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THE ASSOCIATED PRESS CASE

By a divided vote the United States Supreme Court has held that one who gathers news for sale is, for a limited period of time after its publication in news bulletin or newspapers, entitled to restrain its dissemination for commercial purposes by business competitors. *International News Service, Petitioner, v. The Associated Press* (Dec. 23, 1918) U. S. Sup. Ct. Oct. Term, No. 221.[1] The problem presented to the court was purely one of state "common law,"[2] for the jurisdiction of the federal courts depended solely upon diversity of citizenship and there were no statutes involved. For the holding there was no exact precedent in any court of last resort, as Mr. Justice Brandeis makes clear in the dissenting opinion. Many more or less analogous situations had of course been passed upon. Over and over again courts have vindicated the rights of producers to prohibit the copying of

[1] For complete statement of facts see RECENT CASE NOTES, *infra*.

[2] "Common law" is here used in the meaning of "unwritten law" as distinguished from statutory law. It therefore includes the judge-made "equity law" as well as "common law law"—if such a phrase is permissible.

uncopyrighted literary compositions, lectures, paintings, and dramatic and musical compositions, even though they have been communicated or exhibited to a limited number of persons.[3] So also trade secrets are protected so long as they are not given to the general public.[4] In the so-called "ticker cases" it is established that before "news" has been "published," i. e., communicated to the public generally, "pirating" it is unlawful, although here too it may have been communicated to a limited number of persons.[5] In all of these there is the common element that protection is given to something produced by the complaining party which has never been given to the public generally, although it has been revealed or exhibited to a limited number of persons for special purposes. In the principal case the court was invited to take a new step and extend protection to the gatherer of news even after general publication. In several of the "ticker cases" there is general language which assumes this to be the law, a common way of putting it being that a news gatherer has "a property right" in his news.

It is noteworthy that in the prevailing opinion, written by Mr. Justice Pitney, reliance is not placed upon these *dicta*. He says: "We need spend no time upon the general question of property in news matter at common law . . . since it seems to us the case must turn upon the question of unfair competition in business." In spite of this, however, we soon find the learned justice saying that "as between the parties," news matter "must be regarded as *quasi* property." To the mind of the present writer, such general expressions—"property right in news," "*quasi* property," etc.—are so vague as to be of little value in reaching sound conclusions.[6] The situation needs closer analysis

[3] Space permits the citation of only a few of the leading cases. Many others are cited in the dissenting opinion of Mr. Justice Brandeis. Literary compositions: *Webb v. Rose* (1733) Amb. 695; *Donaldson v. Beckett* (1774, H. L.) 4 Burr. 2408; *Wheaton v. Peters* (1834, U. S.) 8 Pet. 591. Letters: *Thompson v. Lord Chesterfield* (1774) Amb. 737; *Gee v. Pritchard* (1818) 2 Swans. 402; *Baker v. Libbie* (1912) 210 Mass. 599, 97 N. E. 109 (see note in 37 L. R. A., N. S. 944). Dramatic compositions: *Macklin v. Richardson* (1770) Amb. 694; *Ferris v. Frohman* (1912) 223 U. S. 424, 32 Sup. Ct. 263; *Thompkins v. Halleck* (1882) 133 Mass. 32. Lectures: *Cullen's Case* (1771, Ch.) 12 App. Cas. 332, note 2; *Caird v. Sime* (1887) 12 App. Cas. 326. Paintings: *Turner v. Robinson* (1860) 10 Ir. Ch. 121.

[4] *Salomon v. Hertz* (1885) 40 N. J. Eq. 400. A large number of the authorities are collected and discussed in 12 L. R. A. (N. S.) 102; 20 *ibid.* 933; 44 *ibid.* 1160.

[5] *Exchange Telegraph Co. v. Gregory* [1896] 1 Q. B. 147; *Kiernan v. Manhattan Quotation Telegraph Co.* (1876, N. Y. Sup. Ct.) 50 How. Pr. 194; *Board of Trade v. Christie Grain, etc. Co.* (1905) 198 U. S. 236, 25 Sup. Ct. 637.

[6] To say that a person who "owns" something has *"a* property *right"* is a totally inadequate way of describing the legal situation. An adequate analysis reveals that the "owner" of anything has a more or less comprehensive aggregate of rights, privileges, powers and immunities, and that other persons indiscriminately are under the respective correlative duties, no-rights, liabilities

and the problem must be stated in more concrete terms. After general publication does the news gatherer have, with reference to his news, any rights, privileges, etc., and if so, just what and how extensive are they? Prior cases, as we have seen, have settled that so long as the news has been communicated only to a limited number of persons for special purposes only, the one gathering the news has: (1) rights that the ones to whom the communication is made shall not repeat it to others except as authorized by the agreement; and (2) rights against people generally[7] that they shall not obtain and communicate to others the news in question without the consent of its gatherer.[8] Our problem then is, do these rights entirely cease upon publication, or do they continue, in whole or in part? One thing seems clear: after news has been given to the public, as it was in the principal case, people generally are privileged to repeat the news to other people for non-commercial purposes, i. e., the news gatherer now has no-rights that they refrain from communicating to others the news in question, so long as it is for such non-commercial purposes. To this extent, at least, the rights of the news gatherer are less than before publication. How now if the repetition to others is by a business competitor of the plaintiff and for the purpose of competing with him as a seller of news?[9] That repetition for this purpose is forbidden for a period long enough to enable the news gatherer to derive a fair business advantage from his expenditure of time and energy, is at least conceivable—and it is just this that Mr. Justice Pitney seems to have in mind when he says that the question is one of "unfair competition." Whether such a result is desirable cannot, of course, be determined except by a careful consideration of the policy involved, *i. e.,* of the results likely to follow from the recognition of such rights.

The admirably brief and lucid opinion of Mr. Justice Holmes—concurred in by Mr. Justice McKenna—accepts the point of view of the majority to the extent of regarding the problem as one of "unfair competition." The learned justice, however, believed that the prin-

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and disabilities. The rights of the "owner" are innumerable; so are the privileges, the powers, the immunities, i. e., they are all *in rem,* or "multital" jural relations. See the discussion by Professor Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1917) 26 YALE LAW JOURNAL, 710, 746. The phrase *"jural* relation" seems preferable to *"legal* relation," for the word "legal" suggests "common law" as distinguished from "equity," whereas "jural" clearly includes both. Many jural relations are, of course, exclusively equitable.

[7] That is, rights *in rem* or "multital" rights. See preceding note.

[8] The cases are cited in note 5, *supra.* A complete analysis of the situation would reveal the existence of privileges, powers and immunities as well.

[9] The court treated the newspapers composing The Associated Press as the real plaintiffs. While the defendant did not sell news directly to the public but only to newspapers, it is believed the court is right in treating the defendant as a "competitor" of the plaintiffs within a fair meaning of that term.

ciples governing that branch of our law did not warrant the court in going farther than to hold that the defendant must, if it used the plaintiff's news, suitably acknowledge its source.[10]

In his dissenting opinion Mr. Justice Brandeis, after a demonstration that previous cases leave the question an open one, devotes himself to an argument that sound policy requires that courts refrain from creating rights of this character. His view seems to be that courts will be unable so to mould the resulting legal situation as to safeguard these rights from abuse.[11] When one notices that the protection asked for, if given, is for a very limited time—only so long as the statements of fact have commercial value as news[12]—one can hardly share the fears expressed by the learned justice that the rule established by the majority will result in any serious interference with the acquisition by the public of information as to the happenings of the world. On the contrary, it seems to the present writer that the protection given the news gatherer by the decision will in the long run have the effect of stimulating the gathering and publication of news. Indeed it is difficult to see how, without it, a great and efficient news-gathering organization could be maintained, in view of the enormous expense necessarily

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[10] He felt that the result of what the defendants were doing made the public believe, at least in many cases, that The Associated Press had copied from the defendant, and so discredited the news service of the plaintiff.

[11] Thus he says: "Courts are ill-equipped to make the investigations which should precede a determination of the limitations which should be set upon any property right in news or of the circumstances under which news gathered by a private agency should be deemed affected with a public interest. Courts would be powerless to prescribe the detailed regulations essential to full enjoyment of the rights conferred or to introduce the machinery required for enforcement of such regulations. Considerations such as these should lead us to decline to establish *a new rule of law* in the effort to redress a newly-disclosed wrong, although the propriety of some remedy appears to be clear." (The italics are those of the present writer.)

[12] The injunction previously directed by the District Court restrained the defendant from "any taking or gainfully using of the complainant's news, either bodily or in substance, . . . *until its commercial value as news to the complainant and all its members has passed away.*" This injunction was a preliminary one, granted upon a consideration of the bill and answer and affidavits on both sides. The defendant objected to the indefiniteness of the portion in italics. To this the Supreme Court said: "Perhaps it would be better that the terms of the injunction be made specific, and so framed as to confine the restraint to an extent consistent with the reasonable protection of complainant's newspapers, each in its own area and for a specified time after its publication, against the competitive use of pirated news by defendant's customers. But the case presents practical difficulties; and we have not the materials, either in the way of a definite suggestion of amendment, or in the way of proofs, upon which to frame a specific injunction; hence, while not expressing approval of the form adopted by the District Court, we decline to modify it at this preliminary stage of the case, and will leave that court to deal with the matter upon appropriate application made to it for the purpose."

involved. Hence it is believed that a refusal to accord the protection sought would do more than anything else to discourage legitimate and desirable enterprise in news collection and dissemination.

It is interesting to note that Mr. Justice Brandeis shares the illusion of probably the majority of the legal profession that by such a refusal to give the plaintiff the relief he asked (the problem presented being admitted to be a new one) the court would avoid making "a new rule of law."[13] This of course is not true. It is usually overlooked—indeed at times it is denied[14]—that in settling that under a given state of facts the person involved is privileged to act in a certain way, a court determines the jural relations of that person to other human beings. Those who deny that a privilege is a jural relation would, if they were logical, have to say that a decision for the defendant in the principal case would involve a determination of a mere question of fact and not of the jural relations of the parties. Surely, this cannot be so. When courts determine that certain facts give a witness a privilege not to testify, or that certain other facts make defamatory remarks about one's neighbor "privileged" and so not actionable, they are determining the jural relations of the parties, just as much as if they were to find against the privileges claimed and thereby to recognize the existence of rights. Whichever way a new problem is decided, therefore, the court establishes for the first time what legal relations result from the state of facts in question. If the decision is for the plaintiff, a *right* and correlative *duty* are recognized; if the defendant wins, his *privilege* and the correlative *no-right* of the plaintiff are recognized. So Mr. Justice Brandeis, in holding that the defendant was *privileged* to pirate the plaintiff's news, was laying down "a new rule of law" just as clearly as was the majority when they held that the defendant was *not privileged.*

W. W. C.

REVOCATION OF LICENSES WITHOUT A HEARING

The line of demarcation between the police power and the limitation of the fourteenth amendment is continually moving in the direction of a wider extension of the police power with a concomitant retreat and weakening of the restraining force of the fourteenth amendment.[1] In specific application to the regulation of occupations, this movement is marked by an ever growing social control over private enterprise and in a subjection to license of many occupations hitherto considered

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[13] See the passage quoted in the preceding note.

[14] Sir Frederick Pollock seems to do so in his volume on *Jurisprudence* (2d ed., 1904) 62. The passage is quoted and criticized by Professor Hohfeld in (1913) 23 YALE LAW JOURNAL, 16, 42.

[1] See *Bunting v. Oregon* (1917) 243 U. S. 426, 37 Sup. Ct. 435.

free from any public interest or need of restraint for the public welfare.[2] Yet, while allowing wide discretion to the legislature in its conclusion that a particular industry or occupation requires public regulation, the courts, in the exercise of judicial control, will test the constitutionality of a statutory or administrative regulation by its tendency to accomplish a legitimate governmental purpose or its "reasonableness" in the adaptation of means to ends. Thus, in recent years, numerous regulations of particular occupations have been held unconstitutional, for example, arbitrary or inappropriate tests to determine fitness for the occupation of railroad conductor[3] or undertaker[4] and a requirement of licenses or license fees from horseshoers,[5] cement contractors,[6] laundrymen,[7] owners of dancing schools,[8] department stores,[9] etc.

It is in the administration of regulations for the grant and revocation of occupational licenses that confusion in the law is to be found. Two lines of decision may be noted. In the one, it is held that the legislature may not constitutionally confide to the unregulated discretion, even though honestly exercised, of an administrative officer, the grant or refusal of a license to engage in an occupation which, without a license, would be illegal. These decisions rest on various grounds, either on the unconstitutional delegation of legislative power, on alleged looseness amounting to unreasonableness, or an administrative opportunity for arbitrary discrimination.[10] The other line of decisions finds no infringement of the fourteenth amendment in the grant of a complete discretion, honestly exercised, to administrative license authorities, a view which has the support of the United States Supreme Court,[11] and is generally sustained on the theory that the legislative power to prohibit involves the power to permit on conditions deemed appropriate. Freund's suggestion that the difference in the decisions follows the distinction between occupations subject to regulation and those subject to prohibition, while not fully satisfactory as a test, is

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[2] For a list of such occupations, see 17 R. C. L. 548.

[3] *Smith v. Texas* (1914) 233 U. S. 630, 34 Sup. Ct. 681.

[4] *People v. Harrison* (1915, N. Y.) 170 App. Div. 802, 156 N. Y. Supp. 679; *People v. Ringe* (1910) 197 N. Y. 143, 90 N. E. 451.

[5] *In re Aubrey* (1904) 36 Wash. 308, 78 Pac. 900; *Bessette v. People* (1901) 193 Ill. 334, 62 N. E. 215.

[6] *State ex rel. Sampson v. City of Sheridan* (1918, Wyo.) 170 Pac. 1.

[7] *Ex parte Sing Lee* (1892) 96 Cal. 354, 31 Pac. 245.

[8] *People v. Wilber* (1910) 198 N. Y. 1, 90 N. E. 1140.

[9] *State v. Ashbrook* (1900) 154 Mo. 375, 55 S. W. 627.

[10] See Freund, *Police Power*, sec. 643 and cases there cited.

[11] *Commonwealth v. Davis* (1895) 162 Mass. 510, 39 N. E. 113; *Davis v. Massachusetts* (1897) 167 U. S. 43, 17 Sup. Ct. 731; *Wilson v. Eureka City* (1899) 173 U. S. 32, 19 Sup. Ct. 317; *People ex rel. Lieberman v. Van de Carr* (1905) 199 U. S. 552, 26 Sup. Ct. 144.

the only one that seems to present reasonable success in reconciling conflicting decisions.[12]

It is when we come to the consideration of due process in the revocation of licenses that serious confusion is found to prevail. An occupational license, according to a preponderance of judicial opinion, constitutes only a privilege and not a right,[13] or property,[14] or a contract between the State and the licensee.[15] It is in its nature revocable.[16] The question therefore arises whether the license may be revoked without notice and an opportunity for a hearing given to the licensee. It is conceded that the power to revoke may, without violating due process, be conferred upon administrative officers, and does not require judicial proceedings.[17] But in determining under what circumstances notice and hearing are required, the courts appear to have no guiding test or principle. On the whole, it may be said that when a statute or ordinance has expressly given power to revoke without notice or hearing the courts have sustained the statute or ordinance. But inasmuch as these enactments usually involve liquor licenses, the decisions are sustainable on the ground that the business is a harmful one which the State might entirely prohibit, and a license may therefore be granted on any conditions deemed appropriate, including its withdrawal without notice. The "implied assent"[18] of the licensee to this condition is assumed by the courts.[19] On the other hand, and clearly distinguishable, there is a group of various occupations, such as those of physicians, lawyers and architects, requiring special study

[12] Freund, *op. cit.*, 670.

[13] *Dist. of Columbia v. Lee* (1910, D. C.) 35 App. Cas. 341.

[14] *Littleton v. Burgess* (1905) 2 Wyo. 173, 82 Pac. 864. But see *Lowell v. Archambault* (1905) 189 Mass. 70, 75 N. E. 65; and *People v. Flynn* (1905, N. Y.) 110 App. Div. 279, 96 N. Y. Supp. 655, aff. 184 N. Y. 579, 77 N. E. 1194.

[15] *Union Pass. R. Co. v. Philadelphia* (1879) 101 U. S. 528; *Wiggins Ferry Co. v. East St. Louis* (1882) 107 U. S. 365, 2 Sup. Ct. 257.

[16] *Doyle v. Continental Ins. Co.* (1876) 94 U. S. 535, 540. In private law there is still much confusion as to the circumstances under which a license becomes irrevocable. See *Hurst v. Picture Theatres, Ltd.* (C. A.) [1915] 1 K. B. 1, overruling *Wood v. Leadbitter* (1845, Exch.) 13 M. & W. 838, and note in (1915) 13 MICH. L. REV. 401; *Phillips v. Cutler* (1915) 89 Vt. 233, 95 Atl. 487. But see as to irrevocability of a license to build granted under the police power, *Lowell v. Archambault, supra,* note 14.

[17] *People v. Apfelbaum* (1911) 251 Ill. 18, 95 N. W. 995; *Meffert v. Packer* (1903) 66 Kan. 710, 72 Pac. 247, aff. 195 U. S. 625, 25 Sup. Ct. 790.

[18] The "implied assent" is, as a matter of fact, non-existent. Justice Holmes in the recent case of *Union Pacific R. R. Co. v. Public Service Commission of Missouri,* decided Dec. 9, 1918, 39 Sup. Ct. 24, points out that "it always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress."

[19] *Wallace v. Reno* (1903) 27 Nev. 71, 73 Pac. 528, reviewing the decisions. See also *Commonwealth v. Kinsley* (1882) 133 Mass. 578, an analogous business, keeping a pool table for hire.

and training, a license for which cannot be withdrawn without fair notice or hearing.[20] Intermediate between the noxious occupations and those requiring long and special training are a third class of essentially useful occupations, such as those of auctioneers, hackmen, milk dealers, dairymen, laundrymen, etc. The law or ordinance requiring a license for such occupations often provides that the license is revocable; its revocation to follow, like its grant, at the discretion of the licensing authority, or on violation of statutes or ordinances, without either providing for or excluding notice and a hearing. It is here that particular confusion prevails both in the decisions of the courts and in their reasons, arising largely from their propensity to cite authority from one or other of the groups above mentioned, without due examination of the essential differences between the three groups and the principles which should govern them. Where, in this third class, grant and revocation are discretionary, most courts justify a discretionary revocation on the "implied assent" of the licensee, and apparently dismiss the consideration that the status of a person who opens and conducts a business after license granted is different from that of one not yet in the business;[21] other courts, a small minority, regard the expense incurred by the licensee as a moral justification for according him notice and a hearing before revoking his license.[22] The New York courts justify the withdrawal without a hearing of a license for the sale of articles likely to injure the public health, on the ground that it is an administrative and not a judicial proceeding and therefore requires no hearing—not a very plausible ground—and assert that the licensee has a remedy by *mandamus* against arbitrary or oppressive exercise of the power.[23] A better ground would seem to be the public emergency requiring prompt action. But where the statute authorizes the revocation of a license as a penalty for violation of statutory provisions, and no existing emergency requires immediate action, it would seem contrary to established notions of due process to deny notice and

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[20] *Meffert v. Packer, supra* (physician); *Reetz v. Michigan* (1902) 188 U. S. 505, 23 Sup. Ct. 390 (physician); *Ex parte Robinson* (1873, U. S.) 19 Wall. 505 (attorney-at-law); *Klafter v. State Board of Architects' Examiners* (1914) 259 Ill. 15, 102 N. E. 193 (architect).

[21] *Child v. Bemus* (1891) 17 R. I. 230, 21 Atl. 539 (hackman; the court, however, expressing its preference for notice and hearing procedure); *Wiggins v. City of Chicago* (1873) 68 Ill. 373 (auctioneer); *Edelstein v. Bell* (1915, N. Y. Sup. Ct., Spec. T.) 91 Misc. 620, 155 N. Y. Supp. 590 (motion-picture theatre); *Stone v. Fritts* (1907) 169 Ind. 361, 82 N. E. 792 (school teacher).

[22] *Peginis v. City of Atlanta* (1909) 132 Ga. 302, 63 S. W. 857 (restaurant). In New York and New Jersey, this has been held to extend even to liquor licenses. *In re Cullinan* (1904, N. Y.) 94 App. Div. 445, 88 N. Y. Supp. 164; *State, Lambert, Prosecutor v. Rahway* (1896, Sup. Ct.) 58 N. J. L. 578, 34 Atl. 5.

[23] *People ex rel. Lodes v. Dept. of Health* (1907) 189 N. Y. 187, 82 N. E. 187. See also *State ex rel. Nowotny v. City of Milwaukee* (1909) 140 Wis. 38, 121 N. E. 658.

a hearing to a person charged with such offense.[24] The recent case in North Dakota[25] which construed a statute authorizing a Dairy Commissioner to revoke the license of the owner of a creamery "on conviction" or "on evidence" of the misreading of a cream test as permitting the revocation of the license on the *ex parte* report of an inspector, without notice or hearing to the licensee, seems therefore contrary to principles of due process.

E. M. B.

SOME EFFECTS OF A PARTIAL ASSIGNMENT OF A CHOSE IN ACTION

It has been said that "the partial assignee of a chose in action acquires no rights at common law."[1] Doubtless in making this statement Dean Ames had in mind the relation of the partial assignee to the debtor. Thus interpreted his statement is for most jurisdictions a correct statement of the law, although, as the present writer has elsewhere pointed out,[2] there are states in America in which assignees may enforce their claims against the debtor in "courts of law."[3] If, however, we examine the relations between the partial assignee and his assignor, we discover the need of limiting or at least explaining Dean Ames's statement. It seems clear that a partial assignment fairly implies an agreement in fact by the assignor to refrain from collecting from the debtor the portion assigned. If so, obviously the common law may attach to this agreement a contractual duty. The cases so hold.[4] As against the assignor, therefore, the partial assignee

[24] *People ex rel. Loughran v. Flynn* (1905, N. Y.) 110 App. Div. 279, 96 N. Y. Supp. 655 and cases there cited. Even the existence of an emergency would seem, properly, to justify only summary *suspension* of the license until a hearing had been had.

[25] *Cofman v. Osterhous* (1918, N. Dak.) 168 N. W. 826. Nor is the conclusion altered by the fact that the licensee requested and obtained a hearing from an officer having no authority to review the ruling of the authorized officer.

[1] Ames, *Cases on Trusts* (2d ed.) 63.

[2] (1917) 30 HARV. L. REV. 482.

[3] In a code state like New York, or any state in which "common law" and "equity" are administered by the same tribunals, the term "court of law" can mean nothing more than the tribunal sitting with a jury in cases which, before the consolidation of law and equity, were heard in "common law courts"; and "court of equity" can mean nothing but the same tribunal sitting without a jury for the hearing of cases formerly cognizable in Chancery in the exercise of its "equitable" jurisdiction. The absence of a jury in the "equity" cases has the farther result that the appellate tribunal reviews the findings of fact of the "equity court" in a manner different from that in which it examines a jury's verdict. So long, however, as by constitution or statute we insist that the facts in all cases which historically were "common law" cases shall be found by a jury, and in all "equity cases" by the judge, we shall preserve that relativity of law which the consolidation of the two courts sought to abolish.

[4] *Eaton v. Mellus* (1856, Mass.) 7 Gray, 567; *Hubbard v. Prather* (1808, Ky.) 1 Bibb. 178; 5 C. J. 968, n. 56.

acquires at least this one right which is recognized by the common law court. Be it noted that this right is not "exclusively legal"; it is "concurrent," *i. e.*, concurrently legal and equitable.[5] Does the partial assignee by virtue of the assignment acquire other legal relations which are concurrent and not exclusively equitable? This problem is involved in the case of *Hinkle Iron Co. v. Kohn* (1918, N. Y. App. Div.) 171 N. Y. Supp. 537. In that case a written partial assignment of a money claim against a city was made by a corporation, acting through its president. The parties orally agreed, however, that the assignee was not to notify the debtor of the assignment, that the assignor should collect the whole, and that "as soon as the corporation received" the amount of the debt from the debtor "the amount so assigned would be paid" to the plaintiff.[6] The president of the corporation collected the whole sum, receiving a warrant therefor, payable, apparently, to the order of the corporation. This warrant he deposited in the corporation's bank account and then used the funds for corporation expenses. The corporation became bankrupt and the partial assignee then brought an action for "conversion" against the president of the corporation. A recovery was denied, one of the five judges dissenting. It is proposed to examine the soundness of this conclusion.

Apparently the result reached by the majority is based partly upon what seems to be a misinterpretation of the agreement of the parties. Their view seems to be that all that was promised by the defendant was to pay the assignor as soon as the money was collected, and not pay him out of *the funds received from the debtor.* Such a view, it is submitted, makes the assignment a legal nullity. Fairly interpreted, the agreement of the parties—if we give effect to all parts of it—seems to be that the assignor shall act as a collecting agent for the partial assignee as undisclosed principal, paying over to the latter as soon as collected the share of the funds to which he is in equity entitled. Clearly, if a partial assignee himself collects his share, the money received is his, both at "common law" and "in equity." Equally

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[5] A "legal relation" which is recognized as valid only by the common law and which is in conflict with a paramount equitable relation is not—as a matter of genuine *substantive* law,—a genuine legal relation, although it may have certain procedural effects. All genuine legal relations are either (1) "concurrent" or (2) "exclusive." The former are recognized as valid by both "law" and "equity," *i. e.*, they are concurrently legal and equitable; the latter are vindicated and sanctioned exclusively by equity, *i. e.*, they are exclusively equitable. Wesley N. Hohfeld, *The Relations between Law and Equity* (1913) 11 MICH. L. REV. 537; Walter W. Cook, *The Alienability of Choses in Action* (1917) 30 HARV. L. REV. 449, 455-459.

[6] The case does not give the exact language used. The quotation is from the opinion of the majority. The dissenting judge says the agreement was that when the money was paid the amount assigned "should be taken therefrom and paid to the plaintiff."

obvious is it that if the assignor had in the principal case disclosed the fact of his agency to the debtor, the funds collected by him would, to the extent of the assignment, have been held by him as a fiduciary.[7] Had he received money, he would have been a common law fiduciary, as would any other agent who collects money for a principal, and the assignee would have had a "concurrent" interest in the money received. Doubtless as a common law fiduciary he would have been privileged to deposit the money in a bank if unable to pay it over immediately,[8] and to draw out from the bank the corporation's share; or, before deposit, to sever and use the corporation's share—always, however, leaving a portion large enough to satisfy the assignee's claim. If, on the other hand, he were to use the whole sum received he would clearly be guilty of a conversion.[9] Would the fact that the debtor did not know of the agency alter these relations between the partial assignee and the assignor? Surely not.[10] Had the payment been in money, then, it seems that the defendant would clearly have been liable for a conversion.

The only doubtful point in the case is due to the fact that the payment was made by a warrant and not in cash. This warrant was, it seems, payable to the order of the corporation. According to the agreement—as we have interpreted it—the latter held this warrant in a fiduciary capacity. While doubtless the corporation was privileged to collect the money due on the warrant, or to deposit the warrant in a bank, it seems that it was under a duty to retain and pay over a proper share of the proceeds of the warrant to the partial assignee. Was this duty exclusively equitable, or was it "concurrent," *i. e.*, one which a court of law as well as the chancellor would recognize and sanction? It may be argued with force that according to the older law the fiduciary relation would be only that of equitable trustee and *cestui*, and that therefore an action for "conversion" would not lie. But it is believed that this argument fails to take account of two facts: (1) that in the progressive development of our legal system many

[7] The common law, as well as equity, had its fiduciaries: bailees, against whom detinue lay; and guardians, "bailiffs" and "receivers," against whom the action of account could be brought. The best discussion of these is in Langdell, *Brief Survey of Equity Jurisdiction*, 75-85.

[8] This distinguishes the common law "bailiff" and "receiver" from the mere bailee, who must turn over the specific thing received. All three are alike in that they receive possession of goods or money not their own and in a fiduciary capacity. Langdell, *op. cit.*, 76-77.

[9] *Wells v. Collins* (1889) 74 Wis. 341, 43 N. W. 160; Mechem, *Agency* (2d ed.) sec. 1256.

[10] That is, as between the parties. It has even been held that where an agent for an undisclosed principal buys chattels with the latter's money, the chattels "belong to the principal" even as against innocent third persons who subsequently purchase the goods from the agent for value and in the belief that the agent owns them. *Kempner v. Dillard* (1907) 100 Tex. 505, 101 S. W. 437.

duties and other legal relations which formerly were exclusively equitable have become "concurrent"; (2) that in New York, where the principal case was decided, all courts are courts of both "common law" and "equity" and that this has hastened the transformation of exclusively equitable jural relations into "concurrent" relations vindicated and sanctioned by both courts.[11] For that reason many of the older notions are no longer law.[12] For example, as bearing directly upon the immediate question, consider the decisions in New York that "trover" for "conversion" will lie against a factor who has sold goods on commission and does not, after deducting his commission, pay the proceeds over to his principal—all without any discussion of whether the factor received payment in money or in a check or bank draft payable to his own order.[13] In the latter case, according to older notions, while the factor might be liable as a "bailiff" in the common law action of account,[14] his principal could not recover for conversion of the check or bank draft, for the "legal title" to that was clearly in the factor. If the principle involved in these cases relating to factors is to be followed, there is no reason why a code action at law for damages should not be allowed against the corporation, even though the complaint describes the wrong as "conversion." If an action of this kind would lie against the corporation, it would on well-recognized principles lie against the defendant, who as president did the actual "converting." It is believed, therefore, that the conclusion reached by the dissenting judge is preferable to that of the majority of the court.

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[11] This does not mean that a "concurrent" right, for example, gives the holder his option of suing on it either at law or in equity. The refusal of equity to enjoin the enforcement of a right in the common law court is a recognition of its validity so as to make it "concurrent" within the meaning intended to be conveyed by that term.

[12] Under the influence of code procedure facts which were formerly a ground for relief in equity way of injunction and a decree for a conveyance of the outstanding "bare legal title" are to-day frequently held to constitute "legal defenses," *i. e.*, they may be set up by way of answer merely instead of by counterclaim. Illustrations are: *Lindell v. Lindell* (1917) 135 Minn. 368, 160 N. W. 1031, commented upon in (1917) 26 YALE LAW JOURNAL, 592; *Chicago & N. W. R. Co. v. McKeigue* (1906) 126 Wis. 574, 105 N. W. 1030. Indeed, is not every case in which a "common law" count for "money had and received" is allowed against a "constructive trustee" an illustration of the transformation of an exclusively equitable jural relation into one which is "concurrent"?

[13] *Britton v. Ferrin* (1902) 171 N. Y. 235, 63 N. E. 954. Under the New York law a factor is a fiduciary, in the absence of agreement to the contrary. This view is apparently not that of all jurisdictions. While a fiduciary when the proceeds of his principal's goods are first received, he is usually regarded as authorized by business usage to appropriate the proceeds and become a mere debtor. Mechem, *Agency* (2d ed.) sec. 2543.

[14] *Godfrey v. Saunders* (1776, C. B.) 3 Wils. 73.

EFFECT ON CONTRACTS OF WAR ORDERS OR OTHER ACTS OF STATE

It has generally been stated to be the rule that impossibility arising subsequently to the formation of the contract does not excuse a contractor from the usual consequences of non-performance; he must pay damages to the other party.[1] To this rule, however, there are several classes of exceptions: first, where the impossibility is caused by a change in the domestic law; secondly, where the subject-matter of the contract is destroyed; and thirdly, where the impossibility is caused by death or illness of the party bound to perform. As has been asserted in this JOURNAL,[2] these exceptions practically nullify the general rule. It is believed that no case can be found where a promisor has been held to pay damages for failing to perform an act that has become absolutely impossible without any fault of his own. The rule it is believed should be stated to be that a contractor is not excused from performing merely on the ground of increased difficulty or expense.

The question of impossibility as an excuse for non-performance has come up in a somewhat new aspect in a number of cases during the great war. Thus in *Moore & Tierney v. Roxford Knitting Co.* (1918, N. D. N. Y.) 250 Fed. 278, where a buyer claimed damages for failure to make and deliver goods as per contract, the seller replied that it was prevented from performing because of orders for goods given by the United States government for war purposes, these orders having precedence by Act of Congress.[3] By reason of the non-delivery, the buyer had himself declared the contract at an end. As in many other cases during the war the negotiations between the manufacturer and the government agents were very informal. The agent had asked what was the mill's capacity for making knitted goods for the government, and further said, "I would request you not to write me that you are sold up and cannot furnish any of these goods. I am aware that this condition prevails with every one." Later an order was given requiring the mill's full capacity and advising that the order was obligatory, although no reference was made to the Acts of Congress. These Acts provided that orders of the government "shall be obligatory" and "shall take precedence over all other orders and contracts." Refusal to comply was made a crime; and on refusal to fill orders at reasonable prices the President was authorized to take possession of the factory.

The court held that the informal order was obligatory and that the seller acted under compulsion; also that the contractual duty to the

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[1] *Paradine v. Jane* (1647) Aleyn, 26.

[2] *Discharge of Contract* (1913) 22 YALE LAW JOURNAL, 513, 519.

[3] Nat'l Defence Act, June 3, 1916, 39 St. at L. 166, and Naval Appropriations Act, March 4, 1917, 39 St. at L. 1168.

buyer was at an end and that the buyer had no right to damages for breach. It would have been otherwise had the seller voluntarily sought the government work and thus intentionally disabled itself from performing the contract with the buyer.[4]

It is to be observed that in the *Roxford Knitting Company* case the duty to deliver as agreed was expressly subject to delays or non-delivery by reason of strikes, accidents, or for any reason beyond the control of the seller. The decision might well be regarded as resting upon this provision, although little was said of it. Even in the absence of such a provision, however, the decision would probably be the same. Thus in a late English case,[5] where a claim for damages was made for failure to deliver raspberries as agreed, and where the contract apparently contained no similar provision, it was held to be a good defense that the government had requisitioned the defendant's whole supply.[6]

In the case of the knitting company, stated above, the government order did not make performance totally impossible; for not only could the goods have been manufactured after the government work was done, but it was not totally impossible to increase the size and capacity of the plant—admitting that this might have been extremely difficult and expensive. The seller did not claim to be totally discharged but claimed only that delay was justified. This would be correct, and the buyer would still be bound to pay for the goods, unless the delay should prove to be so great as to prevent what is often called

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[4] This principle is specifically applied in the still more recent case of *Mawhinney v. Millbrook Woolen Mills* (1918, N. Y. Sup. Ct.) 172 N. Y. Supp. 461. If the government contract is voluntarily sought because of war profits, or if the government in awarding the contract did not demand precedence in accordance with the Act of Congress, the contractor is not excused for failure to perform his private contract.

For another and more doubtful variation in the application of the rule, see *Standard Silk D. Co. v. Roessler* (1917) 244 Fed. 250, (1918) 27 YALE LAW JOURNAL, 408.

[5] *Lipton v. Ford* [1917] 2 K. B. 647.

[6] The English statute differs somewhat from the Acts of Congress. "It is hereby declared that where the fulfilment by any person of any contract is *interfered with* by the necessity on the part of himself or any other person of complying with (government requirements) . . . . that necessity is a good defense to any action or proceeding taken against that person in respect of the non-fulfilment of the contract so far as it is due to that interference." Defence of the Realm, No. 2, Act (5 Geo. 5, c. 37) sec. 1, sub-sec. 2. Under such a statute as this a contractor would be excused by much less than a total impossibility, and it would be unnecessary to determine whether the contract called for specific raspberries or berries to be grown on specific land, as in *Howell v. Coupland* (1876) L. R. 1 Q. B. D. 258.

Where the contract contains a provision like that in the principal case it is clearly discharged by a government requisition of the entire plant. *Metropolitan Water Board v. Dick* (1917, H. L.) 117 L. T. Rep. 766. See (1918) 27 YALE LAW JOURNAL, 953.

"substantial performance." The buyer's duty to pay would surely be constructively conditional upon performance within some period of time that would be reasonable.

A contract containing a provision like that in the knitting case really creates no duty to deliver goods at all events but only a duty to deliver in case reasonable diligence would cause performance to take place.[7] Even in the absence of such a provision, there is a tendency to excuse a contractor by something less than absolute impossibility.[8] But mere "economic unprofitableness," even though that is due to war conditions, is not an excuse for failure to perform.[9]

In one of the cases cited above[10] the court denied that mere impossibility caused by an act of the legislature or of the executive would excuse a contractor, saying that the "true rule is that where performance of a contract, *legal when made, becomes illegal,* by some event, statute, decision, or lawful act of public authorities, both parties are excused from further performance." Of course this rule is correct in its affirmative form. Where impossibility of performance arises from a change in the law of our own country, making performance of a previously made contract unlawful, the obligation is dissolved and there is no liability for non-performance.[11] That the court's

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[7] So in *Davison Chemical Co. v. Baugh Chemical Co.* (1918, Md. App.) 104 Atl. 404, a manufacturer of acid was excused from delivery because war in Europe made the procurement of pyrites impossible. A better acid could have been made from brimstone, which was obtainable; but the expense would have been twice as great. A similar decision was rendered by the House of Lords in *Wilson & Co. v. Tennants* [1917] A. C. 495.

[8] See *North German Lloyd v. Guaranty Trust Co.* (1917, U. S.) 37 Sup. Ct. 490; *Clarksville Land Co. v. Harriman* (1895) 68 N. H. 374, 44 Atl. 527; *Baily v. De Crespigny* (1869) L. R. 4 Q. B. 180. *Cf. Watts & Co. v. Mitsui* (H. L.) [1917] A. C. 227. In *Mineral Park Land Co. v. Howard* (1916) 172 Cal. 289, 156 Pac. 458, the court said that "prohibitive cost" was the same as impossibility "to all fair intents." A similar statement was made by Maule, J., in *Dahl v. Nelson* (1881) 6 App. Cas. 38, 52.

[9] *Wilson & Co. v. Tennants* [1917] 1 K. B. 208, [1917] A. C. 495; *Dixon v. Henderson* (1917, K. B.) 117 L. T. Rep. 636. In a general way this is admitted by the court in *Mineral Park Land Co. v. Howard, supra.*

[10] *Mawhinney v. Millbrook Woolen Mills, supra.*

[11] *Louisville & N. R. R. Co. v. Mottley* (1911) 219 U. S. 467, 31 Sup. Ct. 265; *Cowley v. N. P. R. R. Co.* (1912) 68 Wash. 558, 123 Pac. 998; *Cordes v. Miller* (1878) 39 Mich. 581; *Jamieson v. Indiana Nat. Gas Co.* (1891) 128 Ind. 555, 28 N. E. 76; *Baltimore etc. R. R. Co. v. O'Donnell* (1892) 49 Ohio St. 489, 32 N. E. 476; *Hanford v. Connecticut Fair Ass'n.* (1918) 92 Conn. 621, 103 Atl. 838, (1918) 28 YALE LAW JOURNAL, 198. If the contract was made subsequently to the passage of the law, it was illegal and void *ab initio.*

It appears also that a promisor's liability may be terminated where his performance is prevented by some act of the state, even though the act is brought about by the fault or inefficiency of the promisor himself. *Hughes v. Wamsutta Mills* (1865, Mass.) 11 Allen, 201 (prevention by imprisonment for crime); *State v. Herber* (1918, Okla.) 173 Pac. 651 (bondsmen discharged when their

rule is correct in its negative part may well be doubted. The statement of Lord Reading[12] is to be preferred: "It is true that the act to be performed was not rendered unlawful by an act of the legislature passed since the entering into of the contract, but it was a lawful act of state which equally rendered the delivery of these specific goods impossible."[13]

It is altogether probable that a contract the performance of which would require a breach of the law of some friendly nation would now be held to be illegal and void. If this is true, and possibly even if it is not, a change in some foreign law making the performance of a previously made contract illegal (or impossible) ought to be given the same effect as would a like change in the domestic law.[14]

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failure to produce prisoner in court was caused by his imprisonment for another crime); *Moshenz v. Independent Order etc.* (1913) 215 Mass. 185, 102 N. E. 324 (injunction due to illegal acts); *People v. Globe Mut. L. I. Co.* (1883) 91 N. Y. 174 (dissolution of corporation for failure to maintain a reserve). But impossibility due to bankruptcy does not terminate liability. *Central Trust Co. v. Chicago Auditorium* (1915) 240 U. S. 581, 36 Sup. Ct. 412.

[12] *In re Shipton and Harrison's Arbitration* [1915] 3 K. B. 676.

[13] A case might be put where performance is rendered impossible by an *unlawful* act of the commander in chief.

[14] See *Ford v. Cotesworth* (1870) L. R. 5 Q. B. 544; *Cunningham v. Dunn* (1878) 3 C. P. D. 443. This aspect of the matter is treated at length by Lorenzen, *Moratory Legislation Relating to Bills and Notes and the Conflict of Laws, supra,* p. 324.