of a bailor it is undesirable to give merely incidental consideration to the nature of the benefit derived from the bailment. It is hoped that this decision, which could have rested upon the ground of benefit to the business interests of both bailor and bailee, will serve not to confuse the true basis of liability where injuries are caused by defective chattels, but rather to illustrate that it is in accord with natural justice to rest upon benefit the affirmative obligations arising from possession of property.

\textit{H. P.}

\textsuperscript{3} See MacPherson v. Buick Motor Co., 217 N. Y. 382, 389, 111 N. E. 1050, 1053 (1915) and citations therein, as to "inherently" dangerous manufactured products.