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THE RIGHT OF AN EJECTED TICKET-HOLDER TO RECOVER IN TORT

The right of the holder of a ticket of admission to a theater or other place of amusement to recover in a tort action for unwarranted expulsion has been a topic of much discussion since the case of *Hurst v. Picture Theatres, Ltd.*[1] This decision apparently overruled what had been the established doctrine in

[1] [1915] 1 K. B. 1. Here a person actually paid admission to a moving-picture show, but the doorkeeper, thinking that he had not paid for the seat occupied, laid hands upon him to secure his removal by force. The patron yielded and went out. It was held, Phillimore, L. J., *dissenting*, that the patron was entitled to recover substantial damages for the assault. The defendant sought to justify the removal on the ground that the plaintiff's license had been revoked. The two concurring judges, however, after discussing the rule of *Wood v. Leadbitter*, concluded that the purchaser of the ticket obtained a license to witness the performance from beginning to end, and that the license included a contract not to revoke it arbitrarily during the performance.

England since at least 1845 when *Wood v. Leadbitter*[2] was decided.

A very similar situation seems to have been presented to the Supreme Court of South Carolina in *Metts v. Charleston Theater Co.*[3] In this case the defendant sold the plaintiff a ticket in advance for an advertised performance. The ticket was duly accepted at the entrance and the seat occupied during a part of the performance. Upon the arrival of another person who showed a ticket entitling him to the same seat for the same performance, it was discovered that the ticket seller had made a mistake and given the plaintiff a ticket for a previous date. Nothing appeared on the ticket to put the purchaser on notice of the error. The plaintiff was forced to relinquish her seat and to suffer great humiliation in being escorted from the theater by a policeman.

In affirming the trial court's award of actual and punitive damages for the improper expulsion, the Supreme Court apparently assumed that the so-called "license" to enter and remain, which the patron had secured, might be revoked at any time (according to the doctrine of *Wood v. Leadbitter*), but concluded, curiously enough, that there was no evidence showing such a revocation. If such were the case, obviously an action for assault could be maintained and damages recovered for the indignities and humiliation suffered because of the defendant's conduct. The facts of the case, however, would seem to disclose abundant evidence to support the defendant's contention that there was a revocation. In short, it would appear that the court, being impressed by the justice of the plaintiff's cause of action but unable to free itself from the firmly-embedded notion that a "license" not coupled with a grant under seal is revocable at the will of the licensor, adopted this convenient solution. Other courts had already blazed this path.[4]

[2] (1845) 13 M. & W. 838. In this case the plaintiff paid admission to a horse race, and without in any way having misconducted himself was ejected from the grandstand with no unnecessary violence. The court decided that no recovery could be had as there was no assault, for, by purchasing a ticket for admission, the plaintiff obtained only a license, which was revocable at any time without refunding the money.

[3] (1916) 89 S. E. (S. C.) 389.

[4] Other cases adopting a like solution are *Boswell v. Barnum & Bailey* (1916) 185 S. W. (Tenn.) 692; *Weber-Stair Co. v. Fisher* (1909) 119 S. W. (Ky.) 195; *Walsh v. Hyde & B. Amusement Co.* (1906) 113 App. Div. (N. Y.) 42; *McGoverny v. Staples* (1870) 7 Alb. L. J. (N. Y.) 219.

The reasoning and decisions of the courts on this question, though usually convenient, have indeed been unsatisfactory and confusing. Until the case of *Hurst v. Picture Theaters, Ltd.*, it was generally asserted that the purchaser of a ticket to enter and remain at a theater, circus, or racetrack possessed a mere "revocable license"; that if the "license" was revoked and the licensee ejected without unnecessary force his only remedy was an action for breach of contract, and his damages were limited to the price of the ticket or, at most, to any expense incident to its purchase and attendance at the place of amusement.[5] It was insisted, because of the private character of the enterprise, that there was no breach of legal duty either in refusing admission to anyone or in expelling anyone after admission.

It is submitted that these decisions are erroneous and confusing; that they have given rise to indistinctness of thought; that they are the result of a failure to distinguish the mental and physical phenomena from the resulting legal relations; and that an accurate analysis of the legal relations created in a case similar to the principal one will show that if A is on B's property by "license" of B, such "license" cannot, for reasons which follow, be revoked.

When A purchases a ticket to enter and occupy a seat in B's theater, it is commonly asserted that A gets a mere "revocable license." This is inaccurate. The term "license" is merely descriptive of the group of *operative* facts which create in A a "privilege" of entering and occupying the designated seat during the performance.[6] The *operative* facts referred to are, of course, the payment of the consideration, the issuance of the

[5] The leading cases upholding this doctrine are *Wood v. Leadbitter, supra; Meisner v. Detroit B. I. & W. Ferry Co.* (1908) 154 Mich. 545; *W. W. V. Co. v. Black* (1912) 113 Va. 728; *Marrone v. Washington Jockey Club* (1912) 227 U. S. 633; *Taylor v. Cohn* (1906) 47 Or. 538; *Horney v. Nixon* (1905) 213 Pa. St. 20; *Cornish v. Stubbs* (1870) L. R. 5 C. P. 334; *McCrea v. Marsh* (1858) 12 Gray (Mass.) 21.

[6] Professor Wesley N. Hohfeld in his article on Fundamental Legal Conceptions as Applied in Judicial Reasoning (1913) 23 YALE LAW JOURNAL, 16, at p. 43 says: "The term 'license,' sometimes used as if it were synonymous with 'privilege,' is not strictly appropriate. This is simply another of those innumerable cases in which the mental and physical facts are so frequently confused with the legal relations which they create. Accurately used, license is a generic term to indicate a group of *operative* facts required to create a particular privilege—this being especially evident when the word is used in the common phrase 'leave and license.'"

ticket, proper behavior, etc. A having acquired this "privilege," B is obviously in a different position as regards A from what he was before. B is now said to have a "no-right" that A should not be there; or, in other words, A does not have a "duty" to stay out of the theater, the "privilege" of entering being the negation of the "duty" to stay out. Under the doctrine of *Wood v. Leadbitter,* B would still possess a "power" of extinguishing A's *legal* "privilege" and creating a "duty" in him to leave. This same act would, of course, extinguish his own "no-right," and give rise to a "right" or "claim" that A depart. Wherever the principles of equity are enforced, however, A's *equitable* "privilege" will remain undefeated by B's *legal* "power." The problem here is similar to that in the law of trusts where T holds Blackacre in fee simple on a passive trust for C in fee simple. C's *equitable* "privilege" of entering upon the land conflicts with his *legal* "duty" to refrain from entering; and, correlatively, T's *equitable* "no-right" that C shall stay off the land conflicts with his *legal* "right" that C shall stay off.[7]

In the case of the "license," suppose B should attempt to revoke the so-called "license" and request A to depart, claiming that the "privilege" acquired had been revoked. Equity would restrain B from exercising his *legal* "power" and protect the *equitable* "privilege" which, but for the absence of a seal, would have been a grant at law.[8] If this be so, B in disturbing A in the exercise of his "privilege" would commit an assault for which he must pay damages.[9]

[7] A similarly analogous problem is presented where T holds a bond obligation against C in trust for C. C's *equitable* "privilege" of not paying the amount thereof to T conflicts with his *legal* "duty" to do so; and, correlatively, T's *equitable* "no-right" that C shall make such payment conflicts with his *legal* right. For an exhaustive treatment of this whole problem, see Professor Wesley N. Hohfeld's article on The Relations Between Equity and Law (1913) 11 MICH. L. REV. 537, especially at pages 555 and 556.

[8] Parker, J., in *Jones v. Tankerville* [1909] 2 Ch. 440 at page 443, says: "An injunction restraining the revocation of a license, when it is revocable at law, may in a sense be called relief by way of specific performance, but it is not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract, and protects a right in equity which but for the absence of a seal would be a right at law, and since the Judicature Act it may well be doubted whether the absence of a seal in such a case can be relied on in any court." The learned judge in speaking of a "right" in equity is clearly referring to the "privilege" in the writer's analysis.

[9] Section 25 of the Judicature Act of 1873 provides: "Generally in all matters not hereinbefore particularly mentioned, in which there is any

In this connection, it may be observed that if A elects to sue in tort for the assault, he cannot also recover for a breach of contract. Obviously one is inconsistent with the other. Nevertheless, the two recent devisions which have overthrown the older common-law rule and permitted an action for assault, are apparently inconsistent in allowing a further recovery for breach of contract.[10]

It would seem that at last the English courts, at least, are to give the equitable considerations their true weight, and that the rule in *Hurst v. Picture Theaters, Ltd.*, will supplant that of *Wood v. Leadbitter*. If this be so, it will no longer be necessary for the courts to adopt the convenient but misleading solution employed in the principal case.

S. F. D.

THE WEBB-KENYON ACT AND INTERSTATE COMMERCE

In a recent case,[1] the United States Supreme Court (Mr. Justice Holmes and Mr. Justice Van Devanter, dissenting)

conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." Similarly Section 532 of the Connecticut General Statutes provides: "All courts which are vested with jurisdiction both in law and in equity may, to the full extent of their respective jurisdictions, administer legal and equitable rights and apply legal and equitable remedies, in favor of either party, in one and the same suit, so that legal and equitable rights of the parties may be enforced and protected in one action; but wherever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail." It would be especially easy for a court under the above statutes or similar ones to hold that while B may have a right or claim to A's departure, his exercise of any force to bring this about would amount to an assault.

[10] *Hurst v. Picture Theatres, Ltd., supra; Barnswell v. National Amusement Co.* (1915) 23 D. L. R. 615. In speaking of the question of damages, in the former case Buckley, L. J., says: "The defendants had, I think, for value contracted that the plaintiff should see a certain spectacle from its commencement to its termination. They broke that contract, and it was a tort on their part to remove him. They committed an assault upon him in law." In the latter case, Martin, J. A., adopting the reasoning in *Hurst v. Picture Theatres, Ltd.*, says: "As regards damages, the amount awarded, $50, would not justify our interference, because while breach of contract would be inapplicable, yet the learned Judge has obviously considered that the plaintiff was entitled to something appreciable for the assault."

[1] *Clark Distilling Co. v. Western Md. Ry.* (1917) 242 U. S. 311, 37 Sup. Ct. Rep. 180.

upheld the constitutionality of the Webb-Kenyon Act[2] and finally settled a very much disputed question relating to the power of Congress to regulate interstate commerce. The court in its decision construed the Webb-Kenyon Act as prohibiting the transportation in interstate commerce of all liquor shipped into a state in violation of the law of the state. The law of West Virginia forbade the shipment of liquor into the state and the receipt and possession of liquor so transported, without regard to the use to which the liquor was to be put. It was, therefore, decided that the provisions of the law of the state were made applicable by the federal act.[3] The effect of the Webb-Kenyon Act is to remove the protection of the interstate commerce clause from traffic in intoxicating liquors in certain cases.

As early as 1827, the Supreme Court held that a state did not have the power to regulate and tax an importation from a foreign country while the article taxed remained in the original package.[4] Contrary to a *dictum* laid down in the above case, a state statute regulating original packages containing liquor was declared to be within the police power of the state.[5] *The License Cases,* however, were overruled in *Leisy v. Hardin,*[6] which was directly influenced by the earlier case of *Bowman v. Chicago R. R.*[7] The court held that not only had a state no power to forbid the importation of intoxicating liquors;[8] but it also lacked the power to subject such a legitimate article of commerce to state prohibition laws while it remained in the original package.[9] The effect of these decisions was to call into existence the

[2] "An act divesting intoxicating liquors of their interstate character in certain cases." It forbids the shipment or transportation of intoxicating liquors "from one State . . . into any other State, Territory, or District of the United States, . . . which is intended to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States." 37 St. at L. 699, Act of Mar. 1, 1913.

[3] The Court thus overruled the case of *Van Winkle v. State* (1914) 27 Del. 578, which held that the Webb-Kenyon Act applied only when liquor shipped in interstate commerce was intended to be used in violation of the law of the state, and did not apply to liquor shipped for personal use.

[4] *Brown v. Maryland* (1827) 12 Wheat. (U. S.) 419.

[5] *License Cases* (1847) 5 How. (U. S.) 504.

[6] (1890) 135 U. S. 100.

[7] (1888) 125 U. S. 465.

[8] *Bowman v. Chicago R. R., supra.*

[9] *Leisy v. Hardin, supra.*

Wilson Act,[10] which provided that imported liquors shall, upon arrival in a state, fall within the category of domestic articles of a similar nature. Objections similar to those made to the constitutionality of the Webb-Kenyon Act were unavailing, and the case of *In re Rahrer*[11] declared the Wilson Act valid. However, later cases showed the limited application of the act, and in *Rhodes v. Iowa*,[12] the court decided that, although the Wilson Act removed an impediment to the enforcement of state laws in respect to imported packages in their original condition, yet the states did not have the power, by virtue of the Wilson Act, to pass laws preventing the importation of liquor from another state. To meet the situation created by the above and later cases, Congress finally enacted the Webb-Kenyon Act.

Many objections were urged against the constitutionality of the act. It was originally vetoed by President Taft on the grounds that the act operated to delegate power to the states, and that it lacked uniformity.[13] As early as 1851, the Supreme Court, in considering the constitutionality of pilotage laws enacted by the states, made the following classification:[14] "The power to regulate commerce embraces . . . . . various subjects quite unlike in their nature; some imperatively demanding a uniform rule; . . . . . and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation. Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." The court thus held that the mere grant to Congress of the power to regulate commerce did not deprive the states of the power to regulate pilots. It was this classification that influenced the court in *Bowman v. Chicago R. R.*, and *Leisy v. Hardin*. It was there said that intoxicating liquors were of such a nature as to require a uniform system among the states, and the power to pass such legislation was vested exclusively in Congress. It is interesting to note some of the state acts which were held, nevertheless, to be valid and not encroachments upon the exclusive power of Congress. The Supreme Court recognized the

[10] (1890) 26 St. at L. 313.
[11] (1891) 140 U. S. 545.
[12] (1898) 170 U. S. 412.
[13] 49 Cong. Rec. 4291; see also article in 22 YALE LAW JOURNAL, 567.
[14] *Cooley v. Board of Wardens* (1851) 12 How. (U. S.) 299.

power of the state to pass a law, even in the absence of federal legislation giving the state such authority, excluding and forbidding the importation into the state of oleomargarine, fraudulently described as butter.[15] The court held this was a valid exercise of the police power of the state to prevent a deception being practiced upon the public.

In the principal case, the court intimated that the Webb-Kenyon Act did not lack uniformity: "So far as uniformity is concerned, there is no question that the Act uniformly applies to the conditions which call its provisions into play—that its provisions apply to all the states so that the question really is a complaint as to the want of uniform existence of things to which the Act applies and not to an absence of uniformity in the Act itself." The court went further and denied that uniformity was an essential requisite to the constitutionality of statutes regulating commerce in intoxicationg liquors. "It is obvious," the court continued, "that the argument seeks to engraft upon the constitution a restriction not found in it, that is, that the power to regulate conferred upon Congress obtains subject to the requirement that regulations enacted shall be uniform throughout the United States."

It is a fundamental principle of constitutional law that the general power conferred upon the legislature to make laws cannot be delegated by that body to any other department or authority.[16] The court distinguished between a delegation of power and a state regulation which derives its force from the will of Congress, and held that the Webb-Kenyon Act falls within the second class. One of the outstanding features of the act is the fact that its violation is not made a federal offense, because it was passed simply to enable the various prohibition states to enforce their prohibition laws in an effective manner. It is the state that punishes the offender and not the federal authorities. The act would, therefore, on first reflection appear to confer power upon the states heretofore not possessed by them. But it must be remembered that the states have always had the power to pass laws prohibiting the sale and manufacture of liquor within the state.[17] The Wilson Act removed one impediment

[15] *Plumley v. Massachusetts* (1894) 155 U. S. 461. The same result was reached in *Crossman v. Lurman* (1904) 192 U. S. 189 in the case of artificially colored coffee beans.

[16] Cooley, *Constitutional Limitations*, p. 163.

[17] *Mugler v. Kansas* (1887) 123 U. S. 623.

that prevented the effective enforcement of state liquor laws; the Webb Act went further and removed another impediment. This can hardly be said to be a delegation of power. The Webb-Kenyon Act differs radically from the Lottery[18] and the Mann "White Slave" Acts,[19] which forbid interstate traffic in lottery tickets and in women, in that these federal statutes inhibit such commerce entirely and make their violation federal offenses. Had Congress exercised its power in reference to intoxicating liquors in the same way, making a violation of the act a federal offense, no question would have been raised as to the act being a delegation of power. The constitutionality of the Webb-Kenyon Act would seem to follow as a logical and necessary development of liquor legislation and judicial decisions in this country.[20]

J. I. S.

POWER OF COURTS TO RENDER DECREES REGARDING THE DEVOLUTION OF STOCK IN A FOREIGN CORPORATION

Charles Baker died in Tennessee, the owner of property in that state, of stock in a Kentucky corporation, and of a claim for surplus profits against the latter corporation. He had no children, but left a widow in Tennessee and a mother in Kentucky. His personal property, if distributable according to the law of Tennessee, would have gone entirely to his widow; if distributable according to Kentucky law, it would have been divided equally between his widow and his mother. His widow, in a Tennessee court, sued the intestate's mother who was asserting a half interest in the personal estate. The mother was summoned by pub-

[18] Act of Congress (1895) 28 U. S. St. at L. 963, c. 191; *Champion v. Ames* (1903) 188 U. S. 320.

[19] Act of Congress (June 25, 1910) 36 U. S. St. at L. 825, c. 395; *Hoke v. United States* (1912) 227 U. S. 308. See also the Lacey Act, sec. 242 of Criminal Code of United States. This act prohibits the transportation in interstate commerce of animals or birds killed in violation of the game laws of the various states. It has been sustained in *Rupert v. United States* (1910) 181 Fed. 87.

[20] Australia, which has a constitution very similar to ours, has a provision therein covering the very situation that the Webb-Kenyon Act provided for, viz.: "All fermented, distilled, or other intoxicating liquors passing into any State or remaining therein for use, consumption, sale, or storage, shall be subject to the laws of the states as if such liquids had been produced in the State." *Annotated Constitution of the Australian Commonwealth* (Quick and Carran) p. 277.

lication. She failed to appear, and the court, after finding that Baker had died domiciled in Tennessee, declared that the plaintiff was entitled to have the stock transferred to her. Later the widow, basing her claim upon the decree of the Tennessee court, sued in a Kentucky court to compel the corporation to transfer the stock to her. The defendant claimed that the Tennessee court had had no jurisdiction to render the former decree. This view was sustained by the Kentucky Court of Appeals. The mother came into the suit by an intervening petition in which she averred that Baker died a resident of Kentucky and prayed for one-half of the corporation stock. The court found that Baker had been domiciled in Kentucky, and that the property should be distributed according to the Kentucky rule. On writ of error, the United State Supreme Court affirmed the judgment on the ground that the Tennessee court was without jurisdiction to enter its decree and that the Kentucky court had power to determine the case.[1]

Jurisdiction is the power in a court to take valid action which will be binding on the parties until set aside, or reversed by some competent tribunal.[2] Jurisdiction *in rem* always exists where there is property within the territory of the state. A decree affecting that property is valid even though the owner of it is not within the state, provided he has been constructively served with notice as required by statute.[3]

A court, however, cannot render a personal decree against an absent non-domiciled foreigner unless he has been actually served with process, or has voluntarily appeared in the suit.[4] Even though knowledge of the suit has actually been brought to the defendant's notice, if he was beyond the territory of the state, the court would have no power to render a decree *in personam*.[5] Applying these principles to the present case, we see that since neither the corporation nor the mother appeared in the Tennessee court, no personal decree could be binding on them.

At least for the purpose of founding administration, debts are considered as assets at the domicile of the debtor.[6] The state

[1] *Baker v. Baker Eccles and Co.* (Jan. 8, 1917) 242 U. S. 394, 37 Sup. Ct. Rep. 152.

[2] *In re Sawyer* (1888) 124 U. S. 200; Prof. Walter W. Cook, The Powers of Courts of Equity (1915) 15 COL. L. REV. 106.

[3] *Raher v. Raher* (1911) 150 Ia. 511.

[4] *Pennoyer v. Neff* (1877) 95 U. S. 714.

[5] *Ibid.*

[6] *Wyman v. Halstead* (1883) 109 U. S. 654.

in which a corporation is domiciled may impose a succession tax.[7] It has recently been held that in determining the title to stock, its *situs* is considered to be in the state in which the corporation in which it is a right or interest, is domiciled.[8] It, therefore, seems that the *situs* of the stock is not in Tennessee, even though the certificates are held there. Thus the Tennessee court could not render a valid decree *in rem* concerning the corporation stock.

Under the "full faith and credit" clause of the Federal Constitution, whenever a judgment of a state court is relied upon in another state as conclusive, the jurisdiction of the court rendering it is open to inquiry, and if it appears that the court had no jurisdiction the judgment is not entitled to receive full faith and credit.[9]

The Kentucky court, therefore, had power to inquire into the jurisdiction of the Tennessee tribunal. Having found that the Tennessee court had no power to render the decree concerning the stock, the Kentucky court, having jurisdiction of both parties, proceeded to decide that Baker's domicile had been in Kentucky and that the property should be distributed according to Kentucky law.

Following the view that the *situs* of the stock in the Kentucky corporation is to be regarded as in Kentucky, the instant case seems to be entirely correct in allowing the Kentucky law to govern the distribution of the corporation stock.

F. L. McC.

THE DUE PROCESS AND FULL FAITH AND CREDIT CLAUSES AS APPLIED TO THE CONFLICT OF LAWS

The case of *Kryger v. Wilson,*[1] recently decided by the Supreme Court of the United States, presents an interesting problem in the applicability of the due process clause[2] and the full faith and

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[7] *Matter of Bronson* (1896) 150 N. Y. 1; *Greves v. Shaw* (1899) 173 Mass. 205.

[8] *Holmes v. Camp* (1916) 219 N. Y. 359, 114 N. E. 841, and note thereon in 17 COL. L. REV. 151.

[9] *Borden v. Fitch* (1818) 15 Johns. (N. Y.) 121, 143, 144; *Thompson v. Whitman* (1873) 18 Wall. (U. S.) 457.

[1] (1916) 37 Sup. Ct. Rep. 34.

[2] Amend, xvi, sec. 1: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

credit clause[3] of the Federal Constitution to the conflict of laws. Vendor and vendee, both residents of the state of Minnesota, entered into a contract for the sale of land situated in North Dakota. The contract was executed in Minnesota, and payment in instalments was to be made there. No money was paid by the vendee at the time the contract was executed. Both Minnesota and North Dakota had statutory methods of foreclosure by which the vendor, through cancellation proceedings, could extinguish the contract claim of the vendee. The vendee having defaulted in the making of payments, the vendor employed the method of foreclosure prescribed by the North Dakota statute,[4] which provided that a vendor in a contract for the sale of land may not cancel and terminate the same upon default, except after written notice to the vendee, giving him at least thirty days in which to make good his nonperformance. In accordance with the further provision of the statute, the vendor gave vendee notice only by publication in the county in which the land was situated. In a suit to quiet title, brought by the assignee of the vendor, it was held by the North Dakota trial court that the discharge of the contract was governed by the North Dakota law and that it had been fully discharged by the cancellation proceedings. On appeal to the Supreme Court of North Dakota, the vendee claiming a denial of due process of law, the decree of the trial court was affirmed.[5] The vendee then appealed to the Supreme Court of the United States on the ground that the state courts had deprived him of property without due process of law, in holding that the cancellation proceedings of the vendor in North Dakota, of which he had had no actual notice, had discharged the contract. The court held that since the non-resident vendee had appeared in the suit to quiet title, the North Dakota court had jurisdiction, and a mere mistake, if any, in applying the wrong rule of conflict of laws as to the discharge of the contract, that the *lex situs* governed rather than the rule of law of the place of making and performance, did not deprive him of due process of law as guaranteed by the Federal Constitution.

In the examination of the questions involved in the case, we shall consider: (1) Whether, in general, there can be a denial of due process of law under the Constitution merely as a result

[3] Art. iv, sec. 1: "Full faith and credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State."

[4] N. D. Rev. Codes, 1905, chap. 30, art. 3, pp. 7494-7497.

[5] *Wilson v. Kryger* (1914) 29 N. D. 28.

of error on the part of the totality of state courts; (2) whether, more specifically, an error by the state courts in determining a question in the conflict of laws—namely, what rule of law is applicable to the discharge of a contract—constitutes a denial of due process of law. Apart from these two considerations dealt with by the case itself, we shall consider (3) the possible application of the full faith and credit clause of the Constitution in the event of a refusal by the North Dakota courts to recognize the applicability of the Minnesota statute to determine the discharge of the contract entered into and to be performed in the latter state.

It has become well established that a mere error in a decision, whether of law or of fact, in a civil or in a criminal case is not a denial of due process of law.[6] Thus the decision of a state court involving nothing more than the ownership of property, with all the parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law simply because its effect is to deny his claim to own such property.[7] Due process of law does not assure to a taxpayer the interpretation of state legislation by the executive officers of a state as against its interpretation by the courts of the state.[8] When an act admitted to be valid has been misconstrued by the court, due process of law has not been violated.[9] Mere error in the administration of a law by a state board is equally regarded as not constituting a denial of due process of law.[10] But an error in the administration of a state law may be so gross,[11] a decision may be so fraudulent,[12] or a tribunal may

[6] *Patterson v. Colorado* (1907) 205 U. S. 454. Holmes, J., said: "In general the decision of a court upon a question of law, however wrong, and however contrary to previous decisions, is not an infraction of the 14th Amend., merely because it is wrong or because earlier decisions are reversed."

[7] *Tracy v. Ginzburg* (1906) 205 U. S. 170. Harlan, J., said: "Under the opposite view every judgment of a state court involving merely the ownership of property could be brought here for review—a result not to be thought of."

[8] *Thompson v. Kentucky* (1907) 209 U. S. 340.

[9] *Central Land Co. v. Laidley* (1895) 157 U. S. 103; *Penn. R. Co. v. Hughes* (1903) 191 U. S. 477.

[10] *Chicago B. & Q. Ry. Co. v. Babcock* (1906) 204 U. S. 585 (error committed by an administrative board).

[11] See H. Schofield, Federal Supreme Court and State Law, 3 ILL. L. REV. 195; *Lent v. Tilson* (1890) 140 U. S. 316.

[12] On what constitutes fraud as to administrative board, see *Ross v. Stewart* (1913) 227 U. S. 530, 539.

be so incompetent,[13] as to constitute a denial of due process of law. In the principal case there was no such fraudulent conduct or gross error in the administration of a state law as to constitute a denial of due process within these well-recognized exceptions.

When the suit to quiet title was instituted in North Dakota, the court held that while the contract was entered into in Minnesota between parties residing in that state and was to be perfomed in Minnesota, the *lex situs* nevertheless governed; that the procedure as to the cancellation of the contract related to the remedy and not to the substantive law governing the relations of the parties. We may well doubt the correctness of this reasoning. The secondary obligation of a contract is so intimately connected with the primary obligation, that convenience and logic require that one set of rules be applied throughout to determine the nature, extent, and discharge of both the primary and secondary obligations, whether that single set of rules be the *lex loci contractus* or the *lex loci solutionis,* according as the former or the latter may govern the primary obligations.[14] Here the North Dakota court clearly departed from that principle by subjecting the vendee to the liability imposed upon him by its statute as to cancellation rather than the duties and liabilities that were intended by the *lex loci contractus,* the Minnesota statute.[15]

[13] See *dicta* in *Jordan v. Massachusetts* (1912) 225 U. S. 167, 176.

[14] Story, *Conflict of Laws,* sec. 331 *ff; Pritchard v. Norton* (1882) 106 U. S. 124; *Gibbs v. Société Industrielle* (1890) 25 Q. B. D. 399. Lord Esher, M. R., said: "The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed as to be considered a contract of that country, is the law which governs such a contract, not merely with regards to its construction, *but also with regard to all the conditions applicable to it as a contract.*" (The italics are the writer's.) *Cf. New York & Cuba Mail S. S. Co. v. Maldonado & Co.* (1915) 225 Fed. 353, Rogers, J., dissenting, correctly asserts that the same law should govern throughout, "(1) as to the primary obligation of the contract, (2) as to the secondary obligation of the contract, (3) and as to the discharge of the secondary obligation." See comment on this case, 25 YALE LAW JOURNAL, 147. In accord see Professor Wesley N. Hohfeld, Individual Liability of Stockholders and the Conflict of Laws (1909) 9 COL. L. REV. 492, especially p. 497, note 11. *Contra,* see J. H. Beale, *Cases on the Conflict of Laws,* vol. iii, sec. 97 (summary).

[15] *Walsh v. Selover, Bates & Co.* (1909) 109 Minn. 136; affirmed in *Selover, Bates & Co. v. Walsh* (1912) 226 U. S. 112. See also *Polson v. Stewart* (1896) 167 Mass. 211; *True v. Northern Pacific R. Co.* (1914) 126 Minn. 72.

Of course, the principle that the *lex loci contractus* should govern throughout is not altered by the existence of a so-called "equitable interest" in the North Dakota land: the rights, privileges and powers of the vendee against third persons who take the land with notice of the existence of the Minnesota contract would be determined according to the *lex situs*.[16]

The Federal Supreme Court held that the error, if any, that may have been committed by the North Dakota court in determining the question of conflict of laws did not constitute a denial of due process of law. This is in line with the very few authorities to be found in support of that specific problem. It has been held that where the case turns upon the construction and operation of the statute of another state and not its validity, a decision of that problem does not necessarily involve a question of a federal character.[17] In the case of *Allen v. Alleghany Co.*[18] the plaintiff, a business corporation created by the laws of North Carolina, had not complied with certain statutory requirement of New York and Pennsylvania, where it had applied for the privilege of doing business. In a suit brought in New Jersey upon a promissory note made in New York, it was held that the plaintiff could enforce the note obligation. When the statute of a state does not declare the contract to be expressly void, the tendency of judicial decisions is toward a strict construction in maintaining its validity. Upon appeal to the Federal Supreme Court, it was held that there was no federal question involved.

While the doctrine of the *lex situs* has been well established in questions of conflict of laws as to property,[19] and the doctrine that the *lex loci delicti* determines both the primary and secondary rights, has been quite generally followed as to torts,[20] there has

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[16] *Mallette v. Carpenter* (1916) 160 N. W. (Wis.) 182; *Fall v. Easton* (1909) 215 U. S. 1. See The Effect as Against the Original Defendant and his Transferees, to be given by the Law of the Situs to a Foreign Decree ordering the Conveyance of Realty, (1917) 26 YALE LAW JOURNAL, 311.

[17] *Johnson v. New York Life Ins. Co.* (1902) 187 U. S. 490; *Glenn v. Garth* (1892) 147 U. S. 360; *Lloyd v. Matthews* (1894) 155 U. S. 222; *In re Converse* (1890) 137 U. S. 624.

[18] (1904) 196 U. S. 458.

[19] *Green v. Van Buskirk* (1868) 7 Wall. (U. S.) 339.

[20] *Western Union Telegraph Co. v. Brown* (1914) 234 U. S. 542. The plaintiff sued to recover damages for mental anguish suffered as a result of defendant's negligent failure to deliver, in Washington, D. C., a telegram sent from South Carolina. In an opinion rendered by Mr. Justice Holmes it was held that the South Carolina statute, which made mental

been much confusion and variance among state authorities as to the rule of law applicable to contracts. It is quite improbable, however, although conceivable, that the United States Supreme Court would consider an error on the part of a state court in the application of the wrong rule of conflict of laws as to property or as to torts, a denial of due process of law. Federal uniformity, in questions relating to the proper interpretation and discharge of contractual obligations, is peculiarly desirable. Yet the existing confusion among state authorities makes it clearly more improbable that the Federal Supreme Court will regard an error committed by a state court in the wrongful application of the conflict of laws as to contracts, a denial of due process of law.[21]

The losing side in the principal case did not allege, as a fact, the Minnesota statute, as it was at the time the contract was executed. It is conceivable that the vendee might have pleaded the Minnesota statute in the North Dakota action, and urged upon appeal to the United States Supreme Court, that the North Dakota court failed to give full faith and credit to the Minnesota statute. The appellant failed to set up a possible contention based on the full faith and credit clause.

That the conclusiveness of judgments of a sister state does not depend on mere comity but on constitutional and statutory guarantees, has become well established.[22] It cannot, however, be thought established, and has not been established, as yet, that statutes, considered as "public acts," of one state, are necessarily to be given equally comprehensive effect in another state.[23] A

anguish a cause of action when the tort occurred outside the state, was an infringement upon the exclusiveness of the control of the United States over the District of Columbia.

[21] See *Allen v. Alleghany Co., supra; cf. Finney v. Guy* (1902) 189 U. S. 335.

[22] *Mills v. Duryea* (1813) 7 Cranch (U. S.) 481. See History of Art. iv, sec. 1 of the Constitution, by George P. Costigan, Jr., 4 COL. L. REV. 470.

[23] There are three possibilities in which the statutes of another state may be involved: (1) Misconstruction of the statute of another state; held not to be a denial of full faith and credit. *Banholzer v. New York Life Ins. Co.* (1900) 178 U. S. 402. (2) Denial of the validity of the statute of another state; held to be a failure to give full faith and credit, by *dicta* in *Johnson v. New York Life Ins. Co., supra; Eastern Building & Loan Assn. v. Williamson* (1903) 189 U. S. 122. (3) Determination that the statute of another state is inapplicable; suggested to be a violation of the full faith and credit clause, by expressions used in *Supreme Council of the Royal Arcanum v. Green* (1915) 237 U. S. 531.

possible significant extension of the full faith and credit clause, along the lines last indicated, was suggested by the *reasoning* of Mr. Chief Justice White in the comparatively recent case of *The Supreme Council of Royal Arcanum v. Green.*[24] Had the vendee in the principal case pleaded the Minnesota statute in the North Dakota action, and set up the interpretation given it by the Minnesota courts, he might have raised again the interesting problem of the applicability of the full faith and credit clause to all statutes.[25]

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[24] (1915) 237 U. S. 531. The defendant appealed to the Supreme Court of the United States, claiming that the New York court violated Art. iv, sec. 1 of the Federal Constitution. The court, Mr. Chief Justice White rendering the opinion, reversed the judgment of the New York Court of Appeals, on the ground that it had failed to give full faith and credit to the Massachusetts judgment involved in the case, and apparently, though somewhat ambiguously, on the further ground that full faith and credit had been denied the Massachusetts charter of the corporation and the laws of that state to determine the powers of the corporation involved and the rights and duties of its members." For a discussion of this case see "Conflict of Laws and Full Faith and Credit" (1916) 26 YALE LAW JOURNAL, 324.

[25] Had the action in the North Dakota courts been between the original vendor and vendee the latter might conceivably have taken a position in conformity with the following suggested additional possibilities:

(1) A denial of due process of law by the North Dakota "legislative arm," as such, where a North Dakota statute would *per se* be a violation of due process of law. *Cf. Pinney v. Nelson* (1901) 183 U. S. 144.

(2) A denial of due process of law by the North Dakota statute as in excess of its "legislative power" under the Constitution. See *Western Union Telegraph Co. v. Brown* (1914) 234 U. S. 542.