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Published monthly during the Academic year, by THE YALE LAW JOURNAL COMPANY, INC.
P. O. Address, Drawer Q, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise, it is assumed that a continuation of the subscription is desired.

APPLICABILITY OF LEX LOCI CONTRACTUS TO DETERMINE STOCKHOLDERS' LIABILITY FOR CORPORATION DEBTS

It is asserted by the text-writers with complete unanimity that the individual liability of stockholders for corporation debts is to be determined exclusively by the law of the state of incorporation.¹ The multitudinous cases commonly cited for this proposition seem, however, entirely inadequate to sustain it.² For in these cases, with only one or two exceptions,³ the only point squarely presented to the court was whether a non-resident stockholder was liable under the law of the place of incorporation; and there was nothing to show that the place of incorporation was not also the place where the corporation debt was contracted.

¹ Beale, *Foreign Corporations*, sec. 442. "In all these cases the existence of the obligation is to be determined by the law of the State of charter. That law creates the obligation, and that alone can determine what liability it has created."

² Professor W. N. Hohfeld, *The Individual Liability of Stockholders and the Conflict of Laws*, 10 COL. L. REV. 294, n. 24

³ *Hutchins v. New England Coal Mining Co.* (1862) 4 Allen (Mass.) 580; analyzed and explained, 10 COL. L. REV. 532.

More recently, however, this problem has been definitely raised in a series of important decisions⁴ growing out of the California statute⁵ declaring every stockholder of a corporation, "domestic" or "foreign," individually liable for his proportionate share of the debts and liabilities of the corporation. The case of *Provident Gold Mining Co. v. Haynes*⁶ is an interesting and important extension of this series of cases. A corporation was formed in Arizona for the purpose of doing business in Arizona or in any other state or territory at the discretion of the board of directors. The corporation incurred debts in California; and the defendant, a California stockholder, was held individually liable even though by the Arizona law the liability of the stockholders was expressly limited.⁷

The first case under the California statute was *Pinney v. Nelson*.⁸ A corporation was formed in Colorado with only limited liability of stockholders as provided by the Colorado law. By the express terms of the charter, the corporation could do business in California. Business was done in that state; and the court held that the stockholder became bound by the laws of the state specifically mentioned in the charter; that he would be held individually liable for his proportionate share of the debts of the corporation according to the California statute.

In the next important case of the series, *Thomas v. Mathiessen*,⁹ the defendant, a citizen of New York and a stockholder in an Arizona corporation, was at all times, as he alleged, without knowledge of the California statute. The corporation having been specifically authorized by the articles to do business in California as well as elsewhere, constructed a hotel and in connection therewith contracted debts in that state. The case differed from *Pinney v. Nelson* in that (1) the articles of incorporation

⁴ *Pinney v. Nelson* (1901) 183 U. S. 144; *Peck v. Noe* (1908) 154 Cal. 351; *Thomas v. Wentworth Hotel Co.* (1910) 158 Cal. 275; *Thomas v. Mathiessen* (1914) 232 U. S. 221. In these cases the California statute was held valid and applicable. *Contra, Risdon Iron and Locomotive Works v. Furness* [1916] 1 K. B. 49.

⁵ Const. art. xii, sec. 3; Civ. Code, sec. 322.

⁶ (1916) 159 Cal. 155.

⁷ "The private property of every stockholder in the corporation shall be forever exempt from liability for the corporate debts of the corporation."

⁸ (1901) 183 U. S., 144.

⁹ (1914) 232 U. S., 221.

as well as the state law expressly provided for limitation of the stockholders' liability; (2) the defendant was not a citizen and a resident of the state of incorporation or of California; (3) the action was brought in the federal court of New York instead of the California courts. Both the United States District Court¹⁰ and the Circuit Court of Appeals¹¹ held that, in spite of the evident intention of the California statute, the defendant could not be made liable thereby; but the Supreme Court, reversing the lower courts' decision, held the defendant stockholder liable for his proportionate share of the corporation debts.

It is but a step forward to the problem of the principal case. The corporation was organized in Arizona to do business in that state or "in any other state or territory as the board of directors may from time to time deem necessary and expedient." Although California was not mentioned in the articles of incorporation as in the previous cases, a general authorization to do business in the state was given and the court held the defendant for his share of the corporation debts. This is in conflict with *Risdon Iron and Locomotive Works v. Furness*¹² decided by the English Court of Appeal. This case was, however, seriously criticized in a series of articles appearing at the time,¹³ and it was maintained in the latter that the analogies and authorities as a whole supported the view now adopted in the principal case.

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SUBSEQUENT VALIDATION OF AN ILLEGAL MARRIAGE

A man who had a wife undivorced entered into a ceremonial form of marriage with another woman who did not know of the former marriage. They cohabited as husband and wife for many years and continued to do so after the death of the first wife. An undivided court held that upon the death of the first wife they would thereafter be considered as lawfully married.¹

¹⁰ (1909) 170 Fed. 362.

¹¹ (1911) 192 Fed. 495.

¹² [1905] 1 K. B. 304, affirmed [1906] 1 K. B. 49.

¹³ Professor W. N. Hohfeld, *Nature of Stockholders' Individual Liability for Corporation Debts.* 9 COL. L. REV. 285; *The Individual Liability of Stockholders and the Conflict of Laws.* 9 COL. L. REV. 442; 10 COL. L. REV. 283; 10 COL. L. REV. 520.

¹ *Smith v. Reed* (1916) 89 S. E. (Ga.) 815.

The requirement that the parties must both be unmarried in order to be capable of marriage is an absolute one.² If either party to a marriage has a husband or wife living at the time of the marriage, the marriage is absolutely void, however good the faith of the parties may have been.³

The second so-called marriage being absolutely void, it follows that it is not capable of ratification upon the removal of the impediment. In this respect, it differs materially from a case in which two persons entered into a ceremonial marriage and cohabited as husband and wife, although the marriage was voidable because one of the parties was under the age at which a valid marriage could be contracted.⁴

It is reasoned, however, that the intent to be husband and wife expressed in the invalid ceremony continues unless the contrary appears, and the continued cohabitation after the removal of the impediment is to be considered as under such an intent and declaration rather than with an unlawful intent.⁵ Why such an inference is to be thus drawn is difficult to understand, especially when it appeared in the principal case that the parties had been living together as husband and wife by force of a ceremonial marriage to which, as a valid act, one of the parties had never assented. Rather he consented to deceive the so-called wife and to live with her under the appearance of marriage. In this particular, the principal case must be distinguished from those cases in which both parties to the invalid ceremony were wholly unaware of the existence of any obstacle to their marriage, and manifested in good faith a matrimonial intent.⁶

Other difficulties are encountered in attempting to find a common law marriage. If a man and a woman lived together as husband and wife, holding themselves out as such and supposed to be such by all their neighbors and relatives, a court may well presume that they have been married; but this is a mere

² *Reeves v. Reeves* (1870) 54 Ill. 332; *Cartwright v. McGowan* (1887) 121 Ill. 388; *Tefft v. Tefft* (1871) 35 Ind. 44.

³ *Compton v. Benham* (1909) 44 Ind. App. 51; *Drummond v. Irish* (1879) 52 Ia. 41; *Cartwright v. McGowan, supra*.

⁴ *Smith v. Smith* (1889) 84 Ga. 440.

⁵ *Smith v. Reed* (1916) 89 S. E. (Ga.) 815.

⁶ Cf. *DeThoren v. Attorney-General* (1876) 1 A. C. 686; *Chamberlain v. Chamberlain* (1905) 68 N. J. Eq. 736.

evidential presumption.⁷ Where, however, the connection between the parties is shown to have had an illicit origin, and to be criminal in its nature, the law raises no such presumption.⁸ The fact appearing that one of the parties had full knowledge at the time of the commencement of such cohabitation that he was incompetent to contract a lawful marriage would be strong evidence that he would not hesitate to continue the unlawful conduct after the disability had been removed.⁹

On the other hand, why should the alleged wife be presumed to have done a thing the necessity of which had never been made known to her? If she regarded herself as his lawful wife it would be a violent presumption to hold that she assented to a second informal marriage. Without knowledge of the removal of the impediment neither party could have intended a second marriage, or have attempted to enter into one. Without consent the status of marriage is never created.¹⁰

Presumption must yield to the superior force of direct and positive proof. When the facts show that an apparently lawful marriage was in fact an illicit relation in its beginning, it is presumed to be of that character, unless the contrary be proved,¹¹ and it cannot be transformed into matrimony by evidence which falls short of establishing the fact of an actual contract of marriage.¹²

The fact that one of the parties had no knowledge of the invalidity of the marriage, and therefore the cohabitation on her part was not criminal, cannot validate the assumed marriage even as to her.¹³ If valid to her it must be equally so as to him.

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⁷ *Cartwright v. McGowan*, *supra*; *Plattner v. Plattner* (1905) 116 Mo. App. 405; *Collins v. Voorhees* (1890) 47 N. J. Eq. 555.

⁸ *Compton v. Benham*, *supra*; *Randlett v. Rice* (1886) 141 Mass. 385; *Cartwright v. McGowan*, *supra*.

⁹ *Williams v. Williams* (1879) 46 Wis. 464; *Compton v. Benham*, *supra*.

¹⁰ *Dickerson v. Brown* (1873) 49 Miss. 357; *Cartwright v. McGowan*, *supra*.

¹¹ *Compton v. Benham*, *supra*; *Collins v. Voorhees*, *supra*; *Williams v. Williams*, *supra*.

¹² *Foster v. Hawley* (1876) 8 Hun. (N. Y.) 68; *Spencer v. Pollock* (1892) 83 Wis. 215; *Barnes v. Barnes* (1894) 90 Ia. 282; *Williams v. Williams*, *supra*; *Appeal of Reading Fire Ins. etc. Co.* (1886) 113 Pa. St. 204; *Compton v. Benham*, *supra*.

¹³ *Williams v. Williams*, *supra*.

JURISDICTION OF THE UNITED STATES COURTS IN THE CASE
OF THE APPAM

The exercise of jurisdiction by a federal court, in the case of the Appam,¹ could not even be considered without first holding that the State Department² had placed the proper construction upon Article XIX of the Treaty of 1779 with Prussia, in holding that the Appam did not come within its provisions, both on the ground of her being an unconvoyed prize and also of having come into port for the purpose of permanent internment rather than for the purpose of securing a temporary asylum. But there is still a distinct question as to whether the exercise of jurisdiction was in conformance with the general position of the United States upon this particular phase of international law.

Article XIX of the Treaty of 1779 reads: "The vessels of war, public or private, of both parties shall carry freely where-soever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, etc." A reasonable interpretation of this article shows that it confers privileges only upon "vessels of war."

The treaty continues as to prizes, "Nor shall such prizes be arrested, searched or put under legal process, when they come to and enter the ports of the other party, but may freely be carried out again at any time by their captors to the places expressed in their commissions." The commissions referred to are clearly those of the capturing vessel which accompanies prizes into port and not those of the prize crew. It is clear that a port of refuge was not to be made a port of ultimate destination or permanent asylum. Yet the commission of the prize master of the Appam was "to take her to the nearest American port and there to lay her up." On arrival at Hampton Roads application was made for permanent internment. These two circumstances show conclusively that mere temporary asylum was not the object of the Appam's journey.

In regard to the practice of condemning prizes in neutral ports Sir W. Scott in the *Case of the Henrick and Maria*³ expressed

¹ (1916) 234 Fed. 389.

² Letter of Secy. Lansing to Count von Bernstorff, March 2, 1916.

³ (1799) 4 C. Rob. 35, *per* Sir W. Scott: "Abundant instances are to be produced from the older edicts of England, France, Holland, and Spain, directing that prizes should be brought into the ports of the captor and in a late instance in the practice of this court, where a decree

his regret that the English Court of Admiralty had gone too far in extending its practice of condemning captured vessels in the ports of allies to the condemnation of prizes in neutral ports, but that he was not inclined to recall the rule to its proper purity. No claim was made that the Appam was a war vessel; and as private property and subject to prize she must be taken to a prize court of the belligerent country.⁴ The title of the captor between himself and the owner is inchoate and incomplete and circumstances like a violation of neutrality⁵ may arise in which the title may never become vested.⁶

Our own court has held⁷ that complete title does not vest in the captor until the prize is condemned in a court of the captor's nationality.⁸ The authorities for a period sustained the view that the courts of the neutral country were without jurisdiction.⁹ But this position is no longer held since the decision in the case of *The Betsey*¹⁰ to the effect that a district court may award restitution of property claimed as a prize of war by a foreign power.

It is clearly established in Dana's note to Wheaton that the rights¹¹ of a belligerent vessel of war do not extend to the

had passed on a prize ship taken by stress of weather to Norway, the court rescinded the decree declaring that it would not condemn a vessel lying in a neutral port." See *The Herstelder* (1799) 1 C. Rob. 96: "I think I may state the better opinion and practice to have been that a prize should be brought *infra praesidia* of the capturing country, whereby being so brought, it may be considered as incorporated in the mass of national stock. The greatest extension that has been allowed has not carried the rule beyond the places of security belonging to some friend or ally in the war who had a common interest."

⁴ *The Nassau* (1862) 4 Wall. (U. S.) 634; see also *The Manila Prize Cases* (1902) 188 U. S. 254.

⁵ Moore, *Digest*, see sec. 1302.

⁶ *The Resolution* (1781) 2 Dall. (U. S.) 1.

⁷ *The Adventure* (1811) 8 Cranch. (U. S.) 221.

⁸ *Queen v. Chesapeake* (1863) 1 Oldr. (N. S.) 769.

⁹ *Moxon v. The Fanny* (1794) 2 Pet. Adm. 309; see also *The Ship Friendship* (1793) Bee. Adm. Rep. 40.

¹⁰ (1794) 3 Dall. (U. S.) 6; *Paquete Habana* (1899) 175 U. S. 677.

¹¹ Wheaton, *International Law* (1866) 1 n. 187: "After such examination as the commander of the cruiser can make, his duty as against neutrals is to decide between two courses. He must either release the vessel absolutely with her cargo, papers, passengers and all entire; or he must complete his capture, make her a prize and send her in for adjudication. He cannot take a middle course, and, releasing the vessel, exercise any belligerent authority over her cargo, papers, passengers, etc.; or take

pursuance of such a course in the making of prizes as occurred in the principal case.

The admission of armed ships of a belligerent whether men-of-war or private armed cruisers, with their prizes, into territorial waters of a neutral for refuge, whether from chase or from perils of the sea, is a question of mere temporary asylum, accorded in obedience to the dictates of humanity, and regulated by specific exigency.¹² Wheaton shows in the case of *The Bergen Prizes*¹³ that the right of the United States to send prizes into Danish ports was grounded on necessity arising from stress of weather. It nowhere appears that permanent asylum was sought for these vessels.¹⁴

Inasmuch as the bringing of the Appam into Hampton Roads was in violation of our neutral rights,¹⁵ and of our established policy, as shown by our rejection of Article XXIII of the Hague Convention¹⁶ relative to giving asylum to a prize, restitution was rightfully made to the original owners.¹⁷ This was done by virtue of the *res* itself being within the control¹⁸ of the District Court of Virginia, and of its general jurisdiction as a district court to take cognizance of questions of prize,¹⁹ exclusive of German prize court proceedings.²⁰

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from her persons or property. If he should take this course he will be considered as having declined the exercise of the only belligerent right neutral nations will permit to him. . . . The modern practice of neutrals prohibits the use of their ports by prizes of belligerents except in cases of necessity."

¹² Cushing, Atty. Gen. (1855) 7 *Op. Atty. Gen.* 122.

¹³ Moore, *Digest*, sec. 1314.

¹⁴ Wharton, *International Arbitrations*, p. 4572.

¹⁵ *Queen v. Chesapeake*, *supra*.

¹⁶ (1907) Articles of Hague Convention, xxiii.

¹⁷ *L'Invincible* (1816) 1 Wheat. (U. S.) 238; see also *The Divina Pastora* (1819) 4 Wheat. (U. S.) 52: President Jefferson to Mr. Gallatin, Aug. 28, 1801: "Before the British treaty no stipulation stood in the way of permitting France to sell her prizes here, and we did permit it but expressly as a favor, not as a right. . . . These stipulations admit the prizes to put into our ports in cases of necessity or perhaps convenience, but no right to remain if disagreeable to us and in no case to be sold." To the same effect see Mr. Pickering, Secy. of State, to Mr. Adet, May 24, 1796, 1 *Am. State Papers*, Foreign Relations, 651; also, Mr. Clay, Sec'y. of State, to Mr. Obregon, May 1, 1828. *Ms. Notes to Foreign Legations* IV, 22.

¹⁸ *Juando v. Taylor* (1818) Fed. Cas. 7558.

¹⁹ *The Amy Warwick* (1862) Fed. Cas. 341; *Sasportas v. Jennings* (1795) 1 Bay. 470.

²⁰ *The Santissima Trinidad* (1822) 7 Wheat. (U. S.) 283.

DELIMITATION OF THE STATE POLICE POWER AS TO BUILDING
RESTRICTIONS

In a recent Minnesota case¹ the court held—two judges dissenting—that a city ordinance, adopted under legislative authority of the state, prohibiting the erection of any store on one's own land within a prescribed residential district was an unreasonable exercise of the police power and an invasion of property rights secured by the Fourteenth Amendment of the Federal Constitution. There seems to be no former decision directly in point² but many analogous where certain more limited classes of buildings have been forbidden. All have generally held such restrictions valid.³

The only limitation upon the exercise of the broad police power is that it shall not specifically be repugnant to the Federal or State Constitutions.⁴ There is no doubt that its scope extends to protection against fire,⁵ unsanitary conditions,⁶ vice and immorality,⁷ or any nuisance *per se*.⁸ Furthermore it is now well settled that it may be invoked to prohibit certain businesses, under some circumstances, not nuisances *per se*.⁹ The general welfare is a fundamental object to be accomplished by the exercise of police power, and it would seem that it might well require the exclusion of anything but residences proper from the residential portions of a city. The characteristic architecture, as well as the operation of business, materially depreciates the value of adjacent property for residence purposes. The average citizen rightly prefers his home removed from the noisy industrial

¹ *State ex rel. Lachtman v. Houghton* (1916) 158 N. W. (Minn.) 1017.

² That most nearly the same is *People v. City of Chicago* (1913) 261 Ill. 16, where a city ordinance forbidding the erection of retail stores in a residential section was held invalid, but the ground of decision was that the ordinance was not authorized by state statute.

³ *In re Montgomery* (1912) 163 Cla. 457; *Hadadieck v. Sebastian* (1915) 239 U. S. 394; *Ex parte Quong Wo* (1911) 161 Cal. 220; *People ex rel. v. Village of Oak Park* (1915) 266 Ill. 365.

⁴ *State v. Goodwill* (1889) 33 W. Va. 179; *Knight etc. Co. v. Miller* (1909) 172 Ind. 27; *Mugler v. Kansas* (1889) 123 U. S. 623.

⁵ *Wadleigh v. Gilman* (1835) 12 Me. 403.

⁶ *Commonwealth v. Roberts* (1892) 155 Mass. 281; *Walker v. Jameson* (1894) 140 Ind. 591.

⁷ *State v. Williams* (1901) 160 333; *L'Hote v. New Orleans* (1899) 51 La. Ann. 93.

⁸ *Ex parte Quong Wo*, *supra*; *People ex rel. v. Oak Park*, *supra*.

⁹ *Davenport v. Richmond* (1886) 81 Va. 636.

activities of the city where he can obtain better light and air and more moral surroundings for his family. To allow a property owner to devote his land to a use thus incongruous with that of the immediate vicinity might even be said to damage his neighbor's realty.¹⁰ Whether this be so or not, the ordinance under consideration would seem to be justifiable on principle; but the apparent weight of authority is in accordance with the view of the majority judges in the principal case.¹¹

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¹⁰ See *People v. City of Chicago*, *supra*.

¹¹ *Willison v. Cooke* (1913) 54 Col. 320; *People v. Murphy* (1909) 195 N. Y. 126; *Haller Sign Works v. Physical Culture Training School* (1911) 249 Ill. 436; *Bryan v. Chester* (1905) 212 Pa. St. 259; *Varney & Greene v. Williams* (1909) 155 Cal. 318.