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EXAMINATION OF JURORS PRIOR TO CHALLENGE

The right of challenging a juror for cause seems to be as old as the jury system itself. Glanville and Bracton both speak of it,[1] and the early Year Books contain many cases wherein challenges both to the array and to the polls were interposed and sustained.[2] At common law no peremptory challenges were allowed in civil actions;[3] and they seem to have been originally unknown in criminal causes,[4] for neither Glan-

[1] Glanville, *A Treaties on the Laws and Customs of the Kingdom of England* (Beame's transl. 1912, Legal Classics Series) 50; Bracton, *De Legibus Angliae* (1180-1190) ff. 143, 185, (Twiss' transl. 1879, 1880) Vol, 2, p. 453, Vol. 3, pp. 183-187.

[2] See e. g. *Triple v. Hakeney* (1343) Y. B. 17 Edw. III (Pikes's transl. 1903) 88; *Anonymous* (1344) Y. B. 18 Edw. III (Pike's transl. 1905) 256-260; *Anonymous* (1345) Y. B. 19 Edw. III (Pike's transl. 1906) 146. See also *Atte Wode v. Clifford* (1402-3) reported in *Select Cases before the King's Council* (Selden Society Publications, vol. 35, 1918) 86.

[3] *Gordon v. Chicago* (1903) 201 Ill. 623, 626, 66 N. E. 823, 824; *Sackett v. Ruder* (1890) 152 Mass. 397, 400, 25 N. E. 736, 738.

[4] 2 Pollock and Maitland, *History of English Law* (2d ed. 1899) 621, n. 5; 1 Stephen, *History of Criminal Law* (1883) 301. The statute (1305) 33 Edw. I. St.

ville nor Bracton nor Britton mentions them. But by the time of Fortescue, who was Chief Justice of England during a part of the reign of Henry VI, the accused in a capital case had acquired the right of striking thirty-five jurors "peremptorily without assigning any cause for such challenge; and no exceptions are to be taken against such his challenge."[5] At present peremptory challenges in both civil and criminal cases are usually provided for by statute.

In the early cases it was not uncommon for the judge to examine jurors as to their qualifications, even in the absence of challenge, where he had reason to doubt their impartiality.[6] When the jurors came from the same small community as the parties and answered inquiries as of their own knowledge or even upon their consciences,[7] the problem for the litigant of securing adequate information for the intelligent exercise of his challenges was very simple of solution. There was very little, if any, need for a preliminary examination of the jurors. And it seems to have been the custom to permit such examination only after challenge and only with reference to the particular grounds of disqualification alleged.[8] But as society grew more complex and the jury system developed, the jurors ceased to be drawn from among the neighbors and close acquaintances of the parties, and the functions of the jury were transformed from those of witnesses to those of triers of fact upon evidence produced before them in open court. Under such circumstances any preliminary extra-judicial investigation, sufficiently thorough to yield trustworthy information to be used in framing challenges for cause or in exercising peremptory challenges, must be both difficult and expensive. It is not surprising, therefore, to find counsel endeavoring to get the information by means of an examination of the jurors on *voir dire* prior to challenge. The English judges emphatically discountenanced this attempted innovation upon settled practice. That it had never been done was an entirely adequate reason why it should never be done.[9] In

4 seems to indicate that prior thereto the crown might challenge peremptorily without limit.

[5] Fortescue, *De Laudibus Legum Angliae* (Amos's ed. of the transl. of 1775, 1825) 92.

[6] Bracton, *op. cit.* f. 143 (Twiss' transl. *op. cit.* vol. 2, p. 453); *Anonymous* (1339) Y. B. 13 Edw. III (Pike's transl.) 286.

[7] In folio 185 Bracton, speaking of the jury in the assise of novel disseisin says: "But if even thus the truth cannot be known, then it will be requisite to speak from belief and conscience at least." Bracton *op. cit.* f. 185 (Twiss' transl. vol. 3, p. 195).

[8] This is to be gathered not only from the later practice, but also from such passages as that found in Bracton, folio 85, translated thus by Twiss: "Because a present cause ought to be alleged and proved, but not a past cause, etc." See also the form of challenge given in Chapter 34 of the *Mirror of Justices* (1285-1290?) Selden Soceity Publications (1893) vol. 7, p. 116. But if upon an examination on a challenge for one cause, another cause appeared, it seems to have been considered by the court. See *Triple v. Hakeney, supra* note 2.

[9] *Queen v. Stewart* (1845, Q. B.) 1 Cox C. C. 174, Jones, Serjt., attempted to

some American courts it crept in unawares. When brought to the attention of the judges, they hastened to comment on its heterodoxy and to warn counsel that it must not be considered legitimate procedure.[10]

Counsel seem not to have heeded this warning, for the ancient practice disallowing a preliminary examination now persists in only a minority of jurisdictions,[11] and in these it is sought to support it upon reason. It is said that, if such an examination without challenge is permitted, the court (1) will have no control over it, (2) cannot draw the line between proper and improper questions, (3) cannot protect the juror from improper questions, (4) cannot compel the juror to answer proper questions, and (5) cannot detect false excuses of those desiring to escape jury duty: such an examination (6) will be offensive to the juror, and (7) will cause unseemly, vexatious, and expensive delays. It must be obvious that the first five assertions assume an almost incomprehensible impotence in the trial court. They entirely disregard the fact that such examination, when allowed, is not an extra-judicial, but a judicial, proceeding, and is as much under the control of the court as any other part of the trial. The offence to the juror can be no greater,

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put a question to each juryman as he came into the box, and the prosecution objected. "Alderson, B.—'It is quite a new course to catechise a jury in this way.'

"Jones, Serjt.—'I have a right, my lord, to challenge, and I submit that I am entitled to ask for information that is necessary to enable me effectively to exercise that right. At all events, your lordship will perhaps intimate to the jury, that such of them as are members of this association had better retire from the box.'

"Alderson, B—'I cannot allow you to cross-examine the jury, nor will I intimate to them anything on the subject you mention. If you like to challenge absolutely, you may do so.'"

Reg. v. Dowling (1848) 3 Cox C. C. 509. Here, too, counsel asked the privilege of examining a juror for the purpose of eliciting information on which to base a challenge, admitting that he had no information concerning him. Erle, J., responded: "Then I must refuse your application, unless, indeed, you can quote some authority on the subject. I think it a very unreasonable thing that a juryman should be cross-examined without your having received any information respecting him."

[10] *Negro Matilda v. Mason & Moore* (1822, C. C. D. C.) 2 Cranch C. C. 343. An examination without challenge was allowed, but the court said: "This case must not be drawn into precedent as the court did not mean to sanction such a practice." *State v. Zellers* (1824) 7 N. J. L. 220. The Chief Justice refused to allow counsel to ask a juror if he had not made up and expressed an opinion:

"Wall: 'Do we understand it to be the opinion of the court that we cannot interrogate the juror as to his having formed an opinion;—it has been repeatedly done.'

"Kirkpatrick, C. J.: 'It is true we have slipped into the practice, but on looking into it I am satisfied it is not the true way: the only proper way is, to make the challenge, and then prove it upon oath.'"

[11] *Bales v. State* (1879) 63 Ala. 30; *People v. Hamilton* (1882) 62 Calif. 377; *People v. Trask* (1907) 7 Calif. App. 103, 93 Pac. 891; *Crew v. State* (1901) 113 Ga. 645, 38 S. E. 941; *Clifford v. State* (1898) 61 N. J. L. 217, 39 Atl. 721; *State v. Palmieri* (1919) 93 N. J. L. 195, 107 Atl. 407. But the rule is changed by statute in civil cases in New Jersey. N. J. Pub. Laws, 1911, ch. 151.

and, indeed, will usually be much less, than when preceded by a challenge. As to the delay—in so far as expenditure of time is required to secure an impartial jury, it is entirely justified: in so far as it is made by counsel for improper purposes, the trial court has the remedy at its hand. It is not to be assumed that trial judges will be so shiftless or pusillanimous as to permit counsel to indulge with impunity in misconduct in this or any other part of the trial. The privilege of examining jurors for the purpose of ascertaining the existence of grounds of challenge for cause or of securing data for the intelligent exercise of peremptory challenges is not a privilege to engage in irrelevant and immaterial conversations with prospective jurors without control or supervision by the court.

On the other hand the majority of courts recognize that to deny opportunity for such an examination is greatly to decrease, if not to destroy, the value of the right of challenge.[12] The actual practice

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[12] *Eytinge v. Territory* (1909) 12 Ariz. 131, 100 Pac. 443; *Union Pacific Ry. v. Jones* (1895) 21 Colo. 340, 40 Pac. 891; *Jones v. People* (1896) 23 Colo. 276, 47 Pac. 275; *Donovan v. People* (1891) 139 Ill. 412, 28 N. E. 964; *Baker v. State* (1921, Ind.) 129 N. E. 468; *State v. Dooley* (1894) 89 Iowa, 584, 57 N. W. 414; *Stone v. Monticello Co.* (1909) 135 Ky. 659, 117 S. W. 369; *Hale v. State* (1894) 72 Miss. 140, 16 So. 387; *State v. Mann* (1884) 83 Mo. 589; *State v. Brooks* (1920) 57 Mont. 480, 188 Pac. 942; *Basye v. State* (1895) 45 Neb. 261, 63 N. W. 811; *State v. Douthitt* (1921, N. M.) 194 Pac. 879; *Dresch v. Elliott* (1910) 137 App. Div. 252, 122 N. Y. Supp. 14; *State v. Ellis* (1918) 98 Ohio St. 21, 120 N. E. 218; *Temple v. State* (1918) 15 Okla. Cr. 176, 175 Pac. 733; *State v. Steeves* (1896) 29 Or. 85, 43 Pac. 947; *Comfort v. Masser* (1888) 121 Pa. 455, 15 Atl. 612; *Houston & Texas Ry. v. Terrell* (1888) 69 Tex. 650, 7 S. W. 670; *State v. Thompson* (1902) 24 Utah, 314, 67 Pac. 789; *Fowlies Adm'x. v. McDonald* (1910) 85 Vt. 438, 82 Atl. 677; *Hoyt v. Indep't. Co.* (1909) 52 Wash. 672, 101 Pac. 367; *Carpenter v. Hyman* (1910) 67 W. Va. 4, 66 S. E. 1078. All of these cases exhibit the practice of permitting examination prior to challenge, though some of them are not direct decisions that such examination is a matter of right. In some jurisdictions, it is said that the statute authorizing peremptory challenges necessarily implies the right of preliminary examination. In some states such right is expressly conferred by statute. In an early North Carolina case it was said: "A party has no right to examine a juror or any other person by way of fishing for some ground of exception." *State v. Creasman* (1849, N. C.) 10 Ired. 395. The result was that in order to secure an examination, it was necessary to challenge; and the opposing party might admit the challenge, and thus eliminate a perfectly qualified juror whom the challenger, if the facts were known, might desire to retain. This led to the passage of Laws, 1913, ch. 31, sec. 6, which confers the right of examination prior to challenge. See *State v. Christy* (1916) 170 N. C. 772, 87 S. E. 499. Minn. Rev. Laws, 1905, sec. 5386 also confers such right. Prior thereto the matter rested entirely within the discretion of the trial court. *State v. Smith* (1894) 56 Minn. 78, 57 N. W. 325. In Connecticut the statute gives such right in civil actions. *Zalewski v. Waterbury Co.* (1914) 89 Conn. 46, 92 Atl. 682; in criminal causes the matter rests in the discretion of the trial court and its ruling will not be disturbed in the absence of a showing of abuse of discretion. *State v. Lee* (1897) 69 Conn. 186, 37 Atl. 75. See also the New Jersey statute, *supra* note 11.

varies. In some jurisdictions the court makes a preliminary examination and then puts further questions upon the suggestion of counsel;[13] in others, the court, after the preliminary examination, turns the jurors over to counsel for further questioning;[14] in still others the entire examination is conducted by counsel.[15] In all the scope of the examination is not unlimited, merely because there is no precise issue made by a challenge and its denial. Any question which calls for facts that will enable counsel to determine the advisability of challenging for cause or peremptorily is proper; but the examination is conducted under the supervision of the trial judge, and his ruling upon the propriety of a particular question will not be reversed except for abuse of discretion.[16] There is, therefore, no reason for the unseemly spectacle, occasionally witnessed, of a court permitting counsel to waste days and weeks in irrelevant and useless inquiries addressed to prospective jurors. The remedy for such disgraceful proceedings is not a reversion to an outgrown procedure which makes the right of challenge of slight value but the installation of trial judges with the character and energy to exercise their discretion sanely and courageously.

E. M. M.

SEARCH, SEIZURE, AND THE FOURTH AND FIFTH AMENDMENTS

In the light of a number of recent decisions of the Federal Supreme Court, it seems safe to assert that the cherished rights of the people to security in their persons, houses, papers, and effects against unreasonable searches and seizures, as vouchsafed them by the Fourth Amendment to the Federal Constitution, are in no immediate danger of dissolution. Every man's home is still his castle; and this fundamental doctrine of personal freedom, fought for and achieved by the valiant Wilkes, over a century and a half ago in England,[1] still flourishes with a sturdy vigor. Its renewed vindication by the courts has been partly occasioned by activities of various over-zealous federal agents in the enforcement of the Eighteenth Amendment.

The use of the search warrant for the apprehension of stolen goods was exercised in England from the earliest times.[2] It is to the abuse

[13] See e. g. *Williams v. State* (1921, Miss.) 87 So. 273; *Funches v. State* (1921, Miss.) 87 So. 487.

[14] See e. g. *State v. Ellis, supra* note 12.

[15] This is the practice in most of the cases cited in note 12 *supra.*

[16] *Union Pacific Ry. v. Jones, supra* note 12; *Martin v. Lilly* (1919) 188 Ind. 139, 121 N. E. 443; *National Bank v. Romine* (1911) 154 Mo. App. 624, 136 S. W. 21; *Strong v. State* (1921, Neb.) 183 N. W. 559; *State v. Ellis, supra* note 12; *State v. Turley* (1913) 87 Vt. 163, 88 Atl. 562; *Carpenter v. Hyman, supra* note 12. The same doctrine is indicated in most of the cases cited in note 12 *supra.*

[1] *Wilkes Case* (1763, C. P.) 19 How. St. Tr. 982. See Cooley, *Constitutional Limitations,* (7th ed. 1903) 426, note.

[2] Blackstone, *Commentaries,* *290.

of this necessary governmental power, rather than to its proper legal use, that the Fourth Amendment owes its existence. "General warrants" in England, for the hounding of seditious publications, and "writs of assistance" in this country, for the apprehension of smuggled goods, placed, as John Adams said, "the liberty of every man in the hands of every petty officer."[3] It was these broadside writs that the framers of our Constitution had in mind when they so effectually provided against their recurrence.

The Fourth Amendment not only forbids "unreasonable searches and seizures" but also sets forth the requisites of a lawful search.[4] The protection thus guaranteed embodies an old common-law principle, and the tendency of the courts has been to favor the individual. Although it is a federal limitation only and does not affect the states,[5] it has been included by all the states in their constitutions or bills of rights.[6]

It has always been well settled that search warrants are confined to criminal actions and cannot be used for private ends;[7] nor can they be issued until a "probable cause" has been duly determined to exist. There must be such a state of facts as would lead a reasonable man to believe that a crime has been committed.[8] The specific evidential facts constituting probable cause must be asserted under oath to exist. A mere affidavit that the affiant has "good reason to believe" that named persons on certain premises were possessed of and unlawfully sold liquor is insufficient.[9] The propriety of issuing a search warrant is to be determined by the facts, not by rumor, suspicion or guess-work."[10]

Sufficient facts having been sworn to, there must be a warrant issued to legalize the search. Recent decisions show a tendency on the part of the courts to regard a warrant as essential, even where permission to

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[3] 2 Bancroft, *History of the United States* (1890) 546-548.

[4] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

[5] *Adams v. New York* (1904) 192 U. S. 585, 24 Sup. Ct. 372; *Burdeau v. McDowell* (1921) 41 Sup. Ct. 574; *Johnson v. State* (1921, Ga.) 109 S. E. 662.

[6] Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361.

[7] *State v. Schmuck* (1908) 77 Ohio St. 438, 83 N. E. 797; *United States v. Maresca* (1920, S. D. N. Y.) 266 Fed. 713.

[8] The mere statement of a person under the influence of liquor as to its place of procurement appears not to be probable cause, even though the statement is shown by the search to be true. *People v. De Vasto* (1921, Sup. Ct.) 190 N. Y. Supp. 816. It is entirely possible that the compliance with the technical rules of search warrant, so strictly enforced by the courts in such cases as this, would not be subjected to such close scrutiny if the case involved seditious acts rather than an infraction of the liquor laws,—an unfortunate commentary on the times.

[9] *United States v. Ray & Schultz* (1921, E. D. Mich.) 275 Fed. 1004.

[10] *United States v. Kelih* (1921, S. D. Ill.) 272 Fed. 484; see also Cooley, *op. cit.* 429.

search has been given by the occupants of the premises, because such permission may be due to coercion.[11] An alleged waiver of this constitutional protection must be shown by clear and positive testimony. Mere acquiescence is no waiver.[12] As to whether such a search by consent would have been regarded as unreasonable by those who framed our Constitution may be problematical; but such decisions clearly evidence the liberal tendencies of the courts. The warrant must be issued by an officer having jurisdiction of the search,[13] before such search,[14] and cannot be subsequently altered to fit the circumstances by the searching officers, even though with the consent of the issuing officer.[15]

The purpose for which it is issued must be "reasonable."[16] That is, search warrants may be issued for the recovery of stolen property, for the apprehension of articles used in the commission of a felony, or to terminate a possession that is itself illegal; but property of mere evidentiary value may not be seized, even with a search warrant.[17]

The warrant must contain a particular description of the place to be searched. A description of an apartment building, when the place searched was only one of the apartments in such building, has been held too general, and the warrant vacated.[18] The thing to be seized must also be described, seizure of a different kind of property than that specified being a trespass.[19]

The practical unanimity which the courts have exhibited in enforcing rights against search and seizure has not been displayed in determining the admissibility of evidence secured by an illegal seizure. In the case of *Boyd v. United States*,[20] Mr. Justice Bradley asserted that the intro-

[11] *Dukes v. United States* (1921, C. C. A. 4th) 275 Fed. 142.

[12] *United States v. Lydecker* (1921, W. D. N. Y.) 275 Fed. 976; *United States v. Kelih, supra* note 10; *Amos v. United States* (1921) 225 U. S. 313, 41 Sup. Ct. 266; but see *Bruner v. Commonwealth* (1921, Ky.) 233 S. W. 795; *McClurg v. Brenton* (1904) 123 Iowa, 368, 98 N. W. 881; *Smith v. McDuffee* (1914) 72 Or. 276, 143 Pac. 929.

[13] *People v. 738 Bottles of Intoxicating Liquor* (1921, Co. Ct.) 116 Misc. 252, 190 N. Y. Supp. 477.

[14] *New York v. One Hudson Cabriolet* (1921, Co. Ct.) 116 Misc. 399, 190 N. Y. Supp. 481.

[15] *United States v. Mitchell* (1921, N. D. Calif.) 274 Fed. 128.

[16] In *Gouled v. United States* (1921) 255 U. S. 298, 309, 41 Sup. Ct. 261, 265, the court, speaking through Mr. Justice Clarke, held that search warrants "may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken." See (1921) 30 YALE LAW JOURNAL, 769,

[17] *Gouled v. United States supra,* note 16.

[18] *United States v. Mitchell supra,* note 15.

[19] *State v. Slamon* (1901) 73 Vt. 212, 50 Atl. 1097; but see *Bruner v. Commonwealth, supra* note 12.

[20] (1885) 116 U. S. 616, 6 Sup. Ct. 524.

duction of evidence secured by search and seizure is in effect a violation of that part of the Fifth Amendment which provides against compulsory self-incrimination.[21] Basing this dictum on a previous dictum of Lord Camden,[22] he held the evidence inadmissible.[23] On the other hand, there is a well-settled rule of procedure to the effect that the court, largely to avoid a collateral issue, will receive any competent evidence without inquiry into the means by which it was procured.[24] Following this general rule, the United States Supreme Court changed its position in the case of *Adams v. New York*,[25] and there first enunciated the rule that evidence, even though obtained by illegal search and seizure, is admissible. Ten years later the same court weakened the rule, and held that the defendant, by a seasonable demand before trial, could require the return of articles seized as evidence, and that use thereof, after such demand was in effect compulsory self-incrimination.[26] Following this, the case of *Silverthorne Lumber Co. v. United States*[27] held that the government could not utilize information secured by an illegal search; and in the recent *Gouled* case[28] the "seasonable demand" rule was held inapplicable when the defendant had no knowledge of the adverse possession of the evidence until its production in court.[29] The "seasonable demand" rule has been rendered practically innocuous by two more

[21] "Nor shall (any person) be compelled in any criminal case to be a witness against himself."

[22] "It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty." *Entick v. Carrington & Three Other Kings Messengers* (1765, C. P.) 19 How. St. Tr. 1029, 1073.

[23] "They (the Fourth and Fifth Amendments) throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment, are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." *Boyd v. United States, supra* note 20, at p. 633, 6 Sup. Ct. at p. 534.

[24] Benson v. State (1921, Ark.) 233 S. W. 758; *Johnson v. State* (1921, Ga.) 109 S. E. 662; 4 Wigmore, *Evidence* (1905) sec. 2183; see also *State v. Turner* (1910) 82 Kan. 787, 109 Pac. 654; 136 Am. St. Rep. 129, 135, note.

[25] (1904) 192 U. S. 585, 24 Sup. Ct. 372.

[26] *Weeks v. United States* (1914) 232 U. S. 383, 34 Sup. Ct. 341.

[27] (1920) 251 U. S. 385, 40 Sup. Ct. 182.

[28] *Gouled v. United States, supra* note 16.

[29] Mr. Justice Clarke in his opinion in that case, at p. 312, said, "Where in the progress of a trial it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an object to their admission."

recent cases, one of which allowed a demand after the jury was sworn,[30] and the other allowed an objection just prior to the final charge to the jury.[31] This line of cases clearly indicates a short lease of life for the battered remnant of the original rule that a demand is essential to bring the evidence within the Fifth Amendment.

It is submitted that the supposed relation and inter-dependence of the Fourth and Fifth Amendments is fundamentally unsound, and that the rule originating therein, that a search warrant will not issue for matter of mere evidentiary value, likewise has no valid basis in history, justice, or policy. One amendment preserves the inviolability of the person and the home, the other protects the innocent from inquisition; and it seems reasonable to believe that the framers of the Constitution contemplated no duplication. If the Fifth Amendment actually applied to private papers illegally procured and used in evidence over objection, the question of who procured the evidence would clearly be immaterial, and would in no way affect the compulsory nature of the so-called self-incrimination. But the federal courts have no hesitancy in admitting such evidence when procured by one not connected with the federal government.[32] The distinction is illogical if the application of the Fifth Amendment is sound; but the inconsistency of the court in this matter is further evidence of the unsoundness of such application. The gradual disintegration of the "seasonable demand" rule, which lent color to the claim of privilege, brings us to the astonishing situation that although the government knows as a fact the existence of damning documents in the possession of the defendant, if such documents are merely evidential in nature they cannot be reached either by a subpoena duces tecum[33] or by a search warrant regularly issued. This is surely "justice tampered with mercy."[34]

CERTIFYING ALTERED CHECKS UNDER THE NEGOTIABLE INSTRUMENTS LAW*

When a drawee bank certifies a check which has fallen into dishonest hands and been materially altered before the certification, what is the

[30] *Amos v. United States, supra* note 12.

[31] *Holmes v. United States* (1921, C. C. A. 4th) 275 Fed. 49.

[32] In *Burdeau v. McDowell* (1921) 41 Sup. Ct. 574, 576, the court said: "We see no reason why the fact that individuals unconnected with the government may have wrongfully taken them (the papers) should prevent them from being held for use in prosecuting an offense, where the documents are of an incriminatory character." In the same case it was pointed out that mere retention of papers so obtained does not constitute search and seizure. See (1922) 31 YALE LAW JOURNAL, 335.

[33] The defendant, in supplying evidence under such a subpoena, is regarded as coming within the constitutional protection, because he does in fact by his own act incriminate himself.

[34] 4 Wigmore, *Evidence* (1905) sec. 2251.

* [This comment was received after the decision involved had been considered

bank's obligation? Dean Ames, with characteristic perception, foresaw a different answer to this question under the Negotiable Instruments Law from that which had been given before[1] and he foresaw correctly.

At common law an acceptor was bound to know the signature of a drawer and the state of his account;[2] that is, he was liable on an acceptance whether he owed the drawer or not and whether the drawer's signature was genuine or not,—for who better than the drawee should know these things?[3] Correspondingly, if he had paid an overdraft[4] or a bill to which the drawer's signature was forged[5] he could not recover

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in the form of a recent case note. Inasmuch as the writer of the note reached a different conclusion from the authors of the comment and in view of the importance of the subject to the commercial world, it has been deemed advisable to publish the note as well as this comment. The note will be found *infra,* at p. 548.—Ed.]

[1] *The Doctrine of Price v. Neal* (1891) 4 HARV. L. REV. 297, 306-307.

[2] *Espy v. Bank of Cincinnati* (1873, U. S.) 18 Wall. 604, 619. No attempt is made in this comment to draw or show distinctions between checks and other bills of exchange with regard to the questions at issue. Whatever legal distinctions may conceivably have existed in the matter before the N. I. L. have now lost their reason for existence; the cases in the main treat the question without reference to any such distinction; and the considerations of policy seem identical. It should be further stated that no attempt is made to exhaust the common-law authorities.

[3] The reason assigned is somewhat superficial on the matter of signature for it has been pointed out many times that signatures vary so much on different writings as to be incapable of certain identification. Nevertheless the burden is where it should be,—on the drawee. The rule is applied with some consistency, for payment by a drawee's branch under mistake as to either the signature or state of account is recoverable. *Woodland v. Fear* (1857, Q. B.) 7 El. & Bl. 519 (state of account); *Canadian Exp. Co. v. Home Bank of Canada* (1909, Divis. Ct.) 14 Ont. W. R. 287 (money order: forged signature of drawing agent of express company). Another reason for binding drawees has been given, i. e. that the business world must needs have commercial transactions brought to a conclusion at some certain time and place. See note 24 *infra.* But under the old law this reason proved too much for it applies with equal force to faults in bills other than those just discussed.

[4] *Citizens' Bank v. Schwarzschild & Sultzberger Co.* (1909) 109 Va. 539, 64 S. E. 954 (N. I. L. in force but decided upon common-law authority). See also *Nat. Bank of N. J. v. Berrall* (1904) 70 N. J. L. 757, 58 Atl. 189 (same rule although stop payment order had been given).

[5] *Price v. Neal* (1726, K. B.) 3 Burr. 1354, the doctrine of which seems to be generally established throughout common-law domain. 3 Eng. & Emp. Digest, tit. Bankers and Banking, p. 231, footnote (Canada, Scotland, Ireland, and India cited in apparent accord); *Com'l & Farmers' Nat. Bank v. First Nat. Bank* (1868) 30 Md. 11. The rule is apparently applied where both the drawer's signature and the payee's indorsement are forged. *First National Bank of Marshalltown v. Marshalltown State Bank* (1899) 107 Iowa, 327, 77 N. W. 1045; *State Bank v. Cumberland Savings & Tr. Co.* (1915) 168 N. C. 605, 85 S. E. 5. (N. I. L. in force but not depended upon.) The assumption in such double forgery cases probably and reasonably is that the two signatures were forged by the same person. See, apparently *contra* however, on double forgeries *People's Bank v. Franklin Bank* (1889) 88 Tenn. 299, 12 S. W. 716; *Farmers' Nat. Bank v.*

the money so paid—a sound enough rule, for, as has been often pointed out, there is in general little reason to put actual payment and agreement to pay on different footing. On the other hand, recovery was permitted to the drawee who had paid when the bill had been tampered with or bore a forged indorsement.[6] And, similarly, the drawee was not liable on his acceptance[7] (at least not for the excess) on a raised bill;[8] nor where the bill had been otherwise materially altered—as by a change of the payee's name;[9] nor where the indorsement has been forged[10]—even the indorsement of the very drawer whose *drawing* signature he must recognize at his peril.[11]

Of course, there is no pretending that all the decisions can be grouped harmoniously around so simple a framework as that preceding, especially since the holder's rights against acceptors or his defences against claims of drawees who had paid by mistake depended in part upon his relation to the instrument,—whether, for instance, he was a holder for

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Farmers' & Traders' Bank (1914) 159 Ky. 141, 166 S. W. 986. For the minority view repudiating or modifying the doctrine of *Price v. Neal* see notes 13 and 14 *infra*. The cases are collected in a series of notes: 10 L. R. A. (N. S.) 49; 29 *ibid.* 100; L. R. A. 1915 A, 77; 5 A. L. R. 1566. In 12 A. L. R. 1089 a heroic but ineffectual attempt is made to sum up the law on the subject harmoniously.

[6] *Citizens' Nat. Bank v. City Nat. Bank of Clinton* (1900) 111 Iowa, 211, 82 N. W. 464; L. R. A. 1916 E, 539, note.

[7] We are dealing here with persons taking or relying on the paper *after* the tampering. There is always the possibility that an acceptance or certification, for instance of a bill held under a forged indorsement, will be ratified by the true owner as obligee and thereby render the acceptor or certifier liable. Cf. *Anglo-South American Bank v. Nat. City Bank* (1914) 161 App. Div. 268, 146 N. Y. Supp. 457.

[8] *Espy v. Bank of Cincinnati, supra* note 2; see also note 9 *infra*.

[9] *Parke v. Roser* (1879) 67 Ind. 500 (check raised before certification); *Marine Nat. Bank v. Nat. City Bank of New York* (1874) 59 N. Y. 67; *Clews v. Bank of New York* (1882) 89 N. Y. 418 (date, amount, and payee's name altered before certification); *Metropolitan Nat. Bank v. Merchants' Nat. Bank* (1899) 182 Ill. 367, 55 N. E. 360 (bank draft raised before certification); *contra, Louisana Nat. Bank of New Orleans v. Citizens' Bank* (1876) 28 La. Ann. 189 (check raised before certification upon which holder for value relied and was protected. *Quare:* was he entitled to rely as to alterations? Perhaps this case unintentionally reflects the civil law). The effect in this connection of alteration before acceptance of the date, number, place of payment, etc. of a bill is a nice question; perhaps it would depend on whether the alteration operated to the acceptor's prejudice.

[10] *Depau v. Browne* (1824, S. C. Const. Ct.) Harper, 251, 258; Taney, C. J., in *Hortsman v. Henshaw* (1850, U. S.) 11 How. 177, 182. The rule applies certainly unless the drawer's signature also is forged; as to which in case of payment, see note 5 *supra*.

[11] *Williams v. Drexel* (1859) 14 Md. 566, 568, where the drawer's drawing signature was admittedly genuine but his indorsement as payee alleged to be forged; otherwise where the drawing signature and the indorsement of the same person as payee are both forged. *United States v. Chase National Bank* (1920) 252 U. S. 485, 40 Sup. Ct. 36.

value,—which it seems he must be.[12] Some states even permitted (and permit) the revocation of an acceptance—at least as regards certification of a check—when the state of the drawer's account was misapprehended,[13] or even the recovery of the payment made over a forged drawing,[14] if the accepted instrument had not passed to a holder for value who relied on the acceptance, or, in case of payment, if the holder had not changed his position in reliance thereon.

But such individual variations only serve to emphasize the fact that the common-law rule of *Price v. Neal*[15] was limited strictly to committing the drawee by his acceptance—or payment—to nothing beyond the drawer's signature and the amount actually drawn.

Into this settled state of the common law then was cast Section 62 of the Negotiable Instruments Law, destined curiously enough to lie little noticed for twenty-five years before its recent and sudden emergence into judicial decision startled the banker and his lawyer. The section binds an acceptor to pay "according to the tenor of his acceptance."[16]

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[12] See 10 L. R. A. (N. S.) 49, 51, note.

[13] *Security Savings & Trust Co. v. King* (1914) 69 Or. 228, 138 Pac. 465; see Cardozo, J., in *Carnegie Trust Co. v. First Nat. Bank* (1915) 213 N. Y. 301, 107 N. E. 693. This peculiar rule, which seems to relate only to certification, and not to acceptance of bills generally, has all the marks of a legal fossil, a relic in a new age of the historical origin of certification in a bank's *representation* that a check was "good," persisting deviously despite the general recognition to-day of certification, so far as concerns the obligation of the bank, as "equivalent to an acceptance." N. I. L. sec. 187. It is worth note that Justice Cardozo's dictum rests on two cases both involving the form of order presented by notes payable at a bank and certified at maturity.

[14] *First Nat. Bank of Lisbon v. Bank of Wyndmere* (1906) 15 N. D. 299, 108 N. W. 546; a similar rule prevailed in Oklahoma and Washington. *American Exp. Co. v. State Nat. Bank* (1911) 27 Okla. 824, 113 Pac. 711; *Canadian Bank v. Bingham* (1907) 46 Wash. 657, 91 Pac. 185. On the whole subject see the notes cited *supra*, note 5. It is difficult to see how the rule can persist under the N. I. L. See 12 A. L. R. 1114, note. But in Pennsylvania, where the rule rests on an old statute of 1849, that statute has been held not repealed by the N. I. L. *Union Nat. Bank v. Franklin Nat. Bank.* (1915) 249 Pa. 375, 94 Atl. 1085; see also on this point (1921) 30 YALE LAW JOURNAL, 296.

[15] (1762, K. B.) 3 Burr. 1354.

[16] Sec. 62. Liability of Acceptor. "The acceptor by accepting the instrument engages that he will pay it *according to the tenor of his acceptance;* and admits,—

1. The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the instrument, and
2. The existence of the payee and his then capacity to indorse."

Section 132 states: "The acceptance of a bill is the signification by the drawee of his *assent to the order* of the drawer." It is submitted that there is here no true inconsistency. The definition applies to the normal case, where the acceptance and the order coincide in terms. But section 62 obviously enlarges the acceptor's obligation beyond the terms of section 132: take the case where the apparent order of the drawer is a forgery.

Section 54 of The Bills of Exchange Act (both English and Canadian) covers the same ground, but makes the admissions conclusive, apparently limits them

In the case of the *National City Bank of Chicago v. National Bank of the Republic* (1921) 300 Ill. 103, 132 N. E. 832, the plaintiff certified a bank draft drawn on itself which had been stolen from the mails in course of transmission from a St. Louis debtor to his Pittsburgh creditor, the payee, and had been altered by changing the payee's name. Relying upon the certification, a jeweler delivered goods to the thief, who had filled in his own name as payee, and later collected the paper through his bank, the defendant. When the facts were discovered, the plaintiff sued to recover the amount of the check from the defendant bank. The court—departing consciously from the common-law rule recognized in Illinois as elsewhere, and doing so on the ground that the N. I. L. intended just that change—held that the acceptor had been bound by his acceptance, and having paid, could not recover.[17] His contract was

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to a holder in due course, and expressly excepts from the admission the genuineness or validity of the payee's indorsement. Brannan, *Negotiable Instruments Law* (3d ed. 1919) 224; Maclaren, *Bills, Notes, and Cheques* (5th ed. 1916) 327; Falconbridge, *Banking and Bills of Exchange* (2d ed. 1913) 692. Under the B. E. A. the problem of raised bills would thus seem to be on a footing with the problem under the N. I. L.; whereas the problem of altered payee becomes perhaps a closer question. Certification of checks is not provided for by the B. E. A.; the inference may be that the practice does not exist in England. B. E. A. sec. 73 makes general rules on demand bills applicable to checks; sec. 60 makes valid payment of a check by a bank in good faith and ordinary course of business, though over a forged indorsement.

[17] As a makeweight the court also wrenched the provision that the acceptor admits "the existence of the payee and his then capacity to indorse" into an admission of the then payee's capacity and *right* to indorse (power to pass title by indorsement). This is clearly error. That "capacity" in the section has no such general meaning could not be better shown than by comparing the first sub-section declaring both "capacity *and authority*" to be admitted as to the drawer with the second sub-section, wherein only "the capacity" of a payee is admitted. Cf. *Smith v. Marsack* (1848, C. P.) 6 C. B. 484 (acceptor precluded from showing payee a lunatic). Dolle, in his recent elementary handbook, *Business Paper* (1921) 112, falls into similar error.

Since the true reliance of the court is upon the introductory part of sec. 62 the words "according to the tenor of his acceptance"—the decision will certainly be exposed to attack along the following line: If the introductory words carry such tremendous meaning as is here asserted for them, what is the purpose or effect of the two carefully worded sub-sections stating particular things an acceptor admits? The answer is that, first: these particular admissions are by the language and punctuation itself stated to be additional (; *and* admits). Second: the particular admissions added do in part prove additional by actually extending even the "tenor of his acceptance" clause: even that clause does not, for instance, fairly include an admission of the personal *capacity* of the payee to make a *transfer* which is neither void nor voidable. If the sub-sections in part expand the language which precedes them, they can hardly be treated as pure construction of that language. Third, even assuming the sub-sections to construe the introductory language, the admission of "the drawer's . . . . authority to draw *the instrument*" refers back by any fair construction to "his acceptance": "the instrument, as accepted by him." What other form of instrument does he see, that he may admit its terms? That the admission provided for covers *something* beyond what the purported

to pay the instrument as it read when he accepted it—forged, altered or whatnot—that was the "tenor of his acceptance." The court treated the certification in this respect flatly as an acceptance—a wise approach, from the commercial viewpoint, and a sound one, from the legal.[18]

At least one other case has arisen to present the problem squarely, *National Reserve Bank v. Corn Exchange Bank*,[19] where the plaintiff had certified a raised check which the defendant afterwards acquired for value and collected. But while the issue was fairly enough in the case, it was neither perceived nor decided, the court citing only the less applicable sections of the N. I. L., and therefore reaching, as would be expected on the common law, a decision for the acceptor. A curious feature is that while the language of the act is equally applicable to both cases, the policy in favor of obligating the certifying bank is overwhelmingly stronger in this latter case in which that language was overlooked. Whether or not takers of paper after certification rely in practice on the certification as identifying the payee named, there can be no question that they do rely on the amount as certified to.[20]

The result reached in the Illinois case appears at first sight a severe one. But if it is severe, it is nevertheless sound, for it faces section 62 squarely on the language in which the section is written; furthermore, it makes for the usefulness and currency of negotiable paper, and gives to holders for value something of the security that has been found to be good policy as well as good law on the continent of Europe.[21] Free the mind for a moment from conceptions of justice built not on commercial understanding, but on legal precedent, and it becomes difficult to find objections to the rule which do not apply with equal force to any doctrine of negotiability.

There is one rather startling implication in the rule which does not seem to have been noticed by the court. Section 62 deals in express terms only with the acceptor. But it is agreed on all hands that it incorporates the rule of *Price v. Neal*[22] not only as to acceptors, but *by necessary implication* as to drawees paying without prior accep-

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drawer actually signed, will be conceded: suppose the drawing a forgery. The question then becomes one simply of facing the language of the section, or of straitjacketing that language into the older law.

[18] N. I. L. sec. 187. "Where a check is certified by the bank on which it is drawn, the certification is equivalent to an acceptance."

[19] (1916) 171 App. Div. 195, 157 N. Y. Supp. 316.

[20] The objection may be made that the taker relies equally on the amount stated in the check where it has been raised after the certification. This is true. But the certifying bank escapes liability in that case not because of any want of policy in the law to protect a bona fide taker, but because there is nothing in the chain of causation to fix the certifying bank as the party to stand the loss. So, as to prior parties, with any alteration after an instrument is put in circulation. N. I. L. sec. 124. This section does not affect the principal case because it refers only to "parties liable thereon" *at the time of alteration.*

[21] Cf. Ames, *op. cit.* 4 HARV. L. REV. 306, 307.

[22] *Supra* note 15.

tance:[23] "the greater includes the less," and rights foregone by agreement to pay are not less foregone by payment. But if the same reasoning, by a logic which seems hard to escape, be applied to the same section when *payment* is made on an altered check, without precedent certification, the present law of quasi-contracts will be rudely shaken. Denial of recovery by the bank which has so paid on an altered check was probably not within the intent of the draftsmen of the N. I. L.; it does seem to be carried, almost necessarily, in their language. The argument from the necessity of finality, the best reason ever advanced to support *Price v. Neal,* applies with full force here as well.[24] That a rule similar to that under consideration works well in practice in Europe[25] is abundantly evidenced by the outcry now being made by European banks: that all commercial transactions involving the purchase or collection by them of dollar drafts drawn on Americans are hopelessly tangled and unsettled by the possibility of the whole transaction being reopened months after a supposed final settlement, on the unforeseeable discovery of just such an alteration as is under discussion.

With the decision in the principal case (although a case of first impression) definitely construing the section, with the force derived from the principle of uniform interpretation of a uniform act, and with the rulings already plentiful on the applicability to paying drawees of the other aspect of this section on acceptors, it may fairly be expected that the point will shortly be raised, and with some—not undesirable—prospect of success.

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[23] Cases collected Brannan, *Negotiable Instruments Law* (3d ed. 1919) 225 *et seq.;* 12 A. L. R. 1089, 1114, note.

[24] "The money of the commercial world is no longer coin. The exchanges of commerce are now almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind, to which the drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact. In view of the use of this class of paper as money, it was considered that public policy required that, as between the drawee and good-faith holders, the drawee bank should be deemed the place of final settlement where all prior mistakes and forgeries should be corrected and settled once for all, and, if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that that time and place should be the paying bank and the date of payment." Mitchell, J., in *Germania Bank v. Boutell* (1895) 60 Minn. 189, 192, 62 N. W. 327, 328. See similar language in *First National Bank of Marshalltown v. Marshalltown State Bank* (1899) 107 Iowa, 327, 77 N. W. 1045; *Union Bank v. Dominion Bank* (1907, Ct. App.) 17 Man. 68, 72.

[25] See also Ames, *op. cit.* 4 HARV. L. REV. 306; *Union Bank v. Ontario Bk.* (1879, Super. Ct. Mont.) 23 L. C. Jurist, 66, citing pertinent language from Pardessus and Pothier.

WAIVER OF A PATIENT'S PRIVILEGE

The recent case of *Hethier v. Johns* (1921) 198 App. Div. 127, 189 N. Y. Supp. 605, is a good illustration of the evils attendant on the rule empowering a patient to prevent his physician from testifying. It was a personal injury action in which the plaintiff, as a witness, had fully described her injuries and her feelings. She then called physicians who had treated her to testify concerning her injuries. When the defendant called still another physician, who had examined the plaintiff at a different time but in regard to the very same injuries, the plaintiff objected to all questions concerning their professional relationship on the ground that it was "privileged" by statute.[1] The Court sustained this objection, holding that the plaintiff had not waived her "privilege" either by her own testimony or by calling other physicians to the stand.

In 1776 Lord Mansfield held, in *The Duchess of Kingston's Trial*,[2] that a physician was under a duty to answer any questions propounded to him in a court of justice concerning his professional relations with his patients. This doctrine of the common law was accepted in America, and exists in many states to-day.[3] New York was the first to establish the opposite rule by statute,[4] and in spite of much hostile criticism,[5]

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[1] New York Code of Civil Procedure, sec. 834, now Civil Prac. Act, sec. 352.

It will be observed that the patient's "privilege" is in fact a *power*. The patient is not the witness in these cases; and, indeed, if he is on the witness-stand himself, he is not privileged to refuse to answer. Thus it is apparent that his so-called "privilege" is very different from the privilege of a witness with respect to self-incrimination. The latter is a true privilege, because the witness is permitted to refuse to answer (he has no duty to answer; he is not commanded by society to answer). The cases now under discussion are cases where the *physician* is on the stand. The physician is certainly under no duty to the patient to refuse to answer, and the patient has no right against him in such case. The physician is not even privileged not to answer, at least in case the patient is represented in court. But the patient has the power to create such a privilege in the physician witness by making timely objections. It also becomes error for the court to admit the testimony. With respect to this power the patient may adopt any one of three courses of action: he may exercise it by objecting to the testimony, he may sit silent and forbear to exercise it, or he may extinguish the power altogether in the case by acts amounting to a "waiver."

[2] (1776, H. L.) 20 How. St. Tr. 355, 573.

[3] *Banigan v. Banigan* (1904) 26 R. I. 454, 59 Atl. 313; *Crow v. State* (1921, Tex. Cr. App.) 230 S. W. 148.

[4] N. Y. Rev. Sts. 1829, ch. 7, sec. 73.

[5] "As to the policy of the privilege, and of extending it, there can only be condemnation. The chief classes of litigation in which it is invoked are actions on policies of life insurance, where the deceased's misrepresentations as to health are involved; actions for corporeal injuries, where the plaintiff's bodily condition is to be ascertained; the testamentary actions, where the testator's mental condition is in issue. In all of these cases the medical testimony is the most vital and reliable, the most important and decisive, and is absolutely needed for purposes of learning the truth. In none of them is there any reason for the party to conceal the facts except to perpetrate a fraud upon the opposing party, and in the

more than half the states have enacted similar legislation. The rule is restricted to a physician[6] in his professional capacity,[7] and does not apply in the case of a third person who was present during the communication.[8] When the physician is appointed by the court for the express purpose of examining a patient, the professional relationship is said not to exist.[9] If, at the trial, the patient fails to call his physician, his opponent is privileged to bring this fact to the attention of the jury, pointing out that he might have done so if he had desired[10]; but no inference can be drawn if the patient merely excludes the testimony when the other party calls the physician to the stand.[11]

The patient's "privilege" rule confers a power on the patient[12] to

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first two of these classes the advancement of fraudulent claims is notoriously common. In none of these cases need there be any fear that the absence of the privilege will subjectively hinder people from consulting physicians freely (which is, as we have seen, the true reason for maintaining the privilege for clients of attorneys); the injured person would still seek medical aid, the insured person would still submit to a medical examination, and the dying testator would still summon physicians to his cure. In litigation about wills, policies, and personal injuries, the privilege, where it exists, is known in practice to be a serious obstacle to the ascertainment of truth and a useful weapon for those interested in suppressing it. Any extension of it to other jurisdictions is to be earnestly deprecated." Greenleaf, *Evidence* (16th. ed. 1899) 385.

See also *Renihan v. Dennin* (1886) 103 N. Y. 573, 9 N. E. 320. In this case it was admitted that the statutory rule excludes the most decisive evidence in testamentary cases and actions upon policies, and furthermore that it "will work considerable mischief."

[6] It does not apply in the case of a dentist, *People v. De France* (1895) 104 Mich. 563, 62 N. W. 709; a druggist, *Brown v. Hannibal & St. Joseph Ry.* (1877) 66 Mo. 588; or a veterinary, *Hendershott v. Western Union Telegraph Co.* (1898) 106 Iowa, 529, 76 N. W. 828.

[7] The physician must be in attendance for the purpose of prescribing. *Gray v. City of New York* (1910) 137 App. Div. 316, 122 N. Y. Supp. 118. The rule is not applicable if the communication was made after the professional relationship was over: *Arnold v. Ft. Dodge, D. M. & S. Ry.* (1919) 186 Iowa, 538, 173 N. W. 252; or if the examination of the patient was not professional: *In re Freeman* (1887, N. Y. Sup. Ct.) 46 Hun, 458; or if the examination was solely for the purpose of obtaining information for testimony in a future suit: *Shaughnessy v. Holt* (1908) 236 Ill. 485, 86 N. E. 256. It does not depend on whether or not the services were gratuitous: *In re Hallenberg's Guardianship* (1919) 144 Minn. 39, 174 N. W. 443; or whether the patient was capable of choosing a physician: *Bauch v. Schultz* (1919, Sup. Ct.) 109 Misc. 548, 180 N. Y. Supp. 188.

[8] *Springer v. Byram* (1894) 137 Ind. 15, 36 N. E. 361. If the third person is an agent of the doctor the rule applies. *North American Union v. Oleske* (1917) 64 Ind. App. 435, 116 N. E. 68. It does not apply when it appears that the communication was not intended to be confidential. *In re Schwartz's Will* (1920) 79 Okla. 191, 192 Pac. 203.

[9] Examination by such physician to determine the sanity of the patient. *People v. Austin* (1910) 199 N. Y. 446, 93 N. E. 57. Or to determine the pregnancy of a prosecutrix. *State v. Winnett* (1907) 48 Wash. 93, 92 Pac. 904.

[10] *Cooley v. Foltz* (1891) 85 Mich. 47, 48 N. W. 176.

[11] *Brackney v. Fogle* (1901) 156 Ind. 535, 60 N. E. 303.

[12] The patient only can effectively object to the testimony of his physician. *Davis v. Elzey* (1921, Miss.) 88 So. 630; *Angerstein v. Milwaukee Monument Co.*

prevent his physician from revealing the condition of the former's health; and it is not confined to cases where the patient is one of the parties to an action.[13] While alive, the patient alone can exercise the power[14] or waive[15] it; upon his death the troublesome question arises in whom the "privilege" then rests. The courts are in almost irreconcilable conflict, some maintaining that it survives the death of the patient and cannot be waived by heir, executor, or administrator,[16] while others claim that it rests in the heir alone.[17] Some courts, notably those of Missouri[18] and Iowa,[19] hold that in a will contest the physician's evidence is admissible if introduced by either party. In a recent case[20] in the District of Columbia the executors offering the will for probate were held not to be the legal representatives of the testator, so as to fall within the Code provision which allowed the "legal representatives of the patient" to waive the "privilege." Some states permit this "privilege" to be waived only by the "personal representative"[21] of the patient, and have held the executor to be such representative.[22] In an action for wrongful death, involving the validity of a release, the physician was held incompetent to testify as to the patient's mental capacity at the time when the release was made.[23] Whether or not the beneficiary under an insurance policy can waive the "privilege" is no better settled. A recent case[24] held flatly that the beneficiary could not do so. An earlier case,[25] however, came to the opposite conclusion. Infants may be patients, but they have no power of waiver so as to prevent their objecting to the testimony of the physician.[26] In

(1919) 169 Wis. 502, 173 N. W. 215; *Arizona Eastern Ry. v. Matthews* (1919) 20 Ariz. 282, 180 Pac. 159; *Markham v. Hipke* (1919) 169 Wis. 37, 171 N. W. 300; *U. S. Fidelity & Guaranty Co. v. Hood* (1921, Miss.) 87 So. 115; *McCarthy v. McCarthy* (1921, Wash.) 199 Pac. 733. For the breach of the duty of secrecy by the physician, see COMMENTS (1921) 30 YALE LAW JOURNAL, 289.

[13] *In the Matter of Mary A. Myer* (1906) 184 N. Y. 54, 76 N. E. 920.

[14] *Supra* note 12.

[15] *Angerstein v. Milwaukee Monument Co., supra* note 12; *Hirschberg v. Southern Pacific Ry.* (1919) 180 Calif. 774, 183 Pac. 141.

[16] *McCaw v. Turner* (1921, Miss.) 88 So. 705; *Maine v. Maryland Casualty Co.* (1920) 172 Wis. 350, 178 N. W. 749. The patient's power thus appears to be supplanted by a privilege in the physician not to testify.

[17] *Flack v. Brewster* (1920) 107 Kan. 63, 190 Pac. 616.

[18] *Spurr v. Spurr* (1920, Mo.) 226 S. W. 35.

[19] *In re Swain's Estate* (1919, Iowa) 174 N. W. 493.

[20] *Hutchins v. Hutchins* (1919) 48 App. D. C. 495.

[21] This is the view favored by the text-writers. 4 Wigmore, *Evidence* (1905) sec. 2391; Elliott, *Evidence* (1904) sec. 634. See N. Y. C. C. P. sec. 836, now C. P. A. sec. 354.

[22] *Grieve v. Howard* (1919) 54 Utah, 225, 180 Pac. 423.

[23] *Poinsett Lumber & Mfg. Co. v. Longino* (1919) 139 Ark. 69, 213 S. W. 15.

[24] *Maine v. Maryland Casualty Co., supra* note 16.

[25] *National Annuity Assoc. v. McCall* (1912) 103 Ark. 201, 146 S. W. 125.

[26] *Corey v. Bolton* (1900, Sup. Ct.) 31 Misc. 138, 63 N. Y. Supp. 915.

these cases the guardian of the infant has the power of waiver, unless such a waiver would be prejudicial to the interests of his ward. There is a provision in the New York Statutes[27] that a patient's attorney can execute a waiver by stipulation before the trial. When the statute did not provide for an express method of waiver, the widow of the patient has been held to have the power.[28] All of which indicates the generally confused state of the subject.[29]

The legislatures that have enacted the statutory rule in favor of patients have done so in the belief that persons might otherwise have hesitation in communicating freely with their physicians for fear that the details of their ailments and weaknesses may be laid before the gaze of the public. It would seem, when the patient himself has testified to the state of his health, that the underlying reason for applying such a rule has vanished; but courts have been almost unanimous in holding that such testimony is not a waiver.[30] Although irrational and illogical,[31] the courts have departed from it only in cases involving malpractice,[32] when testimony by the plaintiff operates as a waiver both as to the physician himself and to others called in consultation with him. The statutes of some states,[33] however, expressly provide that if the patient testifies, the evidence of his physician is admissible on the same point.

When a physician is put upon the stand by a patient, the latter thereby prevents effective objection to the testimony of other physicians who

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[27] N. Y. C. C. P. sec. 836, now C. P. A. sec. 354.

[28] *Groll v. Tower* (1884) 85 Mo. 249.

[29] A waiver by the plaintiff before the trial is possible unless expressly prohibited by statute. *Knights of Pythias v. Meyer* (1905) 198 U. S. 508, 25 Sup. Ct. 754; *Cromeenes v. Sovereign Camp, W. O. W.* (1920) 205 Mo. App. 419, 224 S. W. 15; *Sovereign Camp, W. O. W. v. Farmer* (1918) 116 Miss. 626, 77 So. 655; *Western Travellers' Accident Assoc. v. Munson* (1905) 73 Neb. 858, 103 N. W. 688. Filing a physician's certificate as part of the proofs of death, pursuant to a clause in an insurance policy, is not a waiver of the testimony of the physician, but is a waiver as to the contents of the certificate. *Hicks v. Metropolitan Life Insurance Co.* (1916) 196 Mo. App. 162, 190 S. W. 661.

[30] *Bauch v. Schultz, supra* note 7; *Hirschberg v. Sp. Pacific Ry., supra* note 15.

[31] "Certainly it is a spectacle fit to increase the layman's traditional contempt for the chicanery of the law, when a plaintiff describes at length to the jury and a crowded court-room the details of his supposed ailment and then neatly suppresses the available proof of his falsities by wielding a weapon nominally termed a privilege. . . . . The whole reason for the privilege is the patient's supposed unwillingness that the ailment should be disclosed to the world at large; hence the bringing of a suit in which the very declaration, and much more the proof, discloses the ailment to the world at large, is of itself an indication that the supposed repugnancy to disclosure does not exist. . . . . In actions for personal injury, the permission to claim the privilege is a burlesque upon logic and justice." 4 Wigmore, *op. cit.* sec. 2389.

[32] *Capron v. Douglass* (1908) 193 N. Y. 11, 85 N. E. 827.

[33] Okla. Sts. 1893, sec. 335; Or. Ann. Code, 1892, secs. 712, 713; Mont. C. C. P. 1895, sec. 3163; Ariz. Rev. Sts. 1901, sec. 2535; *Phelps Dodge Corporation v. Guerrero* (1921, C. C. A. 9th) 273 Fed. 415.

were present at the same consultation.[34] This is not the case, however, as to other physicians who have examined the patient at a different time for the same ailment.[35] A technical, and perhaps unnecessary restriction is being carried to an unwarranted extent, when a patient, allowed to testify to his injuries and permitted to call a physician who goes into great detail concerning them, is then, as a climax, empowered to exclude the evidence of another physician who perhaps examined him on the same day—for the purpose, forsooth, that his ailments will not be exposed to the gaze of the public. How applicable are the words of that eminent Missouri jurist[36]:

"May one cry Secrecy! Secrecy! Professional Confidence! when there is no secrecy and no professional confidence? As well cry, Peace! Peace! when there is no peace. Jeremiah 6:14, q. v."

Another illogical technicality is the restriction imposed upon the physician in cases where the patient has already, at a prior trial, allowed the testimony to be given.[37] Missouri is perhaps alone in saying that a waiver continues to be operative no matter how many trials may be required.[38] A waiver once made, however, for the purposes of that trial generally extends over the entire professional conduct of the physician.[39]

In an attempt to create and defend rights of privacy the American legislatures and courts have entangled themselves in a forbidding mass of restrictions. In England no such statute in favor of patients has ever been enacted.[40] It is hard to explain the existence of such decisions as that reached in the principal case, when the court saved "the patient from possible disclosure by his physician, which might result in his embarrassment or disgrace," although full disclosure had already been

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[34] " 'The very purpose of the statute is to hide, as with a veil, the malady and trouble for which the physician treated her, and what may have passed between them in the confidential relationship of physician and patient. But when the veil has been lifted by the patient, or with her consent, and the secrets of the sick-chamber given to the world, what logic is there in saying that the patient can clog the wheels of justice itself by closing the mouths of other physicians who know the real facts.' " *Michaels v. Harvey* (1915, Mo.) 179 S. W. 735, 738. *Contra, Jones v. Caldwell* (1911) 20 Idaho, 5, 116 Pac. 110.

[35] *U. S. Fidelity & Guaranty Co. v. Hood, supra* note 12.

[36] Lamm, J., in *Smart v. Kansas City* (1907) 208 Mo. 162, 208, 105 S. W. 709, 722.

[37] *Arizona Eastern Ry. v. Matthews, supra* note 12; *Metropolitan Life Ins. Co. v. Fitzgerald* (1919) 137 Ark. 366, 209 S. W. 77.

[38] *State v. Long* (1914) 257 Mo. 199, 165 S. W. 748.

[39] *Morris v. N. Y. Ont. & West Ry.* (1895) 148 N. Y. 88, 42 N. E. 410 (when plaintiff testified that her physician gave her certain tablets in April, 1907, this was not a waiver as to a similar prescription in 1905).

[40] "A medical practitioner, when called as a witness, is bound, if asked, and if the question is pressed and allowed, to disclose every communication however

made at the trial.[41] At the present time, probably no branch of the law is more involved, illogical, or senseless, and more lacking in that much to be desired attribute—certainty.

CAN AN UNRECOGNIZED GOVERNMENT SUE?

The awkward result reached by the Appellate Division of the Supreme Court of New York in the case of *Russian Socialist Federated Soviet Republic v. Cibrario* (1921) 191 N. Y. Supp. 543, denying the plaintiff the privilege to sue for an accounting a defendant alleged to have defrauded the plaintiff of moneys entrusted to him, on the ground that the plaintiff government had not been recognized by the United States, calls for an examination of the principles on which the case was decided. The refusal of the court to extend the protection of the law to the funds of the plaintiff appears the more startling in the light of the fact in the record that the funds were brought to this country through the instrumentality of the United States Government. It appears that in 1918 the Soviet Government, through its Cinematographic Committee of the Commisariat of Public Instruction paid over to the United States Commercial Attaché in Petrograd one million dollars, to be deposited in the National City Bank of New York, to be drawn against by the defendant under an agreement between the plaintiff government and the defendant, of which our Government was cognizant, to supply the Soviet Government with films for educational purposes. It was alleged that the defendant had misappropriated a portion of the funds in question, and the Government thereupon brought an action for an accounting. This action, in the form of an appeal by the defendant from an order appointing a receiver, the court dismissed because the plaintiff government had not been recognized by the United States Government, thus denying all redress and in effect proclaiming the doctrine that the numerous unrecognized governments whose representatives in Washington now seek the recognition of the United States are without judicial protection for their funds or other property brought here.

The court proceeded on the theory that the power to sue depended on recognition, for without recognition, it is argued, the court could not know that the plaintiff was a government. This is believed to be erroneous in principle. While recognition is perhaps the best means of evidencing the existence of a government, it does not create the government nor is it the only means of evidence. Chief Justice Best in the important case of *Yrisarri v. Clement*[1] expressly accepted other evidence, such as public notoriety, to prove the existence of an unrecognized State. It need hardly be said that a State or Government may

private and confidential, which has been made to him while attending a patient in his professional character." 20 Hals. Laws Eng. 337.

[41] If special disclosures have been made to the particular witness that are not already in evidence, there may be some slight reason for excluding them.

[1] (1826, C. P.) 11 Moo. C. P. 308. At p. 314 he said: "The existence of unac-

exist independently of recognition. It is then called *de facto*. The principal difference between a general *de facto* and a *de jure* Government is that the latter's existence is a matter of record by reason of its recognition—though recognition expressly as a *de facto* government is also possible—whereas the existence of the former must be proved by other evidence.

There are innumerable cases in the American and English courts according full validity to the acts of foreign *de facto* governments not recognized by the political departments of the United States or British Government. For example, the title derived through the requisitioning of property by the military forces or civil authorities of a *de facto* government is protected in the courts;[2] acts committed by its officers are regarded as Acts of State and protect the officer from personal liability;[3] it may, even though only a local and temporary and not a general *de facto* government, collect taxes and customs duties and thereby discharge a taxpayer from the duty of paying them again to a succeeding *de jure* government;[4] it may validly dispose of the fruits of the public domain,[5] and if a general *de facto* government, of the public domain itself. In practically every respect, and certainly as an owner of property and a contractor, it is regarded on the same legal, though not necessarily diplomatic, footing as a *de jure* government. It is of course held to the duties of such a government, and assumes and transmits all State obligations. It will hardly be doubted, for example, that Mexico will be held responsible for any unlawful acts of the unrecognized Huerta government.[6]

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knowledged states must be proved by evidence that they are associations formed for mutual defence, acknowledging no authority *dehors* their own government, observing the rules of justice towards the subjects of other states, living generally under their own laws, and maintaining their independence by their own force." See also (1922) 38 L. QUART. REV. 9; *Underhill v. Hernandez* (1895, C. C. A. 2d) 65 Fed. 577. On the recognition of de facto governments, see Thomas Baty, *So Called "De Facto" Recognition, supra* at p. 469.

[2] *O'Neill v. Central Leather Co.* (1915) 87 N. J. L. 552, 94 Atl. 789; *Oetjen v. Central Leather Co.* (1918) 246 U. S. 301, 38 Sup. Ct. 309; *Ricaud v. American Metal Co.* (1918) 246 U. S. 304, 38 Sup. Ct. 312. The subsequent recognition of the Carranza Government was really immaterial. See COMMENTS (1918) 27 YALE LAW JOURNAL, 812. See also *Republic of Peru v. Dreyfus Bros. & Co.* (1886) L. R. 38 Ch. Div. 348. See also the recent case of *Luther v. Sagor* [1921, C. A.] 3 K. B. 532; COMMENTS (1921) 31 YALE LAW JOURNAL, 82.

[3] *Underhill v. Hernandez* (1895, C. C. A. 2d) 65 Fed. 577, affirmed (1897) 168 U. S. 250, 18 Sup. Ct. 83; *Ford v. Surget* (1878) 97 U. S. 594; *Freeland v. Williams* (1889) 131 U. S. 405, 9 Sup. Ct. 763. See also F. Larnaude, *Les Gouvernements de Fait* (1921) 28 REV. GÉN. DE DR. INT. PUB. 457, 471, *et seq.*

[4] *United States v. Rice* (1819, U. S.) 4 Wheat. 246; *Mazatlan* and *Bluefields* Cases, 1 Moore, *Digest of International Law* (1906) 49, *et seq.; MacLeod v. United States* (1913) 229 U. S. 416, 429, 33 Sup. Ct. 955, 959.

[5] *"Georgiana" and "Lizzie Thompson" (U. S.) v. Peru,* Moore, *International Arbitrations* (1898) 1595, 4785.

[6] See Borchard, *International Pecuniary Claims against Mexico* (1917) 26 YALE LAW JOURNAL, 339.

Yet it is undoubtedly true that recognition by the political department of the Government is in many cases vital to establish the capacity of a plaintiff government to sue in the courts. The important question to determine is the character of the suit and the issue involved. When either of these is political in its nature, the court properly turns to the executive for guidance as to the political status of the plaintiff government.[7] Thus the political status of given territory must be determined by the political department of the Government;[8] as also the independence of a revolting colony or portion of a Government at peace with the United States,[9] whether arising under the neutrality laws[10] or the statutes against piracy.[11] Particularly is this true where the new political entity, whether new State or merely new Government, claims as the legal owner State property formerly controlled by its predecessor or opponent faction. Here the court must be particularly careful not to differ with the executive in recognizing the political authority of a given government to represent the State.[12] But where the plaintiff *de facto* government does not claim as the legal successor of a prior government or as the legitimate government between two opposing factions, but as the legal owner of property in its own right, it would seem that political recognition is immaterial. If it can prove its existence as a *de facto* government and a property owner and its title to the property claimed, there seems to be no valid reason why it should not receive the aid of the courts in the protection of its property. The statements frequently found in the reports to the effect that a foreign government recognized by the United States may sue in our courts[13] by no means establish the proposition that a government not so recognized may not under any

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[7] So, also, where the government is a defendant, recognition will by the rule of comity serve to give immunity from the jurisdiction. See Arnold D. McNair, *Judicial Recognition of States and Governments, British Year Book of International Law* (1921-22) 57 *et seq.*

[8] *Jones v. United States* (1890) 137 U. S. 202, 11 Sup. Ct. 80; *Williams v. Suffolk Insurance Co.* (1839, U. S.) 13 Pet. 415.

[9] *United States v. Palmer* (1818, U. S.) 3 Wheat. 610. But see the illuminating opinion of Johnson, Circuit Judge, in *Consul of Spain v. The Conception* (1819, C. C. D. S. C.) Fed. Cas. No. 3137, 6 Fed. Cas. 359.

[10] *The Hornet* (1870, D. D. N. C.) Case No. 6705, 12 Fed. Cas. 529; *U. S. v. Trumbull* (1891, S. D. Calif.) 48 Fed. 99, 104; *Kennett v. Chambers* (1852, U. S.) 14 How. 38.

[11] *The Ambrose Light* (1885, S. D. N. Y.) 25 Fed. 408.

[12] *Republic of Mexico v. Arrangois* (1855, N. Y.) 11 How. Pr. 1; *Rose v. Himely* (1808, U. S.) 4 Cranch, 241. This rule entirely justifies the decision in *City of Berne v. Bank of England* (1804, Ch.) 9 Ves. 347, and the decision of Judge Manton in *Russian Socialist Federated Soviet Republic v. The Steamers Penza and Tobolsk* (1921, U. S. D. C. E. D. N. Y.) N. Y. L. JOUR., Oct. 4, 1921, though the reasoning of the latter case does not seem entirely satisfactory.

[13] *Republic of Honduras v. Soto* (1889) 112 N. Y. 310, 19 N. E. 845; *Republic of Mexico v. Arrangois* (1856, N. Y. Sup. Ct.) 5 Duer, 634, 637; *State of Yucatan v. Argumendo* (1915, N. Y. Sup. Ct.) 92 Misc. 547, 157 N. Y. Supp. 219.

circumstances sue, a doctrine to which Judge Manton in the *Steamers Penza and Tobolsk* case[14] and the Appellate Division in the instant case appear to give unqualified support. If there was any political issue involved in the present case it was whether the court could admit the plaintiff as the *de facto* Government of Russia when the political department of this Government was still recognizing an Ambassador in Washington who represents a government which for over four years has been nothing but a historical memory. Even this issue, it is believed, was immaterial to the plaintiff's privilege to sue in this case.

E. M. B.

RECOVERING TAXES FROM A COMMISSIONER'S SUCCESSOR

What seems obvious justice is at times made strangely impossible by a rigid construction of supposedly controlling legislation. An interesting example may be found in the recent case of *Smietanka v. Indiana Steel Co.* (1921) 42 Sup. Ct. 1. The plaintiff sued to recover an internal revenue tax which he paid under duress to X, a tax collector. The defendant was X's successor. Acting under a statute,[1] the District Court certified that there was probable cause that X had acted under the direction of the Commissioner of Internal Revenue, and that the amounts recovered should therefore be paid from the Treasury. The Supreme Court held, however, (two judges dissenting) that the action was personal and did not lie against the successor in office.

Prior to the passage of later statutes, a tax collector was personally liable for taxes collected through mistake or duress, if due protest was made at the time of collection and notice given of an intention to sue. Such liability was unquestioned where the money still remained in the hands of the collector, but there was some conflict where the money had been paid into the Treasury.[2] The first step toward relieving collectors of this personal liability was the passage of statutes requiring collectors to pay the taxes collected into the Treasury and providing that on the death of the collector all lists were to be transferred to his successor.[3] It being the duty of the collector to collect the tax and pay it into the Treasury, his acts, it seems, are clearly acts pertaining to his *official* duties and any responsibility for those acts results from the *office*. The collector, being a mere agency for collection under orders from superiors

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[14] *Supra* note 12.

[1] Act of March 3, 1863 (12 Stat. at L. 741).

[2] That there was liability in any event: *Elliott v. Swartwout* (1836, U. S.) 10 Pet. 137; see *Arnson v. Murphy* (1883) 109 U. S. 238, 3 Sup. Ct. 184. That there is conflict where the money has been paid into the Treasury: *Lindsey v. Allen* (1897) 19 R. I. 721, 36 Atl. 840; *Brown v. Pontchartrain Land Co.* (1897) 49 La. Ann. 1779, 23 So. 292; *Scottish Union & N. Ins. Co. v. Herriott* (1899) 109 Iowa, 606, 80 N. W. 665.

[3] Act of June 30, 1864 (13 Stat. at L. 229); Act of June 30, 1864 (13 Stat. at L. 238, 239); *Cary v. Curtis* (1842, U. S.) 3 How. 236.

who have in fact assessed the tax, is in no way connected with the transaction in his personal capacity, and the rule would be a harsh one that would inflict personal liability for what in most cases is a proper performance of a delegated duty.[4] By a statute of 1866, the Commissioner of Internal Revenue is authorized to pay any judgment rendered against a collector.[5] This statute has been held to apply whether a certificate of probable cause was issued or refused and it seems to have been entirely overlooked in the instant case.[6] It was further provided that an action commenced against a collector shall not abate by reason of his death or the expiration of his term of office, but shall survive against his successor.[7] This statute shows a clear intention that the liability of a collector should attach to the office and not to the individual occupying the office and, it is submitted, should have been construed to apply to the instant case. The fact that the action was not commenced against the predecessor ought not to be controlling. For example a recovery has been allowed against the executors of a collector who died after the action against him was commenced.[8] It would be unwarranted to deny a recovery against the executors on the ground that the action had not been commenced during the lifetime of the deceased; for certainly, if there was such a cause of action against the deceased as could survive against his executors, the latter ought to be liable even if the action had never been commenced against the deceased.

The conclusion reached in the instant case was plainly the result of a literal construction of a statute,[9] which might very reasonably have been construed so as to reach a more just decision. The words "by him" may very fairly be construed to mean, by a collector in his official and not in his personal capacity. The test in such cases might well be as follows: if an action would have existed against the predecessor in office as a result of a proper performance of his official duties, the action ought to be permitted against his successor, for in such a case, the certificate provided for by statute would unquestionably be given and the judgment paid out of the Treasury; but where the predecessor acted outside his official duties or against the orders of his superiors, the certificate would clearly be withheld, and there it would plainly be just to consider the action a purely personal one which would not survive against the successor. There would then be no danger of a successor's having ever to suffer for the wrongful collection of a tax by his prede-

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[4] *Armour v. Roberts* (1907, C. C. W. D. Mo.) 151 Fed. 846; *Erskine v. Hohnbach* (1871, U. S.) 14 Wall. 613.

[5] Act of July 13, 1866 (14 Stat. at L. 111).

[6] *United States v. Frerichs* (1888) 124 U. S. 315, 8 Sup. Ct. 514.

[7] Act of Feb. 8, 1899 (30 Stat. at L. 822).

[8] *Patton v. Brady* (1902) 184 U. S. 608, 22 Sup. Ct. 493. This case, often cited to show that the action against a collector is purely personal, cannot be relied upon too strongly since it fails to consider the statute in note 7 *supra*.

[9] Act of March 3, 1863 (12 Stat. at L. 741).

cessor without being reimbursed by the Commissioner. Some courts recognize, in a case of this kind, that an action lies either against the predecessor, who collected the tax, or against the United States, but not against the successor.[10] To say that an action lies against the United States and in the same breath to say that an action cannot on any theory be brought against the succeeding collector is plainly inconsistent.

THE BLACKLIST AND SECONDARY BOYCOTT AS AN AID TO PRICE-FIXING

The recent English case of *Ware v. Motor Trade Assoc.* (1921, A. C.) 125 L. T. R. 265, directs attention to a branch of the law that is much under discussion at the present time. The defendant association, composed of a majority of the manufacturers and merchants engaged in the motor trade, established a uniform price list. The plaintiff dealer, who was not a member of this association, and acting on behalf of a customer, sold an automobile at a price above that fixed by the association. Upon the refusal of the plaintiff to pay a fine and apologize, the defendants placed his name on a stop list, thereby signifying that they would refuse to deal with the plaintiff or with anyone that dealt with him. The plaintiff sought an injunction, which was refused. If the decision may be accepted as a true interpretation of the present English law, it will be of benefit to those who are undecided as to the effect of the two leading cases of *Allen v. Flood*[1] and *Quinn v. Leathem*,[2] which are professedly applied in the instant case.

Since the situation presented was essentially that involved in labor disputes, the court seized upon that analogy. There is thus afforded an opportunity of applying the analysis suggested in previous comments on labor law.[3]

In following this analysis, the first thing to be determined is whether there was a justifiable object. To state it in simple terms—If B threatens to refuse to deal with C unless C refuses to deal with A, thus bringing economic coercion to bear on A, is it sufficient justification that B wishes to maintain an organization to keep prices uniform? The court had no difficulty in holding this to be a justifiable object in accord with the English rules.[4] In America, under the Sherman Act or state

[10] *United States v. Emery* (1915) 237 U. S. 28, 35 Sup. Ct. 499.

[1] [1898, H. L.] A. C. 1.

[2] [1901, H. L.] A. C. 495.

[3] COMMENTS (1921) 30 YALE LAW JOURNAL, 280, 404, 501. It was suggested that essentially there is but little difference, if any, between a strike and a boycott and that the same general rules should apply in both cases.

[4] It is submitted, that this point was more or less taken for granted. Certainly there was but little reference to authority. It was stated on p. 271 that the rule established in the *Mogul* case (*Mogul Steamship Co. v. McGregor* [1892, H. L.] A. C. 25) was at no time dissented from in the House of Lords and was "that it is no part of the duty of the court to inquire whether the action of the defendants in that case was either selfish or unreasonable, but that it was sufficient if it appeared to have been taken *bona fide* in their own interest in the exercise of their

anti-trust acts, the contrary would be true.[5] For the purpose of comparison with the American cases, however, it will be assumed that the object would have been justifiable in this country.

The object being justifiable, there remains the question whether the means used were legal.[6] To put it into simple terms—may B use economic pressure on a third person C in order to have C bring economic pressure on A to compel A to accede to B's demand? This was the main point involved in the instant case and the court had difficulty in sustaining its decision that such means were permissible. Three judges gave their decisions; the outstanding points were: (1) legal means are determined by justification; (2) B was privileged to threaten to do that which he was privileged to do; and (3) a rejection of the prima facie tort idea.

If means are to be determined by justification, we are applying the same yardstick that is used to determine whether the object was lawful.[7] Therefore, in deciding the one, the other is also settled. A careful analysis of this question will show that there is a sharp line between the two, and that it is the object, not the means that is determined by justification. Custom and public policy outline the scope of decisions defining permissible methods.[8]

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trade." Another justice states, on p. 276, that "it is in their (association) opinion in the interests of their trade that their members' goods should be distributed at their members' fixed prices, no more and no less. That this is a lawful object I have no doubt." The court is doubtless right in holding this to be a justifiable object, since there seems to be a wide latitude in England on the question of price fixing. *Elliman Co. v. Carrington* [1901] 2 Ch. 275. Yet it seems well to point out that the test is not whether the defendants think it is in the protection of their trade interests, but whether society chooses to so regard it. Salmond, *Torts* (5th ed. 1920) 530; *North Western Salt Co. v. Electrolytic Co.* [1914, H. L.] A. C. 461.

That the object is justifiable is well illustrated by the case of *National Phonograph Co. v. Edison-Bell Co.* [1908] 1 Ch. 335, in which the facts are similar to the present case, with the added fact that A obtained the goods by representing that he was not blacklisted. B sued A and obtained a judgment because A had obtained the goods by such misrepresentation. Obviously the court was protecting an association which fixed prices.

[5] *Boston Store v. Graphaphone Co.* (1918) 246 U. S. 8, 38 Sup. Ct. 257; *Victor Co. v. Kemeny* (1921, C. C. A. 3d) 271 Fed. 810; *Martell v. White* (1904) 185 Mass. 255, 69 N. E. 1085. But see *Bohn Mfg. Co. v. Hollis* (1893) 54 Minn. 223, 55 N. W. 1119.

[6] This is the method of attack that is generally followed, as explained in COMMENTS, *supra* note 3. The court stated on p. 271, "the material question must be whether, if the end sought to be attained is lawful, the means are in themselves unlawful."

[7] "What the defendants did, and what is complained of in the present action, was done by them *bona fide* in protection of their trade interests. Under these circumstances neither such coercion or threats as were used, nor the acting by the defendants in combination, render their action, in my opinion, unlawful or actionable." Bankes, L. J., at p. 271.

[8] When B's refusal to deal with C, unless C refrains from dealing with A, results in C's withdrawal of trade from A, and A sues B, the object is what B is

Many of the older cases labored to show that a person is privileged to threaten to do that which he is privileged to do. There is little opposition to this doctrine at the present time. In the instant case, however, it is necessary to show that B was privileged to refuse to deal with C unless C refused to deal with A (as well as threaten to do so) a point practically assumed.[9]

The remaining element of importance was a disapproval of the prima

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trying to accomplish by having A do as B demands. Here, B's object is to keep prices fixed. The means used is a secondary boycott; B, through C, is injuring A. If C sues B, however, the object is the same as before, but the means, as to C, is simply a primary boycott. Thus, in this country, in the first case A would have a remedy because the object and the means are both unlawful. In the second case, only the object would be unlawful. And so, if we assume the object to be lawful (as the English court held), A would have a remedy, but not C. This is perhaps unjust, for the defendant's conduct is the same; but it has not received much attention in our law. See, however, *Lehigh Structural Steel Co. v. Atlantic Works* (1920, N. J. Eq.) 111 Atl. 376. It is thus seen that the means have been gradually listed, as custom has dictated, and then do not change with each case through any method of justification. It includes such things as force, injury to property, picketing, etc. The secondary boycott has also been placed on this list. Thus in the first case B used a secondary boycott against A and the means used was illegal. In the second case, B used no secondary boycott against C and the means used was legal.

"Just as 'fraud' cannot be fully defined, so 'unlawful means' is insusceptible of exhaustive definition. But the existing decisions indicate certain acts and conduct which fall within the phrase. Other manifestations of conduct may in future days be also held to fall within it. Personal violence against a third person in order to injure a plaintiff; or threats of personal violence; or nuisance; or fraud; or threats, even though they do not amount to threats of personal violence; are recognized heads of unlawful means." *Pratt v. British Medical Assoc.* [1919] 1 K. B. 244, 260.

[9] The only support for this point was the case of *Scottish Co-operative Society v. Glasgow Fleshers' Assoc.* (1898, Sc. O. H.) 35 Sc. L. Rep. 645, where a combination of butchers informed auctioneers that no butcher would buy from them if the auctioneers sold to the co-operative stores, this course being taken to protect the interest of the butchers by driving their competitors, the co-operative stores, out of business. When put in plain terms it is that B tells C that C must sell either to B or to A. (If compared with the labor cases, it would be called a primary dispute, i. e. one concerned directly with conditions of employment.) In the instant case, B tells A that he must perform certain acts, and when he fails to follow directions, tells C (an outsider) that he must cease dealing with A. In the first instance, B's dispute is primarily with C; in the second instance his dispute is solely with A. That is the reason that the court is unable to harmonize the *Glasgow* case with *Quinn v. Leathem, supra* note 2. See also *White v. Riley* (1920, C. A.) 89 L. J. Ch. 628 which approved of *Hodges v. Webb* [1920] 2 Ch. 70, overruled *Valentine v. Hyde* [1919] 2 Ch. 129, and applied *Allen v. Flood, supra* note 1. It is to be noted that in support of this theory the court goes even further and would disapprove of the generally accepted theory that a person has a beneficial liability in trade. It is not that a person "has a right to trade, and therefore every one must trade with him, and refusal to do so is an unlawful act; and no one may compete with him, and injurious competition is a wrongful act, because it injures him in his trade." Scrutton, L. J., at p. 273. But see *Pratt v. British*

facie tort idea.[10] While this view may be salutary, the historical growth of this branch of the law has certainly established the doctrine. It is, moreover, a theory that has been given particular attention and approval in the English cases.[11] Even if we reject the prima facie tort idea, however, the court has failed to furnish a satisfactory reason for holding that a secondary boycott is a legal method.

Upon examination of the English cases, it seems that, unless the facts of the instant case fall within the Trades Dispute Act[12] (which the court fails to mention), the means used should have been considered unjustifiable.[13] The present decision would be anomalous in America, as it presents the case of a secondary boycott, which is permitted in only a few states.

If a secondary boycott is to be permitted, it is far better that it be openly recognized as such, than that its true character be veiled by circuitous reasoning. Its legality may be coming in America. If so, it is to be hoped that the courts will be frank enough to admit that the past decisions were unjust, and that public policy has required the change.

THE OFFER OF PROOF IN GROUNDING EXCEPTIONS

Many attorneys apparently assume that omniscience is inherent in appellate courts. In appealing a case they present a record of the trial court which is fundamentally deficient in failing to place the errors assigned fairly before the court of appeals. This is due either to the

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Medical Assoc., supra note 8, at p. 258 *et seq.*, as supporting the opposite view, advanced in COMMENTS (1921) 30 YALE LAW JOURNAL, 230.

[10] "Such co-existing rights do in a world of competition necessarily impinge upon one another, and it appears to me illogical to start with the assumption that an interruption of the power of a man to do as he pleases within the law is *prima facie* a legal wrong, which in every case needs to be justified. The true question is, was the power interrupted by an act which the law deems wrongful? with the practical result that to determine liability one has to concentrate, not upon the effect on the plaintiff, but upon the quality of the act of the defendant." Atkin, L. J., at p. 276.

[11] The instant case is the first case of importance to uphold this doctrine since it was brought into prominence in the case of *Allen v. Flood, supra* note 1. On the other side, there is a line of important cases upholding the prima facie tort idea. This started with the case of *Mogul Steamship Co. v. McGregor* (1889, C. A.) L. R. 23 Q. B. Div. 598, and was approved by *Quinn v. Leathem, supra* note 2, at pp. 525, 527. *Giblan v. Nat'l Amalgamated Union* [1903] 2 K. B. 600, 625; *Attorney-General v. Adelaide Co.* (1913, P. C.) 109 L. T. R. 258.

[12] (1906) 6 Edw. VII, c. 47.

[13] It is difficult to reconcile the instant case with that of *Larkin v. Long* [1915, H. L.] A. C. 814, where the plaintiff was given a remedy under circumstances not as strong as those of the instant case. Where the Trades Dispute Act, *supra* note 12, does not apply (i. e. acts done not in contemplation of furtherance of a trade dispute within the meaning of the act) it seems that the common-law rules should govern and in the instant case the means would be illegal.

tardy diligence of an earnest search through the record for flaws after the trial is over or else to a careless omission of an offer of proof as the basis of error when they know that the lower court's refusal to hear their witness is erroneous. The offer of proof, necessary to perfect a record, varies in procedure and inclusiveness in different jurisdictions. The majority of courts, however, require the more formal procedure.[1] Under their practice it is necessary actually to call a witness to the stand and a mere conversation between the court and counsel is not a sufficient offer of evidence.[2] This rule assures a strict guaranty of good faith and fairness by the proponent of the evidence. The Federal Courts on the other hand assume good faith and require the presentation of a witness only where there are indications of bad faith.[3] The advantages of thus dispensing with the use of a witness are said to be the saving of time and the placing of the issues of law more decisively before the court.[4] It carries with it, however, a possibility of the court being deceived by unscrupulous counsel who may in fact be unable to produce the proof offered.

To constitute prejudicial error in excluding the answer of a witness on the stand, the question must be both proper in form and pertinent to the matter at issue. An appellate court will not grant a new trial for an erroneous ruling based on one of these grounds, if the evidence would be inadmissible on the other.

Where an objection to a proper question has been sustained, to save an error in the record, counsel must of course take an exception. The rules followed in the various jurisdictions differ as to whether or not it is incumbent on him to proceed further. According to the orthodox view no error will be predicated unless the proponent of the evidence follows his exception with a statement of the answer he expected.[5]

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[1] *Chicago City Ry. v. Carroll* (1903) 206 Ill. 318, 68 N. E. 1087; *Juby v. Craddock* (1919) 56 Mont. 556, 185 Pac. 771; 1 Thompson *Trials* (2d ed. 1912) sec. 685.

[2] Where a proper offer of proof is made with one witness, the proponent need not call others to lay the basis for his exception to the exclusion of further evidence necessary for his case. *Bartholow v. Davies* (1916) 276 Ill. 505, 114 N. E. 1017.

[3] Cf. *Chicago City Ry. v. Carroll, supra* note 1.

[4] *Scotland County v. Hill* (1884) 112 U. S. 183, 5 Sup. Ct. 93; *Mo. Pac. Ry. v. Castle* (1909, C. C. A. 8th) 172 Fed. 841; *Platte Valley Cattle Co. v. Bosserman-Gates, etc. Co.* (1912 C. C. A. 8th) 202 Fed. 692. Wisconsin does not require the calling of a witness. *Witt v. Voigt* (1916) 162 Wis. 568, 156 N. W. 954.

[5] Cf. *Scotland County v. Hill* and *Platte Valley Co. v. Bosserman-Gates, etc. Co., supra* note 3.

[6] *McKee v. Hurst & Co.* (1918) 21 Ga. App. 571, 94 S. E. 886; *Arfsturm v. Baker* (1919, Mo.) 214 S. W. 859; *Pittsburg etc. Ry. v. Retz* (1919, Ind. App.) 125 N. E. 424; *Louisville, etc. Ry. v. Abercrombie* (1919) 17 Ala. App. 233, 84 So. 423; *Stilz v. Ketelsen* (1920, Ind. App.) 129 N. E. 31; *Seals, etc. Co. v. Bell* (1920) 17 Ala. App. 331, 84 So. 779; *Bringhurst v. Bringhurst* (1920, Mo. App.)

This then becomes part of the record. An appellate court may thus judge whether or not the appellant has been prejudiced by the exclusion of the evidence.[6] If testimony has been wrongfully excluded as incompetent, the granting of a new trial would indeed be vain if the evidence proved irrelevant or immaterial.[7] The orthodox rule safeguards an appellee from the intentional protraction of litigation by an appellant seeking to defeat the ends of justice. The federal rule, on the contrary, requires no such offer of the expected evidence. A party is deemed to have been harmed by an adverse ruling where his question was proper in form and relevant to the issue and would have admitted of an answer favorable to him.[8] A dispensation with a demonstration of purpose by counsel is alleged to have two advantages. It does away with repeated offers of proof as the trial progresses; it guards against the possibility that the statements to the court will furnish the witness a key to a realization of the exact testimony needed.[9] If one more formality, added to those incident to receiving evidence, is an inconvenience, it is certainly not as great as the difficulties inherent in the weary route of a new trial reaching the same end unaffected by the evidence that had previously been excluded. The second argument in support of the federal rule asserts the danger that the witness will be prompted. This is more apparent than real. No injustice has been done if the testimony is true. If a falsehood, the opposing party has his opportunities of cross-examination and impeachment. But all objections could be obviated by requiring the incorporation in the record of the answer of the witness. To prevent the possible prejudice of the jury, the jurors could retire as when a witness is examined on his *voir dire*.[10]

Certain circumstances, however, render an offer of proof unnecessary. Where a trial court regards the theory of the proponent as futile, the court's ruling strikes at the heart of his case and he need make no offer of proof.[11] This is a situation where the court and not counsel is at fault. In the recent case of *Gutt v. Walter's Estate* (1921,

222 S. W. 874; *Janson v. Pac. Diking Co.* (1920) 97 Or. 129, 190 Pac. 340; *Davis v. Union Meeting House Soc.* (1920) 93 Vt. 520, 108 Atl. 704; *Reeves v. Redmond* (1921, Vt.) 113 Atl. 711, 3 C. J. 825.

[6] *Ashmun v. Nichols* (1919) 92 Or. 223, 180 Pac. 510.

[7] Cf. *Powell v. Union Pac. Ry.* (1914) 255 Mo. 420, 446, 164 S. W. 628, 636.

[8] *Buckstaff v. Russell* (1894) 151 U. S. 626, 14 Sup. Ct. 448; *Himrod v. Ft. Pitt Mining Co.* (1912, C. C. A. 8th) 202 Fed. 724. Where the exclusion of a deposition is assigned as error, the federal courts require in the record a demonstration of what the testimony would be. *Packet Co. v. Clough* (1874, U. S.) 20 Wall. 528. This is due to a rule of court. *Rules of the Supreme Court* (1884) no. 21, sec. 2 (2).

[9] Cf. *Buckstaff v. Russell, supra* note 8.

[10] Cf. *Cincinnati, etc. Ry. v. Stonecipher* (1895) 95 Tenn. 311, 32 S. W. 208; *Griffin v. Henderson* (1903) 117 Ga. 382, 43 S. E. 712.

[11] *Brundage v. Mellon* (1895) 5 N. D. 72, 63 N. W. 209.

Mich.) 184 N. W. 529, a trial judge was similarly to blame for the indefinite condition of the record, as he had prevented counsel from making a formal offer. Quite properly a new trial was granted. While the appellate court may penalize a party for his counsel's carelessness, it should give him the benefit of any doubt that is the result of the trial court's confidence in its own infallibility.

The more common exception where an attorney need not proceed with an explanation of his purpose is one taken when his question on cross-examination is held improper.[12] This is obviously correct. An offer of the expected answer would be merely speculative. It would allow unscrupulous attorneys to deal unfairly with the court. It would put the witness on his guard destroying the whole purpose of cross-examination.

Most of the work of appellate tribunals should be done by counsel and judge in the trial court.

When is a "legal highway" not a highway? When there is not a clear and unobstructed path to the heavens. That, in effect, seems to be the doctrine laid down in *Town of Exeter v. Meras* (1921, N. H.) 114 Atl. 24. The Town of Exeter claimed a right in a highway by user for more than the twenty-year period prescribed by statute.[1] During this period, a bay window projected from the second story of the defendant's house above the claimed highway. The defendant was the original owner of the land in question. He commenced to extend the bay window down to the ground, and the Town of Exeter petitioned for an injunction to restrain him, as such an extension would incumber the highway. The bill was dismissed on the ground that a "legal highway" included not only the soil, but also all the space above it, and the partial occupancy of this space by a bay window during the prescriptive period constituted a continuous assertion of a right inconsistent with that of the public in the highway. Reduced to its simplest terms, this amounts to saying that in no case can a "legal highway" come into existence where there has been some occupation of a portion of the space above, however slight.[2] An extraordinary proposition! Can

[12] *Knapp v. Wing* (1900) 72 Vt. 334, 47 Atl. 1075; *Cunningham v. Austin, etc. Ry.* (1895) 88 Tex. 534, 31 S. W. 629; *Budd v. Northern Pac. Ry.* (1921) 59 Mont. 238, 195 Pac. 1109; but see *contra, Reynolds & Heitsman v. Henry* (1921, Iowa) 185 N. W. 67.

[1] N. H. Pub. Sts. 1901, ch. 67, sec. 1.

[2] The Court, however, suggests a distinction between a "legal highway" and a right of travel differing from and less than a "legal highway." Such a distinction does not seem to be borne out by the authorities. It is quite probable that the Court, in making this distinction, is influenced in great measure by the fact that New Hampshire is one of the few states in which a right of way by immemorial user or custom may be acquired. *Knowles v. Dow* (1851) 22 N. H. 387.

one, by maintaining a flag-pole, for example, over a claimed highway by prescription, later defeat the right of the public to use such a highway by extending the pole in a solid mass to the ground? Many public highways run underneath covered arches or connecting bridges such as join factory buildings on opposite sides of the street. To permit such highways to be effectually destroyed by allowing an owner to so extend an arch or bridge to the ground with impunity would clearly hamper and endanger public travel. Though the Court in the instant case deals with the problem as one involving a prescriptive right acquired by user, as was justified by a statute,[3] it appears to be but a simple case of a dedication to the public. The question raised really involves the limit or extent of a highway dedicated to the public. From the nature of the case, to define the boundaries of a highway so dedicated is quite impossible. The authorities are agreed, however, that the extent of a dedication is, as a general rule, co-extensive with the actual use by the public.[4] If, therefore, in the principal case, such use extended as a matter of fact to the portion of the highway under the bay window, it would seem that such a right was acquired by the public for purposes of public travel as could not be interfered with by the defendant. To recognize such a right in the public would not at all be recognizing a further right to have the window removed as originally maintained, a proposition plainly implied by the court. Such a conclusion is clearly a *non-sequitur* if we apply the general rule, for the public use did not extend to the space occupied by the window.

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[3] *Supra* note 1.

[4] *Donovan v. Union Pac. Ry.* (1920) 104 Neb. 364, 177 N. W. 159; *Thiessen v. City of Lewiston* (1914) 26 Idaho, 505, 144 Pac. 548; Angell, *Highways* (3d ed. 1886) sec. 155. Where, however, there has been an express dedication defining the boundaries of the highway, the fact that the public confined its use to a narrow portion does not affect its right to use the entire width. *Brunner Fire Co. v. Payne* (1909) 54 Tex. Civ. App. 501, 118 S. W. 602.