February, 1932

ANNOUNCEMENT


NOTES

The Uniform Veterans' Guardianship Act—In 1928, the National Conference of Commissioners on Uniform State Laws proposed four uniform acts. These were the Business Corporation Act, the Public Utilities Act, the Reciprocal Transfer Tax Act and the Veterans' Guardianship Act. The first, according to the latest tabulation, has been adopted by three states, the second by none, and the third by fifteen. But the Veterans' Guardianship Act, proposed and adopted in 1928, has been enacted, according to the very latest information, in thirty-three states. It is almost amazing to realize, that within three years, this act stands third among the uniform statutes from the standpoint of adoption. This speed was also evident in the drafting of the act by the National Conference. An inspection of committee reports, and conference discussions, readily discloses the haste which attended its formulation and approval. The dangers

1 Handbook, Nat. Conf. of Commrs on Uniform State Laws (1930) 693.
2 For a considerable part of the information contained in this article, the writer is indebted to the Office of the Solicitor of the Veterans Administration, Washington, D. C. The following states have adopted the act: Arkansas, California, Colorado, Idaho, Kansas, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Jersey, New York, Ohio, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, Wyoming, North Dakota, Indiana, Alabama, Mississippi. The act with certain minor changes was enacted in Arizona, Iowa, Missouri, New Hampshire, North Carolina. Texas enacted eight separate acts containing the more important provisions of the Uniform Act. Pennsylvania enacted legislation making the United States Veterans' Bureau a party in interest in the guardianship of so-called "Bureau wards" and providing for the commitment of incompetent veterans to Bureau hospitals. Also, the act is now before several legislatures. Handbook, Nat. Conf. of Commrs on Uniform State Laws (1930) 591.
3 The Negotiable Instruments Act (53); the Warehouse Receipts Act (48).
4 The following is taken from a report of the Conference discussion in 1928:

"Mr. Beers: Have we had any opportunity to hear the act since we met in Committee of the Whole?"

President Miller: The act was placed on your tables last week.

Mr. Beers: I don’t mean that, but have we had an opportunity to get the ideas of other people besides ourselves? The point is that it was read through and everybody was very favorable indeed, apparently, to the substance of the act. But there were a good many changes that were enacted, and now it comes before us with no further opportunity to discuss it.

Mr. Beers: I don’t want to be the one to oppose this act, but it does seem to me that we are acting on this rather quickly, more quickly than any other act I have any recollection of. In order to test the feeling and see whether it is confined to perhaps one or two of us, or in general, I move that we go into Committee of the Whole and read the Act.

Mr. O’Connell: If there is no demand for it—simply a demand on the part of the Bar Association favoring it, I respectfully oppose it and call attention to the Conference that we now have the Firearms Act to be acted upon. The Committee is waiting impatiently. I hope the motion will be tabled.
of speedy consideration of proposed uniform acts, by a body like the National Conference, have been pointed out in the past. In the main, it is apparent, that an act, not carefully thought out or drafted, may foster the very evils which the uniform body seeks to prevent—confusion and uncertainty. On the other hand, it does not follow that speed is an indication of rashness. The rapid procedure may have been due to urgent need, or effective organization, or both. Whatever the explanation may be, it would undoubtedly hinge on the motives behind the act.

In 1924, Congress passed the "World War Veterans' Act, 1924," for the purpose of providing benefits for veterans disabled in the military service of the United States between April 6, 1917 and July 2, 1921. For the purposes of administration, section 425 established an independent bureau, known as the United States Veterans' Bureau, the director of which was to be appointed by the President. The provision involving guardians was section 450, which declared that payments to one under legal disability may be made to the guardian or other fiduciary appointed by the state court, and which gave the director authority to suspend payments to any fiduciary who should "neglect or refuse, after reasonable notice, to render an account to the Director from time to time showing the application of such payments for the benefit of such minor or incompetent beneficiary." This provision evolved as a result of a long controversy as to just how much control a federal administrative officer was to have over a guardian appointed by a state court. That some control was necessary, was quite apparent. Before the act of 1924 the War Risk Insurance Bureau had no power over any money paid to a guardian. The American Legion, American Red Cross, and Disabled American Veterans of the World War, repeatedly pointed out flagrant cases of embezzlement, misappropriation and indiscreet investment by fiduciaries. The demand soon became insistent that some sort of supervision be maintained over these estates, for the purpose of eliminating such activities. But there was a divergence of opinion as to the method to be employed.

One group thought it was a matter solely for the state courts which appointed the guardians, and any interference by a federal officer would be unconstitutional. Another group thought that the funds were of federal origin for the benefit of federal wards, and should not be depleted because of inadequacies...
of state court procedure. Between these two ideas, there was an attitude which believed that the Federal Government should supply the administrative machinery to care for the funds through the medium of the state courts. This latter view found its way into the act of 1924, the amendment of July 2, 1926, and the amendment of July 3, 1930. In order to effectively administer the powers given to the Director under those enactments, the position of Regional Attorney was created, with necessary assistants in each of the fifty-four regional offices. The program creating such offices, known as General Order No. 360, also prescribed the duties of such officials, and gave what is, perhaps, the best existing statement of the policies of the Director relative to guardianship matters. These policies are, briefly, as follows: (1) Safeguarding of interests of wards by supervision of fiduciaries in the administration of the estate; (2) Requirement of satisfactory sureties and bonds; (3) Securing of regular, periodic presentment of accounts by the fiduciaries to the court; (4) Securing of regular, periodic presentment of accounts by the fiduciaries to the Bureau, where not required under state laws; (5) Co-operation with courts in commitment of wards and appointment of guardians; (6) Securing of appointment of guardians, when authorized; (7) No action is to be taken which will deprive any ward of his rights without due process of law; (8) Aiding in discharge of guardian, if incompetent ward has regained sanity, or if minor has reached his majority.

Such being the desire and aim, the Bureau was seriously handicapped by the lack of uniformity among the various states. There was varying procedure as to appointment of guardians, different rules and regulations as to requirement of sureties and bonds, presentment of accounts, commitment of incompetents, and discharge of cured incompetents. A ward in one state would receive advantages which were unavailable to a ward in a neighboring state. The former would have his estate taxed 5 per cent. for administration, whereas the latter would be taxed 15 per cent. Although the Bureau had ample facilities, it was necessary to release a ward from a Government hospital if he so demanded, since the law of some of the states, permitted detention of the ward against his will, by state institutions only.

This was the state of affairs, when the Veterans’ Bureau proposed the Uniform Guardianship Act at the 1928 Conference of Commissioners on Uniform State Laws. Most of the commissioners were greatly impressed with the necessity for uniformity. One objected against the rapidity with which the act was being rushed through, and another found it difficult to understand how it was more convenient and advisable to adopt a uniform act, than to amend the existing guardianship statutes of a few states. The provisions of the Uniform Act itself, followed the policies of Bureau as outlined above, and are, briefly, as follows: (1) Certificate by Director as to ward’s incompetency or minority shall be prima facie evidence of the necessity of appointment of a guardian to care for Bureau funds only; (2) Various limitations as to fees; commissions,
NOTES

bonds, and number of cases in which a fiduciary may act; (3) Provisions for commitment to federal hospitals by state courts; (4) When any incompetent shall be declared competent by the Bureau and the court, the guardian shall be discharged; (5) Provisions for periodic accountings to be made by the guardian; (6) Regulation of investment of Bureau funds in hands of guardian.

The act was unanimously adopted and received the approval of the American Bar Association at its 1928 meeting. Then the National Conference supplied the Veterans' Bureau with some ten thousand copies of the approved draft of the act, and a prefatory statement showing the reasons therefor. These copies were distributed by the fifty-four regional attorneys of the Veterans' Bureau to members of the American Legion and other veterans organizations who desired legislation in behalf of the Bureau wards. The National Conference Commissioners, the regional attorneys and the American Legion and other organizations, then exerted their efforts to enact the provisions in the various states. Before the pressure that the Legion is capable of exerting, there was little opposition, and at the present time, as noted above, thirty-three states have adopted the act. On the face of the matter, there appears in the adoption of the Veterans' Guardianship Act an interesting double lobbying system working in unison for statutory uniformity. The prevalence of the lobby system in the National Conference is fairly well known and, just as in the case of state legislatures, has been both justified and condemned. Former Chief Justice Ailshie of Idaho has said:

“It is the history of all organizations, that as soon as they come to be useful and wield power and influence somebody wants to use them for the advancement of his own personal reasons. The Conference on Uniform Laws is not free from such attack, though I do not believe it has thus far been misused or led aside from the main purpose of its work; nevertheless, I have not failed to observe the presence at these Conferences of representatives of the most powerful interests in the country.”

But of course, in judging an act, the technique of adoption is never a condemnation in itself; it is only a matter of interest. Considering the Veterans' Guardianship Act as a response to a widely prevalent demand, in light of pre-existing conditions, rapid drafting and quick adoption, the issue of the constitutionality of the act comes to the fore.

A Maryland case, In re Rickell's Estate, has held the act constitutional with a four to three division in the court. The decision reversed the holding of the lower court which found the act unconstitutional on three grounds: (1) the appointment of a guardian without a judicial determination of incompetency, deprives the person of his personal liberty without due process of law; (2) the act by placing the determination of incompetency in the Director and making the court's finding of competency dependent on the Bureau's concurrence, is an

14 Ibid. § 8.
15 Ibid. § 3.
16 Ibid. § 15.
17 Ibid. § 16.
18 Ibid. §§ 9 and 10 provide for the periodic filing of accounts with the court and the Bureau, and procedure in case of failure to do this.
19 Ibid. § 12.
20 158 Md. 654, 149 Atl. 446, 150 Atl. 25 (1930).
22 Beutel, supra note 5.
23 Ailshie, supra note 5.
usurpation of judicial function; (3) the act is special legislation.\textsuperscript{25} The first ground is perhaps the most serious objection and centers around section 6 which provides that the presentment of the Director's certificate finding the veteran incompetent, shall be \textit{prima facie} evidence of the necessity of appointment of a guardian. Most states have statutes in regard to the proceedings involved in appointing a guardian for an incompetent, and under such statutes a judicial finding of mental incompetency is invariably a condition precedent to such appointment.\textsuperscript{26} Maryland, however, is one of the few states which has no statute governing its procedure, and consequently its courts follow the English practice.\textsuperscript{27}

In England, Chancery's jurisdiction over an insane person, not so found by an inquisition, has been held to extend only to the maintenance of the lunatic and the supervision of his estate, but not to the appointment of a guardian.\textsuperscript{28} The latter qualification, however, does not apply, to those cases where it is necessary to appoint a person to perform a specific act, required of or decreed to be done by the incompetent, such as conveyance of land to a purchaser or other things decreed by Equity. These situations, cited by Buswell\textsuperscript{29} as exceptions to the rule requiring a prior adjudication of insanity before appointment of a guardian, suggest a faint analogy to the procedure under the present act. The underlying idea behind the above exceptions seems to be a reluctance to start insanity proceedings where a single act has to be done, and third parties would suffer by non-action. Under the Uniform Act it is true that the guardian is appointed for the sole purpose of receiving money from the Veterans' Bureau and caring for it, but the period during which the guardian is to act is extended indefinitely; and moreover there are no third parties who will suffer by non-action. Whatever the merits of the analogy may be it was not considered by the court. Instead the majority opinion found it difficult to understand a deprivation of due process of law when the appointment of the guardian resulted in the obtainment of a benefit which he could not otherwise receive. The court states:

"... the act was probably designed chiefly to enable the unfortunate beneficiaries of the Act of Congress, who are mentally incompetent, to receive the benefits allowed without having to be adjudicated insane ... That worthy purpose should not be frustrated except for such compelling reasons as we do not find to exist."

In this connection a recent Louisiana decision, \textit{In re Carter}\textsuperscript{30} is of considerable interest. Louisiana is one of the three states which had legislation\textsuperscript{31} similar to

\textsuperscript{25} The argument that the act is special legislation does not carry much weight. For years state and national governments have been passing special provisions, in regard to war veterans, which deal with special benefits.

\textsuperscript{26} Craft v. Simon, 118 Ala. 625, 24 So. 380 (1898); Jones v. Learned, 17 Colo. App. 76, 66 Pac. 1071 (1901); Coolidge v. Allen, 82 Me. 23, 19 Atl. 89 (1889); Hamilton v. Traber, 78 Md. 26, 27 Atl. 229 (1893); Woerner, American Law of Guardianship (1897) 434.

\textsuperscript{27} Hamilton v. Traber, 78 Md. 26, 27 Atl. 229 (1893).

\textsuperscript{28} Buswell, Law of Insanity (1885) 62.

\textsuperscript{29} Ibid. "Thus where land had been sold by warrant of a decree in chancery for the payment of charges which had subsisted prior to the commencement of the estate of one of the defendants who was of unsound mind, though not so found by inquisition, the court authorized the appointment of a person to convey to the purchaser in place of the lunatic. And where a defendant, after decree entered in chancery, became impaired in mind, the court appointed a guardian for him, by whom he might do things required by the terms of the decree."

\textsuperscript{30} 165 La. 1012, 116 So. 491 (1928).

\textsuperscript{31} At the time of the drafting of the Uniform Veterans' Guardianship Act, North Dakota, Alabama and Louisiana already had statutory provisions similar to the Uniform Act. The Louisiana Act was passed in 1920.
the Uniform Act, before the drafting of the latter by the National Conference. The Louisiana Act provides, in effect, that where benefits are due to an incompetent from the Bureau, a petition could be filed *without alleging the name of the incompetent*; 32 that a certificate by the bureau alleging the necessity of the appointment of a guardian was to constitute sufficient proof to justify appointment of the guardian; 33 that the guardian could administer only benefits received from the Bureau; 34 and no other property; 35 that the appointment of a guardian under existing laws relative to guardianship, should *ipso facto* vacate appointment under this act; 36 and that the incompetent at all times has the right to revoke the appointment since no pronouncement of insanity is made. 37 Here again the lower court held the act unconstitutional on the ground that it provided for a proceeding which partakes of the nature of insanity proceedings, and since it dispensed with the necessity of citing the person for whom it was sought, it was without due process. Again the upper court reversed the decision and held the act constitutional, stating:

"If the proceeding authorized by Act 195 of 1920 contemplated the deprivation of the mentally unsound beneficiaries of the war risk insurance of any part of their compensation, there would be reasonable ground for scrutinizing the act with microscopic care, for, in that event, the due process clause of the constitution might be violated, but the intent of the legislature is so clearly expressed in the act that it admits of no doubt. Its only intent is to provide the means by which such beneficiaries may enjoy the bounty of an appreciative and grateful government for the sacrifices they made in its behalf. 38 It is special and necessary legislation, and it is effective only so long as the affliction which incapacitates those in whose interest it was passed may endure. Such a statute cannot in our opinion, be held to violate the due process clause of the federal or state Constitutions."

Carried to its logical conclusion, the effect of the *Rickell* and *Carter* cases, is a condition whereby a person is mentally incompetent to receive benefits, but competent to make valid contracts and dispose of his property. The courts when they talk of the incompetent receiving a benefit and gain, can only mean that the person still retains his privilege of entering into valid contracts and disposing of his property. Certainly, if the courts mean that a finding of incompetency by the Director has the same effect as a finding by the court, then it is too obvious for discussion that though there is a gain on one hand, there is a loss of personal liberty on the other hand, and consequently a denial of due process. But if we accept the logical conclusions of the courts' analysis, we have an anomalous and unheard of situation in the law, whereby a person is legally incompetent to the extent of requiring a guardian as to one part of his property, but quite competent as to the remainder.

In two other respects, closely in line with the above, the Uniform Act is clearly in compliance with the law. Section 7 provides that on the filing of the petition such notice shall be given to the incompetent as required by law. Most states require, in a petition for the appointment of a guardian, that notice be given to the alleged incompetent, and statutes providing otherwise have been held unconstitutional. 39 The realization of and provision for this well known

---

32 Section 4.
33 Section 2.
34 Section 6.
35 Section 7.
36 Ibid.
37 Section 4.
38 Italics the writer's.
39 Perhaps the most elaborate review of the cases on the point is contained in the case of McKinstry v. Dewey, 192 Iowa 735, 185 N. W. 565 (1921) which held that a statute
legal principal is an indication that the drafters of the Uniform Act fully realized the nature of the proceedings involved, and the constitutional limitations thereon. If so, then it may well be asked why the act should partake of the nature of incompetency proceedings insofar as notice to the alleged *non compos mentis* is concerned, but be considered something altogether different in respect to adjudication of incompetency. Another provision is equally in accord with well-settled law. Section 15 provides that in cases where the incompetent is to be committed to a Bureau Hospital, "notice of such pending proceedings shall be furnished the person to be committed and his right to appear and defend shall not be denied." In light of this latter provision, the denial of adjudication of incompetency, in section 6 is glaringly obvious. Nor is it clear from the wording of the act that the incompetent may rebut the Director's finding of insanity. Section 6 provides that the Director's certificate stating the finding of incompetency shall be *prima facie* evidence of the necessity of appointment. As pointed out by the lower court in the *Rickell* case, this is not the same as *prima facie* evidence of incompetency. From the wording of § 6, a reasonable inference is that the finding of incompetency is conclusive, since only the necessity of appointment is rebuttable. On the other hand, it might be reasonably inferred that the court may find no necessity for appointment, if it fails to find as a fact the *prima facie* case of incompetency made by the Director's certificate. This was, in effect, the interpretation of § 6 made by the upper court, and if it was justified then it is in accord with the majority rules of procedure and evidence. The merit of such liberal interpretation will be discussed later.

Another difficulty the statute may meet, is its failure to provide for a trial by jury. There is a split of opinion as to whether a jury trial in a lunacy proceeding is a matter of right. Some courts say that it is not, except when made so by statute or constitutional provision. The courts of a few states, notably permitting the appointment of a temporary guardian on the mere presentation of the petition was unconstitutional. See also, Hackman, *Personal Notice in Insanity Guardianship* (1925) 18 LAWYER AND BANKER 293. In the McKinstry case, at 509, the court said: "The basic guaranty of our fundamental law is that no man shall be deprived of life, liberty, or property without due process of law. This is the very genius of our institutions. It has come down to us from the days of the Magna Charta. It is among our choice heritages. It should not be lightly cast aside, even under a claim of necessity. If such proceeding can be had without any notice, the door is opened wide for the machinations of the designing or malicious. Under such a rule, no citizen can rest in security of either person or property, for utterly unknown to him and without opportunity to be heard, he may suddenly discover that he has been placed under guardianship as an incompetent, and his property turned over to a conservator. Such rule is repulsive to our American ideals of justice, and antagonistic to the fundamental rights guaranteed to the individual citizen. It would contravene those essential principles which a liberty-loving and law-respecting people cherish and hold most sacred."

"The fifth essential of commitment is that it be not determined upon an *ex parte* hearing, or before parties or agencies having arbitrary powers. First, the hearing must be before some court or tribunal judicial in form, or under the supervision of the judiciary. It must be by due process of law, and in this connection it has been held that statutes attempting to delegate this power to agencies not charged with the exercise of judicial powers will be void. For example, the statute may not delegate such powers to a clerk of the court. *In re Kane's Estate* 12 Mont. 197, 29 Pac. 424 (1892), or to a committee of physicians. *In re Lambert*, 134 Cal. 626, 66 Pac. 851 (1901)." SMOOT, *Law of Insanity* (1929) 85.

"Most courts which have been confronted with a statute authorizing the court to appoint experts, and accept their testimony, have held such statutes valid. There is no doubt that if the finding of the expert or commission is final, then the statute is unconstitutional. State v. Lange, 168 La. 958, 123 So. 639 (1929). For a discussion of this point see, Overholser, *The Massachusetts Statute for Ascertaining the Mental Condition of Persons Coming Before the Courts of the Commonwealth* (1931) 16 MASS. L. Q. 26.

*Ex parte* Dagley, 35 Okl. 180, 128 Pac. 699 (1912); *In re* Brown, 39 Wash. 160, 81 Pac. 522 (1905).

*State ex rel.* Kiel v. Baird, 47 Mo. 301 (1871); *State ex rel.* Blaisdell v. Billings, 55 Minn. 467, 57 N. W. 206 (1893).
New York and Texas, hold that it is a matter of right. Some cases hold that it depends on the status of the common law at the time jury trials were given as a matter of right by the constitution. From the foregoing, then, it would seem that in some states, at least, constitutional difficulties may be encountered on this ground. In fact, one of the committee members responsible for the drafting of the act has expressed himself as favoring an amendment of the act "so as to allow the alleged incompetent to demand a jury trial as to his incompetency.”

The practical side of the argument is that the Director of the Bureau, unable to pay any benefits to a veteran whom the Bureau has rated as incompetent, is confronted with the impasse of incompetent veterans who are unwilling to submit to the notoriety of insanity proceedings. And the act, so the argument goes, circumvents this by dispensing with formal procedure previous to adjudication except if demanded by the incompetent, and at the same time permits a regular adjudication by the court. The validity of this argument, of course, depends upon the correctness of the former inference drawn from § 6, and if such inference is untenable, then a temporary benefit is no reason for permitting a statute to violate constitutional safeguards.

If § 6 is interpreted as a conclusive finding of incompetency by the Director then it not only involves a deprivation of due process but also reveals an usurpation of judicial function. In this connection section 16 is the greater offender. It provides for the discharge of the guardian upon a finding of competency by the Bureau and the court. This provision, since it renders an effective decree of competency by the court dependent upon the concurrence of the Bureau, is objected to as an encroachment upon the judiciary.

The growth of administrative and quasi-judicial bodies and its effect on the three-fold division of powers has been the subject of a great deal of recent discussion. Encroachment on the judiciary by the legislature has involved cases from the power to punish for contempt, to the selection of court house employees. In the leading case of State v. Noble, it was decided that the legislature could not appoint assistants of the Supreme Court, to aid the judges in their duties. The basis of the decision was the dependency of the judiciary on the legislature, since it could not select its own assistants and control them. If we accept the interpretation of the lower court in the Rickell case, that § 16 makes the decree of the court dependent on the concurrence of the Bureau, then an obvious distinction between this and the Noble case is that the statute in the latter created a body which was to assist the court in all matters, whereas the Guardianship Act requires the concurrence of the Bureau only in the case of an adjudication of sanity. But whether it be in one particular case or in all cases, the problem is basically the same, and a difference in degree, though it be extreme, is insufficient to justify a different conclusion in this case.

---

45 White v. White, supra note 44; Gaston v. Babcock, 6 Wis. 503 (1859); Ex parte Dagley, supra note 42.
46 HANDBOOK, NAT. CONF. OF COMM’RS ON UNIFORM STATE LAWS (1930) 595.
47 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 183.
49 Langenberg v. Decker, 131 Ind. 471, 31 N. E. 190 (1892).
50 Board of Comm’rs v. Stout et al., 136 Ind. 53, 35 N. E. 683 (1893).
51 118 Ind. 350, 31 N. E. 244 (1889).
52 People ex rel. Morgan v. Hayne, 83 Colo. 111, 23 Pac. 1 (1890) (Statute held constitutional which permitted the Supreme Court to select its own assistants).
The majority opinion in the *Rickell* case upheld the constitutionality of § 16 on the ground that the intent of the legislature was to permit the court to avail itself of the Bureau's information, and not to make the adjudication of the former dependent on the latter. Thus, the method of liberal interpretation used to circumvent the constitutional objections to § 6, was applied to § 16; and curiously enough, exactly the same technique has been employed in a somewhat analogous case. In *State v. Yegen*, a statute of Montana after providing for appointment of a receiver by the court provided as follows:

"Receivers of insolvent banks . . . shall conduct said bank . . . under supervision of the state examiner and the state examiner shall take such steps with reference to said bank as he shall think advisable, either to close up the affairs of said bank in accordance with law, or to place said bank in a solvent condition."

Under this statute it was held that the legislature could not have intended to grant the power of sale to the examiner in contradiction to the court's order, since this would be unconstitutional as an encroachment, and therefore the statute would be interpreted as meaning that the court could avail itself of the examiner's knowledge of facts and conditions. If such wide construction of the statute is justified by the end to be attained in the *Yegen* case, then *a fortiori* it must be sound in the *Rickell* case. The former explicitly states that the examiner "shall take such steps with reference to said bank as he shall think advisable," whereas the greater ambiguity of the latter justifies, to a further extent, a liberal interpretation.

On the other hand, Virginia when it adopted the *Uniform Veterans' Guardianship Act*, changed the provisions of § 16, so as to remove the objections noted above. This suggests a ready solution as to those states which are contemplating the approval of the act. But as for those thirty-three states which have already adopted it, the problem is more difficult. Assuming that it is highly desirable to achieve the purposes of the act as noted above, then in any case where the constitutionality of §§ 6 and 16 is questioned, the loose construction employed by the Maryland court may be followed; or the act may be amended. When the nature of the latter remedy is considered the efficacy of the former increases. A recent discussion points out the difficulty and disadvantage of solving problems under the *Negotiable Instruments Law* by way of amendments.

Of course, the two cases are somewhat different. There are no constitutional law features involved in the amendments to the N. I. L., and there is no such organization behind the N. I. L. as could be summoned in support of

---

5329 Mont. 184, 255 Pac. 744 (1917).
6 State v. Wildes, 34 Nev. 94, 116 Pac. 595 (1911).
6 Supra note 9, at 748. "It frequently happens that the state examiner is in charge of a bank when a receiver is appointed. It would seem that to the legislative mind it appeared advantageous to supply the aid of the state examiner, already somewhat conversant with the bank's affairs, to the court and its receiver. It is presumed that the state examiner, familiar with banking conditions in the state, and supposedly familiar with the condition of the particular bank is in an advantageous position to render assistance. That portion of section . . . must be held to relate merely to matters of administrative detail in the conduct of the receivership. It cannot relate to those matters which require judicial action nor can it be held to interfere in any way with the directions of the court given to the receiver. Any other interpretation of the statute would lead to absurd results and would impinge upon the provision of the Constitution above noted."
60 Handboook, Nat. Conf. of Commrs on Uniform State Laws (1930) 596.
61 Beutel, supra note 22, 377.
the Guardianship Act. Nevertheless, the fundamental difficulties of delay and complication are present in both cases, and in view of the fact that the meaning of a statute is moulded by judicial interpretation, it seems best in a doubtful case, like the present, to adopt the method of the Rickell and Yeegen cases.

S. C.

ATTEMPTS TO COMBAT THE HABITUAL CRIMINAL.—Although there have always been habitual criminals, the problem of dealing with this class has acquired an additional importance since bootlegging and racketeering have made crime a profitable "business". Naturally, legislatures and courts have been influenced by these facts and it is interesting to see to what extent their efforts to meet the present situation have resulted or are likely to result in changes in the law.

Most of the legislation aimed at this class has been of the type represented by the Baumes Law in New York, which provides an additional penalty of imprisonment upon the second conviction for a felony, and makes life imprisonment mandatory upon the fourth conviction for a felony, this sentence being impossible after conviction for the fourth felony, by a re-sentencing proceeding. This statute has been copied more or less closely by at least eight other states, and a number of other statutes similar in principle have since been passed by other states, so that, together with the states already having habitual criminal statutes, almost half the states of the Union have statutes punishing habitual offenders with an additional penalty, and probably every other state in the country, has one or more statutes increasing the penalty for repetition of the same offense.


5 Such as: W. Va. Code (1931) c. 61, art. 7 § 1 (increased penalty for second conviction for carrying dangerous weapon); ibid. c. 61, art. I § 7 (successive convictions for anarchistic speeches or displaying red flag); ibid. c. 60, art. 1, § 4 (successive violations of the prohibition law); Neb. Laws 1927, c. 74 (second offense of stealing poultry); R. I. Laws 1927, c. 122, § 12 (second offense of selling drugs); Ohio Gen. Code Ann. (Throckmorton, 1930), §§ 4130, 4131 (successive misdemeanors); Pa. Laws 1929, P. L. 995, § 615 (revocation of driver's license for three offenses within one year); Iowa Code (1927) § 13026 (common thief). In general, see Note (1890) 34 L. R. A. 398.
a few cases one penalty for the habitual criminal is made sterilization, and, by a Federal act, where the criminal is an alien, deportation is made the penalty.

It can hardly be said that these statutes develop any new principle. Statutes increasing the penalty for second offenses are as old as the statutes limiting the death penalty; the Baumes Law itself follows closely the wording of the Massachusetts Habitual Criminals Act of 1817, from which time to the present, the principle of increased punishment for second offenses has been in constant application. It would seem strange then if the application of so old a principle were going to solve the present problem when it had not already done so, particularly where, as in New York, the new law was such a slight change from the existing statute on the subject. Indeed, the Baumes Law and other fourth offender statutes fly in the face of past experience. It is well known that the extreme severity of the English criminal law before 1827 not only did not deter crime, but increased acquittals. Something of the same reaction has met the Baumes Laws. When first put into effect in New York, there was considerable opposition to the law on the part of the lower courts. In Pennsylvania, where the fourth offender statute is not mandatory on the judge, the statute has never been applied. In Michigan, it was found necessary to amend the original act, because of the storm of protest when the grandmother of several children was sentenced to life imprisonment on her fourth conviction for illegally selling in-

---

6 Wash. Laws 1921, c. 53, § 10, provides for the sterilization of criminals who have committed three felonies; Del. Laws (1929) c. 246, provides for sterilization of such criminals, where it can also be shown they were led to commit crimes because of mental abnormality. This provision was probably added because sterilization of the insane has been held constitutional—Buck v. Bell, 143 Va. 310, 130 S. E. 516 (1925), commented on (1926) 26 Col. L. Rev. 356; Note (1926) Va. L. Rev. 419—whereas sterilization of criminals has been held a cruel and unusual punishment, Davis v. Berry, 216 Fed. 473 (S. D. Ia. 1914).


8 The Act of April 22, 1794, 3 Sm. Laws (Pa.), c. 1766, which created the crime of second degree murder and abolished the death penalty for all offenses except first degree murder, provided in § 13 that a second conviction of second degree murder should be punished with life imprisonment. Likewise, 7 & 8 Geo. IV, c. 28 (1827) by which the English Parliament abolished the death penalty for all crimes in which benefit of the clergy had been allowed, provided additional imprisonment for not more than four years, or transportation for not less than seven years, for second offenders (§ 11).

9 Mass. Laws 1818, c. 176, § 5 (where a person is again convicted of a crime punishable by hard labor, in addition to the penalty for the crime, he shall have 30 days solitary confinement and seven years added to penalty; for the third offense, he shall have the same term of solitary confinement, and shall be imprisoned for life) and § 6 (where the previous convictions are discovered after sentence has been passed for the latest, the convict shall be brought out for a trial and resentencing under the provisions of the act).

10 For other such laws, see The Case of Samuel H. Hopkins (1842) 5 Law Reporter 97, which describes a case under the Massachusetts Habitual Criminal Act in force at that time, and where it is said eight other states had similar statutes at that time; the English Habitual Criminals Act, 32 & 33 Vict., c. 99, pt. III (1869); Mass. Laws 1887, c. 435.

11 The sections amended were 1941, 1942, and 1943 of the Penal Law. In § 1941 regarding second offenses, the word "crime" was changed to "felony." Sec. 1942 formerly merely authorized life imprisonment on the fourth offense; by the Baumes amendment life imprisonment is made mandatory and the prisoner is not eligible to parole.

12 As to this, see Schumaker, Life Imprisonment for Habitual Offenders (1927) 31 Law Notes 105. A proposed amendment to the Baumes Law is discussed in Note (1930) 4 St. John's L. Rev. 325.

13 A list of convicts deserving to be sentenced under the act is being prepared; Philadelphia Evening Public Ledger, Jan. 15, 1932.
toxicating liquor, a felony in that state. This is a factor legislatures should take into account.

No one will doubt, however, but that certain criminals are so dangerous to society that they should be imprisoned or otherwise disposed of, as a quarantine measure if nothing more—we do the same to the insane without hesitation. The one difference is that we take adequate means to find out who are insane, whereas the Baumes Laws make no adequate provision for selecting habitual criminals from other criminals. As felonies and misdemeanors are now classed, the fact that a man has four times committed a felony tells us nothing about his character or inclination to do harm; even were a reclassification made to this end, it would scarcely be possible to provide a just standard for all cases. On the other hand there are some crimes so serious and some individuals so obviously dangerous to society, that it should not require four convictions to tell us that the man should be disposed of. If we are to do justice, and make the penalty fit the criminal as the Baumes Law make a "stab" at doing, some more flexible system must be developed, and unless such a flexible system is developed, a growing opposition to such a law may be expected on the part of juries. Apparently the solution to the present problem does not lie in this sort of legislation.

There is a small but increasing amount of legislation, aimed at the professional criminal, which is based on an analysis of modern crime. It requires no statistics to tell us that the "tools of trade" of the modern criminal are the firearm and the stolen automobile. Such books as The Reign of Rothstein or the Biography of Al Capone, while not purporting to be authoritative and probably needing to be taken "cum grano salis" show more clearly than statistics just why these two things are useful to the criminal, and just how hard it is to prove the guilt of the modern criminal. To meet this situation a Uniform Firearms Act, recently adopted in Pennsylvania has been drawn up, aimed at controlling the sale of firearms so as to prevent the criminal from getting them. Further, other statutes make it a criminal offense to obliterate the serial number of an automobile or a firearm—favorite methods among criminals of covering up their traces. To prevent the "borrowing" of automobiles to effect a crime, New York has declared it a larceny to use an automobile without the owner's consent, whether or not it would be a larceny according to other laws of larceny. In a number of these instances the proof of the crime is facilitated by statutory presumptions, such as that the possession of an unlicensed firearm in a trial for attempt to commit a crime of violence, shall be prima facie evidence of the requi-

---

24 See editorial on this incident, (1929) 22 Law & Bank. 2. For the original Michigan Baumes Law and its amendment, see supra note 4.

25 A Canadian writer has pointed out that the Baumes Law fails to take into consideration the natural reluctance of any individual to deliver a fellow human being over to justice portrayed by Galsworthy in his short play Escape. McCuaig, Modern Tendencies in Habitual Criminal Legislation (1929) 15 Corn. L. Q. 62.

26 Thus a number of the later imitations of the Baumes Law such as the Ohio fourth offender statute, supra note 4, enumerate the crimes for which life imprisonment shall be given on the fourth offense.

27 This is certainly what the re-sentencing provision (§ 1943) amounts to.

28 "The United States Census Bureau reports 73 per cent. of the homicides committed by firearms. Many of these crimes would not have been committed if the perpetrator had not possessed this weapon. How many no one can tell. Yet pistols are about as easy to get as any other form of hardware. They should be as difficult to get as opium." (1925) 50 A. B. A. Rep. 665.


30 R. I. Laws 1928, c. 1194; Pa. Laws 1929, P. L. 905, art. iii, § 301.


site intent. Probably the most interesting example of this sort of legislation is an Indiana statute which declares that possession of burglary tools with the intent to commit a burglary shall be a felony for one who has already been previously convicted of a burglary, and further provides that possession of the tools is *prima facie* evidence of the intent to commit a burglary.

These statutes are not as novel as it might at first seem. The same idea that "where there is smoke there must be fire" is the reason why vagrancy has been a crime for centuries. There is nothing harmful to the public in living without apparent means of support, the possession of an unlicensed firearm with obliterated serial number is not harmful to the public; but at least nine out of ten persons possessing such firearms have criminal inclinations, and as one court has said, "the tramp is the chrysalis of every species of criminal". It is therefore highly advantageous to the state, under conditions as they are today, when we have not yet been able to fasten a greater crime on many gangsters than evasion of the income tax laws, to create a new crime to catch such persons who it is substantially certain are criminals, but as the law now stands cannot be convicted of any crime. It is probably the best way of seeing that crime does not go unpunished, and if we take care that our diagnosis of the symptoms of crime is sufficiently accurate, there is no danger from this sort of legislation; properly applied it should go a long way toward anticipating the commission of crimes.

It has always been a principle of the common law that the accused should be given every protection against a possible miscarriage of justice. Indictment by grand jury, the presumption of innocence, the right of confrontation, the rule that the character of the accused should not be attacked unless he tried to prove his good reputation—all were directed toward this end. In spite of this long tradition, the courts no longer seem to show quite the same concern in protecting the accused from possible prejudice.

This change is particularly interesting in Pennsylvania, where the accused is also protected by the Act of 1887 which provides that the district attorney cannot comment on the failure of the accused to testify in his own behalf and by the Act of 1911 which provides that the accused may not be cross-examined as to previous offenses. While this act was passed to prevent the application of the rule that the prisoner on the witness stand is a witness for all purposes (and

---

23 Pa. Laws, Act of June 11, 1931, no. 158, § 3; R. I. Laws 1927, c. 1052, § 2 (an available machine gun is also made *prima facie* evidence of the intent by this section of the R. I. statute); N. J. Laws, 1927, c. 321, § 3.

24 Ind. Laws 1927, c. 49.

25 Vagrancy was a crime as early as Wheelhorse's Case, Pop. 208, 79 Eng. Rep. 1297 (1627).

26 *Ex parte* Brand, 234 Mo. 466, 471, 137 S. W. 886, 887 (1911).


29 Pa. Laws 1911, 20; similar is Iowa Code (1927) § 13892.
NOTES

may be cross-examined as to other offenses with a view to impeaching his credibility) particularly as exemplified in Commonwealth v. Racco\textsuperscript{30} and other cases about that time, the courts persist in applying the rule since the passage of the statute.\textsuperscript{31} Also despite this statute, since the Act of 1925 directs the jury to consider previous convictions in fixing the prisoner's sentence,\textsuperscript{32} the district attorney has been allowed to prove other crimes during the course of the trial—to be considered, of course, by the jury only with a view to fixing the sentence.\textsuperscript{33} By these cases, evidence of prior convictions of any sort can be brought up in any criminal proceeding. In other states there would seem to be a similar tendency\textsuperscript{34} to allow evidence of previous convictions to get in with the crime charged, under the aegis of some existing rule of evidence,\textsuperscript{35} or because the habitual criminal statute requires the prior convictions to be alleged in the indictment.\textsuperscript{36} The courts do not, certainly, show that meticulous regard for the safety of the accused which they exhibited at an early time, apparently feeling that it is a justifiable discrimination against the habitual offender. While as a practical matter of securing convictions, where the prisoner appears to be dangerous to society, such a practice may be justifiable, if a trial is to be considered merely a carefully conducted inquest into the truth of the facts alleged in the indictment no justification for the practice can be found.

Beyond this one trend there are a few miscellaneous ways in which the courts have tried to cope with the habitual criminal. First among these is the attempt made by the Chicago and St. Louis courts to convict “public enemies” under the vagrancy statutes.\textsuperscript{37} In Chicago, at least, most of these trials resulted in a verdict of not guilty.\textsuperscript{38} There seems to be no reason, however, why this method of temporarily eliminating the habitual criminal should not be practicable.\textsuperscript{39} Other instances of the court's power to deal with habitual criminals may be grouped as discrimination by use of the court's discretion. Thus the

\textsuperscript{29} See on the general subject of the prisoner's other offenses, Note (1931) 29 Mich. L. Rev. 473; and Evidence of a Prisoner's Other Offenses (1930) 94 Justice of the Peace 267, 282.

\textsuperscript{30} Such as that allowing evidence of other offenses or similar acts as showing knowledge, design or intent; see 1 Wigmore, Evidence (2d ed. 1923) c. xii.

\textsuperscript{31} For example, see Brown v. Commonwealth, 22 Ky. L. Rep. 1582, 61 S. W. 4 (1901) and Annotation to Ky. Stat. (Carroll, 1922) § 1130; or (1927) 11 Minn. L. Rev. 561.

\textsuperscript{32} See Note (1931) 16 St. Louis L. Rev. 148.

\textsuperscript{33} The Illinois statute, Ill. Rev. Stat. (Cahill, 1929) c. 38, § 606, is probably not so well worded to catch as some other vagrancy statutes.

\textsuperscript{34} People v. Ryan, 140 N. Y. Misc. 850 (1931) shows that the New York vagrancy law is not a dead letter. The vagrancy statutes are still used in England; see (1931) 171 Law Times 327.

\textsuperscript{29} See Note (1930) 34 Dick. L. Rev. 175. The rule applied is the accepted rule in other states, Cauthon v. State, 24 S. W. (2d) 435 (Tex. 1930); 1 Wigmore, Evidence (2d ed. 1923) §§ 61, 2 id. §§ 890-892. The astonishing thing is that the Act of 1911 was passed because of the application of this same rule in Commonwealth v. Racco, supra note 30, and certain other cases about that time. Iowa is equally inconsistent, for Iowa Code (1927) § 11270 provides that the prisoner may be interrogated as to previous convictions for a felony, in spite of the provision in § 1382 which is similar to the Act of 1911; see State v. Friend, 210 Iowa 980, 230 N. W. 425 (1930).

\textsuperscript{30} Pa. Laws 1925, P. L. 759.

\textsuperscript{30} Commonwealth v. Flood, 302 Pa. 190, 153 Atl. 152 (1930); “The Act of 1925 was not passed to help habitual criminals, and we take judicial knowledge of the fact that offenders of that designation have become so general that the law, not only lex scripta but non scripta, must advance to protect society against them”—Von Moschzisker, C. J., in Commonwealth v. Parker, 294 Pa. 144, 154, 143 Atl. 904, 907 (1928). See on this point, Note (1931) 33 Dick. L. Rev. 235.

\textsuperscript{30} Pa. 113, 73 Atl. 1067 (1900).

\textsuperscript{30} Commonwealth v. Doe, 79 Pa. Super. 162 (1922); Commonwealth v. Vis, 81 Pa. Super. 384 (1923); see Note (1930) 34 Dick. L. Rev. 175. The rule applied is the accepted rule in other states, Cauthon v. State, 24 S. W. (2d) 435 (Tex. 1930); 1 Wigmore, Evidence (2d ed. 1923) §§ 61, 2 id. §§ 890-892. The astonishing thing is that the Act of 1911 was passed because of the application of this same rule in Commonwealth v. Racco, supra note 30, and certain other cases about that time. Iowa is equally inconsistent, for Iowa Code (1927) § 11270 provides that the prisoner may be interrogated as to previous convictions for a felony, in spite of the provision in § 1382 which is similar to the Act of 1911; see State v. Friend, 210 Iowa 980, 230 N. W. 425 (1930).
judge can fix a high bail, or can give the maximum sentence, when the prisoner before him has a previous criminal record. When a man already has a criminal record, he will almost never be given a suspended sentence, as is practically the rule with some judges when the man is a first offender. The use of the suspended sentence and deferred sentence, whereby the prisoner is not punished unless he is again found guilty of an offense, are methods of sifting out the dangerous offender from the mere casual offender, who is no particular menace to society. These practices, for they are by no means rules, depending, as they do, on the individual judge, are of course entirely legitimate, and go far towards making the law flexible enough to deal with the habitual criminal. However the solution of the problem does not lie with the courts. As the law now stands any attempt on their part to develop the law to meet present conditions would only create confusion. No half-way measures can solve the problem, a more fundamental change is necessary.

The passage of legislation aimed at the habitual criminal involves a recognition of the principle, that as a protection to society if nothing more, punishment must be made to fit the dangerous criminal. It is impossible to fit the punishment to the dangerous criminal, without first isolating him. This is an essential problem for the solution of which these statutes fail to make adequate provision. Such isolation can only be achieved by a flexible system—statutory definition will either catch many who are not dangerous criminals or will miss many who are. The determination of whether the prisoner is dangerous might be left to the court or jury, but neither is likely to be able to make a fair or adequate judgment during the trial. However, the authorities in charge of probation and parole seem to be highly successful in judging criminals and in keeping them under control.

The power of the judiciary in fixing bail has its limitations. Most states have provisions in their constitutions providing that bail shall not be excessive, and in all states except two bail is a matter of right—see as to these statements, Note (1931) 41 Yale L. J. 293, which deals comprehensively with the subject of bail. Illinois has no provision that bail shall not be excessive, but bail is a matter of right in Illinois, so that excessive bail will not be sustained. People ex rel. Sammons v. Snow, 340 Ill. 454, 173 N. E. 8 (1930). Sammons was one of the “public enemies” indicted by Chicago in 1930; see Note (1931) 16 St. Louis L. Rev. 148, beginning at 159, on this case and the subject of the judiciary's power over bail. Some states have directed the courts by statute to take the character of the prisoner into account in fixing bail. By Mass. Laws 1926, c. 320, § 1, the Massachusetts courts are directed to examine the prisoner's previous record before fixing bail; N. Y. Laws 1926, c. 419, regulates the amount of bail to be given in various cases, forbidding it for certain offenders.

By Mass. Laws 1926, c. 320, § 4, the Massachusetts courts are directed to get all available information as to the prisoner from the probation officer before disposing of any case.

"To me there are always two questions struggling for supremacy in any sentence: one, the duty of the Judge to the individual, the duty that will help restore the individual to right citizenship, and, another, the duty to impose a sentence that will protect society and deter others from committing crime. The first consideration receives the greater attention, so that where the crime is not too serious and the accused is a first offender, he almost always gets a chance to make good"—from an address by Judge Stickel of Newark, Suggested Crime Remedies (1926) 49 N. J. L. J. 221, at 223.


For some other instances see Note (1931) 16 St. Louis L. Rev. 148.

Statistics of the Supervisor of Parole for District One in Pennsylvania (which includes Philadelphia) show that from November 1930 (when the system was established) to May 1931, out of 513 parolees there were only 18 commitments for new offenses. Monthly statistics subsequently are: July—parolees, 591; new convictions, 2; August—parolees, 659;
It would therefore seem wise to enlarge the limited powers these authorities have under the indeterminate sentence—in determining whether the prisoner shall serve the maximum or minimum term—so as to allow them to decide whether or not the prisoner shall be sentenced at all, making their decisions subject to review by the court, as are the decisions of a master, or those of the authorities in charge of the insane. Such a change would seem to be the only way to secure a fair and flexible system. It would seem in part to compel and in part to suggest, certain other changes in the criminal law, all of which should aid in the enforcement of the law.

In determining whether they shall or shall not release a man from prison before the end of his maximum sentence, the parole authorities do not consider the question of his guilt, except in so far as it goes to show how likely he is to be a dangerous man to have at large. It seems that sentiment today is making it logical that this attitude should control all punishment. We no longer identify the common law with the law of God as colonial lawyers and judges did, so we feel no divine duty to see that the guilty are punished. On the contrary we have more difficulty in justifying and explaining punishment. Most people are unwilling to take it upon themselves to sentence another—vide the difficulty of selecting a panel of jurors who believe in capital punishment, the practice of judges in suspending or deferring sentence for first offenders, the fact that Baumes justifies life imprisonment for fourth offenders on the grounds of protection to society, rather than punishment to the criminal.

Everything points to making punishment as severe as is necessary to protect society, but no more severe: imprison the dangerous criminal for life, but let the guilty man go free, if he is not likely to prove dangerous—imprisonment is too expensive and too likely to harden a man, to be resorted to where unnecessary. Leniency in the case of what may be called the “accidental offender” is as much a protection to society as is severity in the case of the habitual offender, and the consistent and continual application of such a system of punishment should be the most effective way of eliminating the more dangerous elements from society.

Under such a system the sentencing authorities would assume jurisdiction, as it were, only after the criminal had been definitely convicted by the court, but

new convictions, 4; September—parolees, 764; new convictions, 11; October—parolees, 771; new convictions, 7. The Quarter Sessions Courts of Philadelphia placed on probation or parole 1,795 offenders for the year November 1928 to November 1929; 49 of these persons were convicted of second offenses. In Media for the same year, 569 were placed on probation and 9 were reconvicted. While it is admitted that these figures are more favorable than the actual facts, as every offense committed is not necessarily known, it is estimated that at the most not more than 15% of those probationed or paroled commit subsequent offenses. This is not an alarming proportion in view of the fact that this percentage would include violation of the prohibition laws. Another fact to bear in mind, is that it costs $355.87 to keep a man in the penitentiary for one year, whereas it should not cost more than $30.00 to $35.00 to keep the same man on probation or parole. (In Philadelphia it actually costs only $4.50 a year per person on probation or parole, as the force is insufficiently manned). See the Biennial Report of the Probation Department of the Quarter Sessions Courts of Philadelphia (1929).

For example as to their present powers see Cal. Laws 1929, c. 872. A very slight change in the wording of the statute would give the parole authorities the suggested power. A contributed article, The Indeterminate Sentence (1930) 34 Law Notes 102, suggests this sort of a solution.

See Warren, History of the American Bar (1911) passim in the first part of the book where he is describing the beginnings of the law in the various colonies.

Mr. Justice Holmes, in Chapter II of The Common Law (1881) where he is discussing the criminal law, seems to have some difficulty in finding an adequate explanation and justification for punishment.

Supra, note 42.

Baumes, op. cit. supra note 2, at 521.
as the question of the defendant's guilt would not be the most important consideration in determining his sentence, and as, in most cases, such a system should result in lighter sentences, the need for protecting the criminal from a possible miscarriage of justice would be slighter even than it is today, and should make it possible to speed up trials so as to test the theory that the greatest deterrent to crime is not a severe punishment, but speedy and inevitable punishment.

P. M.

Coverage of Contractors' Bonds—Statutory enactments which require the contractor who enters into a contract for the building or erection of a public improvement to give a bond for the protection of the public body, and further conditioned for the protection of those furnishing labor and materials are quite common and seem to have been adopted in some form or other in practically every state.

Since it is generally held that a mechanics' lien is not allowed against a public improvement unless the statute creating the lien expressly so provides, the one who supplies materials or labor has no security for the payment of his claim. Hence to assure the state of receiving a good quality of materials such bonds are required from contractors, conditioned to effectuate this result.

The right of laborers and materialmen to sue directly on the bond given, or to sue in the name of the obligee of the bond, and the form of action to be brought, are controversial points but these questions are beyond the scope of this note. Further the question as to whether such materials must be supplied directly to the contractor or whether they enter into the construction by order of a subcontractor will not be considered, as the weight of judicial opinion seems to be that it is immaterial at whose behest the materials were furnished or supplied, the reason being, that these bonds were given and furnished for the protection of those whose materials have entered into the construction of the project at hand.

The statutes may be divided roughly into about four classes with respect to the mode of conditioning the bond.

---

3 "At the present time in this country there is more danger that criminals will escape justice than that they will be subject to tyranny"—Holmes, J., dissenting in Kepner v. United States, 195 U. S. 100, 134, 24 Sup. Ct. 727, 766 (1904). It hardly seems that it will ever be possible to reduce crime to any material extent until something further is done to assimilate or reduce our foreign born population and the prohibition law problem is settled. The average immigrant can scarcely hope to compete successfully in American business, and he does not have any great reason to be loyal to our government—his greatest opportunity to acquire wealth lies in the way of bootlegging or racketeering. Greed is the great incentive to crime [75% of all crimes are crimes of greed, see A. G. F. Griffiths, Crime, Encyclopedia Britannica (13th ed. 1926)] and it is apparent that prohibition has made law breaking highly profitable. Quid non mortalia pectora cogis, sacra auri fames?

---

2 In re Schilling, 251 Fed. 966 (D. N. Y. 1918) (construing the law of Ohio); Young v. Falmouth, 183 Mass. 80, 66 N. E. 419 (1903); Emory v. Comm. of Laurel, 19 Del. 67, 55 Atl. 1118 (1903); Storey v. Nampa etc. Irr. Dist., 32 Idaho 713, 187 Pac. 946 (1920); Foster v. Fowler, 60 Pa. 27 (1858).


4 For discussion and citations see Donnelly, The Law of Public Contracts (1922) § 336; Cushman, New Pennsylvania Bond Laws (1932) 36 Dick. L. Rev. 69.

(1) Those which require that the bond be conditioned for the payment of claims arising out of "materials furnished" or "supplied", in the "prosecution" or "carrying on" or "execution of the work" etc.,

(2) those which adopt the same form as class one except that the words "in connection with", or "in and about" or "in or about", are substituted for the words "prosecution" etc.,

(3) those which include "supplies" in addition to "labor and materials",

(4) those which specifically enumerate other articles.

Without the influence of a judicial interpretation, it would seem that the words "prosecution", "execution", etc., would not be susceptible to as broad a meaning as the term "in connection with" or "in or about". *Per contra* the extent of "supplies" is so vast, that it could not be defined so as to categorically limit that which should be included thereunder, but would have to be decided on the respective equities present in the case. As a whole it would seem to have a broader connotation *per se*, than either of the other two previous classes in the aggregate.

Though patently the meaning of the words "in connection with" or "in or about" seem broader than the mere words "prosecution", "execution", etc., yet in the construction of the construction of these statutes in some few states there has taken place a recrudescence of the rules of construction applied to mechanics' lien statutes, and as a result the paradox is presented of the words "in and about" being construed as to restrict liability to claims for material entering into and becoming a component part of the work, whereas the apparently narrower words "prosecution" etc. have received a much broader construction, and not so confined.


6S. Dak. Laws (1925) c. 187 (bridges only); Stat. Wis. (1929) 289.16 (Sub. 1), 289.53. The bond given is oftentimes worded "in and about" etc. when not so required by statute. This being a voluntary contract between the surety and the obligor and the obligee the coverage is thus extended beyond the requirements of the statute.


Arkansas allows a lien against the public work but requires a contractor's bond, but the rules of construction applied to Ark. Dig. Stat. (Crawford & Moses, 1921) §6913 were the ordinary mechanics' lien rules of construction. It is interesting to note that in Ark. Dig. Stat. (Crawford & Moses, 1921) §6913 a most extensive coverage was included under contractors' bonds in order to lessen the rigor of the strict rules of construction.

Neither Pennsylvania nor Vermont expressly purport to adopt the mechanics' lien rules of construction but actually that is what is done. Wis. Stat. (1929) 289.53 gives lien on the money due contractors, and the apparently broad statute supra note 6 is construed according to mechanics' lien construction.


The doctrine of the minority courts seems to be that only those materials which would serve as the basis of a mechanics' lien are sufficient to support an action on a contractor's bond. The reason for allowing a mechanics' lien only for materials which enter into and become a component part of the work is said to be the underlying equity on the part of him whose materials have gone into and enhanced the value of the property without being paid therefor. Curiously enough, however, this reason is not assigned in support of the so-called "component part" theory in respect to contractors' bonds but rather, that if these bonds be not so strictly construed the surety will be wary about entering into such an unlimited contract and therefore the state itself would be unable to obtain proper protection for the performance of these contracts. The anomaly of this situation is further heightened by an inquiry as to the attitude of the courts towards the paid surety in construing their liability in other fields.

The rule of the majority of the courts in construing these statutes is best expressed in the words of Justice Putnam in *American Surety Co. v. Lawrenceville Cement Co.*: "... the statute in question concerns every approximate relation of the contractor to that which he has contracted to do. Plainly the Act of Congress and the bond in the case at bar are susceptible of a more liberal construction than the lien statutes referred to, and they should receive it. In the one case, as in the other the dealings of the person who claims the statutory security must approximate the work, and in the one case, as well as in the other, there must be a certain margin within which there will be difficulties in discriminating between what is and what is not protected. Nevertheless we are not precluded by the discussions with reference to the ordinary state statutory liens. We can apply them only in a general way, and we are not so restricted by them as to require a construction inconsistent with the remedial purposes of the statute now in question."

Pennsylvania as an adherent to the minority group has presented an interesting situation in the few cases which have arisen under the statute of May 31, 1911, P. L. 468, § 13 reading in effect that the bonds shall be conditioned to pay for "all materials furnished and labor performed in the prosecution of the work contracted for"; and the statute of May 10, 1917, P. L. 158, § 1 requiring as a condition "payment for all labor and materials entering into the said improvements".

The first case in the state construing the extent of the liability under a contractors' bond arose under the aforementioned federal statute of 1894 in which case the claim sought to be recovered was for freight charges and demurrage. Though these were labor charges and hence not strictly within the subject of this note, it was in this instance that the court laid down the rule that the materials must "go into the public work", and on that ground denied liability. The case is interesting on that account.

---

12 *Supra* note 8.
13 See *American Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. 717 at 719 (C. C. D. Me. 1901). *Cf.* *Sherman v. American Surety Co.*, 178 Cal. 286, 173 Pac. 161 (1918). "It would be inequitable to subject an owner of property to a lien for that which did not enter into and become part of such property."
15 *Doctrine of strictissimi juris.*
16 110 Fed. 717 at 719 (C. C. D. Me. 1901).
18 For contracts for state highways only.
19 For contracts for other state subdivisions for roads, buildings, etc.
This doctrine was further supplemented in *Philadelphia v. Malone* which held a claim can only arise for materials specifically enumerated in the contract and specifications. Accordingly, coal to run a steam shovel was insufficient as a basis for a claim on a bond conditioned for payment for materials "used in and about the said work", the court saying that:

"this was a claim for the supply of a material which being burned gave heat to make steam from water and thereby propel machines which did the dredging . . . this is not materials required in constructing . . ."

Just how the construction was to be done without it was not decided. Such reasoning would seem to violate the obvious meaning of the words "in and about", and the cogency of the case as precedent would seem to have been lost when it is considered that had the work of digging the excavation been done by hand labor such labor would undoubtedly have fallen within the condition of the bond, yet if the contractor chooses to perform the work in a more expeditious manner, the materialman who enables it to be so done has no claim for the price of his materials. This is the *ratio decedendi* of the decisions of the majority of courts when confronted with a claim for fuels. Further, these materials form the basis of a mechanics' lien in some states, and yet are not allowed under a contractors' bond in a jurisdiction purporting to be acting under rules of construction analogous to the rules used in construing mechanics' lien statutes.

The doctrine was firmly fixed in the law of Pennsylvania in the case of *Commonwealth v. Empire State Surety Co.*, where the court refused to allow a claim for coal oil, tools and nails under a bond given pursuant to the highway statute and conditioned for "materials furnished in and about the construction". Yet the court vacillates, for in their own words they say:

"These decisions strike us personally as excellent illustrations of how fine a hair may be split. Just why a materialman who furnished the spike should be protected, and the materialman who furnishes a hammer, without whose agency it could not be driven should be left out, when of course nobody ever had any such intention, is a matter quite beyond our powers of comprehension . . . But it is the law."

Unfortunately (since this case is the leading authority in the state) the court did not realize the error into which it had fallen, in failing to recognize the distinction between materials which constitute the contractor's equipment, and those materials which are consumed or go into the project at hand, and whose product does more than to merely facilitate the work.

As the Pennsylvania courts have seen it, the crux of the problem has been that if the materials did not become a component part of the permanent improvement then it was a "mere facilitating aid" and by the application of this alchem-

---

21 *Pa. 90, 63 Atl. 539 (1906).*
22 *City Trust, S. D. to the use of Surety Co. v. United States, supra note 11, cited with approval in Franzen v. Southern Surety Co., 35 Wyo. 15 at 39, 246 Pac. at 37 (1926).*
23 *Mechanics' lien not allowed therefor in Schults v. Quereau Co., 210 N. Y. 257, 104 N. E. 621 (1914), but lien for explosives was allowed; accord, Sampson Co. v. Comm., 202 Mass. 326, 88 N. E. 911 (1909). The distinction is that the explosives come in direct contact with the land, whereas the coal only acts through the medium of the steam shovel. The same reasoning as cited in text would be applicable. To reduce the distinction *ad absurdum*, a dynamite fuse is insufficient to give rise to a lien, but the dynamite is, and he who operates the shovel would not have a lien for his labor. This distinction is criticized in Johnson v. Starrett, 127 Minn. 138, 149 N. W. 6 (1914) and the "analogy to hand labor" argument adopted.
24 *Pa. Super. 404 (1912).*
25 *At 415.*
istic formula, "facilitating aid", all difficulties were dissolved.\textsuperscript{27} As a matter of degree it would seem that false work, and scaffolding would be far removed from contractors' equipment, yet the decisions in reference thereto have been rationalized on that basis, and it is held that the lumber used in false work for bridge construction did not give rise to a claim.\textsuperscript{28}

The majority of other jurisdictions, however, have applied the term "facilitating aid" to its proper category of contractors' equipment. Not that the mere magic of the word "equipment" should determine whether there be liability or not, but that there would appear to be at least two sound logical reasons for not allowing a recovery for equipment under such a bond, whereas materials which are consumed in the task should be sufficient on which to base a claim:

(1) A contractor is normally expected to furnish his equipment when he takes the contract, and that is not within the contemplation of the parties.\textsuperscript{29}

(2) Many types of equipment outlive the particular job and can be used on other projects so that unless the liability on the bond is unlimited it would be manifestly unfair to the other materialmen to exhaust the liability of the bond for such items.\textsuperscript{30}

Yet \textit{inter sese} the majority of courts differ as to which of these foregoing reasons is the correct one to assign for not allowing a recovery for equipment. The first rule seems to have been forgotten and the argument confined to rule two.

Standing alone then, this latter reason would lead to the conclusion that if the machine were only 99 per cent. exhausted in the work, there would be no claim therefor, but if 100 per cent. exhausted it would support an action. From this it would appear that the degree of use should be the determining factor. This manifestly cannot be the true rule, but rather that, when it was furnished whether it was contemplated that it would necessarily be consumed in the work, and the actual result of using it is immaterial.\textsuperscript{31} As applied to equipment this would seem to be the most satisfactory test which can be formulated and it is equally applicable to other items.

It is interesting to note that this doctrine was apparently applied in the case of \textit{Philadelphia v. Jackson},\textsuperscript{32} in which case the court allowed recovery for steel furnished to the contractor, which steel was seized by the city and turned over to another contractor to finish the work but at the time of the suit had not as yet been used in the building. This is apparently irreconcilable with \textit{Robertson}\textsuperscript{33}

\textsuperscript{27} This phrase appears, in and is used to decide the case in \textit{Commonwealth v. National Surety Co.} and \textit{Commonwealth v. Aetna Cas. & Surety Co.}, both \textit{supra} note 26.

\textsuperscript{28} \textit{Commonwealth v. Aetna Cas. & Surety Co.}, \textit{supra} note 26.


\textsuperscript{30} \textit{Beals v. Fidelity & Deposit Co.}, 76 App. Div. 526, 78 N. Y. Supp. 584 (1903); see \textit{American Surety Co. v. Lawrenceville Cement Co.}, \textit{supra} note 16, at 721. This reason is used in those cases which deny recovery for repairs for equipment.

\textsuperscript{31} \textit{Franzen v. Southern Surety Co.}, \textit{supra} note 22, establishes a general test, namely, "that where labor or material furnished is necessary, or even proper for the execution of any particular work . . . and the furnishing of such labor and material may be fairly held to have been in contemplation of the parties when executing the contract . . . and the same is of a nature so as to be necessarily consumed in the particular work, then it is protected. . . ." Under the test pointed out in the text the degree of use would only be a measure of damages, the liability being determined \textit{aliunde} such as the rule as applied to mechanics' liens in \textit{Wisconsin in Moritz v. Sands Lumber Co.}, 158 Wis. 49, 146 N. W. 1120 (1914).

\textsuperscript{32} 280 Pa. 14, 124 Atl. 284 (1924).
v. Globe Indemnity Co. in which recovery was denied for materials which deteriorated due to the contractor's negligence and could not be used. In distinguishing these cases Chief Justice Von Moschzisker said *inter alia* that the bond in the Robertson case was conditioned "in and about the construction" while in this case it was conditioned "in and about the building or work" and "in the prosecution of the work" which is broader than the former bond. Further he says, the materials in the Robertson case were neither used nor fit for such use, whereas in the instant case it is admitted they were designed to form part of the work, and the new contractor will use them. From which the conclusion is drawn (apparently a *non sequitur*) that because of that they were covered by the original contract. Since, according to the court's own test the actual result of the use is immaterial, then the contemplation of the parties at the time the materials were furnished should be the proper rule to apply, and if that is applied, the materials in the Robertson case most certainly were contemplated to be used and form a component part of the work, as best evidenced by the fact that one-half of them were already used and a claim was allowed therefor.

It is regrettable that the rule of the Philadelphia v. Jackson case has not been followed in the later Pennsylvania cases, for the best that can be hoped for today is a slight abatement in the chaos of logical reasoning which is bound to follow the amendment of 1929 of the Highway Act. In its broadest sense it would have allowed recovery for any materials which were necessarily consumed in the work, and thereby perhaps have obviated the necessity for the 1929 amendment. Whether or not the later decisions would have adopted the test stated in Philadelphia v. Jackson in its broadest sense is highly debatable considering that the court attempts to distinguish the case from the other classic Pennsylvania cases, and further considering the fact that the case can be limited on its facts to those materials which are not only covered by the original contract, but also are fit and will most likely become a component part of the completed work.

The amendment to the Highway Act provides that the bond shall be conditioned "for materials whether they become a component part of the road or not"; while at the same time the so-called "public building" statute has remained unamended. One, rather absurd, conclusion from this anomaly, would seem to be that there is a greater equity on the part of the materialman who sells coal which is used for work on a public road, than he whose coal is used in the erection of public buildings.

It is manifest that the legislative intent was to add such a statute as would be certain to receive the same broad interpretation given in the majority of jurisdictions to even much narrower statutes. The words "whether they become a component part or not" would seem to supply the basis of an interpretation with which no one can cavil. It would indeed be surprising should the court show any tendency to exclude in the construction of this statute any item that the majority include under the narrower statutes.

The problem of equipment still remains under this amended statute and the reasons set forth *ante* would still be as cogent as under the unamended statute. Coal, fuels, and other materials consumed in the work would seem to be an *a fortiori* case. Whether or not the interpretation will be extended to include foodstuffs for men and animals, and clothing for the contractor's men, will still be a moot question, but where the conditions of the work require such expendi-

---

23 *Supra* note 2.
25 Franzen v. Surety Co., *supra* note 22, at 39: "Coal or gasoline that generates power is transferred into labor, and should lie within the statute just as much so as labor performed by hand. That is true also in case feed is furnished to horses. The work performed by the
What effect this amended statute will have on the interpretation of the unamended public building statute is highly problematical. In the past the interpretation of the one statute has been used as the authority for the interpretation of the other, with no thought of a different legislative intent, even though the wording was different. Now the intent has been expressed unequivocally, and it is no longer possible to borrow authority in the construction of the respective statutes. Whether or not the court will adopt a more liberal interpretation in the construction of the building statute, remains to be seen. It would seem that in view of the latest manifestation of the legislative intent as respects materialmen, that the court could not logically do otherwise. To remain obdurate in such a situation would be inconsonant with the precept audi alteram partem.

H. C. C.

machinery for which the coal was used, and by the horses in this case might have been performed by the hands of men." But that was not deemed feasible and would have been too expensive. Yet if that had been done there would be no question that the expense thereof would have been covered by the bond given, and it seems to us that where the labor is done by more efficient means, it would be a narrow construction of the statute and of the bond to say that the material furnished in order to put this efficiency into operation is not material contemplated by the statute or the bond." See Note (1926) A. L. R. 511 for complete citation on this and related subjects.

Highway statute: "in the prosecution of the work". "Building" statute: "payment for . . . materials entering into the said improvements".