The creation of a holder in due course is conditioned upon the con-
currence of a considerable number of facts relating to form, inception,
and the elements enumerated in section 52 of the Uniform Negotiable
Instruments Law. These facts have been grouped into categories, as

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"value," and "delivery," and there must be present facts sufficient to represent each of the necessary groups, or the result, the creation of a holder in due course, will not follow. Within each of these groups there are a number of possible facts any one of which will have equivalent efficacy to accomplish the result characteristic of that category; and there are also other facts whose effect, still undetermined, has been and is constantly being ruled upon.

In dealing with the question of what does or does not constitute the category "value" the only wholly unambiguous evidence consists of cases where every other condition to the creation of a holder in due course is admittedly present, and where the transferee, to succeed, must establish greater rights than his transferor had. If the additional facts under consideration have the effect of making the taker a holder in due course, they constitute value; otherwise not. The existence of value as a matter of positive law involves solely the legal effect of certain facts, not the reason for or the justification of the result. Thus social value, economic value, or factual value in any other sense are immaterial in determining what the law is; although they vitally affect the reason for this positive law and indicate the way that positive law should develop. Our question, then, concerns only what by virtue of its legal effect is "value," not what is of value. The problem involved in this discussion is threefold: a determination of the facts which under the present law constitute this juristic value; an examination of the stated reasons for giving these facts that significance and of denying it to others; and a demonstration that reasons of economic policy and legal consistency justify the extension of the concept value to include facts now denied that effect.

The adoption of the Uniform Negotiable Instruments Law has settled the effect of many of these facts. Thus if the transferee takes in payment of the transferor's antecedent debt, or in payment of the

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2 It has been usual to say that certain facts (as, value) must be present and certain other facts (as, notice) must be absent. But a requirement that certain facts be absent is a requirement that certain other facts be present, plus a statement that were the fact required to be absent, present, the result would not be the same.

3 The term "value" has, however, historical significance: it partially indicates why courts of equity gave certain types of fact the effect of preventing equitable owners from following the misappropriated trust rest; and the reason for giving that effect probably was that the facts measured by the prevailing social and economic standards were valuable. And contemporaneously the Law Merchant was developing its concept of value, which when present sufficed to prevent the undoing of commercial transactions.

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antecedent debt of a third person, or in renewal of an instrument previously taken, or even if he spends money upon the faith of the instrument, he takes for value. If the holder takes to secure a then created debt, or if he takes as collateral security of a pre-existing debt of the transferor, he gives value, although in both cases many courts restrict his interest to the amount of the debt secured.


*Youle v. Foels (1907) 76 Kan. 20, 96 Pac. 1090 (N. I. L. not cited).


In one case where the transferee, a bank, credited the account of the transferor, and the transferor presumably debited the account of the transferee with the amount of the instrument, value was held to have been given. If the transferee issues his own negotiable instrument in payment, or if he takes to secure his own contingent duty, such as that created by his indorsement of the transferor's note, although he takes subsequent to the creation of the liability, he takes for value. But where the purchaser simply credits the account of an individual transferor, the overwhelming weight of American authority holds that value has not been given. And accordingly a bank taking an instrument for collection only and crediting subject to payment does not hold for value. But where the bank extinguishes an overdraft, gives in value the transferee may collect the full amount. Continental Credit Co. v. Ely (1917) 91 Conn. 553, 100 Atl. 434 (N. I. L. not cited). The pledgee would hold any balance over the debt for the pledgor or maker of the security. American Bank v. Hill (1915) 169 N. C. 235, 85 S. E. 209 (N. I. L. not cited).

Farmers' Bank v. Nissen (1922, N. D.) 190 N. W. 1014 (N. I. L. not cited). The decision may be attributed to the fact that both the transferor and transferee were banks. See infra notes 25, 31. But see Fox v. Bank of Kansas City (1915) 169 N. C. 235, 85 S. E. 209 (N. I. L. not cited). If the instrument is paid before notice, clearly the transferee gives value. Bacon v. Holloway (1853, N. Y. C. P.) 2 Smith, 159 (before N. I. L.; note); Merchants' Nat. Bank v. Marden Co. (1919) 234 Mass. 161, 125 N. E. 384 (N. I. L. not cited; note). So if the instrument has been negotiated to a holder in due course. Security State Bank v. Brown (1923, Nebr.) 193 N. W. 336 (N. I. L. not cited; certificate of deposit); White v. Wadham (1918) 204 Mich. 381, 170 N. W. 60 (under N. I. L.; same); Elmore Bank v. Avert (1914) 189 Ala. 418, 66 So. 509 (same). And even if his instrument has not been negotiated to such a holder the transferee seems to have paid value. Montgomery Garage Co. v. Manufacturers' Liability Co. (1920) 94 N. J. L. 152, 19 Atl. 296 (under N. I. L.; certificate of deposit); Neill v. Central National Bank (1918) 201 Ala. 297, 78 So. 73 (same); Bank of Chattanooga v. Clayton (1921) 205 Ala. 518, 90 So. 899 (same); Miller v. Marks (1915) 46 Utah, 257, 148 Pac. 412 (same; check); Matlock v. Schneerman (1908) 51 Or. 49, 93 Pac. 823 (same).


credit irrevocably to a third party, or allows the depositor to draw upon the credit, it pays value. The recent case of Ayub v. Saloman (1923, Tex. Civ. App.) 252 S. W. 391, follows the weight of authority in holding that the giving of the transferee's own non-negotiable instrument in payment does not constitute value.

Economic and other factual justification has been given for these results. Taking in payment of the transferor's antecedent debt is said to be value because the creditor may (not does) allow prolonged credit, against the conditional credit are paid. Jefferson Bank v. Merchants' Refrigerating Co. (1911) 236 Mo. 407, 139 S. W. 545 (N. I. L. not cited); (1919) 17 Mich. L. Rev. 703; (1920) 20 Col. L. Rev. 351.


"UNDER N. I. L.: Interstate Trust Co. v. Irwin (1915) 138 La. 325, 70 So. 313; Commercial Credit Co. v. McDonough (1921, Mass.) 130 N. E. 179. If the third party had not been notified the credit seems revocable, and so probably "value" would not have been given. The discounting bank apparently pays "value" if it secures credit for its depositor at another bank. Elgin City Bank v. Hall (1907) 119 Tenn. 548, 108 S. W. 1068 (under N. I. L.)."


"Bird v. Hareville (1863) 33 Ga. 459 (no N. I. L.; due bill); cf. Clayton v. Bank of East Chattanooga (1920) 204 Ala. 64, 85 So. 271 (N. I. L. not cited; certificate of deposit)."
or forbear to take steps to collect his debt.\textsuperscript{19} The surrender of the former debt is the announced reason for making the acceptance of a renewal note value.\textsuperscript{20} In taking for collateral, any new advance made is value; the cases of security given for a pre-existing debt which have departed from the earlier requirement that the creditor must either forbear, agree to forbear, or extend the time for payment,\textsuperscript{21} are justified by the same reasoning used to sustain the payment of antecedent debt cases. Taking in payment of another's debt is said to be value because the original debt is thereby discharged.\textsuperscript{22} In addition it has been said that the "duty" to notify indorsers upon the negotiable paper is value,\textsuperscript{23} a curious confusion of "duty" with "condition" which would result in holding the limited nature of the transferee's right to be the basis for the existence of the right. The giving of a negotiable instrument is said to be value because the transferee is under a liability that his instrument may (not will) be sold to a bona fide purchaser against whom his defence would be unavailing.\textsuperscript{24} On the other hand the giving of bank credit to the depositor is said not to be value because the relation thereby established is one of debtor-creditor, which may be destroyed by justified entries upon the bank's own books.\textsuperscript{25} And the

\textsuperscript{19} *Swift* v. *Tyson*, supra note 3. Any attempt to prove that taking in payment of an antecedent debt is value by deductive logic fails, as the debt is not discharged unless the taking is for value, and the taking is for value only if the debt is discharged. Some other and extrinsic considerations, as those of business convenience, have led to the adoption and codification of this rule that taking in payment of an antecedent debt has the effect which we denote "value."

\textsuperscript{20} See cases cited supra note 3. It would seem that even if the creditor had surrendered a negotiable instrument which alone evidenced the obligation of the debtor, to the debtor, he might still recover if no consideration was given for the surrender.

\textsuperscript{21} "Having received the securities the creditor believes himself to be safe. He is lulled into quiet, and neglects to take such steps to procure the payment of his debts as prudence would have required but for the fancied security in his hands." *Manning* v. *McCure* (1865) 36 Ill. 490, 497.

\textsuperscript{22} Here again the result must be justified upon independent consideration, for if the taking were not for value, the debt of the original promissor would not be discharged.

\textsuperscript{23} *In re Hopper-Morgan Co.*, supra note 8, at p. 262. This would be sound law only where the conditions were the contractual equivalent of the rights claimed. See Corbin, *Supervening Impossibility of Performing Conditions Precedent* (1922) 22 Col. L. Rev. 421.

\textsuperscript{24} And some cases do not require that the instrument actually have been transferred to a bona fide purchaser. *Miller* v. *Marks*, supra note 11; *Adams* v. *Soul*, supra note 11; cf. note 11, supra.

\textsuperscript{25} "... the mere discount of the notes and the credit of the proceeds ... were not equivalent to parting with value." *Queen City Bank* v. *Reyburn* (1908, C. C. E. D. Pa.) 163 Fed. 597, 600. "The mere crediting of an account by a bank to its depositor, where the effect of the credit is only to indorse the balance due the depositor, is not a payment, and does not make the bank a purchaser for value." *Brewer*, J., in *Fox* v. *Bank of Kansas City*, supra note 10, at p. 443, 1 Pac. at p. 791. It must be apparent that these quotations are statements of the result and not of the reasons for that result.
giving of the transferee’s own non-negotiable instrument is likewise held not to be value because if sued upon the obligation the transferee might set up the lack of consideration as a defense.

To determine the justification of these reasons for giving this effect to those facts which are held or are not held to be value let us in every case suppose that the transferee is deprived of his claimed extraordinary right as against prior parties on the instrument and consider the nature of the disadvantage he thereby suffers. The creditor who accepted negotiable paper in payment of an antecedent debt is under no additional liability or duty because of that acceptance; at most he has assumed an economic risk, or “taken a chance” that the ability of his debtor to pay will change to his disadvantage. So the creditor who took collateral security for a pre-existing debt, and who did not agree to forbear or extend the time for payment, assumed no liability and his only risk, now that the security is valueless, is that at the time he chooses to sue upon the debt his evidence will not be available or that his debtor will be insolvent. And if the debt thus secured was not yet due, even this risk is not taken. Where one took a note to indemnify himself against an already existing contingent duty or liability, he likewise assumed no additional duty or liability, and actually received a gratuitous benefit the losing of which leaves him no worse off than when he made his promise. And often where, as by the issuance of a negotiable instrument, a duty or liability has been assumed, the transferee might possibly destroy it,—as by stopping payment on a check while it was still in the payee’s possession, or having a note in the payee’s hands surrendered up for cancellation. Certainly somewhat analogous, if not greater, disadvantageous risks are incurred by a transferee.

2 The running of the statute of limitations is not the imposition of a liability, but rather part of the risk hazards by forbearing to sue. Liability connotes that some human being has a power to impose a duty or disability; and no human being has any power to alter the passage of time.

If the transferor had given counterfeit money instead of a note to which there were defenses, it is clear that the taker would not have incurred any additional legal liability, duty, or disability. At most he would be unfortunate in that the apparent protection gratuitously given him was no actual protection.

Such a procedure seems ineffective against a subsequent bona fide purchaser, although extensive negotiation after the date of a check may be sufficient to protect the drawer when sued upon the instrument. See Chafee, Rights in Overdue Paper (1918) 31 Harv. L. Rev. 1104. There seems to be no duty on the drawer to stop payment, after he receives notice of the infirmity in the instrument he took; and such omission does not preclude him from being a holder for value. Miller v. Marks, supra note 11; Matlock v. Scheuerman, supra note 11; cf. Simmons v. Hodges, supra note 11.

bank which credits the transferor's account and then is deprived of the
benefit of the claims against prior parties on the negotiable paper which
it took. If, believing that a valid defense to the note exists, it with-
draws the credit after the depositor has issued checks against the credit
but before any such checks have been honored, the possibility of having
to spend money in the defense of and perhaps lose a slander of credit
suit seems a serious risk. This risk is enhanced by the anomaly that the
decision of a jury in a suit between the bank and the prior party on the
instrument is not only not res judicata but is not even admissible in
evidence in a suit between the bank and the transferor. And the
transferee who gave his non-negotiable instrument in payment, as in the
instant case, assumed a very real risk in that a jury upon the facts pre-
sented might find against him upon the defense of lack of considera-
tion. In both of these instances the transferee must decide a question
of fact at its peril. Since the assumption of the enumerated procedural
and economic risks by the transferee, risks at times highly hypothetical,
seems to be the justification for making certain facts constitute value,
it seems that there is a sufficient similar procedural and economic risk to
make the giving of bank credit and the issuance of non-negotiable
instruments have the effect of value.

It seems that in reaching and adhering to the results here indicated—
that taking to secure an unmatured antecedent debt is value, and the issu-
ing of non-negotiable paper is not—the courts have been working out

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30 Where the transferor was the transferee's correspondent bank, mutual entries
upon their books were held to be value. Farmers' Bank v. Nissen, supra note 10.
If the transferor was indebted to the transferee the transaction might be a
payment of an antecedent debt; if the balance was the other way the transferee's
debt to the transferor would have been increased, in effect a loan to the transferee
of the amount of the credit, a situation somewhat analogous to the creation of a
deposit for an individual. Since the balance of the account between correspondent
banks is constantly shifting, it would be accidental whether or not the transferee
gave value in the sense of discharging an antecedent debt. Here is a clear
instance where outside factors, such as banking practice, have given to this
transaction the effect of "value" without regard to the state of the accounts.

31 Where conditions permit interpleader this risk is decreased. But interpleader
seems permissible only as against claimant owners. And even so, for the bank to
ask an interpleader is to incur a business risk, that of losing a customer if he is,
proved to be right and the claimant wrong.

32 The reason why particular legal effect is given to a set of facts is difficult to
state. While some courts have assumed that these reasons like the Ten Command-
ments have descended from Heaven in the form of incontrovertible "principles
of the law" it must be apparent that the real reasons are found in the experience
of mankind working with rules adopted in the trial and error system, and in the
largely unconscious conception of what would be feasible, practical, and just.
Commercial law is intensely pragmatic and the pragmatic basis for the decisions
should be recognized to-day as clearly as it was in the day of Lord Mansfield and

33 The same jurisdictions often have these two results existing side by side.
Compare Oppenheimer v. Radke (1912) 20 Calif. App. 518, 129 Pac. 798 (bank
credit) with Sackett v. Johnson (1880) 54 Calif. 107 (collateral); Warman v.
divergent and fundamentally inconsistent rules. The persistence of the divergence may, perhaps, be attributed to a confusion of the dual nature of the term value. In one sense it is synonymous with valuable and is used as a reason to explain a result; in the other senses it is used as a generic term to designate those facts which effect a result, the reason for the result being found outside the syllogism of proof. The courts have employed the use of the term that appeared most appropriate to justify their decision. A definite, positive rule harmonizing the effect of these two uses is desirable. And if, as was said nearly a century ago, “It is for the benefit and convenience of the commercial world to give as wide an extent as practicable to the credit and circulation of negotiable paper,” the rule of the instant case needs changing and the giving of a non-negotiable instrument or of bank credit by the transferee, all the other facts being admittedly present, should be made to constitute the transferee a holder in due course.

THE POWER OF STATE COURTS TO ENFORCE FEDERAL STATUTES

State courts with increasing frequency in recent years have been called upon to enforce legal relations arising from federal statutes. But federal laws, criminal or penal in nature, have not generally been deemed within their cognizance. The enforcement of the National Prohibition Act presented this question anew. In Goulis v. State (1923) 140 N. E. 294, the Massachusetts Supreme Court held that a judge of a state court had the privilege and power under U. S. Rev. Sts. 1878, sec. 1014, which is embodied in express terms in the National Prohibition Act, to cause arrest, to conduct a hearing, to determine probable cause, to hold the accused for trial before the United States Court of Appeals.

A Akron First Bank (1900) 185 Ill. 60, 57 N. E. 6 (bank credit) with Zollman v. Jackson Trust Bank (1909) 238 Ill. 290, 87 N. E. 297 (collateral); Montrose Savings Bank v. Claussen (1907) 137 Iowa, 73, 114 N. W. 547 (bank credit) with Voss v. Chamberlain (1908) 139 Iowa, 569, 117 N. W. 269 (collateral); Dreiling v. Bank of Battle Creek (1890) 43 Kan. 197, 22 Pac. 94 (bank credit) with Birket v. Elward (1904) 68 Kan. 295, 74 Pac. 1100 (collateral); Third National Bank v. Exum (1913) 163 N. C. 199, 79 S. E. 498 (bank credit) with American Bank v. Hill (1915) 169 N. C. 235, 86 S. E. 299 (collateral).


"U. S. Rev. Sts. 1878, sec. 1014 provides that "for any crime or offense against the United States, the offender may . . . by any chancellor, judge of a supreme or superior court . . . of any state where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense." Tit. II, sec. 2, of the National Prohibition Act, Act of Oct. 28, 1919 (41 Stat. at L. 305, 308), provides that "section 1014 of the Revised Statutes of the United States is hereby made applicable in the enforcement of this Act."
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District Court and to order that liquors seized on search warrant be turned over to the United States. The decision is based squarely on the proposition that the judge had jurisdiction to act by virtue of authority expressly conferred upon him by the National Prohibition Act. The court completely ignored the question necessarily raised by the criminal character of the National Prohibition Act. It seems strange that the court did not attempt to distinguish the case from the famous obiter dictum of Mr. Justice Story in Martin v. Hunter's Lessee, to which reiterated lip service has been given, to the effect that "no part of the criminal jurisdiction of the United States can consistently with the Constitution of the United States be delegated to state tribunals." The court seemed to prefer to ignore this controversy, which has existed in our law from the earliest days, than to offer a basis in precedent or in theory supporting its decision. Such a justification exists both in precedent and in principle.

The state of the decisions is one of conflict. In fact one commentator has been led to the conclusion that "state courts cannot find, in their own inherent powers, and cannot acquire through acts of Congress, the requisite authority to enable them to entertain a proceeding, criminal in its nature and designed for the vindication of a purely public right, to enforce a criminal or penal statute of the federal government." But this is not the net result of the decisions or of reasoning on this subject. On the contrary, the spell of the taboo against enforcing foreign penal laws has been broken in many jurisdictions. These are the arguments almost uniformly presented. (1) The extension of jurisdiction to state courts over crimes and offenses against the United States in various acts of Congress is not an original grant of power, but operates to remove a disability created by the Judiciary Act of 1789, which gives to the courts of the United States exclusive jurisdiction of all crimes and offenses against the United States. Congress can give back what

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3 Martin v. Hunter's Lessee (1816) 1 Wheat. 304, 337. The court might also have cited Claflin v. Houseman (1876) 93 U. S. 130, 140, where the dictum is distinguished.
4 48 L. R. A. 33, 40, note.
5 After a fairly exhaustive review of precedents Mr. Justice Bradley in Claflin v. Houseman, supra note 3, at p. 140, says, "These instances show the prevalent opinion which existed, that the state courts were competent to have jurisdiction in cases arising wholly under the laws of the United States; and whether they possessed it or not, in a particular case, was a matter of construction of the acts relating thereto." See also p. 136.
6 "The Judiciary Act of 1789 gives to the courts of the United States exclusive jurisdiction of all crimes and offenses cognizable under the authority of the United States, except when the laws of the United States shall otherwise provide. And we accordingly find that in various acts of Congress this reservation is expressly made, and is done not by way of grant of any power but to remove a disability created by the Judiciary Act of '89." Stearns v. United States (1835, C. C. 2d) 2 Paine, 300, 304; State v. Wells (1835, S. C. Law) 2 Hill, 687, 697. Contra: "State courts may, where not otherwise restricted, exercise jurisdiction over cases where they might have done so independent of the constitution and laws of the
the Judiciary Act of 1789 took away. The removal of this statutory disability restores to the state courts the jurisdiction which they had previously possessed. Federal and state courts, thus, have concurrent jurisdiction to the extent permitted by the federal statute. (2) The penal laws of the United States are not laws of a foreign jurisdiction. "They are laws operating upon and binding on the same people as the government and laws of the several states." (3) The fact that state


Hartley v. United States (1816, Tenn.) Hayw. 45, 49; Houston v. Moore (1820) 5 Wheat. 1, 27, 28; 1 Kent, Commentaries (13th ed. 1884) 389, 398; The Federalist, No. 82; 2 Story, Commentaries on the Constitution (5th ed. 1891) 535-537; State v. Randall (1837, Vt.) 2 Aikens, 89.


Stearns v. United States, supra note 6, at p. 310: "I cannot concur . . . . that the laws of the United States are to be considered as the laws of a foreign government. . . . The laws of one state may be considered as foreign in relation to the government and actions of a state, because in no sense binding without the jurisdiction of the state. Not so with respect to the laws of the United States." Analysis reveals that federal laws establish legal relations between all citizens of the United States and that the same people affected by state laws are involved.

Hohfeld, Fundamental Legal Conceptions (1923) 85. "Every citizen of a state is the subject of two distinct sovereignties having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its constitution in the exercise of such jurisdiction. . . . So rights, whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the state courts, competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it sees fit, give to the Federal Courts exclusive jurisdiction." Claflin v. Houseman, supra note 3, at p. 136. "Counsel . . . . endeavors to assimilate the laws of the United States with those of foreign governments. . . . Their laws are not the laws of the land. . . . The citizens of the state owe no obedience to foreign laws; they have no voice in making them, and . . . . cannot be bound by them; not so as respects the laws of the United States; they are framed by our representatives, and by solemn compact are as obligatory as those made by the state legislature." Hartley v. United States, supra note 7, at p. 50. There is a "tendency to confuse the jurisdiction of the court with the subject matter over which it is exercised, and the failure to discriminate between the sources of jurisdiction and the source of the rights which are the subject of the jurisdiction. That such jurisdiction and rights may have different sources is illustrated by the practice of courts of enforcing rights arising out of acts of a foreign country." 48 L. R. A. 33, note. Contra: State v. Lathrop (1819, N. Y. Sup. Ct.) 17 Johns. 4, 8, 9. But see dissenting opinion of Platt, J., at p. 11. The following cases contain similar reasoning:

Jackson v. Rose (1816) 2 Va. Cas. 34, 35; Davidson v. Champuis (1828) 7 Conn. 244, 248; Ely v. Peck (1828) 7 Conn. 239, 241; State v. Tuller (1857) 34 Conn. 280, 296; Teall v. Felton (1848) 1 N. Y. 537, 546.
judges and courts are amenable only to state authorities does not affect the question of privilege or power.\textsuperscript{10} (4) Conditions are such that it is not only of great convenience to the people of the state but circumstances may arise in which the safety and permanence of the national government will depend upon such cooperation between federal and state agencies.\textsuperscript{11} State courts clearly would have jurisdiction over the persons of the defendants, the crime having been committed within state territory, provided neither the federal statute in question nor the state constitution or statute inhibits the exercise of such jurisdiction.\textsuperscript{12}

As to the legal relations that are created between the citizens of the state by the federal statutes which are the source of the rights to be enforced, no authorities in the state can defeat their creation, modify their scope, destroy their validity, or prevent their ultimate enforcement. And since state courts have jurisdiction over the persons within the


\textsuperscript{11} "Whenever the time comes when the laws of the union shall be disobeyed and looked upon as the laws of a foreign sovereignty and when all our courts and judicial officers withdraw from them sustentation, then that anarchy, with its threatening aspect, will come again which shortly preceded the formation of the present constitution. . . . A judge has no right to be a politician; but when such are the consequences of disregard to the laws of the union . . . he may feel an invigorated desire to execute them. . . . If the United States are willing that infractions of their penal laws shall be heard and adjudged in our own courts, shall we say no?" Hartley v. United States, supra note 7, at p. 53. In differing with the decisions in New York and Virginia to the contrary, Judge Haywood says regarding the latter especially, "I see in that state the most illustrious characters; the ornaments of mankind; much to imitate and much to praise; but so far as they contradict the opinion now given, I must say, Cato Amicus et Plato Amicus sed major Amicus veritas." Ibid. 56.

\textsuperscript{12} Mr. Justice O'Neill in State v. Wells, supra note 6, at p. 697, says, "It seems to me undeniable that every violation of a law of the United States, is, when committed in South Carolina, by a person subject to her jurisdiction, a violation of the law of South Carolina, for which she has the common law power of punishing the offender; unless she, through Congress, has made the Federal Judiciary her agent for that purpose. A violation of statute law which is made criminal . . . . may be punished by any Court where the law is obligatory, which has a general criminal jurisdiction, and which also has local jurisdiction of the act done, and of the person of the offender." The position that federal laws establish legal relations between all citizens of every state and that the violation of such federal laws is \textit{per se} and \textit{pro tanto} a violation of the laws of the state seems consistent on analysis. State v. Wells, supra note 6, at p. 697, discusses the power of state courts to punish all crimes against the state in accordance with common law principles and develops the analogy believed to be analytically sound that as federal laws establish legal relations between all citizens of every state the violation of such federal laws is \textit{per se} and \textit{pro tanto} a violation of laws protecting the state. "The two together form one system of jurisprudence, which constitutes the law of the land for the state." Claflin v. Houseman, supra note 3, at p. 137. The enabling statutes have always made the possession of adequate jurisdiction under state law and freedom from inhibitory state laws conditions precedent to the power to enforce federal statutes. U. S. Rev. Sts. 1878, sec. 1014.
state, the questions become simply these: Can Congress empower the courts to aid in enforcing these legal relations between the citizens of the state? Under state laws, has the court power to enforce such relations? The misconception that Congress grants power has yielded to the view that Congress removes the prior Congressional inhibitions upon state courts' powers. But whether state courts will exercise this power voluntarily is another question, the answer to which lies beyond this discussion. The conflict is probably due to the divergent views of state courts on the various social, economic, or political issues latent in the cases involving the question of jurisdiction. Whether state courts are under a duty to exercise such jurisdiction is also a distinct question. Apparently no federal court has answered the question in the affirmative. But until the National Prohibition Act, no federal statute with criminal or penal implications has created legal relations which are so subject to widespread violation. It seems evident that either the state courts must be relied on or the number and extent of federal courts must be greatly increased if the National Prohibition Act is to be vindicated in this generation. The question of compelling state cooperation will not demand an authoritative answer unless state agencies generally refuse voluntary aid in enforcement.

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13 Note 5, supra.
14 *Hartley v. United States,* supra note 7, at p. 49; *Claflin v. Houseman,* supra note 3, at p. 139. See *Second Employers' Liability Cases,* supra note 1, at p. 55, 32 Sup. Ct. at p. 177.
15 But that is not deemed to be conclusive nor is it very significant in view of the limited scope of such federal statutes prior to the National Prohibition Act, the absence of urgent need of state aid in enforcing their provisions, and the strength of the dogma of state rights throughout the last century. Probably not more than a score of cases of failure by state courts voluntarily to enforce rights created by federal statute have occurred during our history. In the past such refusals have little inconvenienced the citizens to whom such a duty, if posited, would be owed, and the enforcement of the federal act has not been rendered nugatory. Early in our history certain federal revenue laws, by express stipulation penal in character, were made enforceable by state courts. See *Hartley v. United States,* supra note 7; *United States v. Smith* (1818) 4 N. J. L. 33; Act of August 2, 1813 (3 Stat. at L. 72); *Buckwalter v. United States* (1824, Pa.) 11 Serg. & R. 193, 196. Certain postal laws also permitted concurrent enforcement. See *State v. Wells,* supra note 6. Federal bankruptcy laws penal in effect also privileged state court action. See *Claflin v. Houseman,* supra note 3.
16 This does not seem probable. The Wright Act of California, Calif. Sts. 1921, at p. 79, is illustrative of the attitude of the states. Section 1, after reciting the requirements of the federal constitution, provides: "To that end, the penal provisions of the Volstead Act are hereby adopted as the law of this state; and the courts of this state are hereby vested with jurisdiction, and the duty is hereby imposed upon all prosecuting attorneys, sheriffs, grand juries, and peace officers in the state to enforce the same." See *Harris v. Superior Court* (1921, Calif. App.) 196 Pac. 895; *Corse v. Marsh* (1922, Calif.) 210 Pac. 257 (cafe). *Martin v. Hunters' Lessee,* supra note 3, early presented the issue, but neither convenience, policy, nor urgency dictated decisive action at that time. The *Second Employers' Liability Cases,* supra note 1, indicates the modern attitude regarding the duty of the State court. Had the Supreme Court of Connecticut ignored the mandate of
A related question not yet ruled upon by the United States Supreme Court is raised by Sec. 22, Title II of the National Prohibition Act which empowers "any state court having jurisdiction to hear and determine equity cases, to enjoin any nuisance" as defined in the Act. Here, too, the federal statute creates legal relations between all citizens of the United States, and is the source of legal relations between citizens of any state. That equity powers under state laws instead of legal powers are to be exercised seems clearly immaterial. That the relations created by the federal statute are enforcible by injunction does not make them less the law of the land than if they were civil relations enforcible in a law court of the state. It is not surprising then that in the recent case of Ex parte Brambini (1923, Calif. App.) 218 Pac. 569, affirming its former decision, the court decided in favor of the jurisdiction of the state courts. It decided also that the procedure as fixed the United States Supreme Court the question of sanction for the duty would have been squarely raised, as in Martin v. Hunters' Lessee, supra note 3, at p. 305. That mandamus proceedings would not lie to compel state judges to function is commonly asserted. It is suggested that a beginning in that direction has been made in those cases in which a mandamus has issued from a federal court to state officers, e.g. Riggs v. Johnson County (1867, U. S.) 6 Wall. 166. Relying upon the reasoning in State v. District Court of Waseca County (1914) 126 Minn. 501, 148 N. W. 463; 38 Ann. Cas. 199, note; and in Ex parte Campbell (1901) 130 Ala. 196, 30 So. 521, in conjunction with the views expressed in the Second Employers' Liability Cases, supra note 1, the United States Supreme Court might with comparative ease dispose of the theoretical inhibition against compelling state courts. See 38 Ann. Cas. 199, note. Query: Does giving "the party . . . aggrieved . . . liberty to apply to a judge of the United States, who issues the writ of error" to the United States Supreme Court amount to a sanction for the duty of the state judge to adjudicate the case although "no compulsory process is . . . provided by law to oblige him"? Martin v. Hunters' Lessee, supra note 3, at p. 379. It is suggested that "the existence of jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." Second Employers' Liability Cases, supra note 1, at p. 58. It is also suggested that once duty is posited, means of securing its performance would not be wanting, dicta to the contrary notwithstanding.


Note 38: Second Employers' Liability Cases, supra note 1, at p. 57, 32 Sup. Ct. at p. 178.

Note 39: In the Second Employers' Liability Cases, supra note 1, at p. 56, 32 Sup. Ct. at p. 177, the court said: "We are quite unable to assent to the view that the enforcement of the rights which the congressional act creates was originally intended to be restricted to the Federal courts. The act contains nothing which is suggestive of such a restriction, and in this situation the intention of Congress was reflected by the provision in the general jurisdictional act, "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds exclusive of interest and costs two thousand dollars, and arising under the Constitution or laws of the United States. August 13, 1888, 25 Stat. [at L.] 433, chap. 866, § 1. Robb v. Connolly, 111 U. S. 624, 637; United States v. Barnes, 222 U. S. 513."

Note 30: Carse v. Marsh, supra note 16. The court relied upon the Second Employers' Liability Cases, supra note 1, at p. 58, 32 Sup. Ct. at p. 178, as directly supporting its view.
by the state law controls the issuance of injunctions.\textsuperscript{21} The Prohibition Act contains nothing suggestive of an intent to confine enforcement to the federal courts. Consequently the reasoning of the court seems correct. The National Prohibition Act "of its own force constituted any place in this state where intoxicating liquor is illegally sold a public nuisance." Any state court having jurisdiction where the nuisance occurred has the power to abate such a nuisance by appropriate proceedings at the instance of a district or county attorney in the name of the United States. The authority of the court to issue injunctions must be found in the law of the state.

It seems safe to predict that the Supreme Court will uphold the enforcement by state courts of both criminal and civil rights arising under federal statutes, by the application of equitable as well as common law remedies, when under the state law the courts have power, and when according to the federal act state courts have concurrent jurisdiction.

\textbf{INTERFERENCE BY THIRD PARTIES WITH THE PRIVILEGE OF A LICENSEE}

That licenses with respect to real estate\textsuperscript{3} carry with them no rights to protection against interference has been frequently stated with unhesitating precision. Yet as to the justice of the rule or the policy on which it is based little seems even to have been thought. A license has been defined innumerable times to be a mere personal revocable privilege to do an act or series of acts upon the land of another without possessing any interest or estate in that land.\textsuperscript{2} From this conception as a major

\textsuperscript{21}Two other questions were presented, namely, (1) whether an injunction erroneously issued under state procedural law because of a defect in the complaint could be disobeyed with impunity, (2) whether a state statute becoming effective after the commencement of the action, which adopted the National Prohibition Act as the law of California, controlled the case. The presence of these additional questions and their answer in the negative does not qualify the holdings pertinent to the issue in hand.

\textsuperscript{3}For the best general discussions on licenses see 2 Tiffany, 	extit{Real Property} (2d ed. 1920) 1201; Clark, 	extit{Licenses in Real Property Law} (1921) 21 Cal. L. Rev. 757; and Hohfeld, 	extit{Faulty Analysis in Easement and License Cases} (1917) 27 Yale Law Journal 66.

premise, the decision in *Taft v. Bridgeton Worsted Co.* (1923, Mass.) 141 N. E. 119 follows logically enough. The plaintiffs, owners of part of the land under a pond created by the defendant's dam, cut ice on the entire pond. The defendant, unreasonably and with intent to injure the plaintiffs, drew down the water at a time when the ice was ready to be cut. The court allowed damages for the injury only to the ice over the plaintiffs' own soil and not for that over the land of a third party which they had a mere gratuitous parol license to cut. The court said that "the damage to their right to exercise their revocable license was a damage which the law does not recognize as an injury to their property."

The holding undoubtedly represents the orthodox view. But is it not unfair that such a palpable injury should be without remedy? The plaintiffs' privilege to cut ice off the pond above the licensor's soil was, it is true, subject to revocation by the licensor. But neither the defendant nor any other third party could extinguish the privilege as a legal

The reason given for regarding a license as a mere personal privilege is that the law will not recognize new and unusual interests in land. *Hill v. Tupper* (1863, Exch.) 2 Hurl. & C. 121. As to the inadequacy of this reason see *Comments* (1923) 32 Yale Law Journal, 813. See the same case on demurrer (1921) 237 Mass. 385, 130 N. E. 48; 13 A. L. R. 528, note.

4 *Hill v. Tupper, supra* note 2; *Balcom v. McQuesten* (1889) 65 N. H. 81, 17 Atl. 638; *Fletcher v. Livingston* (1891) 153 Mass. 388, 26 N. E. 1001; *Walker Ice Co. v. American Steel & Wire Co.* (1904) 185 Mass. 453, 475, 70 N. E. 937, 942, dissenting opinion; *Elliott v. Mason* (1911) 76 N. H. 259, 81 Atl. 701; 2 Tiffany, op. cit. 1202, where the point is made that if a supposed license conveys rights against third parties it is ipso facto more than a license. The point arises more frequently in the case of a license to occupy land under the owner. Thus a husband has no insurable interest in his wife's house in which he lives. *Bassett v. Farmers' & Merchants' Ins. Co.* (1909) 85 Neb. 85, 122 N. W. 703; *contra: Kludt v. Ger. Mut. Fire Ins. Co.* (1913) 152 Wis. 637, 140 N. W. 321; 66 L. R. A. 657, note. A licensee of a house has no remedy for a nuisance on neighboring land. *Kavanaugh v. Barber* (1892) 131 N. Y. 211, 30 N. E. 235; *Hughes v. Auburn* (1899) 167 N. Y. 98, 55 N. E. 389; but see *Ft. Worth & Rio Grande Ry. v. Glenn* (1904) 97 Tex. 585, 80 S. W. 992; *Pere Marquette R. R. v. Chadwick* (1917) 65 Ind. App. 93, 115 N. E. 678; cf. cases in which he is allowed to recover damages for injuries caused by negligence. *Holly v. Boston Gas Light Co.* (1857, Mass.) 8 Gray, 123; *Hosmer v. Republic Iron Co.* (1913) 179 Ala. 415, 60 So. 801. The language of the Texas court is helpful: "If a suit be brought for an injury to real estate caused by a nuisance, it is clear that the plaintiff must show that he has some right which has been injuriously affected. If the damage be to the right of those occupying the property at the time, he must prove title, or at least right of occupancy. If it be of such permanent character as to cause damage to an estate in reversion or remainder, the reversioner or remainderman, if he sue, must prove his title as such. But why should the owner of a house be allowed to recover damages for being made sick by a nuisance created in the vicinity thereof, and another lawful occupant be denied a remedy for a like reason?" *Ft. Worth & Rio Grande Ry. v. Glenn, supra* at p. 589, 80 S. W. at p. 994.
relation. Why then should the law permit him to destroy its value?5 Why should not the law create in the holder of the privilege a right that third parties should not unreasonably interfere with it?

Had the plaintiff in this case had an easement or a profit à prendre in the land of his licensor, he would unquestionably have been given rights to protection against interference,—rights in rem with respect to it.8 But such rights, though more obvious elements of ownership, are usually not as valuable as the privilege of user, enjoyed alike by the owner of an easement and a licensee. The significant difference ought to be merely that the privilege granted to the owner of the easement or profit carries with it as against the grantor an immunity from revocation, whereas in the case of a mere license the licensor retains the power to revoke,9 even though he may be under a contract duty not to exercise.

5 There have been occasional indications in the law that an injury to the privilege of a licensee should be remediable. Case v. Weber (1890) 2 Ind. 108 (recovery allowed for injury to plaintiff’s license to flow water across licensor’s land); Walker Ice Co. v. Amer. Steel & Wire Co., supra note 4 (where the plaintiff’s “lease” to cut ice had expired, and it was allowed a recovery for damage to the ice on the theory that it was a tenant at will. The dissenting opinion points out that the plaintiff was a mere licensee); see Richards v. Gauffret (1888) 145 Mass. 486, 14 N. E. 535 (“By the lease [to cut ice on “lessor’s” pond] the plaintiff acquired a valuable right, and it would be a reproach to the law if it did not furnish him a remedy for an unlawful encroachment upon this right by a stranger. It is not necessary to discuss the somewhat nice questions whether the plaintiff had such an interest in the land that he could bring trespass”); cf. Paul v. Hazen (1874) 37 N. J. L. 106 (trespass allowed for invasion of plaintiff’s exclusive privilege to occupy oyster bed, the court saying “trespass . . . will lie however temporary the plaintiff’s interest in the soil, if it be in exclusion of others”); Miller v. Greenschi (1893) 62 N. J. L. 771, 42 Atl. 735 (trespass allowed for injury to plaintiff’s drain across licensor’s soil, court saying, “An unrevoked license has value; and, as against everyone but the licensor or those claiming under him, an action ought to lie for an injury to the licensee”); Handforth v. Maynard (1891) 154 Mass. 414, 28 N. E. 348; Keystone Lumber Co. v. Kolman (1896) 94 Wis. 465, 69 N. W. 165.

8 A reasonable interference would not be actionable even if plaintiff’s interest were an easement or a profit. Ognio v. Elm Farm Milk Co. (1916) 90 Conn. 393, 97 Atl. 308; Portland Sebago Ice Co. v. Plumney (1918) 117 Me. 153, 103 Atl. 150.

9 The right [ privilege] to cut ice is a profit. Huntington v. Asher (1884) 95 N. Y. 604.

10 Fitzgerald v. Firbank (1897) 2 Ch. 96; Richards v. Gauffret, supra note 5; Cusack v. Meyers (1920) 189 Iowa, 190, 178 N. W. 401; 2 Tiffany, op. cit supra note 1, at pp. 1203, 1389, note 10. English courts in refusing to recognize an easement as an interest in land have at least been consistent in according licenses the same treatment. But American courts have recognized easements and yet refuse to consider licenses. See Comments, loc. cit. supra note 2.

that power. But in cases where a consideration has been paid or large sums expended in reliance on what appears to be a mere license, courts have gone some length to find that the actual transaction between the parties was a contract for an easement, in order to protect the claimant of the privilege against revocation.

Between the parties the power of revocation is no doubt important, but as against third parties it should be immaterial. In other fields of law one person can create in another, even gratuitously, rights against a third party, although retaining the power to extinguish the relations he has created. The settlor of a revocable trust creates in the cestui que trust rights against the trustee, and creates in the trustee (if not in the cestui) rights in rem with respect to the trust property as long as the trust remains unrevoked. Even in property law an owner of land may create in a tenant at will a right of possession against third parties, though it may be terminated at the pleasure of the owner. The privilege is personal in the sense that it is non-assignable; but, by the majority rule, this is true of an easement in gross. A license is an insufficient interest in land to come within the statute of frauds, but it nevertheless has value to the licensee.


6. For a discussion of the assignability of easements in gross, approving minority rule, see Comments, loc. cit., supra note 2.

7. Wood v. Lake (1775, K. B.) Sayer, 3. It is a familiar rule that a license may be created by parol. 2 Tiffany, op. cit. 1204.
Courts have been gradually extending their protection to increasingly meagre "interests in land." For a long time contingent remainders, now carefully sheltered interests in land, were regarded at best as choses in action. The expectancy of an heir is even now barely struggling over the threshold of legal cognizance; at common law it is not a present interest capable of being the subject of a contract, but in equity it may be assigned pursuant to a fair bargain. Yet these interests are uncertain as to their very existence, while a license confers a tangible present benefit. In the instant case the plaintiffs were allowed to recover the value of the ice over their own soil. Yet only the value of their privilege of cutting ice was destroyed, and no other of the elements of their ownership. And this is the very interest which they had in the land of their licensor.

The same policy which guards this interest in the one case should be invoked to protect it in the other.

THE CONSTITUTIONALITY OF THE SHIP MORTGAGE ACT

An adherence to the eighteenth century denotation of the constitutional phrase "admiralty and maritime jurisdiction" plus an observance

Prior to 1435, the contingent remainder was utterly disregarded. Williams, Real Property (22d ed. 1914) 361. This was due to the rule prohibiting the creation of estates in future. Tiffany, op. cit. 50. It is now freely assignable. Fulton v. Teager (1910) 183 Ky. 381, 209 S. W. 535; Vance v. Humphreys (1922) 210 Mo. App. 498, 421 S. W. 91.

The assignment will be enforced as soon as the property comes into the heir's possession. Tate v. Greenles (1918) 141 Tenn. 103, 207 S. W. 716; Richey v. Richey (1920) 189 Iowa, 1200, 79 N. W. 830; Klingensmith v. Klingensmith (1921) 193 Iowa, 359, 185 N. W. 75; (1922) 21 Mich. L. Rev. 219; see Johnson v. Breeding (1916) 136 Tenn. 528, 190 S. W. 445 (heir predeceased ancestor). Although such expectancy is made contingent by the provisions of a will. Dunning, Roberts & Co. v. McDougal (1916) 200 Ill. App. 583; contra: Flatt v. Flatt (1920) 189 Ky. 801, 225 S. W. 1067; Thiessen v. Moore (1922) 105 Ohio St. 401, 137 N. E. 905; Consolidation Coal Co. v. Riddle (1923, Ky.) 248 S. W. 530.

As the court points out, the question is whether the defendant may commit an act which will "cause serious pecuniary damage to the right [privilege] which is incident to the ownership of the servient estate, to use and consume the waters in liquid or in congealed form."

In estimating damages the jury would have to determine the value of the interest, and the revocability of the license might reduce its value as compared with an easement.

In the instant case it seems that the same result might have been worked out on the theory that the defendant's action was a malicious injury of the plaintiff in his trade. Keeble v. Hickeringill (1809, K. B.) 11 East, 574; Tuttle v. Buck (1909) 107 Minn. 145, 119 N. W. 945; (1922) 32 YALE LAW JOURNAL, 194.

"Its terms are indefinite, and its true limits can be ascertained only by reference to what cases were cognizable in the maritime courts when the constitution was formed,—for what was meant by it then, it must mean now." Catron, J., in People's Ferry v. Beers (1857, U. S.) 20 How. 323, 401; see also The Lotiawonna (1874) 88 U. S. 558, 574.

"The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction." U. S. Const. Art. III, sec. 2.
of the postulate that Congress can neither add to nor subtract from the subjects of admiralty jurisdiction\(^a\) threatens the validity of the Ship Mortgage Act\(^b\) and may presage the defeat of this legislation which enables sounder marine financing. Seventy years ago the Supreme Court held in *The John Jay*\(^c\) that ship mortgages were not a subject of admiralty jurisdiction,\(^d\) at least in the absence of legislative sanction. The constitutionality of the Act, however, was sustained in the recent case of *The Nanking* (1923, N. D. Calif.) 292 Fed. 642.\(^e\)

The upholding of the Act of 1851,\(^f\) limiting liability for maritime torts, and the sustaining of the Act of 1910,\(^g\) giving a lien against a

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\(^a\)"But the judicial power, which, among other things, extends to all cases of admiralty and maritime jurisdiction, was conferred upon the Federal government by the Constitution, and Congress cannot enlarge it, nor even to suit the wants of commerce, nor for the more convenient execution of its commercial regulations." Clifford, J., in *The Belfast* (1868) 74 U. S. 624, 641; "It is true, we have held that the boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance and cannot be affected or controlled by the legislature whether state or national," Bradley, J., in *Butler v. Boston Steamship Co.* (1888) 130 U. S. 527, 529, 9 Sup. Ct. 612, 619; "The question as to the true limit of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no State law or act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be," Bradley, J., in *The Lottawanna, supra* note 1, at p. 570. Can this be read to recognize the court's power to change these limits? Compare the following: "I do not suppose that anyone would say that the words 'the judicial power shall extend to all cases of admiralty and maritime jurisdiction' by implication enacted a whole code for master and servant at sea, that could be modified only by a constitutional amendment." Holmes, J., dissenting, in *Knickerbocker Ice Co. v. Stewart* (1919) 253 U. S. 149, 167, 40 Sup. Ct. 438, 442.

\(^b\)"Act of June 5, 1920 (41 Stat. at L. 988). The Act gives priority to a ship mortgage in foreclosure proceedings over all maritime liens against a vessel except liens arising out of tort, for wages of seamen and longshoremen employed by the ship owner, for general average, and for salvage. Jurisdiction [power] is conferred upon the federal district courts to foreclose such a mortgage by a suit *in rem* in admiralty. The preferred status is created by the recording of the mortgage and endorsement of this fact upon the documents of the vessel.


\(^d\)"And the word maritime was doubtless added to guard against any narrow interpretation of the preceding word, 'admiralty.'" 2 Story, *Commentaries on the Constitution* (5th ed. 1891) sec. 1666. *The Oconee* (1922, E. D. Va.) 880 Fed. 927, accord.


vessel for supplies and repairs furnished in the home port establish the power of Congress to make changes within the admitted circle of maritime law and admiralty jurisdiction. So, too, Congressional power to extend the jurisdiction of admiralty by enlarging the circle to include subjects not previously cognizable has been affirmed. The Judiciary Act conferring jurisdiction on the district courts in admiralty under the impost, navigation, and trade law was early upheld. The extension of admiralty jurisdiction to the waters of the Great Lakes was originally sustained because of Congressional action. And the Act of 1884 extending the limited liability to include non-maritime torts was sustained. In addition, the Supreme Court, itself, has reversed its definition of what was within the circle of "admiralty jurisdiction" so as to include waters not within the "ebb and flow."

The doctrine of immutable definition of "admiralty jurisdiction" has received some approval by implication from the recent denial to the states of power to include workmen injured in maritime employments.

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10 Services and supplies rendered in the home port have always been enforceable by an in personam action in admiralty. The General Smith (1819) 17 U. S. 438. The effect of the Act was simply to give a lien for such maritime claims. It did not create a new class of liens for claims previously not maritime. The Dredge A (1914, E. D. N. C.) 217 Fed. 617.

11 The proposition that Congress cannot change the subject matter of maritime law, nor redefine "admiralty and maritime jurisdiction" is founded upon the assumption that there is some already existing a priori meaning of those words discoverable by patent inspection. The search for inherent meaning is futile. Words mean nothing except as the Supreme Court determines their legal effect; and for each new case in each new situation there must be, not an examination of the meaning of the word admiralty, but a determination of whether that word shall now be defined to affect the facts now under adjudication. "The great generalities of the Constitution have a significance that varies from age to age." Cardozo, The Nature of the Judicial Process (1921) 17.

12 Act of September 24, 1789 (1 Stat. at L. 73); Glass v. Sloop Betsey (1794, U. S.) 3 Dall. 6; United States v. La Vengeance (1796, U. S.) 3 Dall. 297.

13 Act of February 26, 1845 (5 Stat. at L. 726). The original decision was that the court of admiralty had no jurisdiction over waters not within the "ebb and flow" of the tide. The Steamboat Jefferson (1825, U. S.) 10 Wheat. 428. After this Act that test was repudiated. The Propeller Genesee Chief v. Fitzhugh (1851, U. S.) 12 How. 443. But subsequent cases denied that the Act had effected the extension of admiralty jurisdiction to hitherto non-maritime waters. The Eagle (1869, U. S.) 8 Wall. 15; Jackson v. Steamboat Magnolia (1857, U. S.) 20 How. 296. Jurisdiction over all navigable waters—"wherever ships float and navigation successfully aids commerce"—was held to have been conferred by the Act of 1789. The Hine v. Trevor (1866, U. S.) 4 Wall. 555.


15 Richardson v. Harmon (1911) 222 U. S. 96, 32 Sup. Ct. 77; The Steamdrudge No. 6 (1915) 222 Fed. 576; see Current Legislation (1920) 20 Col. L. Rev. 788, 793.

16 See note 13, supra.

17 Disturbing psychological factors were present in the Compensation cases. Liability without fault arouses men's emotions; it even affects judges. An attempt to invade the uniformity of federal control finds ready opposition. Such factors are largely absent from the Ship Mortgage problem, and to that extent the chances of constitutionality are enhanced.
within the scope of their compensation laws. "No such legislation is valid," declares the Court, "if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony of that law in its international and interstate relation." That result is in accord with previous decisions denying the states power to effect substantial changes in admiralty law.

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1 An award to the dependents of a stevedore killed working upon the docks given under the New York Workmen's Compensation Law was held invalid. Southern Pacific Co. v. Jensen (1917) 244 U. S. 205, 37 Sup. Ct. 524. Two bases of unconstitutionality were asserted: first, that the award conflicted with the federal control of maritime law; and second, that the award was inconsistent with the clause of the Judiciary Act "saving to suitors . . . the right of a common law remedy." See Comments (1917) 27 Yale Law Journal, 255; Notes (1917) 17 Col. L. Rev. 703; (1918) 31 Harv. L. Rev. 488. Congress by amending the saving clause of the Judiciary Act to include "the workmen's compensation laws of any state" sought to nullify the decision of the Jensen case. Act of Oct. 6, 1917 (40 Stat. at L. 385). See Senate Report No. 139, 65th Cong. 1st sess.; Comments (1918) 6 Calif. L. Rev. 69; Comments (1918) 27 Yale Law Journal, 924. The amendment was held unconstitutional. Knickerbocker Ice Co. v. Stewart, supra note 3; James Rolph Co. v. Industrial Accident Comm. (1923, Calif.) 220 Pac. 669. Congress again attempted to permit state compensation for longshoremen, by excepting the master and crew from the state law. Act of June 10, 1922 (42 Stat. at L. 634). See Notes (1924) 37 Harv. L. Rev. 387. It has also been held unconstitutional. State v. W. C. Dawson & Co. (Feb. 25, 1924) U. S. Sup. Ct. Oct. Term, 1923, No. 366. This case is not in line with a recent tendency to limit the Jensen case by exceptions. See State Ind. Comm. v. Nordenholt Corp. (1922) 259 U. S. 263, 42 Sup. Ct. 473. Where the contract and injury are both maritime in nature, admiralty has exclusive jurisdiction; where the contract is non-maritime and the injury is maritime, the state laws may be applicable; where the contract and the injury are non-maritime, the state compensation law applies. (1923) 32 Yale Law Journal, 283, 284.

2 McRynolds, J., in Southern Pacific Co. v. Jensen, supra note 18, at p. 216, 37 Sup. Ct. at p. 529. But it is by no means clear that lack of uniformity in compensation would be undesirable. All longshoremen live on the land. Their economic status and standard of living are largely determined by the local conditions under which they live. The state seems a sufficiently large unit to deal with these economic conditions, which are not uniform throughout the country. See Comments (1917) 27 Yale Law Journal, 255, 259.

3 The state's power to make a mortgage a maritime lien had previously been denied. The Lottawanna, supra note 1; cf. The J. E. Runbell, supra note 5. Nor can a state provide for a proceeding in rem in a maritime matter in its own courts. The Glide (1897) 167 U. S. 665, 17 Sup. Ct. 930. So a statute absolving a municipal corporation from liability for damage caused by its fire boat is ineffective. Workman v. Mayor of New York (1900) 179 U. S. 552, 20 Sup. Ct. 212. Nor can state laws change the rights of seamen, nor the liability of ship owners which has been fixed by maritime law. Barrett v. Macomber Co. (1918) 253 Fed. 205. And since the Jensen case it has been held that even in a state court the rules of maritime law, unaffected by state legislation, must be followed. Chelentis v. Luckenbach Steamship Co. (1918) 247 U. S. 372, 38 Sup. Ct. 501. So the state statute of frauds does not apply to maritime contracts. Union Fish Co. v. Ericksen (1919) 248 U. S. 208, 39 Sup. Ct. 112; see Comments (1920) 8 Calif. L. Rev. 114; Comments (1920) 28 Yale Law Journal, 500. Yet a state statute
Economic necessity developed and justified the early maritime rule that the “ship” was liable for the supplies furnished “it,” for services rendered to “it,” and for torts committed by “it.”\(^1\) There was no other security. The owner of the vessel was usually unknown and often far distant. Months must elapse before communication could be had with him. The master had no personal credit to pledge in the local money markets; interest rates were extortionate.\(^2\) These economic conditions have changed. The primary economic advantage of the Ship Mortgage Act is that it gives priority to the mortgage over subsequent liens, although the disputed legal problem involves the power to make such mortgages maritime liens.\(^3\) This priority is economically feasible. Telegraphic communication renders the transmission of credit more reliable security than the libelling of the ship. Repairs done in foreign ports are largely necessitated by accidents which are covered by insurance. Moreover, the bulk of shipping is carried on by large companies whose credit is known or easily ascertainable in any maritime center. Intensely pragmatic reasons justify the Act: investments in ships as in other commercial enterprises by the modern machinery of long time security devices must be made possible if an adequate American merchant marine is to be developed; the Government needed such protection in its sale of vessels on the installment plan.\(^4\) Against these conditions may give a remedy for death injuries, enforceable by proceedings in rem in the admiralty courts. The Corsair (1892) 145 U. S. 335, 12 Sup. Ct. 949; Hughes, Death Actions in Admiralty (1921) 31 YALE LAW JOURNAL, 115.

\(^{1}\) To say that the ship is liable is but a short hand way of expressing the result that claims against the owner of the vessel may be enforced by resort to in rem proceedings, which satisfy the claim by destroying pro tanto the owners’ “rights” in the ship. The situation is somewhat analogous to the liability of a corporation. The corporation is said to be liable for its tort and contract obligations, which expresses the result that the only property of the stockholders which may be availed of to satisfy these claims is that which the owners have contributed to the corporate enterprise.

\(^{2}\) At least three factors contributed to the high interest rates: the necessity of the borrower, the general insecurity and uncertainty of the times, and the risk involved in loaning to any particular unknown ship master.

\(^{3}\) The Act has two effects. It confers on federal courts jurisdiction in foreclosure proceedings and in suits in personam on the mortgage debt. In addition, it gives a preference to the mortgage lien, to that extent departing from the admiralty rules that liens have priority of effect in the inverse order of their attaching and that admiralty liens are to be paid before non-maritime liens. See The Lottawanna, supra note 1. That Congress can rearrange the order of preference of maritime liens is clear. Whether it can prefer non-maritime liens to maritime liens is yet in doubt. Even if it could, a uniform adjudication would be necessary, secure only in admiralty courts. The economic reason necessitates the legal change and the consideration of ship mortgages as a subject of admiralty jurisdiction.

\(^{4}\) The argument that ships can be mortgaged under the Act for other than “the risks and necessities of navigation” applies with equal effect to corporation loans, which may not be used for corporate purposes. The fact is that the present investment market will not take ship securities as readily as other forms of investments.
reasons of policy is the undeniable fact that the subsequent liens of
care and supply men are relegated to a deferred status. Modern
credit facilities and security, however, justify the rearrangement of the
priority of the liens.25

The Act may be sustained by overruling The John Jay and holding
that ship mortgages “are and always have been” a subject of admiralty
jurisdiction,—that the subject has always been within the circle.26 Or
The John Jay may be distinguished upon the ground that there was no
legislative permission at the time of the decision,—that the subject was
without the circle only until Congress brought it in. Or the Court
may recognize that the concept of “admiralty jurisdiction” must
constantly change to include whatever subjects Congress shall place
within the circle of maritime law.27 If Congress cannot alter the
content of the term “admiralty jurisdiction” “this important branch of
our national judicial system, alone of the entire structure, is immutable,
fixed and unalterable, responsive neither to the changing conditions nor
to the necessities of modern commerce, and subject to no expansion
either at the instance of state or nation.”28

DESCRIPTIONS IN DOCUMENTS TENDERED UNDER LETTERS OF CREDIT

In many letter of credit cases it is necessary to determine whether
the descriptions in the documents tendered fulfill the condition to the
obligor’s duty.1 As long as the letter of credit is unambiguous as to

Long time loans are necessary to build up the merchant marine. The argument
for and against the constitutionality is not so much one of law as it is of policy.
Whether one agrees with it or not depends largely upon the viewpoint from which
one looks. Again it is the problem of “the inarticulate major premise” that has
influenced much of our constitutional law.

Some difficulties in practice may be expected. The Act practically makes the
mortgage payable whenever the ship is seized. Supposing a general mortgage
covering a fleet of vessels, would the court prorate the charge on each? Again has
the Act any extra-territorial effect, except possibly between lienors of American
citizenship? See The Angela Maria (1888, D. S. C.) 35 Fed. 430 (foreign liens
enforced as between foreigners in accordance with their law). Undoubtedly a
foreign court would not prefer an American mortgagee to a native repairman.

1 It has not been sufficiently noted that the fundamentals of the letter of credit
transaction may and do exist without any letter; that banks may and do establish
a credit for the benefit of one party at the request of and against indemnity by
another without integrating the promise to the beneficiary into a formal letter,
and that the conditions to benefiting by such an informal credit may be the same
as those on the current documentary commercial credit. The formal letter of
credit which is finding wide discussion is only a species under the genus “third
just what documents are required and the descriptions as to the goods and other facts each must contain, there is no question as to what will constitute a literal performance. Two recent cases illustrate the difficulties that arise where the letter of credit is not clear or is silent as to the descriptions required in the documents tendered. In *Bank of Italy v. Merchants' National Bank* (1923) 236 N. Y. 106, 140 N. E. 211, a letter of credit guaranteed payment for “dried grapes” on presentation of the original bill of lading. The beneficiary of the letter tendered a bill of lading for “raisins.” It was held that this did not fulfill the condition of the defendant’s promise even though there was admittedly sufficient evidence to warrant a finding that “dried grapes” and “raisins” were in fact the same. On the other hand, in *Bank of America v. Whitney-Central National Bank* (1923, C. C. A. 5th) 291 Fed. 929, payment was undertaken for “invoice cost of 500 tons Java white sugar,” to be delivered according to named specifications. Several documents were required to be tendered, and the court held that the condition was fulfilled when all the documents contained such descriptions as to the quality of the goods and other facts enumerated in the letter of credit as it is their usual function to contain. A recovery was allowed even though only the invoice contained an exact description, the other documents varying in some respect from the exact wording of the letter of credit.

party credit,” which fact is a source of some light on its nature. The “letter” feature becomes of course particularly important where bona fide purchasers of drafts drawn against the credit are concerned. For various types of letters of credit, for standard forms and for the theories upon which the obligations involved are supported, see Ward, *American Commercial Credits* (1922); McCurdy, *Commercial Letters of Credit* (1922) 35 Harv. L. Rev. 539, 715; McCurdy, *The Right of the Beneficiary under a Commercial Letter of Credit* (1924) 37 Harv. L. Rev. 343. Nor has it been sufficiently noted by either cases or writers that the rulings on C. I. F. contracts afford great light on conditions in letter of credit contracts. This is peculiarly so where a C. I. F. contract calls for payment by a bank letter of credit. An examination of the underlying principles common to both will be undertaken later in the present volume of the *Journal.*

"As a matter of practice, the issuing bank should not call in its letter of credit for a bill of lading describing the goods by any technical terminology... A careful description of the goods should be contained in the invoice which is prepared by the seller, who knows what goods he has shipped. If he deliberately puts a false description of his goods in his invoice, it is likely that he will be held, under the law of any jurisdiction, to have committed the crime of obtaining money under false pretenses..." Mead, *Documentary Letters of Credit* (1922) 22 Col. L. Rev. 297, 308. Cf. suggested form of letter of credit. *Ibid.* 317. A discussion of the means of protecting the buyer by third party documents, weighers' certificates, etc., in regard to facts upon which the buyer is unwilling to rely upon the seller alone, is found in Ward, *supra* note 1, at p. 215.

*The court held in part, at p. 935: "... when any particular fact is not required to be represented by documents the letter of credit is unconditional as to such fact, and in that event the issuing bank is presumed to rely upon the representation of the person in whose favor the credit is issued." It seems that this must be read as referring not to a credit unconditional as to the particular facts,
In bilateral contracts the plaintiff's promised performance is frequently held to be an implied condition precedent to the defendant's duty. Unless the express words clearly require it, however, this performance need not be literally exact or complete in every detail. The true condition precedent to the defendant's duty is "substantial" performance by the plaintiff, although such "substantial" performance is not such as to discharge entirely the plaintiff's own duty to the defendant.4

In the instant cases, however, the contract is not bilateral. The plaintiff does not promise the obligor that he will ship "dried grapes" or that he will not describe them as "raisins" in the bill of lading. The obligor bank has made a unilateral promise in its letter of credit, the plaintiff's right thereunder being expressly conditional upon the presentation of documents of a certain description. The documents must be such as will fulfill this condition; but it is a question of interpretation in the light of the surrounding circumstances as to what the form of the documents must be. If they are in such form as to attain the purposes for which they are required, they should generally be held to fulfill the condition precedent.5

In the normal case, a bank issuing a letter of credit is merely a third party to promise and effect payment for goods bought under a separate contract for purchase and sale. Its purpose in prescribing conditions precedent to its duty is to prevent any duty from arising unless the tendered performance will assure it not only ultimately but immediately a cause of action on its own indemnity contract with the buyer. It is because if that were the case representations would be immaterial; but to a credit not requiring documentary proof other than the seller's oral, or even implied, statement of the facts concerned. See International Banking Corporation v. Irving National Bank (1921, S. D. N. Y.) 274 Fed. 122.

The problems in documentary conditions are too involved for full discussion here. This comment is therefore centered (1) on the question of the conformity of the words of merchandise-description found in some documents to that called for in the credit; and (2) on the question of what portion of such words must be found in any particular document, such as the bill of lading, as opposed to the invoice. Discrepancies in price and quantity; questions of what constitutes a "bill of lading" or "insurance" within the meaning of the credit; questions of how many documents are required by the words "full set" as opposed, e. g. to "full sets," etc., are not discussed.

It should be observed that the term "substantial performance," in the sense of somewhat less than full performance, does not properly apply to "conditions." If full performance is not necessary to enable the plaintiff to win, the full performance is not a condition. The term properly is applicable only in bilateral cases to indicate that less than full performance as required by the plaintiff's duty may operate as complete fulfillment of the conditions precedent to the plaintiff's right against the defendant. See Anson, Contract (Corbin's ed. 1919) sec. 357. But cf. Second National Bank v. Columbia Trust Co. (1923, C. C. A. 3d) 288 Fed. 17, 22.

conceivable that the indemnity condition may be in such a form that a recovery could be had only if the bank tendered the specified documents with the exact descriptions called for in the letter of credit; on the other hand the tendered documents may secure to the buyer the goods bargained for despite variations in the descriptions. But a bank issuing a letter of credit is not a legal or merchandise expert. Documents only and not goods are involved in its fulfilment of the letter of credit condition. Moreover, in a suit against the bank, a verdict based on a finding that the documents tendered would enable it to fulfil the condition of the indemnity contract would not be binding in a suit between the bank and the buyer, even though the terms used in the letter of credit should be identical with the terms in its contract with the buyer. Where only one document is required, and there is a “question of fact” or “substantial dispute” as to whether the description conforms to that called for, the instant New York case soundly holds, and is in accord with the cases generally, that the bank was under no duty to honor it. And the same test should be applied where more than one document is required.


7 Any variation normally will be in limiting the bank’s obligation to the beneficiary as compared to the buyer’s obligation to the bank. Variation in the other direction will occur only as a result of a mistake by the credit-issuing bank; and one relying to his detriment on a credit so issued obviously should be given rights as if no mistake had occurred.

6 Lamborn v. Lake Shore Banking & Trust Co. (1921, 1st Dept.) 196 App. Div. 564, 188 N. Y. Supp. 162, affirmed 231 N. Y. 616, 132 N. E. 911 (“Java white sugar” not compliance with letter of credit for “Java white granulated sugar”); Brown v. Ambler (1887) 66 Md. 391, 7 Atl. 903 (“yellow pine lumber” not compliance for “yellow pine flooring”); see Bank of Montreal v. Recknagel (1888) 109 N. Y. 482, 17 N. E. 217 (“bales of hemp” not compliance for “bales Manila hemp”). See also McCurdy, supra note 1, at p. 730; Ward, supra note 1, at p. 287. See National City Bank v. Seattle National Bank (1922) 121 Wash. 476, 209 Pac. 705 (“granulated white sugar” not compliance with letter of credit for “standard white granulated sugar”); International Banking Corporation v. Irving National Bank, supra note 3 (omission of “stripes not more than 50% of material width”); Arctic Ice & Coal Co. v. Southgate (1923, C. C. A. 4th) 287 Fed. 48 (change of date of shipment); Banco Nacional Ultramarino v. First National Bank (1923, D. Mass.) 289 Fed. 169; cf. ibid. 175. “The documents, or some one or more of them, should, in this case, call for shipment of ‘Brazil white crystal sugar,’ with other details as to price, quantity etc., mentioned.” Applying the test appearing in the text, the Bank of America v. Whitney-Central Bank case seems weakened by reason of a notation appearing on one of the custom house permits that the sugar was for local consumption; by the failure of another of the permits to show that duty had been paid on the entire lot of sugar, from which the quantity it called for was to come; and by the notation appearing on one of the delivery orders requiring the sugar to be weighed by a certain party. These things seem to be sufficient to at least raise a material doubt in the mind of the bank whether by honoring the documents it would obtain a cause of action on the indemnity contract. Cf. Gillespie Bros. & Co. v. Thompson Bros. & Co. (1922, C. A.) 13 Lloyd’s List, 519.

It has been suggested that the strictness of the rule as to the performance to be
Suppose, however, that the bank is satisfied that despite the departure in the performance tendered, it could by accepting the documents acquire a cause of action on the indemnity contract. In such a case the bank may have the power by accepting to charge the buyer on the indemnity contract. If the functional condition of the indemnity contract is that the buyer is to obtain goods and assurances that the goods on arrival will conform to the contract of purchase, and if this assurance is afforded by documents which in fact mean to the buyer what the documents in the exact terms called for would have meant, there is little reason for not holding him obligated to pay his bank.10 In such a case the bank should be held to fulfil the condition of the

required under a letter of credit may be relaxed where the suit is by the seller, on the ground that he has a contract right as distinguished from that of the purchaser of the drafts, who only has the rights [powers] of an offeree. McCurdy, Commercial Letters of Credit, supra note 1, at p. 732. Looking to the reason of the requirement of strict performance when the issuing bank is the defendant, it does not seem that any distinction should be drawn between the rights of the seller and purchaser. The case would only be expected to arise on a negotiation credit. However striking the suggested analysis, to apply it to such a case would militate against the very function of the transaction, which is to issue an instrument which invites purchase of drafts from the beneficiary by other bankers; and to that end, as evidenced by the bona fide holder clause on such a credit, designed to give such purchasers rights which if necessary shall exceed those of the beneficiary. Where by mistake a credit has been issued more favorable than the buyer contracted to furnish it is of course obvious that reliance will be reasonable so as to protect a bona fide purchaser in cases where the direct beneficiary-seller could have no such rights.

10 If the documents convey a different meaning, the buyer is under no duty to take them under a C. I. F. contract. In Gillespie Bros. & Co. v. Thompson Bros. & Co., supra note 9, the documents evidencing an apparent discrepancy in quality were gratuitously added by the seller, but barred his recovery of payment from his C. I. F. buyer. The same should hold true as between the buyer and his bank, at the very least so far as the bank is requesting payment before arrival of the goods shows the documents to be misleading. But this is clearly not a case of documents conforming to the conditions. And where the discrepancy in the documents would occasion the buyer embarrassment either (1) in assuring himself of proper materials for manufacturing against existing contracts, or (2) in tendering the documents to sub-buyers in performance of a contract for sale before arrival, or (3) in procuring payment against a letter of credit established by sub-buyers in terms excluding the documents in question, such discrepancy would be substantial whether the goods conformed or not. In National Bank of South Africa v. Banca Italiana Disconto (1921, K. B.) 9 Lloyd's List, 501, the underlying sales contract called for tender of either a delivery order or a bill of lading. The credit opened called only for a delivery order. This credit was arranged with Bank B by the buyer; Bank B then procured Bank N to issue the letter. Bank N paid against a bill of lading and the seller's indemnity agreement. Bank B refused reimbursement to Bank N, and was held privileged to do so; the court said that if Bank B were not responsible, it was equally clear that the buyers were not responsible for the consequences of the bank [N] having exceeded its authority. It was held that the seller must refund to Bank N, and the seller was then allowed to recover the price of the goods from the buyer. The dictum referred to tells
indemnity contract, as the tendered documents would effect the purposes
of the transaction. This distinction between the bank's duty and the
bank's power may have considerable practical importance. If a bank
wishes its letters of credit to be acceptable in foreign markets, it needs
an unbroken tradition of honoring credits without insisting on non-
commercial technicalities. And letters of credit without such a trad-
tion behind them are of dubious value for any purpose. To enable
banks to accomplish the financing of foreign trade, in which letters of
credit are such a useful and almost necessary part, the principle that
requires only such performance as will effect the purposes of
the transaction may well be extended to the letter of credit contracts where
the parties have not clearly stipulated the exact requirements.11

against the argument in the text, but the case is clearly distinguishable: the
discrepancy of documents and credit was admitted on all hands; the indemnity
suit was against a bank, not against a buyer, which would lead one to expect a
strict view; the machinery of the court seems to have been sufficiently flexible to
admit of recovery being had by the seller against the buyer in the same action in
which Bank N was denied recovery against Bank B and the seller required to
repay to Bank N, thus avoiding the undesirable circuity of action which would
result from a similar rule under a less flexible procedure.

See also Ward, supra note 1, at p. 23. Cf. also Bailhache, J., in English, Scottish
& Australian Bank v. Bank of South Africa (1922, K. B.) 13 Lloyd’s List, 21,
after assuming that a buyer, though in breach of contract with his seller, may
instruct his banker not to honor a credit of which the terms have not been strictly
complied with, and that the bank on complying with such instructions is not in
default. “Whatever the strict legal obligation may be, I am satisfied that a bank
of defendants’ standing would not stand by and allow another bank mistakenly to
part with its money in a way which the issuing bank knew was outside the terms of
the letter of credit.” He then conveniently found, on the facts, that the parties
had adopted a construction of the credit other than that on the face of the telegrams
embodying it. Perhaps three cases can be distinguished: (1) Bank paying in
ignorance of discrepancy, where the relevant documents and words of credit are
apparently synonymous; (2) Bank paying over protest of buyer, where words are
apparently synonymous but there is a dispute as to whether they are really synony-
mous; (3) Where the bank refuses payment with or without protest of the buyer
under the same conditions. Compare the dictum in a recent case involving payment
by a bank as the buyer’s agent, against bill of lading and invoice but without the
issuance of a letter of credit, that where the bank honors documents outside of its
instructions, the buyer may be required to receive the goods, and at best mitigate
damages by reselling them, as a condition to recovering funds deposited with the
bank to cover the payments improperly made. Kornblum v. Bank of Italy (1923,
Calif. App.) 222 Pac. 143. While the court speaks of the buyer’s “duty” to
mitigate damages, since the defendant could not have recovered damages for
the breach of this “duty,” it seems more accurate to speak of the mitigating as a
condition to the plaintiff buyer’s rights. See Burch, J., in Rock v. Vandine (1920)
106 Kan. 588, 189 Pac. 157; Comments (1923) 32 Yale Law Journal, 380, 382;
Hohfeld, Fundamental Legal Conceptions (1923) 38.