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MAY A STATE TAX A FOREIGN CORPORATION?

Unquestionably the states may exclude foreign corporations so long as such exclusion does not violate the Constitution of the United States; also a state has the right to prescribe the conditions on which a foreign corporation may continue to do business in the state unless some contract right in favor of the corporation prevents or some constitutional right is denied.[1]

In *The Baltic Mining Company v. Massachusetts* the Federal Supreme Court has recently reiterated and affirmed its former decisions in this regard. In this case the petitioner was a foreign corporation capitalized at $2,500,000. It was organized under the laws of Michigan, where its mines and smelters are located, but its financial offices are in Boston, and five per cent of its sales are consummated in Massachusetts. The Mining Company claimed that a statute of Massachusetts, under which it was taxed one-fiftieth of one per cent on its authorized capital stock, was repugnant to the Federal Constitution as an unlawful regulation of

[1] *Hammond Pack. Co. v. Arkansas,* 212 U. S., 322-343.; *Southern Pac. Co. v. Denton,* 146 U. S., 202; *Ducat v. Chicago,* 10 Wallace, 410; *Bank of Augusta v. Earle,* 13 Pet., 586.

inter-state commerce; that it deprived the petitioner of the equal protection of the laws; and deprived it of property without due process by imposing a tax upon property beyond the jurisdiction of the state. It should be stated, too, that the tax, in no case, according to the statute, could be for a greater sum than $2,000. (Mass. Stat., 1909, c. 490, Part III, sec. 70.)

The Mining Company based its claim under the decisions of the *Western Union Telegraph Co. v. Kansas* (216 U. S., 1) and the *Pullman Co. v. Kansas* (216 U. S., 56). In the former of these decisions the Court said: "A state may impose any terms it chooses as a condition of permitting a foreign corporation to do business, so long as it does not deprive the corporation of any rights secured to it by the Constitution. A state may exclude. The Constitution, however, guarantees to every corporation the right to do inter-state business." This latter statement apparently governs this case, and would support the contention of the Mining Company, but this statement must be construed according to the facts concerning which it was made. In *Western Union Telegraph Co. v. Kansas* and *Pullman Co. v. Kansas* it must be noticed that a tax upon their capital stock is a tax upon their business, which is, primarily, or to a great extent, at least, inter-state commerce. The companies were organized for conducting commerce between the states, and, within the states, also, to be sure, but the inter-state and intra-state transactions are all carried on together over property which extends across the lines of states. The business of these companies is commerce, not the manufacturing, the purchasing, nor the selling of the articles of commerce. Thus a tax on all their capital stock is a direct tax upon money and property engaged not only in intra-state but in inter-state traffic, and of course is void. Unquestionably it should be so.

But the *Mining Company v. Massachusetts* presents a very different question. The corporation was not organized for, nor is its business inter-state commerce, but it was organized for the purpose of mining, smelting, and selling copper within the State of Michigan and under the laws of Michigan. Hence it can only enter another state on the terms which that state imposes; it is a foreign corporation and comes within the cases previously cited.

The tax in question is after all not a tax upon property but an excise tax upon the corporation for the privilege of doing business in Massachusetts and while it is based on the amount of the

authorized capital stock, nevertheless there is a limit of $2,000 beyond which the tax does not extend. If, as is shown under the cases cited *supra,* a state may impose such conditions as it sees fit upon a foreign corporation seeking to do business within the state, it can certainly require it to pay an annual fee of $2,000. If the state can do that it can surely charge them less than $2,000 for this privilege when the capital stock is less than a certain amount. The corporation must meet the conditions the state imposes or forfeit its privilege. As is said in *Pullman Company v. Adams* (189 U. S., 420, at p. 422), "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce".[2]

It would seem that *Horn Silver Mining Co. v. New York*[3] is an authority in point. The case holds that the statute of New York of May 26, 1881, imposing a tax upon the corporate franchise or business of every corporation organized under any law of that state or any other state, to be computed by percentage of its entire capital stock, when applied to a manufacturing corporation organized under the laws of Utah, but doing a small part of its business in New York, does not regulate inter-state commerce nor tax property not within the state, and the remedy of the corporation must be sought in the legislature, or by withdrawal.

It is difficult to perceive how the taxing of the corporation for the privilege of entering a state is a tax upon powers granted under the commercial clause of the Federal Constitution. In the present case the statute imposes no prohibition upon the transportation into Massachusetts of the products of the corporation nor upon the sale of them within the commonwealth. It merely exacts a license tax from the corporation when it has an office in the state.[4]

For a state tax to be inhibited by the Federal Constitution it must immediately affect the efficient exercise of a Federal power or else the states are denied the power to tax either person or property.[5]

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[2] *Allen v. Pullman Palace Car Co.,* 191 U. S., 171-182; *Kehrer v. Stewart,* 197 U. S., 60-67.

[3] *Horn Silver Mining Co. v. New York,* 143 U. S., 305.

[4] *Pembina Consolidated Mining Co. v. Pennsylvania,* 125 U. S., 181-4.

[5] *Western Union Telegraph Co. v. Massachusetts,* 125 U. S., 530-550; *Railroad Co. v. Peniston,* 18 Wall., 5-30.

It is the commerce itself which must be burdened by state exactions in order to constitute interference with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part at least in inter-state commerce when such receipts or capital are not taxed as such, but are taken as the mere measure of a tax of lawful authority within the state, has been sustained.[6]

Finally, the *Pullman Co. v. Kansas* and the *Western Union Telegraph Co. v. Kansas* cases hold that the court, looking at the substance of a statute regardless of its form, will determine whether or not the tax operates directly on inter-state commerce. The statutes, in each of these cases, requiring all foreign corporations to pay a percentage of their entire capital stock, were found to be a direct burden upon that portion of the corporate capital engaged in inter-state commerce and hence void. Those cases differ from the present, however, in that both of them were corporations directly and necessarily engaged in inter-state commerce. The impairment of their local business would impair their inter-state business. Also the maximum fee required by the Massachusetts laws is $2,000; this shows conclusively that it is not a property tax, but, only, an excise so limited that it cannot reach beyound a reasonable license fee.

In view of these former decisions it would seem that the Supreme Court of the United States from the standpoint of expediency, reason and authority, has done well not to extend the construction of the inter-state commerce clause to the limit urged by the Baltic Mining Co.

CONSTITUTIONALITY OF STATUTE AFFECTING RIGHT OF TRIAL BY JURY.

Is a statute authorizing the Appellate Court, in cases where, as matter of law, a verdict should have been directed for one party, but where, failing such direction, the jury has returned a general verdict for the other, to enter up final judgment for the appellant, unconstitutional, as an abridgment of the right to trial by jury?

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[6] *Flint v. Stone, Tracy Co.*, 220 U. S., 107; *Providence Institution v. Massachusetts*, 6 Wall., 611; *Maine v. Grand Trunk Railway Co.*, 142 U. S., 217.

In the recent case of *Bothwell v. Boston Elevated Ry. Co.*, the Supreme Court of Massachusetts, speaking through Chief Justice Rugg, answered this question in the negative.[1] An administrator was suing for damages for the death of his intestate, under a statute authorizing such recovery from a street railway company, whose servants in the conduct of its business negligently cause the death of a person not a passenger or an employee, "in the exercise of due care."[2] The uncontradicted evidence showed that plaintiff's intestate ran in front of defendant's car because he was frightened by a Chinaman whom he had teased and angered. The trial judge refused to direct a verdict as requested by the defendant, and the jury returned a general verdict for the plaintiff. On appeal, the Supreme Court held that the refusal to direct a verdict was error. But instead of sending the case back for a new trial, they directed final judgment to be entered at once for the defendant, by authority of the following statute:

"When, in the trial of a civil action, the presiding justice is requested to rule that upon all the evidence the plaintiff cannot recover, and such request is refused, and exception by the defendant to such refusal is duly taken, and a finding or verdict returned for the plaintiff, then if the defendant's said exception is sustained in the Supreme Judicial Court, and exceptions if any taken in said trial by the plaintiff are all overruled, the Supreme Judicial court may, by rescript, direct the entry in the trial court of judgment for the defendant, and thereupon judgment shall be so entered."[3]

Had it not been for the recent decision of the Supreme Court of the United States in the case of *Slocum v. New York Life Ins. Co.*, the point would not have called for further discussion.[4] A statement of that case therefore becomes necessary. The plaintiff was the executrix of her husband, whose life was insured for $20,000 by the defendant company. The policy was styled "non-forfeitable," and provided for a month of grace in the payment of premiums, and even after that, if the value of the paid-up policy to date was not entirely offset by loans to the insured from the company, such surplus would be used, in the absence of notice by the insured, as a further payment of an equivalent amount in pre-

[1] 102 N. E. Rep., 665.
[2] St. 1907, c. 392.
[3] St. 1909, c. 236, sec. 1.
[4] 228 U. S., 364.

miums on the original policy. The rules of the company, known to the plaintiff and the insured, also permitted its agent to adjust the payment of premiums, by accepting part of the amount due in cash, and part in an interest-bearing note of the insured. A premium fell due on Nov. 27, and was not paid. On Dec. 27, the last day of grace, the plaintiff applied for an adjustment, and made the necessary cash payment, but the note was never signed by her husband, who died four days later. Moreover, the paid-up value of the policy had been entirely offset by loans to the insured from the company.

At this point it should be noted that the foregoing statement of facts, taken from the opinion of the majority of the Supreme Court, was not based on a special verdict, but was expressly held by that majority to contain all the facts, inferences, and conclusions, which a reasonable jury could possibly, as matter of law, have drawn from the evidence.

Yet the trial court, when this evidence was all in, refused to direct a verdict for the defendant, and the jury returned a general verdict for the plaintiff. On error to the Circuit Court of Appeals, that tribunal found, as matter of law, that the verdict ought to have been directed for the defendant. Acting, in accordance with the Conformity Act, under a Pennsylvania statute essentially similar to the Massachusetts statute quoted above, it then entered up final judgment for the defendant.[5] On appeal, all the justices of the Supreme Court were agreed that the trial court should have directed a verdict for the defendant, on the ground that all the facts legally inferable from the evidence showed as matter of law that the plaintiff had no cause of action. But five of the justices held that the act of the Circuit Court of Appeals, in entering final judgment for the defendant in conformity with the Pennsylvania statute, was error, because that statute contravened the Constitution of the United States, which provides that:

"No fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law."[6] The minority, speaking through Hughes, J., denied that this statute violated the Constitution.

Now it was admitted on both sides that this clause, quoted above, and indeed the entire amendment dealing with the preser-

[5] Penn. Laws, 1905, p. 286, c. 198.

[6] U. S. Constitution, Seventh Amendment.

vation of trial by jury, related only to the Federal courts. But there is a clause in the constitution of Massachusetts, looking to the presevation of the right of jury trial, which is sufficiently similar to this Seventh Amendment to render the decision of the majority in the Slocum case, if not binding, yet extremely persuasive upon the Supreme Court of Massachusetts in the principal case.[7] It is therefore fair to say that Chief Justice Rugg, in deciding as he did, followed the opinion of the minority in the Slocum case, and in fact he admits as much. Keeping in mind then the essential similarity between the Massachusctts and Pennsylvania statutes, and the fact that the law of Massachusetts and of the United States are in accord on the subject of demurrers to evidence and the later motion for directed verdict, as is shown in the cases cited in the note, it will be seen that a full discussion of the arguments pro and con in the Slocum case, and a conclusion thereon, should also conclude the principal case.[8]

The argument of the majority in the Slocum case, briefly stated, is that when the Circuit Court of Appeals entered up final judgment for the defendant, after setting aside the verdict, it was re-examining a fact tried by a jury otherwise than according to the rules of the common law. They admit that in certain cases even at common law the jury was dispensed with, and then they proceed to distinguish those cases. As to motions for judgment *non obstante veredicto,* and in arrest of judgment, they point out that these were based on the total effect of the pleadings, and had nothing to do with evidence, or with disputed questions of fact. As regards motions for nonsuit, these always required the plaintiff's consent, and even when granted did not make the cause *res adjudicata.* And in the old demurrer to evidence the demurrant had to admit all the evidence of his opponent, and reasonable inferences therefrom, to be true, and then a final judgment was reached for one or the other. This, say the majority, is obviously distinguishable from the modern motion for a directed verdict.

The dissenting justices reply that while the effect of the old demurrer to evidence and that of the motion for a directed ver-

[7] Bill of Rights, Art. 15.

[8] On demurrers to evidence, compare *Copeland v. N. Eng. Ins. Co.,* 22 Pick., 135, with *Fowle v. Alexandria,* 11 Wheat., 320. On motion for directed verdict, compare *Davis v. Maxwell,* 53 Mass., 286, with the statement of the majority in the *Slocum Case,* 228 U. S., 369.

dict are quite different, yet both raise a pure question of law. In both, the judge must consider all the evidence of the opposite side, with all reasonable inferences therefrom, as admitted, and determine both its legal effect, and its sufficiency in law to support the issue. Final judgment was entered on the demurrer to evidence, and might be reversed on appeal without a new trial. Without discussing nonsuits or motion *non obstante* at all, here is a parallel at common law to the present action of the court below. In short, no disputed fact has been re-examined, for there was never anything here within the province of a jury to try. The minority opinion strikes at the very root of the matter, and its logic is unanswerable, when it says:

"If this court found that on the trial there was any question of fact for the jury to decide, it could not sustain, as it does sustain, the Circuit Court of Appeals in reversing the judgment for the plaintiff."

These arguments would seem to give ample support to the opinion of Chief Justice Rugg. But it has been suggested that there is a difference between a pure question of law, such as the legal effect of evidence, and a question for the judge which may be as to whether or not the evidence is sufficient to go to the jury.[9] As an example of the first is cited the case of *Oscanyon v. Winchester Arms Co.*, where the Turkish Consul, having by agreement with defendant company procured his government to buy arms of them, sued for his commission.[10] There the evidence showed a contract which was void as against public policy, and is said to raise a pure question of law, on which judgment, if reversed on appeal, might properly be entered up the other way without a ne wtrial. But the Slocum case, it is said, is an example of the second, for here the question was as to the sufficiency of the evidence, as certain facts were disputed. And it is claimed that such a question, while it is for the judge, is not such a pure question of law that the Appellate Court has any right to set aside a verdict upon it, and enter up a final judgment for the appellant.

This suggestion, it will be observed, does not affect the principal case, for there the question was as to the legal effect of the uncontradicted evidence. Nor does it seem to overthrow the minority argument in the Slocum case, for the following reasons:

[9] *Illinois Law Review*, p. 387.

[10] 103 U. S., 261.

Is there any inherent difference between the two questions, what is public policy, and, what is sufficient evidence to go to the jury? One seems just as much a fact as the other, and both, to be sure, require the exercise of sound reasoning power, backed by long experience, for their proper solution. That is why they have both been left to the judge. We arrive, then, at this paradox, that the only essential difference between law and other facts is that human experience has shown it to be necessary that the former should be dealt with by a man of special training—the judge. This is well brought out in Professor Thayer's Preliminary Treatise on Evidence, where, after stating that, philosophically speaking, all law is fact, he concludes his discussion of Law and Fact in Jury Trials as follows:

"It seems plain that the doctrine of our common law system which allots to the jury the decision of disputed questions of ultimate fact, is to be taken with the gravest qualifications. Much fact which is part of the issue is for the judge; much which is for the jury is likely to be absorbed by the judge, 'whenever a rule about it can be laid down'; as regards all of it, the jury's action may be excluded or encroached upon by the co-operation of the judge with one or both of the parties; and, as regards all, the jury is subject to the supervision of the judge, in order to keep it within the limits of law and reason."

The conclusion seems inevitable, that when a jury has rendered a verdict upon a question which human experience, crystalized in the common law, has marked out as a question for the judge, it has so far exceeded its province, that an arbitrary reversal of its verdict by an Appellate Court cannot by any stretch of the imagination be regarded as an infringement of that province.

FORFEITURE FOR BREACH OF CONDITION IN INSURANCE POLICY.

In the recent case of *Dolliver v. Granite State Insurance Co.*, 89 Atl. 8, Me., it was held: that where the standard policy of insurance in question provided that the policy should be *void* if the premises should become vacant and so remain for more than thirty days, without the previous consent of the insurer in writing, and a breach of this provision took place, followed by a subsequent occupancy, the insured could not recover for a loss occurring after the subsequent occupancy. The court construed

the word "void" to mean null, of no effect, and decided that the force of the provision did not depend upon an increase of the risk but that the vacancy worked a forfeiture and not merely a suspension of the risk so that the subsequent occupancy did not revive the policy.

There is decided conflict in the authorities upon this matter. In the first place it should be noticed that the cases which decide that a breach of the condition will not work a forfeiture, where the policy provides simply for notice to the insurer of any increased risk and giving him the option to declare it void, are clearly distinguishable from the principal case.[1] Again it is evident that cases holding, under the older form of policies, which provide that a breach shall avoid the contract but also specifically state that the policy shall "cease and be of no effect so long as the premises shall be used, etc.," that a breach only suspends the policy during the prohibited user are no authority in opposition to the case under discussion.[2] The contract as a whole shows that the parties only intended a failure to comply with the provision should cause the policy to be suspended so long as the breach continued and no longer.[3] Yet these cases are often baldly cited to the effect that a breach of a provision stipulating that the contract shall be void if not complied with will work only a temporary suspension of risk.[4] We see they stand for no such proposition.

Now as to the principal case it would seem clear at first impression that where the policy provides that upon breach of a condition it shall become void there should be no recovery after such breach though the loss is not due to the breach and occurs after it has been repaired. This is the view of many jurisdictions.[5] The provision is a warranty in the nature of an express

[1] *Joyce v. Maine Ins. Co.*, 45 Me., 168; *Tiefenthal v. Citizens' Mut. F. Ins. Co.*, 53 Mich., 306; *Arkansas Ins. Co. v. Bostick*, 27 Ark., 539.

[2] *Lounsbury v. Ins. Co.*, 8 Conn., 458; *Phoenix Ins. Co. v. Lawrence*, 4 Metc. (Ky.), 9; *Blood v. Fire Ins. Co.*, 12 Cush., 472; *U. S. F. & M. Ins. Co. v. Kimberly*, 34 Md., 224.

[3] *New England Fire & M. Ins. Co. v. Wetmore*, 32 Ill., 221.

[4] See *Athens Mutual Ins. Co. v. Toney*, 1 Ga. App., 492; *Germania Fire Ins. Co. v. Klewer*, 129 Ill., 599; *Trader's Ins. Co. v. Catlin*, 163 Ill. 256.

[5] *Phoenix Ins. Co. v. Lawrence, supra; Putnam v. Commonwealth Ins. Co.*, 4 Fed., 753; *Leggett v. Aetna Ins. Co.*, 10 Rich. (S. C.), 202; *Wheeler v. Trader's Ins. Co.*, 62 N. H., 450; *German Amer. Ins. Co. v. Humphrey,*

condition precedent and must be fulfilled before liability can attach to the insurer.[6]

Certainly this is so when the provision is against insurance in other companies. As was well said in an Indiana case, "The primary purpose of inserting (such) conditions is to protect the company from the hazard of over insurance. * * * Consequently, it aims to secure the continued vigilance and co-operation of the owner in preserving the property. * * * Whenever the property owner * * * applies for and obtains a second policy, valid upon its face, with intent and purpose to carry the second policy as valid insurance * * * he has therefore defeated the whole policy and purpose of the condition."[7]

Other courts, however, have assumed an opposite view. They construe the word *void* as meaning *voidable* only and hold that when the cause for forfeiture no longer exists the policy is revived.[8]

With this decision we cannot agree. Most of the reasons given therefore seem to be founded upon some idea of doing "natural justice" between the parties.[9] An interpretation is thus given to the contract which is not apparent on its face.

The rule of construction applicable to all contracts is that in the absence of ambiguity there is no room for interpretation of the meaning of words.[10]

It is not within the province of a court to change the terms of a contract, however harsh they may be, if in so doing the meaning

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62 Ark., 348; *German Ins. Co. v. Russell,* 65 Kans., 373; *Chester Co. Mut. F. Ins. Co. v. Coatesville Shoe Factory,* 86 Pa. St., 407; *Georgia Homes Ins. Co. v. Rosenfield,* 95 Fed., 358; *Stuart v. Ins. Co.,* 179 Mass., 434; *Hardiman v. Fire Ass'n.,* 212 Pa., 383; *Jersey City Ins. Co. v. Michol,* 35 N. J. Eq., 291; *Carleton v. Ins. Co.,* 109 Me., 79; *Imperial Fire Ins. Co. v. Coos County,* 151 U. S., 452, 14 Sup. Ct., 379.

[6] *Mead v. Northwestern Ins. Co.,* 7 N. Y., 530.

[7] *Am. Ins. Co. v. Replogle,* 114 Ind., 1.

[8] *Trader's Ins. Co. v. Catlin, supra; Fireman's Ins. Co. v. Cecil,* 12 Ky. Law Rep., 259; *Obermeyer v. Globe Mut. Ins. Co.,* 43 Mo., 573; *German Mut. F. Ins. Co. v. Fox,* 96 N. W., 652; *Born v. Insurance Co.,* 110 Iowa, 379; *Insurance Co. v. Pitts,* 88 Miss., 587; *McGannon v. Ins. Co.,* 171 Mo., 143; *Athens Mut. Ins. Co. v. Toney, supra; Sumter Tobacco Warehouse Co. v. Phoenix Ins. Co., supra.*

[9] See cases cited in note 7, *supra.*

[10] *Hoyt v. Ketcham,* 54 Conn., 60; *Nichols v. Mercer,* 44 Ill., 250; *Noyes v. Nichols,* 28 Vt., 159.

is ignored.[11] Words are to be given their plain meaning unless a contrary intent appears.[12] In these policies we find it difficult to discern any ambiguity. The word *void* does not mean *voidable* in ordinary legal parlance.

The Illinois court has said in substituting such a meaning:[13] "That a recovery on a policy on a building * * * should be defeated because a gallon of gasolene was therein kept and used * * * does not commend itself as a reasonable rule." Where is the limit to be fixed, then? Surely the keeping of 2,000 gallons should preclude recovery, or of 200. Each case cannot be decided upon its individual merits.

In a recent Georgia case the view of these courts was thus expressed:[14] "When words of the policy are that the insurance shall be void if the premises * * * shall be vacant, the meaning is simply that if a loss occurs during the prohibited vacancy the policy is void"; that," it is unjust to hold that a condition that in no wise contributed to the loss should work a forfeiture of the insurance," and that, "the purpose of the clause is to protect the insurer from the risk of non-occupation."

This construction does not appeal to the reason. As we have shown, the purpose of such provisions is not only that stated by this court, but also to ensure care on the part of the insured. But apart from the practical side of the matter, the parties have a right to make such contracts, keeping within constitutional limitations and not offending public policy, as they please. They enter into contracts, as far as the law is concerned, advisedly. If the insured cannot bring himself within the terms of the policy he has accepted why should the court relieve him? To hold otherwise is to make a contract for parties which they never made themselves.[15] This the courts have no power to do. It is the exercise of such power that raises the cry against judicial legislation. Upon what principle can the courts revive a policy which by its terms was null and void?[16] We know of none.

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[11] *Languier v. White,* 29 La. Ann., 156; *Louber v. LeRoy,* 2 Sandf., 202.

[12] *Griswold v. Sawyer,* 56 Hun., 12; *Moran v. Prather,* 23 Wall., 492; *Thellusson v. Rendlesham,* 7 H. L. Cas., 429.

[13] *Trader's Ins. Co. v. Catlin, supra.*

[14] *Athens Mut. Ins. Co. v. Toney, supra.*

[15] *Imperial F. Ins. Co. v. Coos County, supra.*

[16] *Reynolds v. Ins. Co.,* 107 Md., 110; see *Bemis v. Ins. Co.,* 200 Pa., 340.

This is not a question of whether there has been a breach of the essence of the contract. It is a question of what the parties have said. It may be freely admitted that the rule contended for will in some cases work hardship. Nevertheless, in the sum total of cases greater justice will be done by holding the parties to the intendment of their statements than by applying a rule of so-called "natural justice." Such expeditions into the realm of moral obligation invariably end in confusion in the law and uncertainty in business affairs.[17] It is submitted that the holding of the principal case is correct.

ADEQUACY OF PROVOCATION IN HOMICIDE TO REDUCE THE CRIME FROM MURDER TO MANSLAUGHTER.

In the case of *The State v. Buonomo*,[1] the defendant, while with a party of drunken men and women in a brothel, shot and killed a woman. "The State introduced a confession of the accused in evidence, in which he stated that the woman whom he killed slapped him in the face just before the shooting, that he was drunk, and thought they wanted to kill him, and shot only to scare them." The trial court in its charge to the jury said: "As this case has been presented to you, no construction of the evidence open to you discloses either legal justification, or excuse; the only crime involved in your deliberations is that of murder. * * * You start, as I have said, with a killing which amounts to murder —that is, a killing characterized by malice aforethought, either express or implied."

On appeal by the defendant, Justice Thayer, in delivering the opinion of the court ordering a new trial, said: "The part of the confession tending to show that the shooting was accidental or done in hot blood upon reasonable provocation, presented matters which were clearly for the jury's consideration, if the claim had been made that the shooting was accidental or done under circumstances which extenuated the crime. * * * The court, by its charge, said in effect that it was not evidence, and withdrew it from the jury."

It may be that the court was right as to there being evidence of an accidental killing, but that a slap in the face at the hands of

[17] See *Vance on Insurance*, p. 433, and *Richards on Insurance*, p. 309.

[1] 87 Conn., 285.

a woman constitutes such reasonable provocation as to reduce the grade of a homicide from murder to manslaughter, we do not agree.

Reasonable or adequate provocation is such as would naturally and instantly produce in the mind of a person ordinarily constituted the highest degree of exasperation, rage, anger, sudden resentment, or terror, rendering the mind incapable of cool reflection, and thus negativing the inference of malice drawn from the fact of homicide.[2] A technical assault, if of a trivial nature, will not reduce the grade, where the retaliation is outrageous in its nature, and beyond all proportion to the provocation.[3] An assault need not, however, be so violent as to put the defendant in imminent danger of death; nor of such grievous bodily injury as might reasonably cause death.[4]

There are two English cases of interest in this connection; one, tending to support the principal case; the other, opposed to it. In one case,[5] the prisoner was indicted for the murder of his wife, who had returned home and received forgiveness after having lived with another man in adultery. Shortly after her return she violently abused her husband, taunted him with her preference for the other man, who had died, and becoming very violent, finally broke away from two other women who had been holding her, and spat at her husband's face—the evidence does not show whether she actually spat upon him—repeating with much foul language, her expressions about the other man. Thereupon the prisoner stood up and gave his wife a mortal wound in the neck with a sharp-pointed pocket-knife. The court left the question whether the words spoken, and the other circumstances, aggravated the provocation given by the assault, so as to make it a serious assault and reduce the crime to manslaughter, to the jury, which returned a verdict of manslaughter. It is doubtful, however, whether the question would have been left to the jury had

[2] *Judge v. State,* 58 Ala., 406; *Holmes v. State,* 88 Ala., 26; *People v. Bruggy,* 93 Cal., 476; *Swanner v. State,* 58 S. W. (Tex.), 72; *Reg. v. Welsh,* 11 Cox C. C., 336.

[3] *Stewart v. White,* 78 Ala., 436; *State v. Emory,* 58 Atl. (Del.), 1036; *State v. Anderson,* 4 Nev., 265; *State v. Barfield,* 30 N. C., 344; *State v. Ferguson,* 2 Hill (S. C.), 619; *Honesty v. Com.,* 81 Va., 283; *Rex. v. Lynch,* 5 C. & P., 324.

[4] *Williams v. State,* 107 Ga., 721; *English v. State,* 95 Ga., 123; *Cook v. Com.,* 4 Ky. L. R., 31; *State v. Sizemore,* 52 N. C., 206.

[5] *Reg. v. Smith,* 4 F. & F., 1066.

it not been for the vile language accompanying the technical assault. At best, the case is an extreme one.

In the other case,[6] upon provoking words being used by a soldier to a woman, she gave him a box on the ear, and the soldier immediately gave her a blow with the pommel of his sword on the breast, and then ran after her and stabbed her in the back. This was at first deemed murder; but it afterwards appearing that the blow given to the soldier was with an iron patten, and that it drew a great deal of blood, the offense was held to have been manslaughter only. This case cannot be said to support the Connecticut court, for the crime was deemed murder until it appeared that the woman had seriously wounded the soldier by means of a weapon. Even in its later aspect, the correctness of the holding has been doubted by an eminent American jurist: "If a man should kill a woman or a child for a slight blow, the provocation would be no justification; and I very much question whether any blow inflicted by a wife on her husband would bring the killing of her below murder. Under this view of the law I have always doubted Stedman's case. * * * Where a blow is cruel or unmanly, the provocation will not excuse it."

To determine the sufficiency of the provocation to mitigate the killing from murder to manslaughter, the instrument or weapon with which the homicide was effected must be taken into consideration; for if it was effected with a deadly weapon, the provocation must be great indeed to lower the grade of the crime from murder; the instrument employed must bear a reasonable proportion to the provocation to reduce the offense to manslaughter.[8] It will be observed that in the first case above referred to, the crime was committed with a pocket knife; in the second, with a sword. Both were instruments ordinarily in the hands of the defendants and their use as weapons was devised in sudden passion. But in the case under discussion, the killing was done with a revolver carried by the accused; and a revolver is not carried by the ordinary man under ordinary circumstances. This alone is sufficient to distinguish it and to require evidence of great provocation in order to reduce the grade of the crime.

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[6] *Stedman's Case,* Fost., 292.

[7] Chief Justice Gibson in *Com. v. Mosler,* 4 Pa. St., 264, 268; *Wharton on Criminal Law,* §971; see also *State v. Kloss,* 117 Mo., 591; *State v. Ferguson, supra.*

[8] *State v. Shippey,* 10 Minn., 223, 230; *State v. Ferguson, supra; Rex v. Thomas,* 7 C. & P., 817; *May on Criminal Law,* §227.

There is, however, further ground for disagreeing with the opinion of the court. Buonomo, in his confession, stated that he "shot only to scare". This in itself refutes any theory of actual provocation or passion.

We are of the opinion, therefore, that the reversal, in so far as it stands upon the ground that there was evidence of reasonable provocation, was erroneous. While the capacity of the ordinary man to withstand provocation is the criterion where there was in fact provocation,[9] yet where the accused was not actually provoked, the fact that an ordinary man might have been provoked to do the same act is of no consequence.

BREAKING AS AN ELEMENT IN BURGLARY.

Burglary at common law is the breaking and entering the dwelling house of another in the night-time with intent to commit some felony therein, whether the intent be executed or not.[1] By statute it is practically universal now to make a breaking and entering into any building, boat, or car a crime of similar gravity to common law burglary.

In some of the states statutory enactments defining burglary have eliminated the breaking as a necessary element of the crime,[2] other states have by statute adopted the common law definition of the crime to the extent of making the breaking an essential part.[3] In these latter states there is the same necessity which arises under the common law of determining what acts are necessary to constitute a breaking.

It has been held apparently universally that an entry through an open door, window, or other aperture is not burglary.[4]

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[9] *Judge v. State, supra; State v. Walker,* 50 La. Ann., 420; *State v. Hoyt,* 13 Minn., 132; *Gardner v. State,* 40 Tex. Cr. R., 19; *Reg. v. Welsh, supra...*

[1] 1 Hale P. C., 358, 559; Hawk. P. C., c. 38; *Martin v. State,* 1 Tex. App., 525; *Clarke v. Com.,* 25 Gratt. (Va.), 908.

[2] Cal. Penal Code, sec. 459; Rev. Laws of Nev., sec. 6634; N. C. Statutes, Rev. of 1905, sec. 3332.

[3] Conn. Gen. Stat., secs. 1194, 1195, 1196; Vt. Pub. Stat., sec. 5751; Ill. Rev. Stat., 756, sec. 36.

[4] *Miller v. State,* 77 Ala., 41; *McGrath v. State,* 25 Nebr., 780; 41 N. W., 780; *Rex. v. Spriggs,* 1 M. & Rob., 357.

It has also been held almost universally that an entry by pushing open a door or window which is partially open is not burglary.[5] On the other hand, it is burglary to enter by unlocking or unlatching a door or window,[6] or even by pushing open a door that is shut but not fastened in any way,[7] or by raising a window or trapdoor which is entirely closed but held in place by its weight only.[8] It is burglary to enter by means of a chimney.[9] The degree of force necessary to effect the entry is not of importance.[10] The question is whether the place of entry has been closed as much as the nature of things will permit, irrespective of whether after being closed it has been fastened or secured in any way. If so closed, any entry by such place constitutes a breaking.[11]

The need of a clear distinction to determine what is to be held burglary and what not, is apparent. The great majority of the cases hold the further opening of a partly opened door or window is not an act which amounts to a breaking of the security of the building, apparently upon the ground that the breaking must be the initial act impairing the security.[12]

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[5] *Rose v. Com.*, 19 Ky. L. Rep., 272, 40 S. W., 245; *Com. v. Strupney*, 105 Mass., 588 (the window by which entry was made had been left open a quarter of an inch); *State v. Wilson*, 1 N. J. L., 439; *Rex. v. Smith*, 1 Moody C. C., 178. But see *contra, Claiborne v. State*, 113 Tenn., 261, 83 S. W., 352, 68 L. R. A., 859; *People v. White*, 153 Mich., 617, 117 N. W., 161, 17 L. R. A. (N. S.), 1102; *State v. Sorenson*, 138 N. W. (Ia.), 411; *State v. Lapoint*, 88 Atl. (Vt.), 523.

[6] *State v. Moore*, 117 Mo., 395; 22 S. W., 1086; *State v. O'Brien*, 81 Ia., 93, 46 N. W., 861.

[7] *Kent v. State*, 84 Ga., 438, 11 S. E., 355.

[8] *State v. Herbert*, 63 Kan., 516, 66 Pac., 235.

[9] *Donohoo v. State*, 36 Ala., 281; *State v. Willis*, 52 N. C., 190.

[10] *Walker v. State*, 63 Ala., 49; *Timmons v. State*, 34 Ohio St., 426.

[11] 1 Hawk P. C., c. 38, sec. 4; 1 Hale P. C., 552.

[12] Sir William Blackstone in his Commentaries, Book 4, sec. 226, gives as the reason for the rule that entry by means of a partially opened door or window is not such a breaking as to constitute burglary, that it was "the folly and negligence" of the person in leaving his doors and windows open. Many of the cases have given the negligence of the house owner as the reason for the distinction. *Pines v. State*, 50 Ala., 153; *State v. Boone*, 35 N. C., 244. Such reasoning is contrary to the well settled rule that contributory negligence is not an answer to a criminal charge. *Belk v. People*, 125 Ill., 584, 17 N. E., 744; *Crum v. State*, 64 Miss., 1, 1 So., 1; *Reg. v. Kew*, 12 Cox C. C., 355.

Since the breaking is a necessary element of the crime, the rule that when an entry is made through an open door or window where no force is necessary to make the entry—that is, where the opening is sufficient to admit of entry without need of further increasing it—such an entry is not a breaking, seems technically justifiable, although the moral wrong of such an entry is as great as in any other form of entry. Now that the death penalty for burglary has been abolished the necessity of restricting the scope of the crime is largely done away with, and the rule which determines that burglary is committed when a closed window is raised to effect the entry, but that no burglary is committed if the window be found raised the fraction of an inch at the time of entry,[13] has no longer as its justification the extreme penalty formerly inflicted for the crime,[14] and since the man who enters by further opening a partly opened door or window is morally as deserving of punishment as he who enters by opening a fully closed door or window, the better rule, and the one towards which the latter cases seem to tend, is that given in the recent case of *State v. Lapoint*,[15] holding that the removal of an obstruction which if left as found would prevent an entrance, constitutes a sufficient breaking, it being immaterial that a portion of the entrance was already open.

In view of the almost universal practice at the present time of leaving windows open for ventilation, the statutes abolishing breaking as an element of burglary seem preferable.

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[13] *Com. v. Strupney, supra.*

[14] *Rex v. Hyams*, 7 C. & P., 441 note (a), 32 E. C. L., 577.

[15] 88 Atl. (Vt.), 523.