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THE LAW SCHOOL

Several changes in the Faculty appear at the opening of the present session. Herschel W. Arant, who has been Assistant Professor of Law for two years, resigned on July first to become Dean of the University of Kansas School of Law. Although he will be much missed, his many friends cannot but congratulate him upon his call to a position which offers unusual opportunities to advance the cause of legal education in the progressive state of Kansas.

Much of Professor Arant's work will be taken over by Karl Nickerson Llewellyn, who has been appointed Assistant Professor of Law. Mr. Llewellyn received from Yale the degrees of B.A. in 1915, LL.B. in 1918, and J.D. in 1920. He served as instructor in the Yale Law School during the academic year 1919-20. Since that time, he has been engaged in the practice of law in New York City. His record as a student and an instructor justifies the prediction of a successful teaching career for him. Professor Llewellyn's courses will be Bills and Notes, Persons, Sales, and Labor Law.

Walter Wheeler Cook, Professor of Law at Columbia University for the past three years, has returned to Yale. Professor Cook received from Columbia University the degrees of B.A. in 1894, M.A. in 1899, and LL.M. in 1901. He has been engaged in law teaching for twenty-one years and is recognized as one of the most scholarly and successful teachers in the profession. He taught at Yale from 1916 until 1919 and his return to the Yale Faculty is a cause for congratulation by all friends of the School. Professor Cook's subjects will be the Equity courses and Common Law Pleading.

With these exceptions the personnel of the Faculty remains unchanged. Several changes in the curriculum, however, should be mentioned. Professor Vance will offer a course in State Insurance and Professor Corbin will give a course in Legal Analysis. Judge Gager's death, which was recorded in the June issue, has left open the courses in Mortgages and Legal History. The former will be given by Professor Thurston; the latter by Assistant Professor Woodbine, who has during the summer prepared a series of cases, so that Legal History will be taught by the case method. The course in Public Service Law will be taught by Professor Clark, and Professor Borchard will teach Administrative Law.

The enrolment continues to show a slight increase, two hundred and thirty-four students, exclusive of those from other departments of the University, having registered up to this time. A comparison of the registration this year and last year is given below:

	1921-1922	1922-1923
Graduate Class	3	10
Third Year Class	72	73
Second Year Class	62	81

First Year Class	78	72
Students from other departments of the University	47	40
Total	262	276

The decrease in the number of college seniors registered in the Law School is due to the new requirement that academic students taking the combined course shall devote their entire time during the fourth year to law courses.

During the 1922 Summer Session seventy-seven students registered for the first term and eighty for the second term, the total number for the summer being one hundred and fifty-seven. Eight completed the course and have been recommended for their degrees. The Session was divided into two terms of five weeks each. Criminal Law, Property I, Evidence, Public Service Law, Suretyship, Equity III, and Municipal Corporations were offered during the summer. Professor W. L. Summers, of the University of Illinois Law School, taught Criminal Law, and the course in Municipal Corporations was taught by Professor W. A. Sturges, of the University of South Dakota Law School. The other courses were taught by the regular members of the Law Faculty.

In the Law School this year, eighty-one colleges and universities are represented, as follows: Yale University, 84; Holy Cross College, 9; University of Minnesota, 5; Harvard University, Trinity College, Catholic University, Clark University, Wesleyan University, University of Kansas, 4; University of Virginia, University of Oregon, Pennsylvania State College, University of California, Columbia University, Smith College, Barnard College, Syracuse University, Princeton University, 3; Baylor University, University of Vermont, Dartmouth College, University of Wisconsin, Cornell University, University of Pennsylvania, Brown University, George Washington University, Boston College, Georgetown University, Notre Dame University, Vassar College, United States Military Academy, Hunter College, University of Illinois, University of Indiana, Ohio State University, Wellesley College, Ursinus College, 2; Radcliffe College, Columbia College, Valparaiso University, University of Texas, Nova Scotia Technical College, Randolph-Macon College, Fisk University, University of Missouri, University of Kentucky, Mercer University, University of Cincinnati, Mount Holyoke College, Saint Bonaventure College, Latran University (P. I.), Virginia Military Institute, Lehigh University, Georgia School of Technology, Washburn College, Pennsylvania Military College, Saint Mary's University, Pomona College, Rutgers College, Connecticut College, William Jewell College, Hamilton College, University of San Marcos, University of West Virginia, Muhlerberg College, Bates College, University of Oklahoma, University of Nebraska, Rensselaer Polytechnic Institute, Washington and Jefferson University, Kenyon

College, University of Michigan, University of Arkansas, North American College (Italy), Niagara University, Muskingum College, Lincoln University, Vanderbilt University, Colby College, Oberlin College, University of Mississippi, 1.

THE RULE AGAINST PERPETUITIES—SEPARABLE LIMITATIONS

It is a long settled rule that a gift not separated by the donor will not be separated by the courts in order to save it from the rule against perpetuities. Thus if a politically-minded testator should devise his real estate to John for life with remainder in fee to the first son of John who should be elected to Congress, but if John should have no such son, then the estate to go to the testator's daughter, Sarah, in fee, the gift to Sarah would be void for remoteness, even though John should die without ever having had any son at all.[1] Sarah's gift would have been saved if the testator had been thoughtful enough to separate the contingencies, and had said that Sarah was to have it if none of John's sons was elected to Congress *or* if John had no sons. But since the testator had not done this, it is settled that the courts will not do it for him. Jessel, M. R.,[2] thought the rule "purely technical," but for all that it still flourishes in the United States as well as in England, its ancient home.[3] There has, however, grown up an interesting exception to this rule in case of bequests of future interests in personalty. Suppose the testator bequeaths family plate and portraits to his son John for life, with successive remainders in tail to the first and other sons of John, and then, in default of such issue of John, to Sarah. Here it is manifest that John's issue may fail at the time of his death by his then having no issue at all, or it may fail at some remote time in the future in case he leaves a son. Since the subject of this gift is personalty, the first vested donee in tail takes the entire property, and the gift over to Sarah must be a mere executory interest and not a vested remainder. Therefore, under the general rule, Sarah's gift would be void even though John died a bachelor. And such was the earlier holding.[4] After much fluctuation of opinion[5] the House of Lords in 1760[6] held it valid when the persons who were to take the prior absolute interests never came into existence; that is, the limitation was split to save the gift. And this has ever since been settled law. But even so, the rule that personalty settled after the

[1] *Proctor v. Bishop of Bath & Wells* (1794, C. P.) 2 H. Bl. 358.

[2] *Miles v. Harford* (1879) L. R. 12 Ch. Div. 691, 704.

[3] See Kales, *Future Interests* (2d ed. 1920) sec. 685; Gray, *Perpetuities* (3d ed. 1915) sec. 350 *et seq.*

[4] *Burgess v. Burgess* (1674) 1 Ch. Cas. 229, 1 Mod. 115.

[5] Compare *Higgins v. Dowler* (1707) 1 P. Wms. 98, 2 Vern. 600, and *Stanley v. Leigh* (1732) 2 P. Wms. 686 (holding such a gift good), with *Clare v. Clare* (1734) Cas. Temp. Talbot, 21, and *Brett v. Sawbridge* (1736, H. L.) 4 Bro. P. C. 244, 1 Eng. Rep. 1230 (declaring it to be too remote).

[6] *Pelham v. Gregory* (1760, H. L.) 5 Bro. P. C. 435.

mode of realty vests absolutely in the first donee *in esse* to whom the gift has been described with words, such as would create a fee tail in realty, with a consequent failure of all limitations over, has proved most embarrassing to settlors who wished to make sure that chattels of family interest, like portraits and plate, should remain in possession of the successive owners of the family landed estates. In the effort to accomplish this natural desire of testators, conveyancers in England have been accustomed to place such personalty in trust to be held and enjoyed in the same manner as settled land "so far as the rules of law and equity will permit." This phrase was a direct invitation to the courts which they could not be expected to decline. There has been much litigation[7] with the net result that each successive life tenant of the realty takes a possessory right to the chattels for life, until an estate in the land vests in right (although not necessarily in possession) in an existing tenant in tail, when the trust in the personalty is executed. Such tenant in tail then becomes the absolute owner of the chattels, subject, of course, to the possessory right of any prior life tenant of the realty who may be living, unless the language of the settlement clearly makes possession of the realty a condition of ownership of the chattels, in which event the trust remains executory. The Court of Appeal held[8] that in such a settlement of personalty for the use of "the person or persons who for the time being shall be entitled to the said mansion house," such a condition was expressed with sufficient clearness. This decision has been much criticized, although never overruled.[9]

The rule and its application have recently come up for debate and decision in the House of Lords in the interesting case of *Portman v. Portman*.[10] Here, in effect, was a testamentary trust of chattels, "to go and be held so far as the rules of law and equity will permit with the Mansion House called Buxted Park as heirlooms,[11] to be held and enjoyed accordingly in succession by the several persons who shall be respectively entitled for the time being to hold and enjoy the said Mansion House." The land referred to was settled in substance as follows: to A for life, with remainder for life to the first son of A, who should be born in the settlor's lifetime, and not be entitled to the Barony of Portman, with remainders in tail successively to the other sons of A. Then was added the proviso that if any of A's issue should become entitled to said Barony in possession, the estate should go over as if he had died without issue.

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[7] Gray, *op. cit.* secs. 365, 366, where the cases are cited with comment.

[8] *In re Lord Chesham's Settlement* [1909] 2 Ch. 329, adopting the construction placed upon the same instrument by Mr. Justice Chitty. *In re Lord Chesham's Settlement* (1886) L. R. 31 Ch. Div. 466.

[9] See the remarks of Lord Chancellor Birkenhead in the case of *Portman v. Portman* (1922, H. L.) 38 T. L. R. 887, 890.

[10] *Supra* note 9.

[11] Of course, calling them heirlooms doesn't make them so. See Gray, *op. cit.* sec. 363, note 3.

Under this settlement, upon A's death in 1899, her second son came into possession of the Mansion House and chattels. In 1903 a daughter, the Hon. Selina Lusie, was born to him. According to the rule above stated, this honorable infant became at once vested with an estate tail in the Mansion House, expectant upon her father's life estate, and subject to be divested by the subsequent birth of a brother, and thereby absolutely entitled to the chattels, likewise subject to divestment upon the advent of a brother. No brother arrived, but the Hon. Selina's father did succeed to the Barony in 1919, and she at once lost her vested interest in the Mansion House by the operation of the proviso which carried to the third son of A, the Hon. Claud, an estate tail in possession in the realty. This shifting clause did not violate the rule against perpetuities as far as the real estate was concerned, for it is well settled that a conditional limitation that must take effect, if at all, during the continuance of an estate tail, does not violate the rule, since the power of the tenant in tail to destroy all future interests by barring the entail places the entire estate unconditionally under his control.[12]

The third son, having been confirmed in his possession of the Mansion House by a decree of the Court of Chancery,[13] insisted that he was entitled to have also the "heirlooms" which the settlor so evidently intended to remain in the Mansion House. But the intention of the testator, however clear to the lay reader, and the hopes of the third son, now tenant of the Mansion House, were alike doomed to defeat, for the House of Lords, affirming the order of the Court of Appeal,[14] which, in turn, had approved the decree of the Chancery Division,[15] held, (1) that there was nothing in the language of the settlement to prevent the operation of the general rule that settled chattels vest in the first tenant in tail *in esse,* whether in possession of the realty or not; and (2) that the proviso which had shifted the realty to the third son, did not disturb the Hon. Selina in her ownership, or her father, the now Viscount, in his possession of the personalty, because the proviso, although perfectly valid as to the realty, for the reason stated, was void for remoteness as to the personalty. This latter conclusion is necessarily correct if the limitations of the personalty be regarded as a single gift, for the shift might easily take place much more than twenty-one years after lives in being at the settlor's death, and there is no such thing as barring an entail in personalty. But, it may be asked, if the court will split the gift as originally made for the sake of the Hon. Selina, why will it not now split it for the sake of the Hon. Claud? It is obvious that, as the event occurred, the shift can take place within lives in being; and if the gift

[12] See Gray, *op cit.* sec. 443 *et seq.;* 1 Jarman, *Wills* (6th ed. 1910) 321, 322; *Carr v. Erroll* (1805) 6 East, 58; *Portman v. Portman* [1921, C. A.] 2 Ch. 491, 505.

[13] *In re Harcourt* [1920] 1 Ch. 492.

[14] [1921] 2 Ch. 491.

[15] [1921] 1 Ch. 187.

over can be separated into one which should take effect in case the first son of A to take the Mansion House should succeed to the Barony (which happened), and another in case any succeeding tenant should attain to that honor, it is clear that the gift over could be saved, and the testator's purpose given effect. But after the brief suspension of activity that saved the gift to the Hon. Selina, the general rule came again into its own. The courts will not separate gifts for donors. The Lord Chancellor distinguished *Harrington v. Harrington*[16] upon which counsel for the Hon. Claud relied, and the family plate and portraits of the Harcourts passed from the Harcourt Mansion into the present possession of Viscount Portman and the ultimate disposition of the Hon. Selina, always assuming that no baby brother intervenes. Such is the perfect work of a rule of construction allowed to play the part of a rule of law.

W. R. V.

THE CORONADO COAL CASE

In these times of great industrial unrest, when disagreement between capital and labor seems to be the order of the day, every movement in the direction of remedial settlement of fundamental differences assumes proportions of unusual interest. While legislatures have been characteristically sluggish in their efforts, it is stimulating to note that the courts, to the limited extent that they can, are dealing with the question in a courageous and straightforward manner. An excellent example of such judicial courage is the recent decision of the Supreme Court of the United States in the case of the *United Mine Workers of America v. Coronado Coal Co.* (1922) 42 Sup. Ct. 570. Among other points of great moment to labor, that case held,[1] that a labor union was a legal entity so that it could be sued in its union name and that its funds accumulated to be expended in conducting strikes were subject to execution in suits for torts committed by such a union in the course of a strike.

At common law, only a natural or artificial person could sue or be sued. A corporation, therefore, being a legal entity, distinct and apart from the individuals who composed it, was considered as endowed with that attribute of artificial personality which permitted it to sue and be sued.[2] This power to bring suit and the liability to judgment in suits brought

[16] (1871) L. R. 5 H. L. 87.

[1] Although this holding was not absolutely necessary to the decision, nevertheless it is clear that the court intended to decide this issue before passing to the other issues involved. It should be borne in mind also, that this holding, even if it is considered part of the decision, is in theory binding only on the federal courts and that as far as the state courts are concerned, it is merely persuasive.

[2] 1 Cook, *Corporations* (7th ed. 1913) sec. 1. For our present purposes it is not necessary to analyze or discuss this legal fiction of an "entity."

by others were withheld at common law from that class of associations of individuals known in our law as voluntary unincorporated associations.[3] To this latter class trade unions belong, and hence the well established rule that a trade union is not a legal entity for the purposes of being sued and bringing suit. A trade union, as such, distinct from the individuals that composed it, was a pure myth, so far as being endowed with legal rights and duties was concerned. The proper manner in which to proceed against such associations was by going after the individual members.[4] It is clear, therefore, that the question of suability of labor unions is, in essence, a procedural one. Should a labor union, for example, incur a debt through one of its officers or members duly acting for the union, it was well settled at common law that no action in contract could be maintained against the union in its association character for the recovery of that debt.[5] Recovery could be had only against the individual who actually made the contract, or against the individual members of the union who conferred power upon the acting agent, all of whom must normally be named as defendants. In some states, statutes have been passed providing that actions may be brought by and against an unincorporated association in the names of specified officers.[6] Then too, the equitable doctrine of parties by representation, embodied in almost all codes, that when the question is one of a common or general interest to many persons, or where the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, is applicable in actions against voluntary unincorporated associations.[7] As between the members of such an association and a creditor, each individual member is liable for the entire debt.[8] If the "union fund" can be reached at all, it can be reached only as the joint property of the members, who are really joint tenants of all the association property, and not as the property of a

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[3] Wrightington, *Unincorporated Associations* (1916) sec. 70; *Karges Furniture Co. v. Amalgamated Woodworkers Local Union* (1905) 165 Ind. 421, 75 N. E. 877; *Pickett v. Walsh* (1906) 192 Mass. 572, 78 N. E. 753; *Baskins v. United Mine Workers* (1921) 150 Ark. 398, 234 S. W. 464; COMMENTS (1921) 31 YALE LAW JOURNAL, 92.

[4] Wrightington, *Unincorporated Associations* (1916) sec. 70; Dicey, *Parties To An Action* (2d ed. 1886) 169, rule 20; 5 C. J. sec. 102, n. 51; *Baskins v. United Mine Workers, supra* note 3.

[5] In an article on the *Coronado* case appearing in *The New Republic* for August 16, 1922, the author proceeds on the assumption that a trade union could be sued in contract at common law as a legal entity for a debt incurred by it. It is submitted that such an assumption was erroneous. See *supra* notes 3 and 4.

[6] N. Y. C. P. A. secs. 12, 13; *Ostrom v. Greene* (1900) 161 N. Y. 353, 55 N. E. 919; *Elm City Club v. Howes* (1898) 92 Me. 211, 42 Atl. 392.

[7] Story, *Equity Pleading* (8th ed. 1870) secs. 94, 97; *St. Germain v. Bakery Union* (1917) 97 Wash. 282, 166 Pac. 665; *Branson v. I. W. W.* (1908) 30 Nev. 270, 95 Pac. 354.

[8] *Nolan v. McNamee* (1914) 82 Wash. 585, 144 Pac. 904.

distinct legal entity known by the union name.[9] In other words, the union funds, like all other property, belong not to the union, as such, but to the individual members who compose it.[10] In suits against the individual members their joint union funds can be reached on execution, just as their separate and individual property can be, but only such portion of those funds as belongs to the individual members who can be proved to have authorized the acts for which the suit is brought. It is clear, therefore, that it was impossible, at common law, to hold the union to a group responsibility, and it was this disability that has at various periods given rise to movements looking toward compelling the incorporation of these bodies. Appreciating the effect that such legislation would have upon the peculiar immunity from group responsibility that labor unions have enjoyed, these attempts have been successfully repelled. Although there may be some doubt as to the advisability of requiring incorporation, it seems that the balance is in favor of such a requirement and that the matter is well worthy of prompt legislative attention. Statutes have already been passed in several jurisdictions providing in substance that where several individuals form themselves into a voluntary unincorporated association known by some distinguishing name, such association may sue or be sued by that name.[11] These statutes have been held not to deprive a plaintiff of the rights he previously had at common law; for the individuals comprising such associations do not thereby acquire any immunity from individual liability, and it is optional with a creditor to sue either the association as such, or the individuals composing it.[12] On the other hand, statutes have been passed in a few jurisdictions expressly codifying the common-law rule to the effect that unincorporated associations may not bring an action in the association name.[13]

In this state of the law, it becomes extremely difficult, if not impossible,

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[9] *Ahlendorf v. Barkous* (1898) 20 Ind. App. 657, 50 N. E. 887; *Torrey v. Baker* (1861, Mass.) 1 Allen, 120; *Parks v. Knickerbocker Trust Co.* (1910) 137 App. Div. 719, 122 N. Y. Supp. 521; *Branagan v. Buckman* (1910, Sup. Ct.) 67 Misc. 242, 122 N. Y. Supp. 610.

[10] *Curtis v. Hoyt* (1848) 19 Conn. 154; see *Grand Lodge v. Reba* (1922) 97 Conn. 235, 116 Atl. 235.

[11] Conn. Gen. Sts. 1918, ch. 293, sec. 5611; *Huth v. Humboldt* (1891) 61 Conn. 227, 23 Atl. 1084; *Davison v. Holden* (1887) 55 Conn. 103, 10 Atl. 515; *Detroit Lt. Gd. Band v. First Mich. Inf.* (1903) 134 Mich. 598, 96 N. W. 934; *U. S. Heater Co. v. Iron Moulders' Union* (1902) 129 Mich. 354, 88 N. W. 889.

[12] *Davison v. Holden, supra* note 11; *U. S. Heater Co. v. Iron Moulders' Union, supra* note 11. The labor unions should observe that by incorporation they may gain an advantageous limitation of individual liability.

[13] In Ohio and Nebraska, an unincorporated association cannot sue in the associate name, unless it is organized to carry on some trade or business in the state or to hold property. *St. Paul Typothetae v. St. Paul Bookbinders' Union* (1905) 94 Minn. 351, 102 N. W. 725; *Cleland v. Anderson* (1902) 66 Neb. 252, 92 N. W. 306.

to uphold the decision as to the suability of labor unions on common-law principles. The court was itself conscious of that fact and reached its decision in the face of existing precedents to the contrary. In so doing, it did what has been done repeatedly in the past and will continue to be done by courts in the future; that is, it legislated judicially.[14] However much the advisability of the court's resorting to judicial legislation as the medium through which to reach its final decision may be doubted, there can be little if any doubt that the end sought and attained, namely, a group responsibility for the wrongful acts of combinations as powerful as labor unions, was a most desirable one.[15] To deny the existence of labor unions as legal entities for purposes of accountability for obligations assumed and wrongs committed by them, and in the same breath to recognize them as such for purposes of receiving privileges under various legislative acts,[16] is neither more nor less than permitting such associations, through proper agents, to enjoy all the advantageous rights, powers, privileges, and immunities of the law without bearing the burdensome duties, disabilities, no-rights, and liabilities that other persons are compelled to endure. There is no reason in logic or policy why such highly organized bodies, controlling so much wealth, so many human beings, and so freely engaging in all phases of business activity should be immune from a group responsibility for contractual and tort obligations. The difficulty to be surmounted is almost wholly a procedural one; and since procedure is a means to an end and not an end in itself, procedural difficulties should not be permitted to stand in the way of effectively dealing with powerful combinations of individuals when obvious rules of policy demand the contrary.[17]

Although from a strictly legal point of view, the particular question under consideration was purely procedural, yet the political element inseparably connected with it magnified the problem considerably. It is

[14] It is only fair to state that the court was influenced in reaching its result by an interpretation of several acts of Congress, believed by the court to have altered the common law piecemeal. See *United Mine Workers of America v. Coronado Coal Co.* (1922) 42 Sup. Ct. 570, 576.

[15] Albertsworth, *Leading Developments in Procedural Reform* (1922) 7 CORN. L. QUART. 332.

[16] See *supra* note 14.

[17] The members of a labor union or other unincorporated association already have the unlimited individual liabilities of partners for the acts of union agents acting with their actual or ostensible authority. As stated above, each individual member's share in the joint fund can be reached, provided only he is made a party defendant. The method of making him such a party is purely a procedural matter. The problem becomes more than procedural only when the substantive jural relations of the union members are changed. The court has not yet determined, however, that the whole union fund can be seized for the acts of any individual member, including the share of those members who have never actually or ostensibly authorized the acts. Such a determination would raise questions of policy requiring separate discussion.

the presence of this political aspect that has cast a slight doubt upon the wisdom of the Supreme Court's assuming to pass upon so delicate a question which legislatures have steadfastly sidetracked. For a court to legislate judicially upon a political question of such vital importance to so large a percentage of the population is daring conduct, even though it reaches its result by inference from several statutes passed for other purposes. Whether it was wise policy to strike down with one mighty stroke an immunity which the labor unions have enjoyed and to which they have considered themselves entitled since the Clayton Act[18] is another question. There is no denying that it has engendered further hostility toward the court, which has manifested itself in bitter criticism. Would it have been better if the courts had assumed a "hands-off" policy and had left the problem for solution to the legislature? There is doubtless much merit in the contention that this whole question was one rather for legislative action than for judicial decision. The Supreme Court, however, thought differently and chose to face the matter frankly and courageously. Despite differences of opinion as to the manner of approach to the goal attained, it is the goal, after all, that is the more important factor to be considered. Were the court to hesitate to act on admittedly legal questions merely because vital political and economic issues were also involved, many questions of great moment both to labor and capital on the one hand, and to the public at large on the other, would remain suspended and unsettled, much to the detriment of all concerned.[19]

If it is agreed that labor unions ought to be held to a group responsibility, the question in a given case ought not to be whether the union as such should be responsible in contract or in tort, but whether the particular promises or acts alleged constituted a binding contract or a tort, as the case may be. In this latter regard, the instant decision clearly contains what may well be characterized dangerous inferences as to the chargeability of unions for acts of individual members or groups of members. Let us suppose that a union, whose membership runs into the tens of thousands, orders a strike. During the course of the strike, fifty odd members commit acts of lawlessness resulting in damage to the plaintiff's property. Should the union, as an entity, be held responsible for the damage done? Should the tens of thousands of other members, in their group character, be made insurers for the good conduct of every individual member? Though the decision did not squarely answer that query in the affirmative, it clearly left room for a positive inference in that direction. It is submitted that to impose such an insurer's liability on labor unions would be decidedly out of harmony with the spirit of the Clayton Act and would be doing violence to justice. The fact must be recognized that in movements of large bodies of men

[18] Act of Oct. 15, 1914 (38 Stat., at L. 730), U. S. Comp. Sts. 1916, sec. 8835f.

[19] COMMENTS (1921) 31 YALE LAW JOURNAL, 86.

struggling for what they conceive to be their just rights, some lawlessness is bound to creep in. Common experience has taught that. Unless such lawless conduct can clearly and unequivocally be laid to the union either by proving a direct authority to commit such acts or by so manifest a ratification or silent acquiescence as can leave no room for doubt, the union ought not to be held responsible for it. In brief, the same degrees of proof should as well be required in establishing the liability of labor unions as is required in establishing that of corporations and natural persons. The ordinary rules of agency should apply and no insurer's liability should be imposed. To hold otherwise would be an obvious attempt to deprive labor of the only effective weapon it has for purposes of self-defense and self-advancement; for it is plain that the result would be the ultimate elimination of the strike and the overthrow of trade unions. It is well to remember that, as yet, the Supreme Court has not definitely passed upon the question and it is hoped that no such position will be taken.

Labor generally has looked upon the decision as one of the greatest set-backs it has ever suffered. Much has been heard to the effect that it was merely one more victory for the so-called "privileged classes." The best answer to such ridiculous implications is the fact that the decision was a unanimous one. That in itself is a conclusive indication of absolute good faith. Labor men have already begun to realize that the decision may not only not be a set-back, but possibly a gain to labor.[20] It is true that the decision necessarily implies that labor unions are legal entities as well for the purpose of bringing suit as for being sued. It might be added that with this bestowal of legal capacity on labor unions, one of the principal grounds upon which courts have in the past granted injunctions was rendered far less effective; namely, the argument of inadequacy of the legal remedy based on the fact that unions were not

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[20] On June 20, 1922, there appeared editorially in the *United Mine Workers' Journal*, the official organ of the union coal miners, the following: "If a labor union can be sued, as was decided by the United States Supreme Court in the Coronado case, then it can also sue. If a labor union can sue, then there is no good reason why it should not utilize the law and the courts for the protection of itself and its members and its welfare against oppression, damage, and outrage. If the law and the courts afford a means by which union-busting employers may harass, torment and oppress unions and the working people, then unions and working people should not hesitate to use the same weapons against that class of employers. Coal operators secure injunctions to prevent strikes. Labor unions could secure injunctions to prevent lock-outs. Numerous coal companies have sued the union for heavy damages for things that happened during strikes. Unions could sue such employers for damages for things they do to their employees. Without any legal right whatever, some employers evict families of working men from their homes and set them and their household goods out upon the roadside to be destroyed by rain and weather. Who will say that damage suits could not be filed against such employers under such circumstances?"

liable in money damages for the harm done to property, which it was the purpose of the injunction to prevent.

The development of this question in England is interesting. In the leading case on the point, *Taff Vale Ry. v. Amalgamated Society of Ry. Servants,*[21] it was held that a trade union could be sued in its registered name and its funds were amenable to actions in tort for damages occasioned by acts of its members. The result was a greater participation by labor in politics with a coincident growth in a class consciousness among laborers. Within five years after the *Taff Vale* decision, the labor party secured the passage of the Trade Disputes Act of 1906,[22] which largely nullified the effect of that decision.[23] It may be that the *Coronado* decision will have a similar effect in this country, though such a consequence is quite unlikely, for class consciousness among laborers here is as yet not strong enough. It has been suggested, and wisely, that "how to deal with the causes underlying these conflicts is the real question confronting law no less than labor, and not the recognition by law of the reality of trade unions."[24]

EQUITABLE RELIEF AGAINST FORFEITURES IN LAND SALES

Suppose that A and B enter into an executory contract for the sale of land in which payments are to be made in instalments. By express stipulation time is declared to be "of the essence," and a condition is inserted that upon the vendee's default to make a payment, all sums previously paid are to be considered as forfeited. If A pays but a small portion of the purchase price and then defaults, or pays all but one hundred dollars of the total amount and then fails to pay an instalment, will equity afford relief in either situation under the doctrine that equity abhors a forfeiture?

Generally, in the case of a contract for the sale of land, equity will not treat time as of the essence, but will permit one who has suffered the time for payment to elapse to pay after the prescribed date and compel a performance by the other party notwithstanding his own delay; provided, of course, that equitable grounds for relief exist and that the delay has occasioned no undue hardship on the other party.[1] Where, however, one of the parties defaults upon the date set, if no forfeiture

[21] [1901] A. C. 426.

[22] (1906) 6 Edw. vii, ch. 47.

[23] 1 Br. Rul. Cas. 832, n. 1.

[24] *The New Republic, supra* note 5 .

[1] *Parkin v. Thorold* (1852, Ch.) 16 Beav. 59; *Sylvester v. Born* (1890) 132 Pa. 467, 19 Atl. 337; *Diamond v. Shriver* (1911) 114 Md. 643, 80 Atl. 217; *King v. Connors* (1915) 222 Mass 261, 110 N. E. 289; *Robberson v. Clark* (1913) 173 Mo. App. 301, 158 S. W. 854; *Robinson v. Collier* (1909) 53 Tex. Civ. App. 285, 115 S. W. 915; *Dillon v. Ringleman* (1916) 55 Okla. 331, 155 Pac. 563; *Quinn v. Roath* (1870) 37 Conn. 16; *Raymond v. San Gabriel Co.* (1893, C. C. A. 8th) 53 Fed. 883; *McLean v. Windham Light Co.* (1912) 85 Vt. 167, 81 Atl. 613.

is involved, the other, being invested with a power to change the terms of the contract,[2] may make time of the essence by giving notice.[3]

Time may also be of the essence by implication or construction of law when from its very nature the value of the subject matter necessarily fluctuates with the mere lapse of time.[4] And finally it may be expressly stipulated by the parties that time shall be of the essence. No particular clause is necessary, but any statement will have that effect which clearly provides that the contract shall be null and void if not fufilled within the proper time.[5] Where such stipulation exists, many courts adopt a most stringent rule. The recent case of *Rafferty v. Gaston* (1922, Wash.) 204 Pac. 595, following what seems to be the weight of authority in this country,[6] held that a vendee, under such a contract, who has defaulted in payment without the consent or acquiescence of the vendor,

[2] The notice served must be reasonable, the length of time allowed depending upon the circumstances of each individual case. *Harding v. Olson, infra* note 3 (42 days); *Plummer v. Kennington* (1910) 149 Iowa, 419, 128 N. W. 552 (one month); *Garrison v. Newton* (1917) 96 Wash. 284, 165 Pac. 90 (one and one-half months); *Carroll v. Mundy* (1919) 185 Iowa, 527, 170 N. W. 790.

[3] *Parkin v. Thorold, supra* note 1; *Burchfield v. Hageman* (1915) 35 S. D. 147, 151 N. W. 47; *Moore's Estate* (1899) 191 Pa. 600, 43 Atl. 474; *Harding v. Olson* (1898) 177 Ill. 298, 52 N. E. 482; *Schmidt v. Reed* (1897) 132 N. Y. 108, 30 N. E. 373; *Clarno v. Grayson* (1896) 30 Or. 111, 46 Pac. 426; *Grigg v. Landis* (1868) 19 N. J. Eq. 350.

[4] *Mackey Wall Plaster Co. v. U. S. Gypsum Co.* (1917 D. Mont.) 244 Fed. 275; *Bennie v. Becker-Franz Co.* (1913) 14 Ariz. 580, 134 Pac. 280; *Hardy v. Ward* (1909) 150 N. C. 385, 64 S. E. 171; *Acme Building Co. v. Mitchell* (1916) 129 Md. 406, 99 Atl. 545; *Taylor v. Longworth* (1840, U. S.) 14 Pet. 172; *Ky. Distilleries Co. v. Warwick Co.* (1901, C. C. A. 6th) 109 Fed. 280.

[5] *Ellis v. Bryant* (1904) 120 Ga. 890, 48 S. E. 352; *Garcin v. Furniture Co.* (1905) 186 Mass. 405, 71 N. E. 793; *Cadwell v. Smith* (1909) 83 Neb. 567, 120 N. W. 130; *Collins v. Delaney Co.* (1906) 71 N. J. Eq. 320, 64 Atl. 107.

[6] *Heckard v. Sayre* (1864) 34 Ill. 142; *Jones v. Farms Co.* (1917) 116 Miss. 295, 76 So. 880; *Hurley v. Anicker* (1915) 51 Okla. 97, 151 Pac. 593; *Skookum Oil Co. v. Thomas* (1912) 162 Calif. 539, 123 Pac. 363; *Nelson Real Estate Agency v. Seeman* (1920) 147 Minn. 354, 180 N. W. 227; *Suburban Homes Co. v. North* (1914) 50 Mont. 108, 145. Pac. 2; *Vito v. Birkel* (1904) 209 Pa. 206, 54 Atl. 127; *True v. Northern Pac. Ry.* (1914) 126 Minn. 72, 147 N. W. 948; *Moss v. Rubinstein* (1921, Sup. Ct.) 117 Misc. 385, 199 N. Y. Supp. 496; *Wensler v. Tilke* (1916) 97 Kan. 567, 155 Pac. 946; *Schwerin Realty Co. v. Slye* (1916) 173 Calif. 170, 159 Pac. 420; *Claremore Co. v. Burke* (1916) 56 Okla. 169, 155 Pac. 897; *Fratt v. Daniel-Jones Co.* (1913) 47 Mont. 487, 133 Pac. 700; *Papesh v. Wagnon* (1916) 29 Idaho, 93, 157 Pac. 775; *Keefe v. Fairfield* (1903) 184 Mass. 334, 68 N. E. 342 (even though the vendor accepted payments from the vendee after default). In several states there are statutes prohibiting clauses of forfeiture, but the provision is construed to apply only where unusual grounds are presented for equitable relief, which the vendee must prove to the satisfaction of the court. *Barnes v. Clement* (1899) 12 S. D. 270, 81 N. W. 301; *Cook-Reynolds Co. v. Chipman* (1913) 47 Mont. 289, 133 Pac. 694. In Oklahoma, where such a statute also exists, the court came to the conclusion that by inserting the clause in the contract the parties were equally guilty, and hence that the law would help neither of them to recover either the money or the land. *Kershaw v. Hurtt* (1917, Okla.) 168 Pac. 202.

can neither recover the amount already paid, nor obtain specific performance.[7]

No real hardship is caused by the forfeiture if the consideration already paid upon the contract is small as compared with the purchase price. In such cases courts of equity have no difficulty in determining that the parties intended such sum (usually the first payment) either as a deposit or as earnest-money to bind the bargain, or as liquidated damages.[8] But where only one or two small instalments of the purchase price are still to be paid before the vendee is entitled to a deed, it seems obviously unjust to deprive the vendee of both his money and his land, in view of the fact that he has certain equities in the land which must be fully recognized. The analogy of a vendee to the common-law mortgagor may be of assistance in reaching a more equitable result.

At common law, upon the granting of a mortgage, the legal title to the land becomes vested, subject to a condition subsequent, in the mortgagee, who retains it as security for the payment of the debt.[9] The beneficial or equitable interest, however, is in the mortgagor, who is treated in equity as the owner of the land. Upon the principle of treating as done everything which ought to be done, equity regards the interest of the mortgagor not as a mere chose in action, but as property, as an estate, subject to the lien created by the mortgage. The analogy of the vendee to such mortgagor is striking. It is generally held that where there is an executory contract for the sale of realty, the vendee becomes in equity the owner of the land, in conformity with the maxim above mentioned. The vendor is said to retain the legal title as security for the payment of the purchase money until the final conveyance.[10] To such an extent

[7] The vendee had been accustomed to pay in advance, usually giving the vendor a lump sum amounting in excess of his $25 monthly payments, and having it applied to these payments as they fell due. The last payment, together with all prior ones, became used up, so that the vendee was in arrears in his payments and interest in the sum of $110. Thereupon the vendor sold the land to a third person. In a suit to recover the purchase money already paid, the vendee was denied relief, the court holding in a rather abbreviated opinion that the vendee had committed a breach of contract, and must therefore suffer the loss.

[8] *Bentley v. Keegan* (1921) 109 Kan. 762, 202 Pac. 70; *Pinkston v. Boyd* (1906) 43 Tex. Civ. App. 568, 97 S. W. 103; *Ketchum v. Evertson* (1816, N. Y.) 13 Johns. 359; *Scott v. Merrill* (1915) 74 Or. 568, 146 Pac. 99; *Hull v. Allen* (1911) 84 Kan. 207, 113 Pac. 1050; *Mulcahy v Gagliardo* (1919) 39 Calif. App. 458, 179 Pac. 445; *Steinbach v. Pettingill* (1901) 67 N. J. L. 36, 50 Atl. 443; *Steinhardt v. Baker* (1900) 163 N .Y. 410, 57 N. E. 629. In many cases following the majority rule only an initial payment has been made, so that the court may adopt either view.

[9] *Whitehurst v. Gaskill* (1873) 69 N. C. 449; *Brobst v. Brock* (1870, U. S.) 10 Wall. 519; *Weeks v. Baker* (1890) 152 Mass. 20, 24 N. E. 905. The mortgage is held to be a mere security for the debt. *Gabbert v. Schwartz* (1880) 69 Ind. 450.

[10] *Wehn v. Fall* (1898) 55 Neb. 547, 76 N. W. 13; *Siter's Appeal* (1856) 26 Pa. 178; *Love v. Butler* (1900) 129 Ala. 531, 30 So. 735; *Ehrenstrom v. Philips* (1910, Del. Ch.) 77 Atl. 81; *Lambert v. St. Louis Ry.* (1908) 212 Mo. 692, 111 S. W. 550; *Laughlin v. Wis. Lumber Co.* (1910, D. Wis.) 176 Fed. 772.

is the vendee an owner that he is invested with practically all the rights and obligations of an owner at law. As equitable owner, he is entitled to any benefit, and must sustain any loss or injury which may accrue to or befall the property between the execution of the contract and the time set for the final conveyance.[11] Like other landowners he has power to devise his interest in such land.[12] It would therefore seem that the principles applicable to the mortgagor in equity should also be adopted with respect to the vendee. But many courts have held otherwise. In the case of a mortgage, although the legal estate in the mortgage becomes absolute upon default, yet an equity with respect to the land is recognized as existing in the mortgagor. The court allows the mortgagor to redeem his property, after the day stipulated, by paying interest in addition to the debt; and, to avoid hardship, the mortgagee is allowed at any time after the maturity of the debt to file a bill to foreclose the mortgagor's right of redemption. The decree of the court will provide that unless the mortgage be paid with interest within a certain time specified by the decree, the mortgagor shall be forever foreclosed (strict foreclosure), or, in accordance with modern practice, that the land be sold to satisfy the mortgagee's claim, any surplus resulting being given to the mortgagor.[13] Why then should not the vendee, whose status in equity so nearly approaches that of the mortgagor, be allowed the same opportunity of redemption? The mortgagor is as much a contract breaker as the vendee, and in the mortgage agreement time is also held to be of the essence in a court of common law. It seems that since what has been created in case of an executory contract is in effect an equitable mortgage, the stipulation therein contained should receive no more weight than similar provisions in a mortgage.

A few jurisdictions, however, have refused to enforce the contract literally and have given the vendee relief under conditions of the same nature as those in the principal case, the courts refusing to enforce express clauses of forfeiture, or clauses providing that time shall be of the essence.[14] And in the jurisdictions adopting the majority

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[11] *Paine v. Meller* (1801, Ch.) 6 Ves. 349; *Manning v. North Brit. Ins. Co.* (1907) 123 Mo. App. 456, 99 S. W. 1095; *Dunn v. Yakish* (1900) 10 Okla. 388, 61 Pac. 926; *Reed v. Lukens* (1863) 44 Pa. 200; *Brakhage v. Tracy* (1900) 13 S. D. 343, 83 N. W. 363; *contra, Thompson v. Gould* (1838, Mass.) 20 Pick. 134.

[12] *Buck v. Buck* (1844, N. Y.) 11 Paige, 387; *Wimbish v. Montgomery* (1881) 69 Ala. 575.

[13] *Kortright v. Cady* (1860) 21 N. Y. 343; 1 Jones, *Mortgages* (7th ed. 1915) secs. 6-11.

[14] *Vernon v. Stephens* (1722, Ch.) 2 P. Wms. 66; *Richmond v. Robinson* (1864) 12 Mich. 193; *Brown v. Verzani* (1917) 181 Iowa, 237, 164 N. W. 601; *Barnes v. Clement* (1899) 12 S. D. 270, 81 N. W. 301; *Lytle v. Scottish-American Co.* (1905) 122 Ga. 458, 50 S. E. 402; *In re Dagenbaum* (1873) L. R. 8 Ch. 1022; *Edgerton v. Peckham* (1844, N. Y.) 11 Paige, 352, 358. "It is only true as a general proposition that the courts of chancery cannot make new contracts for parties, but can only enforce them. For the court of equity looks to the substance

view there is convincing evidence of an attempt to interpret the terms of the contract as unfavorably as possible toward the vendor. Thus some courts hold that the vendor by giving notice of his intention to consider the contract at an end has in fact rescinded the contract, and hence, before he can obtain a return of his land, he must put the defaulting party in *statu quo,* less such damages as might have been occasioned by the breach.[15] Others hold that after the vendee's default, the vendor, in order to show that he is able and willing to perform, must tender a deed before he can maintain his action.[16] Finally in many jurisdictions the inequitable nature of the rule has given rise to a loose construction of the doctrine of waiver. As a result the courts construe the slightest deviation by the vendor from the strict terms of the contract, or the least sign of leniency shown to the vendee in the matter of time for payment, as evidence of an intent on the vendor's part not to adhere literally to the contract.[17]

Perhaps the most satisfactory solution is that adopted by the later English cases. The courts have there come to the conclusion that because the parties expressly stipulated that the time should be of the essence, no specific performance after default need be granted since in substance this must have been the intention of the parties.[18] However,

of a contract, and when that is fulfilled, and the general intention of the parties carried into effect, the court relieves against any forfeiture penalty inserted for the purpose of enforcing the contract."

[15] *Pierce v. Staub* (1906) 78 Conn. 459, 62 Atl. 760; *Frink v. Thomas* (1891) 20 Or. 265, 25 Pac. 717; see *Three States Lumber Co. v. Bowen* (1910) 95 Ark. 529, 129 S. W. 799. Some courts hold that mere notice of default or forfeiture does not constitute a rescission entitling vendee to a return of payments made *List v. Moore* (1912) 20 Calif. App. 616, 129 Pac. 962; *Newell v. Stone Co.* (1919) 181 Calif. 385, 184 Pac. 659; *Malloy v. Muir* (1901) 62 Neb. 80, 86 N. W. 916.

[16] *Zeimantz v. Blake* (1905) 39 Wash. 6, 80 Pac. 822; *Wells Fargo Co. v. Page* (1905) 48 Or. 74, 82 Pac. 856; *O'Connor v. Hughes* (1886) 35 Minn. 446, 29 N. W. 152; *Reese v. Westfield* (1909) 56 Wash. 415, 105 Pac. 837; *Forsell v. Carter* (1913) 65 Fla. 512, 62 So. 926.

[17] *Three States Lumber Co. v. Bowen, supra* note 17; *Boone v. Templeman* (1910) 158 Calif. 290, 110 Pac. 947; *Fox v. Grange* (1913) 261 Ill. 116, 103 N. E. 576; *Baerenklau v. Peerless Co.* (1912) 80 N. J. Eq. 26, 83 Atl. 375; *Weaver v. Griffith* (1904) 210 Pa. 13, 59 Atl. 315; *Turpin v. Beach* (1909) 88 Ark. 604, 115 S. W. 404; *Lancaster v. Roberts* (1893) 144 Ill. 213, 33 N. E. 27; *Hill v. Alber* (1913) 261 Ill. 124, 103 N. E. 612; *Phillips v. Carver* (1898) 99 Wis. 561, 75 N. W. 432; *Shorett v. Knudsen* (1913) 74 Wash. 448, 133 Pac. 1029. A stipulation for the payment of interest after maturity is held to amount to a waiver of the forfeiture. *Phillis v. Gross* (1913) 32 S. D. 438, 143 N. W. 373; *Robberson v. Clark, supra* note 1; *contra, Moffett v. Or. & Calif. Ry* (1905) 46 Or. 443, 80 Pac. 489. And if the vendor after default acts as if he still considers the agreement in force, he is held to have waived the forfeiture. *Mound Mines Co. v. Hawthorne* (1909, C. C. A. 8th) 173 Fed. 882.

[18] *Steedman v. Drinkle* [1916, P. C.] A. C. 275; *Cornwall v. Henson* (1900) 2 Ch. 298; *In re Dagenbaum, supra* note 14; *Price v. Ruggles* (1917, Manitoba) 28 L. Rep. 132.

they hold that a stipulation for the forfeiture of all payments previously made must have been intended in the nature of a penalty. The penalty would become more severe as fast as the vendee's performance becomes more nearly complete; the smaller his breach the greater the penalty. Therefore equity will relieve against such a forfeiture. This is true even though the parties expressly describe the forfeiture as liquidated damages. There is in fact no true liquidation or honest estimate, for the amount stipulated varies in inverse proportion to the loss actually sustained. Such a result seems to accord fair and equitable treatment to both parties. It is true that the vendee's legal status is that of a contract-breaker. He should not be entitled, therefore, to a return of his purchase money until he has allowed as a deduction therefrom all the damages caused by his breach, one element of which would be the fair rental value of the property during the time he occupied it. The law should not allow one to profit by another's breach, but merely to receive compensation for the loss sustained.[19] When the vendee has paid damages for the breach and returned the land to the vendor, the latter is sufficiently recompensed.

Although in general the vendee should be given equitable relief against a forfeiture, this does not mean that he should always be given a judgment or decree for a part of his money back. Under the doctrine of mutuality of remedy, the vendor is entitled to a decree for specific performance against the vendee.[20] Therefore if after default the vendee seeks relief, the option should be in the vendor to choose whether he will submit to specific performance of the contract, or to a rescission thereof accompanied by a repayment to the vendee of so much of the purchase price already paid as exceeds a fair sum as damages for the vendee's breach of contract. It is only fair to the vendor to give him this option, for he is not a contract-breaker and he is the best judge of the manner in which he can obtain just relief. When it is considered that in the majority of cases the vendors are large home-building corporations, or individuals controlling huge tracts divided into home sites, and that the vendees are frequently persons who do not clearly comprehend the legal significance of the document (which often contains printed clauses that are never noticed), the injustice of enforcing a penalty against the vendee is evident.

EFFECT UPON A PRIOR AND EXISTING WILL OF THE REVOCATION OF A SUBSEQUENT WILL CONTAINING AN EXPRESS REVOCATORY CLAUSE

In the absence of statute, the destruction, *animo revocandi*, of a will

[19] Even at law in a number of American jurisdictions a contract-breaker has been allowed to recover instalments due him upon a contract. *Britton v. Turner* (1834) 6 N. H. 481; Woodward, *Quasi-Contracts* (1913) sec. 174 *et seq.*

[20] In equity, if the vendee can have specific performance, the vendor ought also to be able to obtain it. 5 Pomeroy, *Equity* (5th ed. 1918) sec. 2169.

containing a revocatory clause, leaving in existence a prior will, has the effect of re-establishing the prior will as the last will and testament of the testator. This principle is old, sound, and logical, but it has long been obscured by a mass of careless statements in text-books, and ill-considered *dicta* in judicial opinions.

One of the causes of this unfortunate clouding of the common-law rule is an early Connecticut case[1] which rests squarely upon the fundamental and elementary principle that a will is ambulatory. It is poetic justice that the Supreme Court of Errors of Connecticut should clear up the confusion for which it was in part responsible. This it did in the recent case of *Whitehill v. Halbing* (1922) 98 Conn.—; 118 Atl.—. In this case the testatrix executed a will in 1914. A later will, executed in 1919, containing the customary revoking clause, was destroyed by her with the knowledge that the earlier will was still in existence. After her death the 1914 will was presented for probate. The contestants claimed that she had died intestate by reason of the revocation of the 1914 will by the revocatory clause in the destroyed will. The Probate Court admitted the 1914 document as her last will and testament. Upon appeal the Superior Court directed a verdict for the proponent, and the Supreme Court[2] (Mr. Justice Wheeler *dissenting*) found no error.

Many writers have dismissed this problem with the statement that there is a hopeless conflict among the American authorities.[3] This, as later pointed out, seems incorrect, and a few of the text-writers have so stated.[4] Unfortunately, however, some courts have repeated the statement without carefully considering the effect of statutes upon the problem.[5]

A careful investigation has failed to disclose any reported case, except the early Connecticut case above referred to, either in this country or in England, in which it has been held that the revocation of a will containing a revoking clause leaves the estate intestate if the prior will is in existence at the death of the testator, unless such decision is affected by, and explainable because of, a controlling statute. The exception, the

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[1] *James v. Marvin* (1819) 3 Conn. 576.

[2] The Supreme Court said in part: "Upon these facts the only conclusion which the jury could reasonably have reached was that the will of 1919, with its clause of revocation, did not immediately and finally take effect to revoke the will of 1914; that when she destroyed the will of 1919, the testatrix left the will of 1914, which she was carefully keeping in existence, in force as her will; and that no other will having been found, the will of 1914 was the only written declaration relating to the disposition of her property which subsisted at her death."

[3] 1 Underhill, *Wills* (1900) 367; Page, *Wills* (1901) 304; Woerner, *Law of Decedents' Estates* (1913) 41; Schouler, *Wills* (5th ed. 1915) 516; 1 Alexander, *Wills* (1917) 755; 1 Jarman, *Wills* (Bigelow's 6th ed. 1893) 162, note; Powell, *Devises* (1806) 55; 40 Cyc. 1214; 28 R. C. L. 195.

[4] Thompson, *Wills* (1916) 420; 1 Redfield, *Wills* (1876) 328.

[5] *In re Gould's Will* (1900) 72 Vt. 316, 47 Atl. 1082; *Lane v. Hill* (1895) 68 N. H. 275, 44 Atl. 393.

old Connecticut case of *James v. Marvin*,[6] was severely criticized by Redfield,[7] and, as the Connecticut Supreme Court has just declared, has not been the law in Connecticut since 1821.

In England, before 1837, when the Statute of Wills[8] was enacted, providing that no will once revoked might be revived except by a re-execution thereof or by a codicil expressly providing for its revival, there were two rules: (1) the *Ecclesiastical Rule*, which sought for and gave effect to the testator's intention at the time of the revocation of the will containing the revoking clause;[9] and (2) the *Common-Law Rule* (known also as *Lord Mansfield's Rule*), which declared that the first will was ipso facto re-established upon the revocation of the revoking will.[10]

This statute and similar statutes in the United States are in derogation of these rules.[11] In those states where no statute affecting this subject has been enacted, either the *Ecclesiastical* or the *Common-Law Rule* obtains.[12] In many of the states, however, there are statutes which control. These statutes fall into two classes. Some of them are actual or substantial re-enactments of the English statute of 1837.[13] Others provide that a will may be revoked not only by a later will or codicil but by some "other writing."[14]

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[6] *Supra* note 1.

[7] Redfield, *loc. cit.*

[8] (1837) 1 Vict. c. 26, sec. 22.

[9] *Helyar v. Helyar* (1754, Prerog.) 1 Lee, 472.

[10] *Harwood v. Goodwright* (1774, K. B.) 1 Cowp. 86; *Glazier v. Glazier* (1770, K. B.) 4 Burr. 2512.

[11] *Ross v. Woolard* (1907) 75 Kan. 383, 89 Pac. 680.

[12] *Moore v. Rawlett* (1915) 269 Ill. 88, 109 N. E. 682; *Stetson v. Stetson* (1903) 200 Ill. 601, 66 N. E. 262; *Bates v. Hacking* (1908) 29 R. I. 1, 68 Atl. 622; *Blackett v. Ziegler* (1911) 153 Iowa, 344, 133 N. W. 901; *Marsh v. Marsh* (1855) 48 N. C. 77; *Taylor v. Taylor* (1820, S. C.) 2 Nott & McC. 482; *McClure v. McClure* (1887) 86 Tenn. 173, 6 S. W. 44.

[13] The New York statute is typical of this class: "If after making any will the testator shall duly make and execute a second will, the destruction, cancelling, or revocation of such second will shall not revive the first will unless it appear by the terms of such revocation that it is his intention to revive and give effect to the first will, or unless .... he shall duly republish his first will." N. Y. Cons. Laws, 1909, 505. See also Ky. Sts. 1915, ch. 135, sec. 4834; Va. Code, 1919, sec. 5234; Deering's Calif. Civ. Code, 1915, sec. 1297; Ga. Code, 1911, sec. 3917; Burns' Ind. Sts. 1914, sec. 3115; Kan. Gen. Sts. 1915, ch. 126, sec. 11794; Mo. Rev. Sts. 1919, ch. 1, sec. 513; Or. Laws, 1920, sec. 10104; Remington's Wash. Comp. Sts. 1922, sec. 1405; S. D. Rev. Code, 1919, sec. 628.

[14] This type of statute is exemplified in Michigan: "No will .... shall be revoked, unless by burning ...., or by some other will or codicil in writing, executed as prescribed in this chapter; or by some other writing, signed, attested and subscribed in the manner provided in this chapter for the execution of a will ...." Mich. Comp. Laws, 1915, ch. 226. sec. 9. See also Tex. Rev. Civ. Sts. 1911, art. 7859; Wis. Sts. 1921, ch. 103, sec. 2290; Minn. Gen. Sts. 1913, ch. 74, sec. 7256; Purdon's Pa. Digest, 1910, p. 5130.

Under the latter class of statutes, some courts have held that since the revocation of a will may be effected by a non-testamentary document, merely including the revocatory document in a will does not make that clause ambulatory.[15] Other courts, construing similar statutes, have declared that when the testator chooses to effect the revocation of a prior will by a clause in a subsequent will, the revocation, like the rest of the will, is ambulatory.[16] The decision in *James v. Marvin*[17] was justified by a rule of law, independent of statute, which before 1821 permitted the revocation of a will in Connecticut, not only by a writing not testamentary, but even by parol.[18]

In 1821 was enacted the Connecticut Statute of Wills,[19] which in substance has continued in force to this day. By force of this statute the power to revoke a will by a writing not testamentary in character is taken away; revocation can be accomplished only by "a later will or codicil." After the enactment of this statute, *James v. Marvin*[20] ceased to be the law in Connecticut, and the Supreme Court has so intimated more than once.[21]

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[15] *Danley v. Jefferson* (1908) 150 Mich. 590, 114 N. W. 470; *Cheever v. North* (1895) 106 Mich. 390, 64 N. W. 455; *In re Cunningham* (1888) 38 Minn. 169, 36 N. W. 269; *Hairston v. Hairston* (1885) 30 Miss. 276; *Bohanon v. Walcott* (1836, Miss.) 1 How. 336; *In re Noon* (1902) 115 Wis. 299, 91 N. W. 670.

[16] *In re Diament's Estate* (1915) 84 N. J. Eq. 135, 92 Atl. 952; *Colvin v. Warford* (1863) 20 Md. 357; *Williams v. Miles* (1903) 68 Neb. 463, 94 N. W. 705; *In re Gould's Will, supra* note 5; *Pickens v. Davis* (1883) 134 Mass. 252; *Williams v. Williams* (1886) 142 Mass. 515, 8 Atl. 424; *Lane v. Hill, supra* note 5.

[17] *Supra* note 1.

[18] *Witter v. Mott* (1816) 2 Conn. 67; *Card v. Grinnan* (1821) 5 Conn. 164. Hosmer, C. J. said in the case of *James v. Marvin, supra* note 1, at p. 578: "A deed of revocation separate from a will has the effect of annulling a prior will, instantaneously; and the operation is the same whether the revoking clause be in a deed or will; for it is never a necessary part of the latter."

[19] Conn. Gen. Sts. 1918, ch. 254, sec. 4946.

[20] *Supra* note 1.

[21] *Fitzpatrick v. Cullinan* (1913) 87 Conn. 579, at p. 584, 89 Atl. 92, at p. 94: " . . . . It is therefore unnecessary to determine the question, left undecided in *Peck's Appeal,* whether, under our present statute, such a revoking clause would take effect immediately, so that the subsequent destruction of the second will with intent to revive the first would be ineffectual without a republication of the first will." See also *Peck's Appeal* (1883) 50 Conn. 562; *Security Co. v. Snow* (1898) 70 Conn. 288, 39 Atl. 153. In the instant case the court said in part: "It would be difficult to demonstrate logically that an express revocatory clause was not a legal expression of the testator's intention respecting the disposition of his property after death, made known through a written declaration, to which the law will give effect only after his death and execute as his will . . . . . If this declaration of intention is not a will, by the terms of statutes no will is revoked by it. If it is a will, it must have the essential quality of a will which is expressed by the word ambulatory. Page on Wills, p. 49. 'It is this ambulatory quality which forms the characteristic of wills.' 1 Jarman on Wills (6th Ed.) p. 18 . . . . .

"This principle of law was so strongly entrenched in England that a statute was needed to dislodge it. In 1837, the Parliament decreed that no will or codicil, nor any part thereof, which shall be in any manner revoked, shall be revived other-

Although the logic of this decision seems unassailable, the fact that the legislative trend has been in the other direction may encourage adverse criticism on the theory that harmony is peculiarly desirable in this field. The wisdom of the legislation prevailing in this country is, however, extremely doubtful, for the decisions have not been uniform[22] under the type of statute[23] providing for a revocation by some "other writing."

Wills may easily be, and frequently are, executed and later destroyed in secret. The witnesses to the revoking will would not necessarily know of the testator's death, and even though they should happen to know about it, they would not be likely to examine the will offered for probate and make known that a later will had been executed. Even if there were rare cases where witnesses whose keen sense of duty would lead them to do this, whether the second will contained a revocatory clause or not would still be an open question of fact, since it is infrequent that a copy of the revoked will is available. Thus, where the rule is that a revocation by will is instantaneous, it must necessarily frequently happen that a revoked will is probated merely because the execution of the subsequent will (later destroyed) is never brought to the attention of the probate court.

It is clear that the common-law rule is much simpler of application. The will bearing the latest date having been offered for probate, it may safely be admitted without the disturbing possibility that the testator might at some time have revoked that will by a later testament which was also revoked by burning or tearing. Under this rule it is assumed as a matter of law, after a thorough search has shown that no later will is in existence, that the existing document is an expression of the testator's last desires; under the other rule the legal assumption is either directly contrary, or the matter is entirely indefinite. Even though there may be cases in which the existence at the testator's death of the prior will may be due to accident or oversight, the common-law doctrine has the merit of stating a definite legal rule which it seems will more often than not coincide with the testator's desires.

SAMUEL A. PERSKY

New Haven, Connecticut

wise than by a re-execution thereof, or by a codicil executed as required by the Act and showing an intention to revive the same. 1 Victoria, Chap. 26, Sec. 22. This statute in substance has been adopted in many of the United States, including New York, Indiana, Ohio, Kansas, Missouri and California. The decisions of the courts of these States are controlled by such legislation, and have therefore no direct bearing upon the subject of revivor in Connecticut, where no statute has been enacted. In Massachusetts, Vermont, New Hampshire, Maryland, Michigan, Minnesota and Pennsylvania, the statute permits wills to be revoked by 'some other writing' than a will, if it be executed in the manner provided for the execution of wills. This, as we have seen, has not been the law of Connecticut since 1821 . . . . . Decisions which are compelled or conclusively influenced by such local laws, necessarily have little weight in our courts where no similar law is now in force."

[22] *Supra* notes 15 and 16.

[23] *Supra* note 14.

[Note. In an able dissenting opinion received after the above comment had been printed, Chief Justice Wheeler attempts to demonstrate that *James v. Marvin, supra,* "one of the notable contributions of constructive legal reasoning in our reports," is "established by the overwhelming weight of authority in this country, judicial and legislative as well." To the point that "Lord Mansfield's rule has been thoroughly disapproved in this country as well as in England," he cites, *inter alia,* Schouler, *op. cit.* sec. 415, note; COMMENTS (1912) 21 YALE LAW JOURNAL, 672. He also differs from his associates as to the effect of the Connecticut Statute of 1821. The recent case of *In re Tibbetts' Estate* (1922, Minn.) 189 N. W. 401, is in accord with the majority view in the principal case. Ed.]

THE PRIVILEGE OF A PUBLIC UTILITY TO WITHDRAW FROM SERVICE

When private property is "affected with a public interest, it ceases to be *juris privati only.*"[1] Land and chattels devoted to the public service are subject to special rules; property in them is subject to limitations not existing in the case of purely private ownership. Public servants are likewise subject to special control; they have fewer privileges and heavier duties than other persons. Such special burdens and control may, of course, be made so heavy as to react against the public welfare and defeat their own ends. Thus a rule absolutely forbidding a public utility to withdraw from the public service would operate oppressively and would prevent men from entering such service at all. In particular is this true where the utility contemplates a partial withdrawal only.[2]

When there is no grant from the state, but a mere holding out to serve the public as in the case of innkeepers[3] or common carriers by wagon,[4] it has long been settled that mere cessation of business will con-

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[1] Lord Hale in his treatise *De Portibus Maris,* 1 HARG. LAW TRACTS, 78. "When one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use." Waite, C. J., in *Munn v. Illinois* (1876) 94 U. S. 113, 126.

[2] Wyman, *Public Service Corporations* (1911) sec. 290.

[3] *Anonymous* (1623) Godbolt, 345, where it was said: "If an Inn-keeper taketh down his Signe, and yet keepeth a hosterie, an Action upon the Case will lie against him, if he do deny lodging unto a travailer for his money; but if he taketh down his Signe, and giveth over the keeping of an Inn, then he is discharged from giving lodging." In *Rex v. Collins* (1623) Palmer, 373, it is said that "an innkeeper may at his pleasure demolish his sign and leave off innkeeping." And in *Conklin v. Prospect Park Hotel Co.* (1888) 48 Hun, 619, 1 N. Y. Supp. 406, it was intimated that after a sale of his business an innkeeper would not be under any further duty.

[4] *Satterlee v. Groat* (1828, N. Y.) 1 Wend. 272. The defendant was a common carrier by wagon between Schenectady and Albany previous to 1819, but had given up the business. The court said: "The defendant stood upon the same footing as though he had never been engaged in the forwarding business. He had abandoned it entirely."

stitute withdrawal.[5] In some cases, however, there must be reasonable notice of this intention.[6] What constitutes reasonable notice is a question of fact in each case to be determined by the character and importance of the business.[7]

The public has a stronger interest to preserve when special obligations are assumed by reason of the acceptance of a franchise, and different results often follow. Such are cases of railroads, trolleys, water, gas, and electric companies. Three recent decisions concern cases of this character. In one a street railway, which was operating at a loss with no prospect of recoupment, was given the privilege of abandoning its entire service if the city did not remove burdensome paving obligations imposed by franchise.[8] In the second case an electric utility was permitted over the objection of individuals who relied on contract rights, to discontinue service on an unprofitable line when such discontinuance in no way interfered with the rest of the general system of the company.[9] In the third case a water company was not permitted to cease operations because of alleged losses until there had been a determination as to the adequacy of the present rates.[10]

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[5] Similar in character are the decisions recognizing the privilege of a ferryman to abandon his profession. *Carter v. Commonwealth* (1823) 2 Va. Cas. 354. Or of a warehouseman to make his warehouse private. *Munn v. Illinois, supra* note 2. *Nash v. Page* (1882) 80 Ky. 539, acc. In that case the defendants were tobacco warehousemen and refused to sell to the plaintiffs. They sought to avoid their legal duty to do so "by the passage of a resolution disclaiming that they were operating their houses in the capacity of warehousemen, but as commission merchants." The court would not hear them say: "'I am, in fact, a public warehouseman for the sale of tobacco, but in name I am a commission merchant.'" The situation seems analogous to that of the innkeeper who simply takes down his sign but does not abandon the business. But the case of *Glass v. Davis* (1873, Va.) 23 Gratt. 184 is *contra* to the *Nash* case and certainly seems to go too far. Here it was held that the owners of a public warehouse may close it on a certain day, on giving reasonable notice, and open it on the same day as a private warehouse, where everything except the inspection of tobacco is to be done as in the public warehouse. That case apparently stands alone.

[6] Wyman, *op. cit.* sec. 316, and cases there cited.

[7] "A teamster might withdraw upon a day's notice doubtless, as his patrons may quickly make other arrangements. A canal boatman might tie up at the end of any trip, for other opportunities for shippers over the canal are numerous. But a railroad company may not without long notice abandon its line. And a gas company could abandon its service only after a long enough period to provide for a new supply." Wyman, *op. cit.* sec. 317, and cases there cited. For decisions by public service commissions on this point see *Re Tidewater & W. Ry.* [1917 E.] Pub. Util. Rep. (Va.) 798; *Re Delaware & H. Ry.* [1917 A.] Pub. Util. Rep. (N. Y.) 715; *Ex parte Central Illinois Public Service Company* [1916 B.] Pub. Util. Rep. (Ill.) 920; *New York Trust Co. v. Buffalo & L. C. Trac. Co.* (1920, Sup. Ct.) 112 Misc. 414, 183 N. Y. Supp. 278.

[8] *Re City of Sault St. Marie* [1922 D.] Pub. Util. Rep. (Mich.) 14.

[9] *Re Idaho Power Co.* [1922 C.] Pub. Util. Rep. (Idaho) 705.

[10] *Wiesehan v. Zionsville Water & Elec. Co.* [1922 C.] Pub. Util. Rep. (Ind.) 863.

The rule is well established that in the absence of statute or express contract a public service corporation may discontinue its entire service when operations are being carried on at a loss without reasonable promise of future profit, since otherwise the "due process" clause of the Fourteenth Amendment would be violated.[11] It follows that there is no implied contract to continue operation from the mere acceptance of a charter or the exercise of the power of eminent domain.[12] This rule is clearly sound, for a rule compelling the relinquishment of private property without compensation would not operate for the good of the general public.[13] The first case[14] falls clearly within this rule; there being no mandatory provision in the franchise, the consent of the state was unnecessary. Whether there can be total abandonment of a solvent road without the consent of the state raises a different problem. Naturally the courts have not often passed on such a question, as the owners of a profitable road do not, as a practical matter, abandon it. The existence of this privilege depends upon whether the charter under which the utility operates is mandatory or permissive. When the franchise is mandatory in character, a mandamus will issue to compel the utility to continue operation;[15] but when it is permissive no such remedy may be had.[16]

A contract of service with individuals, in contrast with one made with the state in a franchise, is not to be construed as an impediment to any action which the company may see fit to take in regard to withdrawal.

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[11] *Brooks-Scanlon Co. v. Ry. Commission* (1919) 251 U. S. 396, 40 Sup. Ct. 183. In that case the petitioner, operating a railroad in connection with a sawmill, sought to abandon the railroad because it was unprofitable. The court permitted this although a profit could be derived from the entire business, saying: "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." *City of Helena v. Helena Light & Ry.* (1922, Mont.) 207 Pac. 337. See also *Northern Pac. Ry. v. N. D.* (1914) 236 U. S. 585, 35 Sup. Ct. 429; *Norfolk & W. Ry. v. W. Va.* (1914) 236 U. S. 605, 35 Sup. Ct. 437.

[12] *Bullock v. Florida* (1921) 254 U. S. 513, 41 Sup. Ct. 193.

[13] *Erie Ry. v. Board of Pub. Util. Comm.* (1921) 254 U. S. 394, 41 Sup. Ct. 169; *New York Trust Co. v. Buffalo & Lake Erie Traction Co.* (1920, Sup. Ct.) 112 Misc. 414, 183 N. Y. Supp. 278; *State v. Duluth & M. N. Ry.* (1921) 150 Minn. 30, 184 N. W. 186. It has been held also that where the available supply of a natural gas company is exhausted, the company may withdraw its services and facilities. *Village of St. Clairsville v. Public Utilities Comm.* (1921) 102 Ohio St. 574, 132 N. E. 151. See also (1922) 20 MICH L. REV. 802.

[14] *Supra* note 8.

[15] Wyman, *op. cit.* sec. 300; *Fellows v. Los Angeles* (1907) 151 Calif. 52, 90 Pac. 137; *Gainesville v. Gas & Elec. Co.* (1913) 65 Fla. 404, 62 So. 919; see *Southern Ry. v. Hatchett* (1917) 174 Ky. 463, 192 S. W. 694; *State v. Postal Telegraph Co.* (1915) 96 Kan. 298, 150 Pac. 544; *Colorado & S. Ry. v. Ry. Commission* (1913) 54 Colo. 64, 129 Pac. 506.

[16] Wyman, *op. cit.* sec 296; *East Ohio Gas Co. v. Akron* (1909) 81 Ohio St. 33, 90 N. E. 40; see *Munn v. Illinois, supra* note 1; *San Antonio Street Ry. v. State* (1897) 90 Tex. 520, 39 S. W. 926.

Hence this point is correctly disposed of in the second case.[17] Although it causes hardship to the individual, this seems to be a necessary rule.[18]

The question of partial withdrawal, however, as brought out in the second of the principal cases, is quite similar to that of total abandonment by a solvent company. As a corollary to the power of the state to compel an extension of service, although unprofitable, if the venture as a whole will return a profit,[19] it may grant permission partially to withdraw from service. According to the better view such discontinuance is possible only with the permission of the state.[20] There are, however, almost as many cases permitting a partial withdrawal without the consent of the state, in the absence of mandatory provisions in the charter. This was the prevailing view until the latter part of the last century; the usual doctrine being that when the charter was permissive the continuance of any service was left to the discretion of the company.[21]

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[17] *Supra* note 9.

[18] "An individual can acquire no vested right as against the public in the continued service of a public utility. Such a doctrine once admitted would destroy the convenience as a public utility; it would then become hampered and subject to the control of the individual and made to subserve such interests, to the detriment of the public welfare." *Asher v. Hutchinson Water, L. & P. Co.* (1903) 66 Kan. 496, 500, 71 Pac. 813, 814; *Clute v. Nassau & Suffolk Lighting Co.* (1922, Sup. Ct.) 118 Misc. 630, 195 N. Y. Supp. 84. The rights of the individual to his action on the contract must be determined as an independent matter. It has been held that a contract in a franchise from a city may not prevent a street railway from going out of business when properly authorized to do so by the state. *City of Helena v. Helena Light & Ry., supra* note 11.

[19] (1918) 27 YALE LAW JOURNAL, 715.

[20] Wyman, *op. cit.* secs. 305-308, and cases there cited. *Southern Ry. v. Hatchett, supra* note 15; *Farmers Loan & Trust Co. v. Ry.* (1878, C. C. D. Kan.) Fed. Cas. No. 4666; *Brownell v. Old Colony Ry.* (1895) 164 Mass. 29, 41 N. E. 107; *Colorado & S. Ry. Commission* (1913) 54 Colo. 64, 129 Pac. 506; *Mt. Carmel Pub. Util. & Sew. Co. v. Pub. Util. Comm.* (1921) 297 Ill. 303, 130 N. E. 693; *State v. Postal Telegraph Co.* (1915) 96 Kan. 298, 150 Pac. 544.

[21] *Northern Pac. Ry. v. Dustin* (1891) 142 U. S. 492, 12 Sup. Ct. 283; *San Antonio Ry. v. State* (1897) 90 Tex. 520, 39 S. W. 926; *East Ohio Gas Co. v. Akron* (1909) 81 Ohio St. 33, 90 N. E. 40. See 1 Wyman, *op. cit.* sec. 306 and cases there cited. This view is well summarized in the language: "Where the line of railway, taken as a whole, cannot be profitably maintained; when its operation, when discreetly and economically managed, is attended with loss, it is difficult to perceive how a court can, by *mandamus* or otherwise, compel its operation to be continued. . . . .It more frequently happens, however, that a part of the line becomes unprofitable, though the system as a whole may be valuable. In such an event the court will inquire, first, as to the positive duties imposed by the charter, and compel their performance by appropriate remedies, while with respect to those duties . . . . which have been assumed by the corporation under permissive grants of power, it will consider all the circumstances of the case, and if upon the facts it shall appear . . . . that the service . . . . is . . . . reasonably adapted to their (those who make the complaint) needs, while the performance of the duty would entail a burden and loss upon the company far in excess of any benefit conferred, the court will withhold its hands." *Sherwood v. Atl. & D. Ry.* (1897) 94 Va. 291, 306, 26 S. E. 943, 948.

However justified a utility may be in ceasing operations, it should not be permitted to do so until there has been an adequate investigation. The public should not be subject to the caprice of the officers of the public service company. If the utility desires to suspend its operations either wholly or partially because of alleged unreasonable rates, for example, such suspension should not be countenanced until there has been a determination of the adequacy of the rates.[22] If the rates are inadequate they may be raised, but if they are reasonable, inefficient management may be brought to light and corrected. At all events the company has an adequate legal remedy, and should be required to continue to render its service in a proper manner until relieved of its duty by due process of law.[23] This seems to dispose of the last of the principal cases,[24] and it is submitted that the decision is correct.

In deciding cases of this character, confusion has often resulted from failure to distinguish between cessation of operation on the one hand and dismantling the plant on the other.[25] While an unprofitable utility may be permitted to cease its operations, yet the public interest still continues in it to the extent that the company shall not be allowed to stand in the way of another company seeking to render such service.[26] The dismantling of a plant which could well be sold to a new company, is certainly an action in derogation of the rights of the public. If a utility has the privilege of withdrawal, it might seem that the privilege of dismantling should follow,[27] but public policy dictates otherwise.[28]

Although governmental regulation of business is frequently undesirable, yet it is necessary at times to protect the interest of the public. The problems of withdrawal and dismantling are peculiarly adapted to control by the state. Discontinuance of service may be prohibited when it is subversive of the welfare of the public, or it may be permitted when the burden is far greater than the benefit of operation. In the case of public service companies accepting special rights and privileges from the state,

[22] *Gainesville v. Gas & Elec. Co., supra* note 15.

[23] *Gainesville v. Gas & Elec. Co., supra* note 15.

[24] *Supra* note 10.

[25] A recent Arkansas case, however, drew the proper distinction when the court said: "It does not follow that because we have held that the order of the railroad commission was arbitrary and oppressive, the railroad company has a right to take up its rails and dispose of them at its own motion." *Rowland v. Saline River Ry.* (1915) 119 Ark. 239, 246, 177 S. W. 896, 899.

[26] *Re St. Croix Gaslight Co.* [1919 A.] Pub. Util. Rep. (Me.) 487.

[27] Such is certainly the rule in the case of the company ceasing operation by reason of the expiration of its franchise. *Cleveland Elec. Ry. v. Cleveland* (1907) 204 U. S. 116, 27 Sup. Ct. 202; *Laighton v. City of Carthage* (1909, C. C. D. Mo.) 175 Fed. 145; *Gas Co. v. Akron* (1909) 81 Ohio St. 33, 90 N. E. 40.

[28] This view is suggested in *Lyon & Hoag v. Ry. Commission* (1920) 183 Calif. 145, 146, 190 Pac. 795, 796, where it is said: "The state has no power to compel the continued operation of a public utility at a loss where the owner of that utility is willing to and does in fact abandon to the public all its property that has been devoted to the public use." See NOTES (1919) 32 HARV. L. REV. 716, 719.

cessation of operations should not be tolerated without the consent of the proper authorities.[29]

In a recent case before the New York Court of Appeals, the defendant, superintendent of the law and order department of the New York Civic League, transmitted to the district attorney a charge that the plaintiff was engaged in acts of criminal immorality.[1] This charge, although made by the defendant as of personal knowledge, was in fact based solely upon letters received from an unknown correspondent. A majority of the court held that this defamatory charge, although made in good faith, was not privileged, since the defendant's conduct was so reckless and wanton as to justify the jury in inferring "malice." The majority and minority opinions agreed that this occasion was not absolutely privileged[2] and further that the English rule, which holds that an honest belief in the truth of the matter asserted is sufficient belief to establish a privilege, should be applied.[3] The latter doctrine is the rule in several of the states in this country.[4] However, other jurisdictions require proof of reasonable grounds upon which the alleged honest belief was based, before the privilege is raised, although the defendant proves that he published the slanderous words without actual malice.[5] If the defendant had merely turned the anonymous letters over to the district attorney, there is no doubt but that his act would have been privileged.

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[29] Concerning the procedure in compelling a public utility to perform its obligations see COMMENTS (1918) 3 CORN. L. QUART. 311, 313.

[1] *Pecue v. West* (1922) 233 N. Y. 316, 135 N. E. 515.

[2] There is a conflict on this point. *Matter of Quarles and Butler* (1895) 158 U. S. 532, 15 Sup. Ct. 959; see *Gabriel v. McMullin* (1905) 127 Iowa, 426, 103 N. W. 355 (absolute privilege); *contra, Miller v. Nuckolls* (1905) 77 Ark. 64, 91 S. W. 759; *Pearce v. Oard* (1888) 23 Neb. 828, 37 N. W. 677; 7 Ann. Cas. 113, note.

[3] *Clark v. Molyneux* (1877) L. R. 3 Q. B. Div. 237; *Collins v. Cooper* (1902) 19 T. L. R. 118.

[4] "It is not essential, in order to invoke the protection of a privileged communication that the defendant should have had what might seem to the jury to be good and reasonable grounds for believing that the statements made by him were true; it is sufficient, if he honestly believed them to be true and made them in good faith on an occasion of privilege to discharge his duty or to protect his interest." *Barry v. McCullom* (1908) 81 Conn. 293, 70 Atl. 1035; *Ely v. Mason* (1921) 97 Conn. 38, 115 Atl. 479; *Bays v. Hunt* (1882) 60 Iowa, 251, 14 N. W. 785; *Joseph v. Baars* (1910) 142 Wis. 390, 125 N. W. 913; *Hemmens v. Nelson* (1893) 138 N. Y. 517, 34 N. E. 342; *I. & G. N. Ry. v. Edmundson* (1920, Tex. Com. of App.) 222 S. W. 181; but see *Vacicek v. Trojack* (1920, Tex. Civ. App.) 226 S. W. 505.

[5] *Elms v. Crane* (1919) 118 Me. 261, 107 Atl. 852; *Coogler v. Rhodes* (1897) 38 Fla. 240, 21 So. 109; *Allen v. Pioneer Press Co.* (1889) 40 Minn. 117, 41 N. W. 936; *Conroy v. Pittsburg Times* (1891) 139 Pa. 334, 21 Atl. 154; see *Hutchins v. Page* (1909) 75 N. H. 215, 72 Atl. 689.

Two demands of public policy clash in this situation. The reputation of the individual, which is really of more value to him than any material possession[6] must be protected against false accusations. On the other hand, it is necessary to the public welfare that criminals be apprehended and that persons should be encouraged to communicate bona fide charges of crime to the proper officials. The protection of the reputation of the individual is of such importance, however, that a rule requiring persons who report crime to base such charges on grounds which would be accepted by reasonably prudent men seems not unduly severe. One who has, through negligence, harmed another should not be permitted to justify his conduct. This rule would operate to check hasty, negligent accusations which are of no value in the detection of criminals, and it would afford the necessary protection to the good name and fame of all persons.

The result of the instant case is obviously correct, but it is regrettable that the court went out of its way to reaffirm its approval of the English rule.

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[6] "Who steales my purse, steals trash, tis something, nothing,
Twas mine, tis his, and has bin slave to thousands:
But he that filches from me my good name,
Robs me of that, which not inriches him,
And makes me poore indeed."—Shakespeare, *The Tragedy of Othello* (1622) 46.