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THE CONTROL OF THE TITLE TO PROPERTY BY THE HOLDER OF AN OPTION.

The Supreme Court of Kansas in the recent case of *Khrut v. Phares,* reported in the 103 Pac. Rep. 117, compelled the agent of certain option holders to account to the principals for a sale which he had made, they having released their option because of the fraudulent representations of the agent. The agent contended that as the plaintiffs had no title in the land by virtue of the option, an accounting need not be made to them. But it was held that while an option holder does not before acceptance acquire any estate or interest in the land, he has such control of the title that by specific performance he may compel a conveyance and so may make a lawful sale of the land to a third party.

It is frequently desirable in the making of contracts for the sale of property that the vendee should have time for consideration before entering into the transaction. The option is the means by which this may be accomplished. The holder of the option acquires a right by contract to accept or reject a present offer for the sale of land within a certain time.

The confusion which has resulted from the exercise of options has been caused by the failure of courts to distinguish between an offer to sell, and a contract independent of such offer—the contract to leave the offer open for a period named. There are two elements in optional contracts; an offer to sell, which must be accepted to become binding; and a contract to leave the offer open for a specified period. The former is an executory contract, the latter executed. The elements are distinctly independent.

In an agreement for a lease containing an option to sell a tenant the fee within two years, the lease was forfeited for breach of a covenant, but the court held that the option to sell was a separate agreement and would be specifically enforced although the lease had been forfeited. *Green v. Low,* 22 Beav. 625; *Allison v. Cocke's Exc.,* 106 Ky. 763.

The giver of the option does not sell his land, or agree to sell it. But he does sell something, viz: the right or privilege to buy at the option of the other party. The owner parts with his right to dispose of the property except to the option holder, for a specified time. The option holder purchases the right to elect to buy within that time. *Ide v. Leisor,* 10 Mont. 5; *Fulenwider v. Rowan,* 136 Ala. 387.

The old English case of *Cooke v. Oxley,* 3 T. R. 653, holding that an offer which was intended to be accepted at a future time could not be turned into a binding contract although there was nothing to show that notice of revocation of the offer had been communicated to the promisee before acceptance by the latter, seems to be responsible for the conflict which has grown out of the making of optional contracts. In the case of *Bell v. Howard,* 9 Mod. 302, the English Court of Chancery would not grant specific performance, because of the want of mutuality, of an optional contract to purchase even though it had been given for a valuable consideration. But *Cooke v. Oxley* has been generally overruled in the United States and in England. *Ry. Co. v. Bartlett,* 3 Cush. (Mass.) 225; *Cummins v. Beavers,* 103 Va. 230. In fact, it is now supposed that the case was improperly reported. And *Bell v. Howard, supra,* is clearly a minority rule at the present time. However, in *Jenkins v. Locke,* 3 App. D. C. 485, the court followed that case.

The supposed want of mutuality in optional contracts is, of course, the main point of difference. Might the giver of the option at any time defeat the right of the holder to accept the offer? Where there is a valuable consideration given for the option, the option is irrevocable within the time specified. "A covenant in a lease giving to the lessee a right or option to purchase the premises leased at any time during the term is in the nature of a continuing offer to sell. The offer thus made, if under seal, is regarded as made upon sufficient consideration, and therefore one from which the lessor is not at liberty to recede." *Willard v. Tayloe,* 8 Wall. 557; *Moses v. McClain,* 82 Ala. 370; *Ross v. Parks,* 93 Ala. 153; *Johnston v. Trippe,* 33 Fed. 530; *O'Brien v. Boland,* 166 Mass. 481; *Borel v. Mead,* 3 New Mex. Rep. 84; *Bishop on Contracts,* Sect. 325; 1 *Addison on Contracts,* Sect. 20. But see *Rust v. Conrad,* 47 Mich. 449, *contra.*

Where there has been no consideration given for the option, the giver thereof may revoke the same before acceptance at any time he sees fit. For until the offer is accepted, there can be no contract as there is nothing by which the proposer can be bound. Unless both are bound so that an action can be maintained against one or the other, neither will be bound. *Weaver v. Burr,* 31 W. Va. 736; *Ry. v. Bartlett, supra*; *Cummins v. Beavers, supra*; *Ide v. Leiser,* 10 Mont. 5.

It is proper to note, however, that in studying the reported cases it is found that there has been in all of them an acceptance of the offer contained in the option, thus completing the contract. But the language of the courts is broad enough to imply that even where the offer was formally withdrawn before the expiration of the option which was supported by a valuable consideration, they would nevertheless decree specific performance.

After the option has been exercised and the conditions performed it is too late for the grantor to recede from his offer. *Perkins v. Hadsell,* 50 Ill. 216; *Corson v. Mulvany,* 49 Pa. 100; *Cheney v. Cook,* 7 Wis. 413; *Wilcox v. Cline,* 70 Mich. 517. On acceptance, the contract becomes absolute and mutual in its obligations and may be specifically enforced. *Frue v. Houghton,* 6 Colo. 318; *Fressler's App.,* 75 Pa. 483; *Calanchini v. Branstetter,* 84 Cal. 249. Many courts hold that the filing of a bill for specific performance is sufficient to make the remedy mutual.

Cummins v. Beavers, supra; *Ives v. Hazard,* 4 R. I. 25; *Estes v. Furlong,* 59 Ill. 298; *Maghlin v. Perry,* 35 Md. 352.

The modern idea of options was given in *Watts v. Kellar.* 56 Fed. 1, where the court said: "An option to buy or sell land, more than any other form of contract, contemplates a specific performance of its terms; and it is the right to have them enforced specifically that imparts to them their usefulness and value. An option to buy or sell a town lot may be valuable when the party can have the contract specifically enforced, but if he cannot do this and must resort to an action at law for damages, his option in most cases will be of little or no value. No man of any experience in the law would esteem an option on a law suit for an uncertain measure of damages of any value."

It appears, therefore, after a review of the authorities, that the courts will specifically enforce a transfer of title to property where an option, given for a valuable consideration, is accepted within the time specified for its life.

Has an option holder such control of the title that, because he is entitled to specific performance, he may make a sale of the land to a third person? This was the question asked and answered in the affirmative by the Kansas Supreme Court in the case under discussion.

Where the option has been given for a valuable consideration, and therefore is irrevocable within the time limited, it may be assigned. "Why may not an option to purchase be sold? If the owner of an estate has fairly made a contract for a sufficient consideration received by him, by which contract he has himself stipulated that another person may, at the option of the latter, receive a conveyance upon the payment or tender of a fixed sum within a given sum, what principle of equity is violated by making the owner comply with this contract?" *Hall v. Center,* 40 Cal. 65. Assigning the option, when supported by a valid consideration, is not a wagering contract. *Hanna v. Ingram,* 93 Ala. 482. In the case of *Dyer v. Duffy,* 39 W. Va. 148, the assignment of an option was held void where no consideration was given to support the option. The court thought that where a man relied on the honesty and solvency of another he should not be compelled to rely on still a third.

If the option forms part of a lease which is assigned, the option goes with it and may be enforced by the assignee. The agreement giving the option to purchase is more than a personal covenant. It is a right in the lessee which he might transfer to his vendee and be enforced at the latter's election. *Napier v. Darlington,* 70 Pa. 64; *Kerr v. Day,* 14 Pa. 112; *House v. Jackson,* 24 Ore. 89. And in *McCormick v. Stephany,* 57 N. J. Eq. 257, the executrix of the option holder (the option being contained in a lease) was allowed to elect to buy. However, where there was simply an option—not connected with a lease, which was good for one year, and the holder died before that time, his heirs were not allowed to exercise it. *Sutherland v. Perkins,* 75 Ill. 338.

A further illustration of the option holder's control over the land is found in cases where there is a valid option, and the one making the offer sells the land to a third person with notice, before the option has expired. There the holder of the option may file a bill against both for a conveyance of the land to himself. *Barrett v. McAllister,* 33 W. Va. 738. *Peoples St. Ry. Co. v. Spencer,* 156 Pa. St. 85; *Haughwout v. Murphy,* 22 N. J. Eq. 531; *Lazarus v. Heilman,* 11 Abb. (N. C.) 93. An option may be transferred or mortgaged. *Bank of Louisville v. Baumeister,* 87 Ky. 6. And it has even been held that an option to purchase contained in a lease, when exercised, is subject to the lien of a judgment. *Ely v. Beaumont,* 5 Sergt. & R. (Pa.) 124.

The United States Supreme Court in *Willard v. Tayloe, supra,* says that it is not the invariable practice to grant specific performance where options have been exercised but is a matter of discretion for the court. "But," it adds, "the discretion which may be exercised in this class of cases is not an arbitrary or capricious one, depending upon the mere pleasure of the court, but one which is controlled by the established doctrines and settled principles of equity." In none of the other cases here referred to was this phase of the question discussed.

The decision in the present case was based primarily upon *Trust Co. v. McIntosh,* 68 Kans. 452, which held that a man having such an interest in land that he may compel a conveyance by specific performance, may properly make a contract in his own name to convey. A contract giving an option to pur-

chase land gives an interest in the land to the person who has the option. *London & Southwestern Ry. v. Gwinn,* 20 Ch. Div. 562; *Peoples St. Ry. Co. v. Spencer, supra.*

Easton v. Montgomery, 90 Cal. 307, is in point with the present case. In that case the court said: "It is not necessary, however, that the vendor should be the absolute owner of the property at the time he enters into the agreement of sale. An equitable estate in the land, or a right to become the owner of the land, is as much the subject of sale as the land itself; and whenever one is so situated with reference to a tract of land that he can acquire the title thereto, either by the voluntary act of the parties holding the title, or by proceedings at law or in equity, he is in a position to make a valid agreement for the sale thereof."

Dresel v. Jordan, 104 Mass. 407, is one of the leading cases holding that the vendor need not have an absolute title. Says the court: "* * * if the obligation of the contract be mutual, and the seller is able in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance."

Since the holder of an option, given for a valuable consideration, which makes it irrevocable within the time specified, may by proper acceptance, compel a specific performance of the title to him, it would seem that he has a right to contract for the sale of the land. Within a reasonable time he may comply with the contract of sale, and therefore, such a sale would be valid. Surely in this country where the real estate business is so uncertain and where land values fluctuate so rapidly, it would work an injustice to hold that no one could make a valid contract for the sale of land until the absolute title is vested in him.

WATERS AND WATER-COURSES—OWNER'S RIGHTS TO PERCOLATING WATER.

The New Jersey Court of Appeals in reversing the holding of the Supreme Court of that state in the case of *Meeker v. City of East Orange,* 70 Atl. 360, not only deviated from the rule long adhered to in that state but also rejects the English rule as to property rights in percolating underground waters.

The plaintiff owned a farm in what is known as Canoe Brook Valley which he used in his dairy business as pasture land for his stock. Two brooks ran through the farm which also contained a spring, the water of which was used for drinking purposes. His cattle in the pasture had for years resorted to the brooks for drinking water. The City of East Orange, under the authority of a statute, acquired a tract of 680 acres situated in Canoe Brook Valley, above the plaintiff's farm, and installed thereon a water plant of 20 artesian wells. A few years prior to the commencement of this action the city began to pump from the wells and it had thus taken water, which, but for its interception, would have reached the plaintiff's spring or stream. No water other than percolating has been taken and in this action the plaintiff seeks damages for the diversion of such water which otherwise would have reached his spring and for the injury to the land caused thereby.

The lower court held that a city has an absolute right to appropriate all percolating waters found beneath the land owned by it and to use the water for purposes entirely unconnected with the beneficial use and enjoyment of that land, to the extent, indeed, of merchandising the water and supplying it to the inhabitants of East Orange. The judgment was based on the theory that the owner of land has an absolute right to all waters found beneath the land and that the diversion from the plaintiff's land was *damnum absque injuria.*

The subject involved in the case is one of comparatively recent development in our law, the first time it was discussed being in the case of *Hammond v. Hall,* 10 Sim. 552 (1840); but that case was not directly on the point so that Chief Baron Pollock says: "That the distinction between underground waters and those which flow upon the surface was first made in England in *Acton v. Blundell,* 12 M. & W. 324, decided in 1843. *Dickinson v. Canal Co.,* 7 Exch. at 300. Chief Justice Tindal in that case approved and adopted the maxim of the Roman law that: "If one digging on his own land, in good faith and with no purpose of injuring his neighbor, nevertheless drys up his well by diverting the underground currents from it, there is no remedy."

The question was again considered in *Dickinson v. Grand Junction Canal Co.,* 7 Exch. 282; *Broadbent v. Ramsbotham,* 11 Exch. 602; but the doctrine of *Acton v. Blundell, supra,* was not

essentially modified. The point finally came up before the House of Lords in the case of *Chesemore v. Richards,* 7 H. L. Cas. 349 (1856), where it was held that the owner of the land has an absolute ownership of the waters found under it and may do with them as he pleases. This decision has been treated as finally settling the law for England on this question and has been followed and approved in numerous subsequent English cases.

Thus it is seen that the doctrine of *reasonable use* does not exist as to percolating waters in England, but Lord Wensleydale in *Chasemore v. Richards, supra,* says: "That according to reason and law it seems right to hold that a land owner ought to exercise his right to use percolating waters in a reasonable manner with as little injury to his neighbor's rights as may be." And he suggests it is not reasonable to pump water from a well to supply a municipal corporation at a distance.

In speaking of the English cases on this subject, Mr. Farnham in his recent comprehensive work on *Waters and Water Rights,* Vol. III, p. 2718, says: "When it is remembered that the first English case dealing with percolating waters arose in 1840, and that it was not decided that a land owner might exhaust the water to furnish a municipal water supply until 1860, it will be at once seen that there was no common law on the subject when the American states put the common law into statute and hence, the opinions of the American courts as to what is the common law on this subject are as good as the English. Therefore, in any case the question can be decided upon its merits, giving to the English cases the weight their reasoning entitles them to, but without the necessity of regarding them as binding precedents."

Bearing this in mind let us look for a moment at the American authorities on this subject.

The first case in this country in which the question of owner's rights in percolating water was involved was that of *Greenleaf v. Francis,* 18 Pick. (Mass.) 117, decided in 1836, seven years before *Acton v. Blundell, supra,* the leading English case. It was there decided "that the owner of the soil may dig a well on any part of his land which he desires. It is a lawful act and although it may be prejudicial to the plaintiff it is *damnum absque injuria.*" This case, however, is not inconsistent with the doctrine of reasonable use. In the case of *Frazier v. Brown,* 12

Ohio St. 294, the court says: "That in the absence of express contract and positive legislation, as between proprietors of adjoining lands, the law recognizes no correlative rights in respect to underground water percolating or filtering through the earth." In *Miller v. Black Rock,* 99 Va. 747, it is held that "percolating waters which have no known or defined course are said to form a part of the realty with the absolute right of use and appropriation by the owner of the land." Holding that the owner of the land has an absolute right to the use of percolating waters, provided that he does not act maliciously, may be cited, the cases of *Taylor v. Welch,* 6 Ore. 198; *Metcalf v. Nelson,* 8 S. D. 87; *Wheatley v. Baugh,* 25 Pa. St. 528; *Roath v. Driscoll,* 20 Conn. 533; *Delhi v. Youmans,* 50 Barb., (N. Y.) 316; *Emporia v. Soden,* 25 Kan. 588, and *Washburn on Easements,* Sect. 353.

Summing up it may be stated as a general rule that the owner of the soil may intercept and divert percolating waters without incurring liability to owners of land in the neighborhood through whose lands the water so diverted would have percolated, and this is true notwithstanding the fact that the consequence of his act in so diverting or intercepting the water would be to injure or even render entirely worthless another's well, spring, or surface water course. This is stating the rule positively and broadly but such statement is upheld by the cases cited.

But the rule above stated has been subject to qualifications and it is with these qualifications that we must now deal and see to what extent the absolute ownership has been modified.

The Minnesota court qualified the rule at an early date by holding that "a land owner has no right, except for the benefit and improvement of his own premises, or for his beneficial use to drain, collect, or divert percolating water thereon, where such act will destroy or materially injure the spring of another, and that he cannot divert such waters for the sole purpose of wasting them." *Stillwater Water Co. v. Farmers,* 89 Minn. 58. The Wisconsin court held *contra* to this in *Huber v. Merkel,* 117 Wis. 355 but Prof. Farnham in a note to 64 L. R. A. 236, says that "this case is opposed to good morals, good sense, and all common law principles."

Then the New York courts have deviated from the former strict rule and in *Smith v. Brooklyn,* 18 Hun. (N. Y.) 340, they

held "that the owner of land cannot gather the water by pumps that it may be carried to a distant place for use or sale in a case where the inevitable result would be to destroy a spring upon the land of an adjoining owner." This has been followed consistently, and in *Forbell v. New York,* 164 N. Y. 522, acting on the suggestion of Lord Wensleydale mentioned before, they held "that to fit up wells with pumps of such pervasive and potential power that from their base they tap the water stored in the plaintiff's land and in all the region thereabout and lead it to his own land and by merchandising it prevent its return is, however reasonable it may appear to the defendant and its customers, unreasonable as to the plaintiff and others whose lands are impaired." The California courts in *Katz v. Walkinshaw,* 141 Cal. 116, make substantially the same holding.

The Vermont court in *Chatfield v. Wilson,* 28 Vt. 49, held that "the owner of land may make any use whatever of the percolating waters no matter by what motive he is induced, and that the presence of malice makes no difference." But this case stands alone on this phase of the question, the overwhelming weight of authority being *contra. Greenleaf v. Francis, supra*; *Wheatley v. Baugh, supra,* and *Roath v. Driscoll, supra.*

The first case in which a doubt was expressed as to the soundness of the reasoning of the English cases and the one in which the doctrine of reasonable use was enunciated was that of *Bassett v. Salisbury,* 43 N. H. 569, in which, after a long and well reasoned argument, the conclusion was reached that "owners of land are liable to the owners of adjoining lands for injuries done by the obstruction of percolating water unless such obstruction was caused by them in a reasonable use of their own privileges and rights." This case was later affirmed in *Swett v. Cutts,* 50 N. H. 439.

The Massachusetts courts have turned from their strict construction of the rule and have indicated, particularly in *Hart v. Jamica,* 133 Mass. 488, that they follow and agree with the reasoning of the New Hampshire courts. In *Cohen v. Canada Land Co.,* 142 Cal. 437, the California court held, "that the owner of land has a right to make only a reasonable use of the water percolating therein for the benefit and enjoyment of his land;" and in *Haldeman v. Bruckhart,* 45 Pa. St. 514, the Pennsylvania court

said that "the right to use the percolating waters cannot be exercised in an unreasonable, negligent, or malicious manner to the injury of the land owners in the vicinity." The same doctrine has been applied to an artesian basin in Minnesota, the court saying that "the law of correlative rights applies to the use, by adjoining land owners, of waters drawn from an artesian basin and such proprietors must so use their wells as not to unreasonably injure their neighbors." *Erickson v. Crookston Water Co.,* 100 Minn. 481. The following cases sustaining or tending to sustain this doctrine of reasonable use may be cited: *Barclay v. Abraham,* 121 Iowa 619, 64 L. R. A. 236, and note; *Reisert v. New York,* 174 N. Y. 196; *Gognon v. French Lick,* 163 Ind. 687; *Katz v. Walkinshaw,* 141 Cal. 116, and *Pence v. Carney,* 58 W. Va. 296.

In 10 *American and English Decisions in Equity,* 704, issued in 1905, it is stated that "it may be said to be now the generally accepted doctrine in the United States that the rights of the owners of soil to percolating waters are limited to a use for proper purposes connected with the natural enjoyment of their property. According to the best considered cases the early doctrine must be limited so as to permit only a reasonable use of the percolating waters underlying the land." And in a note to *Katz v. Walkinshaw,* 64 L. R. A. 236, it is said: "The New Hampshire doctrine is the only one which can be recognized. The mere fact that the source and course of the water is unknown is no reason why the courts should refuse to apply to such waters definite rules so far as it is possible to apply them, and in actual practice the application of rules recognizing correlative rights and confining each land owner to a reasonable use of the percolating water is not difficult."

Can it be said in these days of powerful machinery and modern appliances, where it is possible for one owner to deprive the lands of the neighborhood of this underground water and thus render the land practically worthless, that percolating waters are wholly without the protection of the law, that they, like wild animals, belong alone to him who first obtains possession of them?

From the trend of modern decisions, from the justice of the rule, and from the clear concise reasoning through which it ar-

rives at its opinion, it would seem that the New Jersey court was right in adopting the doctrine of reasonable use in percolating water and rejecting that of absolute ownership.

RIGHT OF MINISTERIAL OFFICER TO QUESTION CONSTITUTIONALITY OF A LAW IN MANDAMUS PROCEEDING.

In a recent case, *State ex rel., University of Utah v. Condland et al., State Board of Land Commissioners,* reported in 104 Pac. 285, the Supreme Court of Utah decided that when an officer, though acting ministerially, is directly responsible for his official acts, he may attack a statute directing him to act, as unconstitutional, and upon that ground justify his refusal in a *mandamus* proceeding. The point in consideration came up on an application to the court by which the University of Utah prayed a mandate against the State Board of Land Commissioners to compel said board to comply with the provisions of a certain act. The commissioners refusing to act, justified their non-compliance by pleading the unconstitutionality of the law under which the mandate was prayed.

The following cases support their contention: In *Van Horn v. State ex rel., Abbott,* 46 Neb. 62, it was stated: "As the Constitution is our fundamental law, an act of the legislature repugnant thereto is not only voidable but absolutely void and of no effect whatever. The officers of the state are sworn to support the Constitution, so where a supposed act of the legislature and the Constitution conflict, the Constitution must be obeyed and the statute disregarded. Ministerial officers are therefore not bound to obey an unconstitutional statute, and the courts, sworn to support the Constitution, will not by *mandamus* compel them to do so." *Marbury v. Madison,* 1 Cranch (U. S.) 137 (1803), holds that courts as well as other departments are bound by the Constitution. *Norman v. Kentucky Board of Examiners,* 93 Ky. 537, held that "although an officer cannot rightfully refuse obedience to a law if it be *prima facie* regular and valid, for it would be against public policy for him to do so, yet a court will not compel him to obey a law when it is unconstitutional and void." In the opinion of one of the judges, it was said: "It is not only a right but a duty of such a ministerial officer (auditor in this case) to contest the constitutionality of the law." The last opinion is supported by *Smith v. Broderick,* 107 Cal. 644.

The Utah decision, *supra,* is supported also by *McDermott v. Dinney,* 6 N. D. 278; *Denman v. Broderick,* 111 Cal. 96; *Von Schmidt v. Widber,* 105 Cal. 151; *Brandenstein v. Hoke,* 101 Cal. 131; *Hindman v. Boyd,* 42 Wash. 17; *School Directors v. City of New Orleans,* 42 La. Ann. 92. (This case, however, was overruled and the opposite rule established in the later case of *State ex rel. New Orleans Canal & Banking Co. v. Heard,* 47 La. Ann. 1679.)

There are many cases in which the defense of unconstitutionality of law was made without any discussion as to the right to make such defense. *People ex rel. Dunkirk, W. & P. R. Co. v. Batchellor,* 53 N. Y. 128; *Madison County Ct. v. People ex rel. Toledo, W. & W. R. Co.,* 58 Ill. 456; *Rankin v. Colgan,* 92 Cal. 605; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides,* 30 S. C. 579. The reasoning in the above cases is constructed on the hypothesis that "an unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Cooley on Constitutional Limitations,* 3; *Norton v. Shelby County,* 118 U. S. 422; *County Comm's v. Kansas City R. R.,* 4 Kan. App. 772. While the reasoning in the cases just reviewed is logical, the reasoning in the opposing line of cases is equally logical and is more expedient.

"A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." *Cooley's Constitutional Limitations,* 232. The opinion in *Thoreson v. State Board of Examiners,* 19 Utah 18, states that to allow a ministerial officer who has no direct personal interest in the matter to refuse to perform his duty on the ground that performance of the act would violate the Constitution, would be deciding a constitutional question affecting the rights of third persons at the instance of such officer, who because his duties are merely ministerial, and because he has no direct interest in the question, cannot in any event be made responsible. Ordinarily, a ministerial officer has no different interest from that of any other citizen in constitutional questions, and therefore cannot revoke the same. *State ex rel. Morton v. Stevenson,* 18 Neb. 421. A party will not be heard to question the constitutionality of a statute unless he shows that some right of his is impaired or prejudiced there-

by. *Red River Valley Nat'l Bank v. Craig,* 181 U. S. 548; *Mountfort v. Hall,* 1 Mass. 443; *State v. Smiley,* 65 Kan. 240, 196 U. S. 447. To allow a ministerial officer to decide upon the validity of a law would be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all like officers may do the same and an end be put to civil government, one of whose cardinal principles is subjection to the law. *People ex rel. v. Solomon,* 54 Ill. 39; *Smyth v. Titcomb,* 31 Me. 273; *Maxwell v. Burton,* 2 Utah 595; *Waldron v. Lee,* 5 Pickering 323; *State ex rel. v. Buchanan,* 24 W. Va. 363; *People v. Collins,* 7 Johns. 549; *Com. v. James,* 135 Pa. St. 480. "It is not within the scope of the duties of a ministerial officer to pass upon the validity of laws, instructions or proceedings, *prima facie* valid, and requiring his action. His only duty in such a case is obedience, and he cannot excuse himself by undertaking to show the unconstitutionality or other invalidity of the law, or the irregularity of the proceedings." *Mechem on Public Officers,* Sect. 523.

The general rule in regard to evidence is that a court in passing upon the constitutionality of a statute must confine itself to a consideration of those matters which appear upon the face of the law and of those of which it can take judicial notice and cannot consider evidence *aliunde* to show the invalidity of the statute. *Stevenson v. Colgan,* 91 Cal. 649; *State ex rel. Reed v. Jones,* 6 Wash. 452; *People v. Durston,* 119 N. Y. 569; *Harvey v. Foster,* 118 Ind. 502; *Pacific R. R. v. The Governor,* 23 Mo. 353. Therefore, the law of evidence as well as sound reasoning, together with the important consideration of expediency, supports the latter view.

From the various decisions it is evident that there is no theory which will reconcile all the conflict. There is running through the cases, however, a general proposition which would give a reasonable and satisfactory rule upon the question if ultimately adopted. That rule is: that statutes are generally presumed to be valid, and ministerial officers must treat them as such until their invalidity is established, but that if the nature of the office is such as to require the officer to raise the question, or if his personal interest is such as to entitle him to do so, he may contest the validity of the statute in a *mandamus* proceeding brought to enforce it. In other cases he must perform his duty as the statute

requires, and leave those whose rights are affected by it to take steps to annul it.

Applying the rule deduced from the decisions to the case under discussion we conclude that, though there is much support, the weight of authority is against the proposition that a ministerial officer has a right to question the constitutionality of a law in a *mandamus* proceeding to compel him to act under such law.

DEATH AND SURVIVORSHIP—PRESUMPTIONS.

In the case of *Walton & Co. v. Burchel,* decided by the Supreme Court of Tennessee in 1907, but reported only recently in 121 *Southern Reporter,* 391, where a father and son were killed by a premature explosion of dynamite, the court held that "in the absence of evidence as to which died first, there is no presumption in favor of either; the presumption being that both died at the same time;" and affirmed the decision of the lower court which charged the jury that "when the proof shows that two persons are killed in a common sudden disaster, the presumption is that they died simultaneously." Among the leading cases cited by the court to back up this opinion are: *Russell v. Hallett,* 23 Kan. 276; *Newell v. Nichols,* 75 N. Y. 78; *Moehring v. Mitchell,* 1 Barb. Ch. (N. Y.) 264; *Young Women's Christian Home v. French,* 187 U. S. 401, all of which clearly follow the common law rule that when two or more perish in the same disaster, there is *no presumption of law whatever* upon the subject and that the law will no more presume that all died at the *same instant* than it will presume that one survived the other.

The question then remains, in these cases of survivorship in a common disaster, whether the presumption that all died simultaneously has the same effect and means the same as the common law rule which holds that there is no presumption. Some courts seem to be careless in their expressions on this point. *Newell v. Nichols, supra.*

Presumptions of law are rules which, in certain cases, either forbid or dispense with any ulterior inquiry; *Bouvier's Dictionary.* But some presumptions of law are disputable and hold good only until they are invalidated by proof, and it seems that this proof cannot be overcome always by a bare preponderance of evidence. *The State v. Jones,* 64 Iowa 349. While not regard-

ing a presumption as evidence, nevertheless some courts hold it has a certain amount of probative force. *Barber's Appeal,* 63 Conn. 393; *Bradshaw v. The People,* 153 Ill. 156.

It would seem then, that it would require more evidence, to some degree at least, with the presumption in the case than with the presumption out.

The question of survivorship is one of fact, to be decided in each case by the jury without any rule of presumption; *Robinson v. Gallier,* Fed Cas. No. 11,951; and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. *Wing v. Angrave,* 8 H. L. Cases 182.

Although, with the exception of Louisana and California, the civil law does not apply in this country, yet evidence as to age, sex, and physical condition of the persons who perished, the nature of the accident and the manner of death may all be taken into consideration by the jury. *Wigmore on Evidence,* Sect. 2532. In the absence of any legal presumption it would seem that the jury may consider any evidence, however slight, in determining whether the parties died together or one survived the other; *Robinson v. Gallier, supra;* and the finding or verdict that one of the persons survived the other may thereby be warranted as a question of fact, though there is no direct or positive evidence upon the question. *Ehle's Will,* 73 Wis. 445; *Stinde v. Ridgway,* 55 How. Pr. (N. Y.) 301.

So it seems that there is a difference whether the law presumes that the parties died together or does not presume anything at all, and therefore the Tennessee court was wrong in assuming that there is no difference even though the effect in this particular case would probably have been the same.

CHANGE OF CONTRACT OF INSURANCE BY AMENDMENT OF BY-LAWS OF A FRATERNAL MUTUAL BENEFIT ASSOCIATION.

By its recent decision in the case of *Wright v. The Knights of the Maccabees of the World,* 42 N. Y. Law J. No. 56, the Court of Appeals of New York has further extended a rule of law laid down by it which seems to be peculiar to that state, and unsupported by either the weight of opinion or the better reasoning of other jurisdictions. The history of this case, which has been

before the courts for several years, has been reported in 48 Misc. Rep. 558; 119 App. Div. 914; 122 App. Div. 904; 128 App. Div. 883.

The plaintiff became a member of the above named "Mutual Fraternal Benefit Association" in 1897. In his application for membership he agreed that any laws of the association "now in force or that may hereafter be adopted" should form the basis of the contract and be made a part thereof. The certificate, or policy, issued to the plaintiff, stated that at his death, one assessment on the membership, not exceeding $1,000 would be paid as a benefit to the designated beneficiary. It appears that the laws then in force fixed the assessment of the member at $1.40 per month and provided that he should pay the same rate of assessment thereafter as long as he remained continually in good standing. Seven years later, the laws were amended by increasing the monthly assessment to be paid by the member from $1.40 to $3.00 per month, and provisions were also adopted which decreased his benefits beyond those specifically stated in the certificate issued to him and in the by-laws in force at that time. These related to certain exemptions from payment after reaching the age of seventy years. When the plaintiff refused to pay the increased rate, he was suspended by the defendant order, and the suspension, if lawful, involved the forfeiture of his right to participate in either the benefit fund or in the fraternal privileges of his tent. Claiming that such suspension was in violation of law, he brought action to secure his reinstatement as a member in good standing, the restoration of his certificate of insurance, and an injunction against the defendant restraining it from changing the contract or the laws and assessment thereunder.

Although it was shown that the changes were desirable as a matter of policy for the general welfare of the order and that the increased rates were not excessive, it was held without dissent that the general statement in plaintiff's application did not amount to such a reservation of power in the association as would authorize it subsequently, and against the will of the insured, to amend its by-laws so as to increase the assessment or decrease his benefit beyond the amount specifically stated in his certificate and in the by-laws in force at that time, and that it cannot be held necessary, as a matter of law, for a corporation to violate its contract to preserve its existence.

The courts have widely discussed the subject of amendments to by-laws of associations and they have differed in the various jurisdictions as to the extent that contracts with members may be affected by amendments. It is generally agreed that such an association has the power to alter and amend its by-laws, provided that the new by-laws adopted are reasonable and not contrary to law; or are not inconsistent with its charter or the purpose and object of its creation, or do not deprive any member of his vested rights or impair the obligation of his contract of membership, and provided that the amendments are adopted in the mode legally prescribed. *Marshall on Private Corps.,* Sect. 330. But when it is a matter of determining whether a given by-law is reasonable or whether it interferes with a vested right, or whether it impairs the original contract of membership, there is difficulty in reconciling the decisions, and indeed, in some cases, they cannot be reconciled—a fact which courts have recognized and which Chief Justice Parker admits in *Parish v. N. Y. Produce Exchange,* 169 N. Y. 46, in distinguishing his holding from that of *Pain v. Societé St. Jean Baptiste,* 172 Mass. 319.

The question involved in the principal case, as stated by the Court of Appeals, is, how far does the reservation, by a mutual benefit association, of a general power to amend its by-laws, without specifying in what respects, authorize it to amend them in all particulars. Or in other words, it asks, can such an association amend a specific clause under a general power?

That this is an important question in view of the vast number of such certificates being issued by the numerous benefit orders, no one can deny. And the fact that the great majority contain the general reservation clause in very often exactly the same wording as in the principal case, adds even more to its seriousness.

The decision of the New York court that the general power is not sufficient, is not out of harmony with its previous holdings, although, as the Supreme Court judge who first tried this case, remarked: "A careful reading will show that none of the New York cases go quite to the length of holding that a member of a fraternal benefit association has a vested right in having his charges remain at a certain rate when it is necessary that the assessments be increased in order that the association be kept alive."

The early leading case is *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159, decided in 1879, in which that court held that even though a power to alter and amend had been reserved by its charter, a corporation could not repeal a by-law so as to impair rights which had been given and become vested by virtue of it. As in the principal case, that court has held, through a considerable line of decisions, that such alterations of the original terms are not reasonable because they disturb vested rights; that the contract consists only of the application, certificate and by-laws in force at the time the certificate is issued, and that it could not be within the contemplation of the parties, in making the contract, at least in the absence of stipulations clearly specifying the subjects to be affected, that one party should have the right to make changes and thus have the other party completely at his mercy. Nothing less than an explicit statement in the certificate itself that the payments therein specified would be subject to modifications that would reduce the pecuniary value of the agreement to the member, would operate as a defense for the association against the charge of impairment of the contract obligations. *Beach v. Supreme Tent of K. of T. W.*, 177 N. Y. 100; *Ayres v. Ancient Order of United Workmen*, 188 N. Y. 280; *Englehardt v. Fifth Ward R. D. and Loan Association*, 148 N. Y. 281; *Weiber v. Equitable Aid Union*, 92 Hun. 277. Reasonable amendment is limited to matters regulating the administration of the order and its membership which do not destroy contract rights. *Weber v. Sup. T. of K. of T. M.*, 172 N. Y. 490.

The English rule is clearly opposed to the doctrine of the principal case. In *Smith v. Galloway* (1898), 1 Q. B. 71, where a subsequent amendment affected a reduction of sick benefits to the plaintiff member, the court held that such benefits were not in the nature of a vested right to a fixed sum and where the original contract had provided for an alteration of the by-laws by a general power given to the association, the member was bound by any amendment that might subsequently be made, "whatever the extent of that alteration may be."

The United States Supreme Court has held to the same effect in *Korn v. Mutual Assurance Society*, 6 Cranch (U. S.) 192. This was a case where a mutual fire insurance company changed its by-laws so as to increase the assessments on certain policy holders under a reserved general power to amend. A very help-

ful view was introduced in this decision. The court called attention to the essential difference between a mutual and an ordinary insurance company. The members of the former stand in the peculiar situation of being party to both sides, insurer and insured, so that there is a twofold liability on each member. In this suggestion of the Supreme Court, there is the only key to reconciling many of the decisions which, rightly analyzed, really turn on the distinction between an attempted amendment of the by-laws affecting the promise to the certificate holder and an amendment affecting his duties as a member of the insuring association bound to fulfill his part in providing means to maintain the order on a sound business basis. *Reynolds v. Royal Arcanum,* 192 Mass. 150.

The New York courts have regarded this question from a standpoint of protecting the individual member's rights. As the Illinois court says in *Grand Legion of Ill. v. Beaty,* 224 Ill. 346: "Seldom, if ever, has the insured or his beneficiary the advantage of legal advice when the insured enters the contract. The terms being entirely those of the insurer's own choosing, the contract should be liberally construed in favor of the insured."

The ground upon which the opposite view is based, is well stated in *Sup. Lodge, K. of P. v. Knight,* 117 Ind. 489, where a change made for the welfare of the order under a reserved general power to amend, whereby the original benefits were decreased for the older men by the creation of new classes for the younger men, was held not to constitute such a breach of contract that any damages could be ascertained or given. If the change is made in good faith, and the motive which influences the change is an honest desire to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change, no actionable wrong is done the members or their beneficiaries. It is the duty of the society to protect the interests of the many, rather than the few. Persons who become members of such societies must take notice of this, and one person cannot therefore demand that the welfare of the order be sacrificed for his sole benefit. His right is not an unqualified vested right, but on the contrary, it is qualified and limited to a great degree. The contractual relation between the members is to be determined by a consideration of the entire body of rules governing the association and is not limited to those existing at

the time of a member becoming such. The only right which vests is the right to such sums as become due before the new by-law is adopted. *Bowie v. Grand Lodge,* 99 Cal. 392; *Lawson v. Hewell,* 118 Cal. 613; *Fugure v. Mutual Society of St. Joseph,* 46 Vt. 362; *Pain v. Societé of St. Jean Baptiste, supra.*

The Alabama courts strengthen this view. In the leading Alabama case, *Sup. Commandery, K. of Golden Rule v. Ainsworth,* 71 Ala. 436, that court says: "The mutuality of duty and equality of rights which is the fundamental principle of such organizations, cannot well be preserved if the members stipulating for benefits were not required to consent that they would be subject to future as well as existing by-laws. Time and necessity will develop a necessity for change in the by-laws, and if the consent were not required, there would be a class of members bound by the changed laws and a class exempt from their operation. And there is little room, if any, for the apprehension that advantage will be taken by the governing body, of the assent of the member to be bound and affected by subsequent laws, to impose upon him unjust burdens." This opinion was upheld by the United States Supreme Court in 1904, in *Wright v. Minn. Mut. Life Ins. Co.,* 193 U S. 657, where the rule is laid down that there is no vested right in a policy holder to have the original plan of insurance continued, nor is there any impairment of the obligations of any contract the member had with the association when the company changed from the assessment to the regular premium paying basis under a status permitting this change.

The conclusion from these citations is that the rule of the principal case, while in harmony with the New York rule, is not in accord with the weight of opinion or with what seems to be the wiser reasoning.